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**EXPERT
WITNESSES**

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Applying *Lydig* to the Requirements for Requesting a Writ of Attachment

ONCE A PARTY TO A CONTRACT breaches by failing to provide payment, any creditor looking to recover will likely have strong concerns regarding whether the debtor has or will have sufficient assets available to satisfy any money judgment rendered against it. Creditors without collateral for a debt want to protect their interests during the long delay before trial and ensure that they can collect on any potential judgment. One way is through writ of attachment, and in a recent case of first impression, *Lydig Construction, Inc. v. Martinez Steel Corporation*,¹ the appellate court discussed requirements for obtaining and, more specifically, offsetting or reducing a party's request for a writ of attachment.

In the commercial and business setting, in which labor, services, and material transactions are generally not secured by collateral, the creditor's only recourse is to engage in civil litigation and obtain a court judgment. A creditor in these circumstances may be looking for alternate ways to obtain legitimate leverage. Also, if the debtor has breached multiple agreements, other parties may have liens placed on the debtor's property before the creditor even makes it to trial, let alone obtains a judgment. An unsecured creditor subordinated to priority liens then runs the risk that any judgment obtained will be essentially worthless. There are, however, provisional remedies available to protect unsecured commercial creditors allowing them to secure the debtors' property before a money judgment is issued, or even before trial proceedings commence. While a collection action is pending, provisional or prejudgment remedies prevent debtors from conveying, encumbering, or hiding assets that could be used to satisfy a judgment.² A writ of attachment is an example of a provisional remedy that permits an unsecured creditor to obtain a judicial lien on the debtor's property before final adjudication of the creditor's claims. Unless released or discharged, the attachment lien remains in force, and the property remains levied for three years from the date of the issuance of the writ of attachment.³ The attachment period may be extended by one year from the expiration date upon motion by the plaintiff, but the maximum period of attachment, including extensions, is eight years from the date of issuance of the writ of attachment.⁴

In *Lydig* the defendant Martinez Steel Corporation challenged the application of the plaintiff Lydig Construction, Inc., for writ of attachment. The defendant did so by making a factually unsupported cross-claim for an amount greater than that of Lydig's writ of attachment claim.⁵ Martinez argued that when its offsetting claim was taken into account, the amount to be secured by Lydig's attachment was less than zero, and, as a result, Lydig had failed to establish the probable validity of its claim—a requirement for obtaining a writ of attachment. Martinez's opposition to the writ application was supported by one declaration.⁶ In a victory for the creditors, *Lydig* held that bogus cross-claims do not defeat writs of attachment.⁷ Although the case arose in the construction context, its outcome is broadly applicable to all business and commercial disputes involving unsecured creditors in comparable circumstances. The decision in

Lydig is an important confirmation of the statutory intent and requirements for obtaining an offset to the amount sought by a writ of attachment.

Writs of Attachment

With a writ of attachment the creditor lacking collateral on the debt can become secured and gain priority over other potential creditors, thus preserving and ensuring an enforceable judgment. A subsequent judgment relates back to the date of the attachment.⁸ For example, in *Lydig*, Lydig served as the general contractor on a public works project to expand San Bernardino County's Adelanto Detention Center. Lydig's project bid was partly based on the bid provided by defendant Martinez, a rebar (steel) subcontractor. Subsequent to being awarded the project, Lydig entered into a subcontract with Martinez under terms that required Martinez to provide a faithful performance bond and payment bond to Lydig. Martinez was unable to provide such bonds and was in material default under the terms of the subcontract. However, rather than terminate Martinez's performance of the subcontract, Lydig agreed to accept a personal guaranty from Martinez's owner, which unconditionally guaranteed the payment and performance of all liabilities and obligations of Martinez arising under the subcontract.⁹

During the course of the construction project, Lydig learned that Martinez was on a cash-only basis with its steel mill supplier and had become financially unable to facilitate the purchase of materials required under the subcontract with Lydig. Lydig was forced to purchase raw steel materials directly from the steel mill, and then ship the materials to Martinez to be fabricated, delivered, and installed on the project. Eventually, Lydig came to believe that Martinez had wrongfully diverted materials purchased and shipped to Martinez by Lydig to other projects, which forced Lydig to obtain replacement rebar from other sources. Martinez and its owner continued to breach both the subcontract and the personal guaranty by failing to procure and provide materials required under the subcontract and by failing to properly staff the project. Lydig submitted a formal subcontractor substitution request to San Bernardino County, and after holding a substitution hearing, the county consented to Lydig's request. As a result of Martinez's breach, Lydig incurred damages of over \$200,000 completing the subcontract work. Lydig filed a complaint against Martinez and its owner for breach of contract, and subsequently filed an application for a right to attach order and writs of attachment in order to secure the debt owed pursuant

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to the subcontract and guaranty, and to preserve an enforceable potential judgment.¹⁰

Seeking or obtaining a writ of attachment can also promote settlement. An applicant's successful demonstration of a prima facie claim and success at the hearing suggests that the creditor will ultimately prevail against the debtor on the entire claim. If an attachment is made, the debtor will be prevented from using any of the attached assets for the entirety of the action,¹¹ which encourages a debtor to come to a compromise before more time and assets are expended. In addition, a writ of attachment is a speedy remedy, which can be crucial when dealing with a debtor who owes multiple creditors. A noticed attachment hearing can be scheduled with 16 court days' notice, and, should the circumstances require, a writ of attachment can even be granted on an ex parte basis upon a showing of "great or irreparable" injury to the plaintiff.¹²

There are also disadvantages to attaching property. An attachment lien will generally always be subordinate to certain other properly perfected liens, such as federal tax liens or preferred wage claims, which take priority over nonperfected claims.¹³ Additionally, if an attachment disrupts a debtor's use of his property, it could push the debtor to file for an early bankruptcy to protect its assets.¹⁴ Of course, the debtor must have attachable assets in order for the writ of attachment to be useful. It is therefore a good idea to investigate the debtor's assets before proceeding with a writ of attachment application. Writs of attachment are also typically more successful when employed against corporate defendants. Against a natural person, a writ of attachment may only be issued on claims arising from the debtor's conduct of a trade, business, or profession.¹⁵ Certain property belonging to an individual is exempt from attachment, but all property held by a corporate defendant is subject to attachment, if there is a statutory method of levy for the property and the property is within the state.¹⁶

Writs of attachment are purely statutory and viewed by some courts to be a harsh remedy, so they are subject to strict construction.¹⁷ Specifically, no attachment procedure may be ordered by the court unless specifically provided for by the attachment laws.¹⁸ Thus, applying for a writ of attachment should not be undertaken lightly, and a thorough understanding of statutory requirements is required in order to efficiently obtain a writ of attachment.

Conditions to Attachment

A plaintiff may apply for a right to attach order and writ of attachment upon the filing of a complaint or at any time thereafter.¹⁹ The application must include a statement

showing that the attachment is sought to secure the recovery on a claim upon which an attachment may be issued, the amount to be secured by attachment, a statement that the attachment is not sought for a purpose other than recovery on the claim upon which the attachment is based, and a description of the property to be attached.²⁰ The applicant must also include 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 bankruptcy proceeding.²¹

An attachment may be issued only in an action on a claim for money based upon an express or implied contract in which the total amount of the claim, exclusive of costs, interest, and attorneys' fees, is a fixed or readily ascertainable amount exceeding \$500.²² An attachment may generally not be issued if a claim is secured by a real property interest.²³

In addition to an application, a hearing is required, and may be scheduled in accordance with standard notice procedures, or, in certain cases, on an ex parte basis.²⁴ In order for a court to issue a right to attach order, 1) the attachment must be based upon a claim for which "an attachment may be issued," 2) the applicant must have established the "probable validity" of the claim upon which the attachment is based, 3) the attachment must not be sought for a purpose other than the recovery on the claim upon which the attachment is based, and 4) the amount to be secured by the attachment must be greater than zero, as determined in accordance with the Code of Civil Procedure.²⁵

The application must be supported by an affidavit or declaration showing that on the facts as presented, the plaintiff would be entitled to a judgment on the claim.²⁶ All facts in the declaration must be stated with particularity, and the declarant may be any person, whether or not a party to the action, who has knowledge of the facts and can testify competently to the facts if called upon as a witness.²⁷ Even though the declaration is, in most cases, being prepared and signed under penalty of perjury at the very beginning of the litigation prior to the start of discovery, the declaration must be completely factually accurate, as it can be used to impeach the declarant at trial.

"In determining the probable validity of a claim where the defendant makes an appearance, the court must consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation."²⁸ This requires consideration of the declarations in support and in opposition to the motion, as well as a hearing.

In *Lydig*, the plaintiff included with its attachment application business records and

declarations from its employees, which detailed Lydig's understanding of Martinez's improper steel diversion practices, demonstrated how Lydig had to intervene and pay for steel, and illustrated the damages sustained by Lydig.²⁹ Lydig also included a verified copy of the county hearing officer's finding that permitted Lydig to terminate the subcontract with Martinez and utilize another supplier to obtain rebar.³⁰

Martinez's opposition to the attachment application, on the other hand, was supported by only one declaration from an employee alleging that Lydig owed Martinez for steel and other items that Martinez had delivered to the project. The court in *Lydig* stated that the declaration did not dispute the specific factual contentions set forth by Lydig in its application, but instead asserted, among other things, that Lydig still owed Martinez certain amounts and that Martinez had delivered more than 200,000 pounds of steel that Lydig did not account for in its application. Additionally, the declaration disputed the validity of change orders submitted by Lydig but did not set forth any factual basis for the contention that the change orders were invalid.³¹ The court specifically noted that "the factual basis for Martinez's claims [was] presented in a fairly conclusory manner in [the employee's] declaration."³²

In its reply to Martinez's opposition to the attachment application, Lydig included a further declaration, records, and a supporting contemporaneous log of the steel delivered by Martinez that directly addressed and refuted the allegations in Martinez's opposition. The court in *Lydig* found that Lydig's evidence sufficiently set forth the circumstances that gave rise to Lydig's claims against Martinez and the amount of its claims.³³ The trial court "plainly found Martinez's factual presentation unpersuasive."³⁴ The court of appeal likewise found that Martinez failed to establish the probable validity of its claims set out in its cross-complaint; "[i]n particular, with respect to its claim that it was entitled to credit for retained amounts and for 200,000 pounds of steel, Martinez provided no proof other than Williams's conclusory declaration, which, in turn, was rebutted both by Lydig's accounting records and contemporaneous logs provided by Lydig. In short, Lydig's documents entirely undermine the validity of Martinez's claims."³⁵

In order to establish the probable validity of a claim, the applicant must show that it is more likely than not that the applicant will obtain judgment against the opposing party on its claim.³⁶ When determining the probable validity of a claim, the court must consider the relative merits of the positions of the respective parties and make a determination

of the probable outcome of the litigation.³⁷ Case law provides that only establishing a prima facie case for breach of contract is not sufficient, instead, an applicant must also show that the defenses raised in opposition to the application are less than 50 percent likely to succeed; failure to rebut a factually supported defense that would defeat the applicant's claim prohibits the applicant from establishing probable validity.³⁸

Offsetting the Attachment

If the circumstances warrant, the debtor defendant may reduce or offset the amount to be secured by attachment by filing a cross-complaint claiming indebtedness of the plaintiff.³⁹ However, as the *Lydig* court ruled, in order for a defendant to successfully offset the amount to be secured by attachment, the defendant's claim must be one upon which an attachment could be issued, which means that the claim must meet the requirements as to the amount and nature of the claim under Code of Civil Procedure Section 483.010.⁴⁰ This means that the defendant also must establish the probable validity of the claim of indebtedness set forth in the cross-complaint in order to successfully offset any amount to be secured by attachment.⁴¹

In *Lydig*, the court of appeal confirmed this standard of proof for defendants seeking to offset the amount of an attachment. Responding to Lydig's attachment application to secure the debt owed pursuant to the subcontract and guaranty, Martinez filed an answer and opposition and subsequently filed a cross-complaint in which it alleged that Lydig owed Martinez funds for rebar that Martinez had fabricated and installed, and that such owed amounts were greater than the damages alleged by Lydig. Martinez contended that it could offset Lydig's claims under Code of Civil Procedure Section 483.015, and because its claims in the cross-complaint exceeded Lydig's claims, the amount to be secured by attachment was completely offset and the attachment could not be granted.⁴²

As required by the Code of Civil Procedure, with its application for a right to attach order and writ of attachment, Lydig included detailed declarations from its employees, business records, and a verified copy of the County's hearing officer's finding that Lydig was permitted to terminate the subcontract with Martinez and use another rebar supplier for its steel needs.⁴³ Finding that Lydig had established the probable validity of its claim, the trial court granted its application with respect to Martinez, but not the owner of Martinez. Lydig subsequently obtained writs of attachment.⁴⁴

Martinez appealed and argued that the mere filing of a cross-complaint alleging an indebtedness of Lydig to Martinez in excess

of Lydig's claims against Martinez was sufficient to defeat the writ of attachment under Section 483.015.⁴⁵ Martinez argued that pursuant to Code of Civil Procedure Section 484.090, in order to issue a writ of attachment, the court must find the amount to be secured by the attachment is greater than zero, and such amount is to be determined in accordance with Section 483.015. Section 483.015 provides that the amount to be secured by attachment must be reduced by the amount of plaintiff's indebtedness (if any) claimed by defendant, or cross-defendant, in its cross-complaint. Martinez argued that application of this section was mandatory and that the trial court erred in not applying this offset, which would have reduced the amount to be secured by Lydig to less than zero and defeated Lydig's right to a prejudgment attachment.

Lydig, on the other hand, asserted that Section 483.015 requires the amount of indebtedness claimed by Martinez in the cross-complaint must be a claim "upon which an attachment could be issued" in order to successfully offset Lydig's claim. Thus, the claim must satisfy the requirements of Code of Civil Procedure Sections 483.010 and 484.090. Lydig argued that these requirements apply to a claim of indebtedness set forth in a cross-complaint, not merely the plaintiff's claim in a complaint. In order to reduce an amount to be secured by attachment, a cross-complaint must not only satisfy the requirements of Section 483.010 but also the requirements of Section 484.090—including, specifically, that the defendant must prove the probable validity of its claim. Without the probable validity requirement, any opponent to a writ of attachment could wrongfully offset the attachment amount by filing a baseless and conclusory cross-complaint that met the basic requirements for attachment.

In response, Martinez argued that neither the Code of Civil Procedure nor case law supports or even implies that a party opposing attachment must prove the probable validity of its offsetting claim, but the appellate court disagreed. The court of appeal found that requiring a defendant to establish the probable validity of an offsetting claim is a "clear implication" of the phrase "claim upon which an attachment could be issued" under Section 483.015.⁴⁶

In coming to such a conclusion, the appellate court relied on the relevant federal case *Pos-A-Traction v. Kelly Springfield Tire Company*,⁴⁷ in which Kelly Springfield Tire filed an application for right to attach order and writs of attachment to secure a counterclaim against counterdefendant Jay Krech. Pos-A-Traction, a tire distributor, sued Kelly, its tire manufacturer, for breach of contract due to Kelly's failure to deliver all tires ordered by

Pos-A-Traction. Kelly alleged that Krech, as president of Pos-A-Traction, executed and delivered to Kelly a guaranty in which he personally and unconditionally, without collateral, guaranteed the payment of all of Pos-A-Traction's debts to Kelly, and that in reliance on such guaranty, Kelly agreed to sell tires to Pos-A-Traction on an open book account, that at the time of suit, had an unpaid balance owed by Pos-A-Traction.⁴⁸

The Central District court in *Pos-A-Traction* discussed the procedures and grounds for obtaining orders permitting prejudgment writs of attachment under California law, specifically the requirements for issuing an attachment order under Section 484.090. The court noted that an amount to be secured by an attachment may be reduced or offset by the amount of any indebtedness of the plaintiff, or in this case, counterclaimant, that the defendant or counterdefendant has claimed in a cross-complaint filed in the action if the defendant's or counterdefendant's claim is one upon which an attachment could be issued. The court clearly stated that "since an offset claim must be 'one upon which an attachment could be issued,' it must meet the requirements of C.C.P. § 484.090(a)."⁴⁹

The *Lydig* opinion further noted that requiring Martinez to establish the probable validity of an offsetting claim "is also required as a matter of simple practicality,"⁵⁰ and one justice even queried during oral argument whether this issue had not been previously discussed in California case law because it was so obvious. Although Section "483.015 does not explicitly require more than a filed cross-complaint or contract defense in an answer that would itself support an attachment," in order "to sustain a reduction in writ amount, most courts require that defendant [or counter-defendant] provide enough evidence about its counterclaims [or claims] and/or defenses to prove a prima facie case."⁵¹ Thus, the court of appeal held that as a matter of law, Martinez was required to establish the probable validity of its cross-claim in order to obtain the offset permitted by Section 483.015.⁵²

In opposing Lydig's application, Martinez had included only one supporting declaration from an employee that both the trial court and appellate court found to be conclusory and unpersuasive.⁵³ The court of appeal affirmed the trial court's orders, finding that Martinez failed to establish the probable validity of its claims and failed to substantiate its offset assertions with additional proof beyond the subpar employee declaration. The court of appeal also noted that the legislature intended to require a defendant to establish probable validity of its offsetting claim, because if a defendant could offset a plaintiff's
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Applying Lydig to the Requirements for Requesting a Writ of Attachment (continued from page 15)

probably valid claim with a cross-claim that was probably not valid, “a defendant could always and easily defeat a plaintiff’s right to a prejudgment attachment.”⁵⁴ The court explained, “We do not believe that in adopting our state’s prejudgment attachment procedures the Legislature intended to effectively deprive litigants of the right to such prejudgment relief.”⁵⁵

Because the same standard of proof required of an applicant is also required of an opponent to obtain an offset or defeat the attachment, those seeking and those defending writ applications must be cognizant of the strength of their claims and the evidence they present to the court. The mere filing of a cross-complaint will not be sufficient to offset any amount of a writ of attachment if the defendant is not able to establish the probable validity of its success on its counter-claims.

Writs of attachment are effective tools for collecting on business and commercial debts and can prevent the debt from becoming uncollectible due to a debtor’s going into bankruptcy or out of business. Though it can be expensive and risky, it could be the only way to ensure a wronged party to a contract receives its due payment. In a commercial contract dispute regarding payment, it is always best to get to the courthouse first as a plaintiff and file a writ of attachment application right away to protect the client’s interests. It can be a game changer and help beat the opponent at the start of the case. ■

¹ Lydig Constr., Inc. v. Martinez Steel Corp., 234 Cal. App. 4th 937 (2015).

² AHART, CAL. PRACTICE GUIDE: ENFORCING JUDGMENTS AND DEBTS, ¶4:1 (2013).

³ CODE CIV. PROC. §488.510(a).

⁴ CODE CIV. PROC. §§488.510(b), (d).

⁵ Lydig, 234 Cal. App. 4th at 942.

⁶ *Id.*

⁷ *Id.* at 944-45.

⁸ *In re Aquarius Disk Servs., Inc.*, 254 B.R. 253, 256 (Bankr. N.D. Cal. 2000).

⁹ Lydig, 234 Cal. App. 4th at 940.

¹⁰ *Id.* at 940-42.

¹¹ The defendant debtor may substitute a bond for the property that is attached or is subject to attachment. CODE CIV. PROC. §489.310. This releases the debtor’s property but remains as a protection for the creditor until the litigation is resolved.

¹² CODE CIV. PROC. §485.010(a).

¹³ An attachment lien will be subordinate to a federal tax lien attaching to the same property when the notice of the tax lien is filed before the judgment lien creditor perfects the lien and obtains a judgment in the action. 26 U.S.C. §6323; *Calvin & Co. v. United States* 264 Cal. App. 2d 571, 574 (1968).

¹⁴ A debtor can file for bankruptcy without showing insolvency, and if done within 90 days after a lien attached to the property, the attachment lien automatically terminates. CODE CIV. PROC. §493.030(b).

However, though the lien terminates automatically upon a petition for bankruptcy, if the petition is dismissed, the lien will be reinstated as if it had not been terminated. CODE CIV. PROC. §493.050(a)(2).

¹⁵ See CODE CIV. PROC. §483.010(c).

¹⁶ CODE CIV. PROC. §§487.010(a), (b). When the defendant is a natural person, the property of the defendant subject to attachment is limited to the categories set forth in Code of Civil Procedure §487.010(c).

¹⁷ CODE CIV. PROC. §§481.010 *et seq.*

¹⁸ See *Pacific Decision Scis. Corp. v. Superior Ct.* 121 Cal. App. 4th 1100, 1106 (2004).

¹⁹ CODE CIV. PROC. §484.010.

²⁰ CODE CIV. PROC. §484.020.

²¹ CODE CIV. PROC. §483.010(a).

²³ An attachment may be issued when a claim was originally secured but the security has become valueless or decreased in value to less than the amount then owing on the claim, without any act by the plaintiff or person to whom the security was given. CODE CIV. PROC. §483.010(b).

²⁴ CODE CIV. PROC. §§484.040, 484.090, 485.010(a). No writ shall be issued unless after a hearing, and a defendant must be served with a copy of the summons and complaint, a notice of application and hearing, and a copy of the application and of any affidavit in support of the application.

²⁵ CODE CIV. PROC. §§484.090, 483.015.

²⁶ CODE CIV. PROC. §484.030. A declaration may be used instead of an affidavit if executed under penalty of perjury. CODE CIV. PROC. §2015.5.

²⁷ CODE CIV. PROC. §482.040.

²⁸ *Loeb & Loeb v. Beverly Glen Music, Inc.*, 166 Cal. App. 3d 1110, 1120 (1985).

²⁹ *Lydig Constr., Inc. v. Martinez Steel Corp.*, 234 Cal. App. 4th 937, 940 (2015).

³⁰ *Id.* at 941.

³¹ *Id.* at 940-42.

³² *Id.* at 945-46.

³³ *Id.* at 940-42.

³⁴ *Id.* at 945.

³⁵ *Id.* at 945-46.

³⁶ CODE CIV. PROC. §481.190.

³⁷ *Loeb & Loeb v. Beverly Glen Music, Inc.*, 166 Cal. App. 3d 1110, 1120 (1985).

³⁸ See *Studio 159, LLC v. Pophang, LLC*, 2012 WL 6675790 at *3 (C.D. Cal. 2012).

³⁹ CODE CIV. PROC. §483.015(b)(2).

⁴⁰ CODE CIV. PROC. §483.015(b)(2).

⁴¹ Lydig, 234 Cal. App. 4th at 945 (citing AHART, CAL. PRACTICE GUIDE: ENFORCING JUDGMENTS AND DEBTS, ¶4:64 (2014) [hereinafter AHART]).

⁴² Lydig at 942-43.

⁴³ See CODE CIV. PROC. §§484.030, 482.040.

⁴⁴ Lydig, 234 Cal. App. 4th at 943.

⁴⁵ *Id.* at 943, 945.

⁴⁶ *Id.* at 945.

⁴⁷ *Pos-A-Traction v. Kelly-Springfield Tire Co.*, 112 F. Supp. 2d 1178 (C.D. Cal. 2000).

⁴⁸ *Id.* at 1179-81.

⁴⁹ *Id.* at 1181-83.

⁵⁰ Lydig, 234 Cal. App. 4th at 945.

⁵¹ *Id.* at 944-45 (citing AHART, *supra* note 41, at ¶4:64).

⁵² Lydig, 234 Cal. App. 4th at 945 (citing *Pos-A-Traction*, 112 F. Supp. 2d at 1183).

⁵³ The court of appeal noted that an affiant or declarant must show actual, personal knowledge of the relevant facts, rather than the ultimate facts commonly found in pleadings, and also that the factual basis for Martinez’s claims was set forth in Martinez’s opposition to Lydig’s attachment application rather than in Martinez’s cross-complaint. Lydig, 234 Cal. App. 4th at 944-45.

⁵⁴ *Id.* at 945.

⁵⁵ *Id.*