ASSOCIATION OF BUSINESS TRIAL LAWYERS
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abtl REPORT

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Is Arbitration the Cure for the Perceived Ills of Litigation? A Conversation

by Charles V. Berwanger, Esq.

"Parties who agree to arbitration are presumed to intend that the award be final."

An arbitrator is not bound by the dry law and may decide on "principles of equity and good conscience."

An award "may not be reviewed for errors of fact or law."

Moncharsh v. Heily and Blasé (1993) 3 Cal.4th 1.

Frustrated, Amex Corp's general counsel, George Corash (who goes by GC) summoned Amex's trial lawyer, Henry Gunn, to discuss a major issue: What can be done about the delay, expense and unpredictability of litigation?

Charles V. Berwanger

GC greets his long-time friend and after perfunctory pleasantries, gets to the point. "Cost, delay and lack of predictability are endemic in the courts. Discovery is a financial black hole and disruptive of Amex's operation. Document and email discovery is killing Amex financially in lawsuits."

"And then the motions. This is a never ending expense and too often serves no purpose."

(See "Arbitration" on page 6)

From the Courts

Mandatory Electronic Case Filing in U.S. District Court Is Here

by W. Samuel Hamrick, Jr., Clerk of Court

On November 1, 2006, electronic case filing became mandatory in the U.S. District Court, Southern District of California. On September 5, 2006, the Clerk's Office for the U.S. District Court, Southern District of California, successfully converted to the new Case Management/Electronic Case Filing (CM/ECF) system.

W. Samuel Hamrick, Jr.

This project was a huge undertaking for Clerk's Office employees, court staff, judges, attorneys, and court related agencies. After nine successful test conversions, the court converted all civil and

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Inside

President's Column

by the Hon. Jan M. Adler, President ABTL

It is my pleasure and privilege to serve this year as President of the San Diego chapter of the ABTL. I am delighted to announce that I will be working with an outstanding group of officers, including Robin Wofford (Vice President), Edward Gergosian (Treasurer) and Mark Zebrowski (Secretary). We also welcome a terrific group of lawyers and judges to our Board of Governors, including attorneys Erik Bliss, Ethan Boyer, Edward Cramp, Daniel Drosman, Michael Fabiano, Cynthia Freeland, Chad Fuller, Richard Gluck, Christopher Healey, Thomas McNamara, Christian Platt, Nancy Stagg, Frank Tobin and Ross Hyslop, Justice Cynthia Aaron of the Fourth District Court of Appeal, and Superior Court Judges Jeffrey Barton and Steven Denton.

Hon. Jan M. Adler

We are fortunate to have Thomas Egler and Anna Roppo continue in their role as Co-Program Chairs, and to have Alan Mansfield continue as lead editor of the ABTL Report, with the assistance of Richard Gluck. Erik Bliss, John Brooks, Bob Grawlewski and Shannon Petersen on the editorial board. And, as all of our officers and board members know, we owe a great debt of gratitude to our long-time Executive Director, Susan Christison, for her dedication and excellent service to our organization.

As is often said about the state of the nation at this time of year, I can say with confidence that the state of our chapter has never been stronger. Following another highly successful year presided over by my predecessor, Maureen Hallahan, our chapter has over 700 members and has achieved a well-deserved reputation as one of the premier legal organizations in San Diego. We have consistently presented the highest caliber of dinner programs, featuring outstanding trial lawyers, state and federal judges and other excellent speakers on a diverse range of topics that have both educated and entertained our membership. Our popular "Meet the Judge" brown bag lunch series, spearheaded by past President Charles Berwanger, has enabled lawyers to meet members of the local judiciary in an intimate setting and to learn how those judges manage their cases and their courtrooms. The ABTL Annual Program, presented in conjunction with the efforts of our sister chapters across the state, provides an unparalleled opportunity to enhance our knowledge and skill as trial lawyers and judges while enjoying the company of family and friends in beautiful surroundings. Our ABTL Report consistently publishes high-quality articles providing advice and practical insights to the bench and bar, as well as profiles of members of our judiciary. And perhaps most importantly of all, our organization fosters cordiality, professionalism and civility among our membership.

In keeping with our tradition, we have a series of exciting and stimulating programs planned for this year. We begin with a program on January 29 featuring the past two recipients of the Broderick Award, David Noonan and Vince Bartolotta, who will tell us what to do "When Things Go Wrong" at trial. We also plan to present programs featuring Harvard Law Professor Charles Ogletree, which we will sponsor in conjunction with the Harvard Club of San Diego; a panel of state court judges, which is always one of our most informative and valuable programs; and two renowned experts on the U.S. Supreme Court, Professors Erwin Chemerinsky of Duke University and Charles Whitebread of the University of Southern California, who will fascinate and entertain you with their analysis of the first two years of the Roberts Court and what we might expect from the Court in the future. As always, we will continue our "Meet the Judge" brown bag lunch series starting with a program featuring Magistrate Judge Kathy Bencivengo on February 14.

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Writs of Attachment: What They Are, How To Get One, And How To Protect Your Client Against One

by Shannon Z. Petersen, Ph.D., Esq. of Sheppard Mullin Richter & Hampton LLP

What Is A Writ Of Attachment?

A writ of attachment is a provisional remedy. An attachment will prevent a defendant from disposing of the attached property pending a final resolution of the dispute. An attachment will protect a plaintiff from an unscrupulous defendant which would otherwise conceal or fraudulently transfer its assets in response to litigation. An attachment will also prevent a financially precarious defendant from disposing of its assets in due course pending trial or arbitration so as to pay off other creditors. With an attachment, a plaintiff can secure its interest pending a final resolution of its substantive claim.

An attachment can be levied against all sorts of corporate, real, and personal property. Most commonly, attachments are used to freeze bank accounts and encumber real property. A plaintiff can even use an attachment to encumber a defendant's home. *See* C.C.P. § 487.010. A plaintiff, however, cannot attach the property of a natural person which is necessary for the support of that person or his or her family. *Id.* § 487.020.

Writs of attachment are procedurally complicated and can be difficult to obtain. Courts will strictly construe a motion for a writ of attachment and will deny any motion which does not meet all of the many statutory requirements. Prior to seeking an attachment, counsel are advised to familiarize themselves with Title 6.5 of the California Code of Civil Procedure, Sections 481.010 through 493.010 (the "Code" or "C.C.P."). Counsel should also consult Chapter 9.D. of the Rutter Group's *California Practice Guide: Civil Procedure Before Trial*, Sections 9:853 through 9:968.

How To Obtain A Writ Of Attachment: Procedural Considerations

A plaintiff may obtain an attachment by filing a regularly noticed motion. While the Code allows for an attachment on a ex parte basis, such attachments are almost never granted. A plaintiff should instead seek a temporary protective order (TPO) on an ex parte basis to prevent the disposal of the property sought to be attached pending a hearing on the attachment.

Shannon Z. Petersen

The best procedural strategy is as follows. Prior to filing a complaint, the plaintiff should prepare the motion papers for the attachment as well as the ex parte application for the TPO, which can be combined into the same document. The plaintiff should then file the complaint. Once the judge has been assigned, the plaintiff should schedule the hearing on the attachment and should also schedule the ex parte for the TPO. The plaintiff should then serve the complaint along with the motion and ex parte application.

The ex parte should be scheduled for within a few days of serving the complaint. This way, the plaintiff can best safeguard against the disposal of the property to be attached. Otherwise a defendant may drain its bank account or otherwise dispose of the property sought to be attached prior to the ex parte on the TPO.

In the event the substantive claims are subject to arbitration, the plaintiff should proceed as follows. Prior to or in conjunction with the filing of the arbitration claim, the plaintiff should file a complaint in Superior Court for: 1) specific performance of the arbitration agreement; and 2) for a writ of attachment and TPO pending arbitration. Section 1281.8(b) of the Code specifically authorizes this procedure.

The complaint should include the following allegations. The plaintiff should allege that it is entitled to an attachment pending arbitration because without such provisional relief its arbi-

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How To Avoid Fumbling Your Settlement On The 1 Yard Line

By Robert J. Kaplan, Esq.

You are plaintiff's counsel in a hotly contested business fraud case that you've worked on for nearly 2 years. You scheduled a full-day mediation several months earlier. You and your client arrive at 8:30 a.m. loaded for bear. At 7 p.m. the President of the defendant corporation has to catch a plane back East. At 8 p.m., defense counsel gets a hold of his client at the airport and obtains his approval of the final number. The case is settled — or so everyone thinks.

The mediator pulls out his standard 1 page form entitled, Stipulation for Settlement, which expressly states: "The parties intend that this settlement is enforceable pursuant to the provisions of Code of Civil Procedure Section 664.6". He then writes in the 4 essential terms of the settlement — Defendant shall pay Plaintiff the lump sum of $X as full and complete "global settlement"; §1542 waiver; confidentiality; each side to bear own attorney fees and costs – and checks the box indicating that defense counsel will prepare the formal Settlement and Release Agreement within the next 7 days. You and your client sign the Stipulation for Settlement and defense counsel signs it "on behalf of" the defendant corporation.

Do you have a settlement that is enforceable under CCP §664.6? The short answer is "no."

A. What Is An Enforceable Settlement Under CCP §664.6?

The statutory procedure under §664.6 provides the most efficient way to enforce settle-

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Merchant Beware: A New Class Action May Be Stalking You if You Accept Credit Cards

By John T. Brooks, Esq. of Luce, Forward, Hamilton & Scripps LLP

Your client runs a retail business. You've dodged the bullet on wage and hour class actions. You faced and defeated suit under Prop 65. You've even avoided trouble under the Americans with Disabilities Act. You've surveyed the litigation horizon, and the coast looks clear. You can finally relax and just worry about business, not lawsuits.

However, before you reduce your litigation threat level to yellow, make sure your client checks out their potential liability under the Song-Beverly Credit Card Act, particularly Civil Code section 1747.08. Enticed by statutory penalties of up to $1,000 per violation, class action attorneys are filing ever-increasing numbers of suits under this statute against both large and small retail chains.

The point of this article is to give you and your retailer clients a "heads up" about this litigation threat, and to highlight some of the key issues for litigation prevention and defense.

John T. Brooks

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Arbitration

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"Often judges are distracted by other cases and cannot give our case their undivided attention. Juries are often akin to Russian roulette. Jury (and, sometimes, judge) unpredictability is scary."

"Then there is confidentiality: it is horrible PR to have newspapers publicize trial evidence that excoriates Amex's products. Finally, the appeals: win or lose, we seem to always be on appeal."

In a word, exclaimed GC: "I'm tired of paying hundreds of thousands of dollars (and more) in a dispute resolution system, which is delayed, expensive, unpredictable and disrupts our operation!"

GC, being ever-attentive to new developments, concluded from what he heard at the recent City Business Law Section Annual Retreat that arbitration solves these problems. "I want an arbitration agreement in all of Amex's contracts! What do you think?"

It is Gunn's turn.

Sympathetically, Gunn acknowledges that GC's exasperation may be well-founded.

"Everything you say about litigation is true, although, not always."

However, Gunn continued. "I have arbitration experience that you should be aware of before you engage in a wholesale incorporation of arbitration into your agreements. My experience should also shape how you craft an arbitration provision should you choose to use one."

"One case stands out" says Gunn. "It was *Startup v. Microsap*, a dispute over a software licensing agreement. Startup had developed a marvelous program that Microsap wanted. Startup signed Microsap's standard licensing agreement – a true testament to unconscionability – procedural and substantive."

"As time passed, Startup received 10% of what it expected and Microsap refused to disclose its financial records for Startup to independently calculate its royalty."

"Startup hired me to sue Microsap. The licensing agreement contained an arbitration agreement, but one that was one-sided in the extreme. For example, it precluded punitive damages; it required whoever requested arbitra-

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criminal cases to the new system. The conversion involved over 100,000 case records and 1.5 million scanned images. On September 18, 2006, the court received its first filing over the Internet.

The new filing system provides many benefits to attorneys, including electronic filing and service of documents 24 hours a day, 7 days a week. CM/ECF is currently being utilized in several federal courts across the country with great success. Registration for CM/ECF will permit you to electronically file documents. Your registration also authorizes the court to provide notification by email of all court orders. You must have a valid PACER account to receive email notification. The email will provide a link to the document and you will receive one free copy that you may print or save.

During the first six weeks of CM/ECF implementation, the Clerk's Office staff trained more than 200 court employees and 600 attorneys. More than 2,000 attorneys have registered for e-filing and e-noticing. In September 2006, Clerk's Office staff entered 22,255 documents into the new system, and during the first four weeks of electronic filing, attorneys e-filed 2,455 documents in CM/ECF.

Attorneys must register with the district court even if they are registered in other federal courts, and they should not wait to register until they have to file a document. Registration not only enables the attorney to e-file, but also enables the court and litigants to e-notice documents via e-mail the moment the document is e-filed in the system. For more information regarding registration and training, visit the court's web site at www.casd.uscourts.gov/cmecf. Registration forms can be downloaded from the site. The Clerk's Office also provides hands-on training at their office for any interested attorney and support staff. ▲

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Arbitration

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tion to pay all arbitration and arbitrator costs and fees; and it provided for Fairbanks, Alaska venue (which had nothing to do with the parties or the relationship). I thought that we had a good chance of persuading a court that the arbitration provision was unconscionable and, therefore, unenforceable. Microsap's team of lawyers moved to dismiss and after two months of battling, the court determined that the arbitration provision was enforceable, though it struck the punitive damages and Alaska venue provisions."

"I then commenced an arbitration. The ultimate cost (excluding attorney fees and discovery costs), however, was significant – the case involved more than $10 million and the AAA administrative fees came to $17,250. We had one arbitrator (not a panel of three) and the

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President's Column

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Finally, please mark your calendars for ABTL's Annual Seminar, which will be held from October 5-7 at the fabulous Silverado Resort in the magnificent Napa Valley, and at which former Supreme Court Justice Sandra Day O'Connor will be the keynote speaker.

I think you can see why we are so enthusiastic about this year. Please accept my best wishes for a happy and healthy 2007, and I look forward to seeing all of you at our programs throughout the year. ▲

Arbitration

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arbitrator's fees ultimately came to $175,000. (Parenthetically, Startup questioned why it was paying enormous administrative and arbitrator fees when a court is free.)"

"The first of many battles then commenced. The battle was: 'who' will be the arbitrator? The importance of who cannot be understated. The arbitrator's decision is almost immune from review for factual or legal error – so you want someone who will get it right."[1]

"Another major 'who' issue was driven by my concern that Microsap and its high-powered mega law firm were potential repeat business for the arbitrator. How do you protect against repeat user bias?"[2]

"After a spate of procedural battles the 'who' was decided upon. The compromise: an unknown lawyer who hired himself out as an arbitrator.

"Did we get an expedited arbitration hearing? No! Microsap persuaded the arbitrator that substantial discovery was required including the production of emails and documents that filled a barn. We had discovery disputes that were briefed; and the arbitrator had to decide the very type of motions we hoped arbitration would avoid. The months passed and hundreds of thousands of dollars were spent just dealing with written discovery."[3]

"And Microsap needed depositions – some out of state (creating a deposition morass) allowed by the arbitrator. Time passed and my client was running out of money."

"Finally, we got to the hearing. Microsap's list of witnesses was five single spaced pages long. The arbitration took two months. The evidentiary rulings were scary. The arbitrator kept out some of our most important evidence and allowed in almost all of Microsap's evidence."[4]

"The award issued and surprise of surprises – it was in Startup's favor but for an amount far less than the evidence required – the award effectively split the baby. The award was two lines long and I have no idea what the arbitrator found determinative. I had the sense that the award could have been for Microsap and I would not have been surprised."

"Startup celebrated and we filed a petition to confirm the award. Microsap filed an opposition. The grounds for Microsap's challenge to the award were all inclusive, including undisclosed bias by the arbitrator; erroneous prejudicial evidence rulings; the award was beyond the power of the arbitrator; and the arbitrator was wrong on the facts and the law."

"Once again Startup was immersed in litigation with its attendant expense and delay. The trial court rejected the claim of factual and legal error, but determined that the arbitrator should have disclosed a remote relationship with one of Startup's principals and set aside the award. More attorney's fees and delay awaited Startup. There was a possible appeal and a possible new arbitration. Startup was broke and settled to stop the expense meter."

GC: "It sounds like arbitration can be just as costly, protracted and unpredictable as litigation."

Gunn: "That is correct and incorrect. The arbitrator can manage the case to limit discovery, expense and delay. She has that power."

GC: "Then the 'who' the arbitrator is all important."

Gunn: "A trained, carefully vetted arbitrator can overcome a lot of problems."

GC: "My goal is to get a fair hearing and have a reasoned and fair outcome. Again, it sounds like 'who' the arbitrator is is vital."

Gunn: "That is a fair assessment. My general preference for an arbitrator is a retired judge or an attorney with whom I have a high level of comfort."

GC: "So you are not saying that arbitration necessarily results in delays, expense and the potential unpredictability of courts."

Gunn: "Right. And I have some arbitration clause drafting ideas to minimize the delay, expense and unpredictability of arbitration if you plan to write it into your contracts."

GC: "We're almost out of time. Can you give me some ideas."

Gunn: "I would identify specific potential arbitrators or an arbitration service provider that has an arbitrator roster I am comfortable with. I would select a set of procedural rules (CCP Section 1280 et seq.; AAA; JAMS, etc.) that

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best serve your goals. I would avoid putting unconscionable elements into Amex's arbitration clause such as faraway venue; one-sided relief waivers; and one-sided cost bearing provisions. Keep the clause simple, straightforward and fair."

GC: "I almost forgot – I believe it is important that the arbitrator has expertise in our business."

Gunn: "I suggest to you that is a valuable asset – but that a smart, fair, and trained arbitrator is more important. I can use experts to educate the arbitrator and overcome any lack of familiarity with your business."

GC: "You have given me a lot to contemplate and thank you."

Gunn: "One last thing. Make sure Amex's counsel treats the arbitration as seriously as she would treat litigation. Preparation and knowledge of and adherence to the applicable rules are vital." ▲

1 *Moncharsh v. Heily and Blasé* (1993) 3 Cal.4th 1. [Award may not be reviewed for factual or legal error.]

2 "Hundreds of judges have deserted the bench to enrich themselves in a system of private arbitration. The arena is largely unregulated and tilted, many say, in favor of big business and against the little guy." Saul Berkowitz, *L.A. Daily Journal*, October 22, 2006.

3 AAA Commercial Rules 22 through 43 provide for the conduct of the hearing and vest wide discretion in the arbitrator to shape those procedures to ensure "that each party has the right to be heard and is given a fair opportunity to present its case." JAMS Comprehensive Rule 22 and CCP Section 1282.2(d) also provide broad arbitrator discretion in the conduct of the hearing.

4 CCP Section 1286.2 provides the exclusive bases for vacating an award. *Cable Connection, Inc. v. DirecTV*, 2006 Daily Journal D.A.R. 12, 2006 WL 270 9407 [Disapproves of prior decision's suggestion that arbitration clause may provide for judicial review of award for error.] For contracts subject to the Federal Arbitration Act (9 USC 1 *et seq.*), section 11 provides essentially the same bases to challenge an award as does Section 1286.2. *Kyocera Corp. v. Prudential Bache Trade Service, Inc.*, (9th Cir. 2003) 341 F.3d 987 [Also disapproves a clause that provides for judicial review of an award for error.]

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tration claim "may be rendered ineffectual." *Id.* The plaintiff should also specifically reserve its right to arbitration of its substantive claims and request that discovery be stayed pending the Court's ruling on the request for specific performance of the arbitration agreement. If necessary, the plaintiff can follow up with a motion to compel arbitration and stay discovery.

How To Obtain A Writ Of Attachment: Substantive Requirements

Before the Court can issue a writ of attachment, it must find: (1) that the claim upon which the attachment is based is one upon which an attachment may be issued; (2) that the plaintiff has established the "probable validity" of its claim; (3) that the plaintiff seeks the attachment only for the purpose of recovering its claim; and (4) that the amount to be secured by the attachment is greater than zero. C.C.P. § 484.090(a).

As for the first requirement, a plaintiff may obtain a writ of attachment only on a claim for breach of contract. The contract may either be express or implied. The contract claim must be one for money damages, rather than for injunctive relief. The contract claim must be for a "fixed or readily ascertainable amount" of not less than $500.00. *See* C.C.P. § 483.010(a).

An attachment may not be issued on a claim which is secured by an interest in real property. *Id.* § 483.010(b). This bar applies to actions on mortgage and trust deed liens and other statutory, common law, or equitable liens on real property.

The second requirement is often the most contested because it concerns the merits of the case. The plaintiff must make a sufficient evidentiary showing that its substantive claims are "probably val*Id.*" In other words, the plaintiff must convince the Court that more likely than not it will prevail at trial. The Court's ruling on the substantive merits for the purpose of the writ of attachment motion cannot later be introduced into evidence or referred to in any way. *Id.* § 484.100.

With respect to the third requirement, the plaintiff must submit a declaration showing that the plaintiff only seeks the attachment for the recovery of its claim and for no other purpose.

In the fourth requirement under Section 484.090(a) of the Code, the plaintiff must establish that the amount sought to be attached is greater than zero. Section 483.010(a), however, requires that a claim be for at least $500, and appears to trump the "greater than zero" requirement of Section 484.090(a). A plaintiff may obtain an attachment in an amount sufficient to secure its "fixed or readily ascertainable" actual damages. In addition, a plaintiff may also obtain an attachment in an amount sufficient to cover its estimated total costs and attorneys' fees. *Id.* § 482.110.

In addition to meeting these requirements, a plaintiff must submit a declaration showing that it has posted an undertaking of at least $10,000. A plaintiff may obtain an undertaking from a bond service. A $10,000 bond will typically cost the plaintiff around $200.

A plaintiff seeking a TPO pending the attachment hearing must also show "great or irreparable injury." C.C.P. § 486.020. This standard is met if: "Under the circumstances of the case, it may be inferred that there is a danger that the property sought to be attached would be concealed, substantially impaired in value, or otherwise made unavailable to levy if issuance of the order were delayed." *Id.* § 485.010(b)(1). Great or irreparable injury may also be inferred if the plaintiff can establish that the defendant has failed to pay the debt underlying the requested attachment and is "insolvent in the sense that the defendant is generally not paying his or her debts as those debts become due," unless those debts are subject to a bona fide dispute. *Id.* § 485.010(b)(2).

Plaintiffs should be forewarned that any attachment will be automatically expunged and the security interest lost if the defendant files for bankruptcy within 90 days of the issuance of the writ of attachment. *Id.* § 493.030(b).

How To Protect Your Client Against A Writ Of Attachment

In opposing a motion for an attachment, a defendant should lead by reminding the Court that such motions are strictly construed. *See Pacific Design Sciences Corp. v. Superior Court* (2004) 121 Cal.App.4th 1100.

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Writs of Attachment

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Fights over attachment usually focus on the "probable validity" element. The defendant should emphasize that the plaintiff bears the burden of showing that it will more likely than not prevail on its substantive claims.

The defendant should also focus on any failure by the plaintiff to meet the many procedural requirements for an attachment. In particular, an attachment can be had only on a money claim for a "fixed or readily ascertainable amount." C.C.P. § 483.010(a). Case law clarifies this requirement as follows. Although the damages need not be liquidated, they must be measurable by reference to the contract itself. The contract must either specifically identify a fixed amount owed, or it must provide some way of calculating this amount, for example by providing a formula or schedule of payment. If the damages cannot be readily ascertained from the face of the contract, the plaintiff is not entitled to a writ of attachment. *See CIT Group/Equipment Financing, Inc. v. Super DVD, Inc.* (2004) 115 Cal.App.4th 537, 541.

Further, if the defendant is a natural person, an attachment must be based on a contract arising from a trade, business, or profession. C.C.P. § 483.010(c). In other words, the claim must be a commercial claim. Attachments are precluded in claims against a consumer. *See Kadison, Pfaelzer, Woodard, Quinn & Rossi v. Wilson* (1987) 197 Cal.App.3d 1, 4.

The Code also precludes attachments against individuals in claims based on: the sale, lease, or license of property; the furnishings of services; or the loan of money used primarily for personal, family, or household purposes. See C.C.P. § 483.010(c).

Aside from these defenses, a defendant can also argue for the posting of a bond hirer than the statutory minimum of $10,000. In doing so, the defendant must establish that $10,000 would be insufficient to cover its damages in the event the attachment is later determined to have been wrongful. *Id.* § 489.220(b). Wrongful attachments are defined by Section 490.010. A defendant may release an attachment by counter-bonding. *Id.* § 489.310. If a defendant intends to counter-bond a successful attachment, the defendant should not argue that the plaintiff assume an undertaking greater than the statutory minimum, because the counter-bond must be sufficient to entirely offset the initial undertaking.

Section 484.060(a) states that an opposition must be served at least 5 court days before the hearing. A defendant, however, would be ill-advised to deviate from the standard requirement that an opposition be filed at least 9 court days before the hearing. See C.C.P. § 1005(b).

Conclusion

A plaintiff may bring an attachment only to secure its interest in the property pending a final resolution of its substantive claims, and for no other purpose. Nevertheless, bringing a motion for a writ of attachment may have several ancillary consequences.

First, a motion for attachment results in a sort of "mini-trial" of the case very early on in litigation. This requires that both parties expend significant time and money at the outset of litigation. In many cases where attachment is appropriate, a defendant has failed to make a payment required under a contract because of its financial condition. The plaintiff may be one of many creditors. Bringing a lawsuit and moving for a writ of attachment will grab the attention of the defendant and likely force the plaintiff's claim to the top of the list of creditors. A defendant in this situation may settle quickly and on favorable terms.

Even if the motion for a writ of attachment is ultimately unsuccessful it may still have been worth the effort. Plaintiff's counsel has the luxury of taking whatever time necessary to investigate the facts and law prior to filing the complaint, the motion for a writ of attachment, and the TPO. Defendant's counsel, on the other hand, may have merely a few days to digest the complaint and facts and to respond to the TPO. Defendant's counsel may have as little as 21 days to properly oppose the motion for a writ of attachment, which goes to the heart of the substantive claims. Under these circumstances, it is very easy for the defendant and/or its counsel to make mistakes.

In particular, a defendant should be very

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A. What is Section 1747.08?

Broadly speaking, Civil Code Section 1747.08 prohibits any company that accepts credit cards for payment from requesting or requiring that the customer provide any "personal information" – *e.g.*, address, phone, or email information – in connection with the credit card transaction. The statute also prohibits using a credit card transaction form that has preprinted spaces specifically designated for such personal information. The statute does not apply to cash or check transactions.

The statute includes certain express exceptions, including exceptions where the retailer requests address or phone information for "a special purpose incidental but related to the individual credit card transaction." Some of these "special purposes" are expressly defined by statute – such as shipping or installation of purchased merchandise – but the statutory list of exceptions is non-exclusive. There is no court authority defining what other "special purposes" might qualify for the exception.

Section 1747.08 has caught many retailers unaware. For a variety of customer service or marketing reasons, many retailers request customer address or phone information at the point of sale. Over the last several years, many retail chains have been hit with class action suits as a result.

Because of the large potential statutory penalty, there is substantial pressure to settle. While the compensation to individual class members in past settlements has typically been in the form of a coupon or store credit, other components of such settlements – including notice costs and attorney fees – can impose substantial cash costs on a settling defendant.

B. Can't a Customer Voluntarily Provide His or Her Address or Phone Number?

When Section 1747.08 was originally enacted, it only prohibited "requiring" a credit card customer to provide address or phone information. However, the statute was later amended to prohibit "requesting" such information.

The point of the amendment was apparently to prohibit retailers from "requesting" address or phone information in such a way that customers might be duped into believing providing the information was a condition to acceptance of their credit card. However, the broad and grammatically ambiguous language of the amendment has permitted class action plaintiffs to contend that *any* request for address or phone information in connection with a credit card transaction is prohibited – even if the customer is fully aware that providing the information is optional.

The only published case on point is less than perfectly illuminating. *Florez v. Linens 'N Things*, 108 Cal.App.4th 447 (2003), is not a model of clarity, and provides fodder for both plaintiff and defense arguments.

C. Does Section 1747.08 Apply to Credit Card Refund Transactions?

There is also a new front opening in the Section 1747.08 wars. Initially, class actions under Section 1747.08 targeted retailers that requested customer address or phone information at the time of purchase. Lately, class action attorneys have begun targeting retailers that request such information at the time of processing a credit card refund (*e.g.*, when a customer returns an item and a credit is put on to the customer's credit card). No appellate court has yet decided whether Section 1747.08 applies at all to credit card refunds.

D. Does Section 1747.08 Apply to Debit Card Transactions?

There is one clear spot in the fog of ambiguity surrounding Section 1747.08. By statutory definition, "credit card" transactions do not include debit card transactions. That exclusion can substantially reduce the size of a potential class.

E. Should a Section 1747.08 Case Be Removed to Federal Court Under the Class Action Fairness Act?

The Class Action Fairness Act ("CAFA") permits the removal of some Section 1747.08 cases if more than $5 million is in controversy. In addition to all the other factors that weigh into the removal decision, keep in mind that CAFA imposes certain limitations on coupon settlements. Historically, Section 1747.08 cases have

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settled using coupon settlements. A defendant will want to analyze whether CAFA may make it more difficult to reach a coupon settlement.

F. Are There Commercial Free Speech Defenses?

The potential overbreadth of the statute – specifically, the possibility that it can be construed to prohibit fully voluntary and consensual exchanges of information between a retailer and its customers – raises commercial free speech concerns, and thus may give rise to a constitutional defense.

While commercial speech is given less protection than political speech, it is still constitutionally protected. A statute that restricts commercial speech must be narrowly tailored to achieve the legislative goal. A statute that imposes unnecessarily broad restrictions on commercial speech is therefore potentially vulnerable to constitutional challenge.

Obtaining a customer's address or phone information is an essential prerequisite to many forms of commercial speech – such as mailing a catalog to a consenting customer, or sending a customer a notice of an upcoming sale. Further, as a practical matter, the point of sale is often the only face-to-face time that a retailer and its client can exchange the necessary contact information. Accordingly, a company's act of requesting a customer's address or phone information, and the customer's act of providing such information, deserve protection against overbroad government interference. Several cases extend constitutional protection in analogous circumstances.

The question is whether Section 1747.08 is narrowly tailored to the stated legislative purpose. The stated purpose of Section 1747.08 is to protect against identify theft, and to ensure that customers aren't misled into providing personal information under the false impression that doing so is required to complete the credit card transactions. Under the broad interpretation of Section 1747.08 advanced by most plaintiffs, that statute sweeps more broadly than it needs to. For example, most Section 1747.08 plaintiffs argue that the statute prohibits almost any request for address or phone information made in connection with a credit card transaction – even if the customer *wants* to provide the information and *knows* that doing so is optional. Most plaintiffs would also argue that the statute applies regardless of whether the retailer stores the address or phone information in such a way that there is no practical risk of identity theft.

G. What Can Your Client Do to Protect Against Section 1747.08 Suits?

Many retailers feel that they have a legitimate business need, for customer service or other reasons, to request address or phone information from clients. How can such a company do so without potentially running afoul of the law? Unfortunately, given the ambiguous statutory language and sparse case law, the answer is less than clear.

Some plaintiffs' counsel have suggested that Section 1747.08 permits requesting a customer's address or phone information after the credit card transaction is fully completed (*e.g.*, after the clerk has handed the customer his or her goods and receipt). Others have suggested that retailers could comply with Section 1747.08 by having some type of "guest book" available to customers who want to sign up to receive catalogs or other mailings – provided that the "guest book" procedure is kept separate from the credit card transaction. However, no appellate decision has expressly blessed either such procedure. Moreover, it is likely that neither of these methods would be as convenient to the customer or the retailer as a request made during the register transaction.

Absent further judicial or legislative guidance, the bottom line is that retailers who request customer address or phone information will likely be subject to a certain degree of litigation risk. ▲

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ment agreements. However, it is important to keep in mind that when there is a settlement agreement outside of Court, in order to avail oneself of §664.6, the agreement must be *in writing* and must be signed by *both* the party seeking to enforce the agreement *and* the party against whom it is to be enforced.

In 1995, the California Supreme Court was called upon to decide whether the term "parties" as used in §664.6 means the litigants themselves or whether it should be construed to include the parties' attorneys or other agents. In *Levy v. Superior Court* (1995) 10 Cal.4th 578, the Court held that a written settlement agreement had to be signed by the litigants themselves in order to be enforceable under the summary procedure specified in §664.6. In the above scenario, since the defendant didn't sign the settlement agreement, §664.6 would not be available if one of the parties suffered from settlor's remorse and decided to back out of the deal.

There is an exception to the "litigants themselves must sign" rule. When a liability insurer is providing a defense without any reservation of rights, there are adequate coverage limits (*i.e.*, the defendant has no personal liability at stake) and the carrier has the unfettered right to settle without the insured's consent, the insurance carrier (but not the defense counsel) has the power to settle on defendant's behalf. Its signature on the settlement agreement (or agreement when a settlement is being put on the record in court) suffices for purposes of §664.6. *Fiege v. Cooke* (2004) 125 Cal.App.4th 1350, 1353-1355; *Robertson v. Chen* (1996) 44 Cal.App.4th 1290, 1295-1296.

However, even if a settlement is not enforceable under §664.6, settlements signed by counsel alone may be enforceable in separate proceedings, *e.g.*, by motion for summary judgment (after amending the pleading to allege a settlement defense), prosecuting an action for breach of contract, or, in a separate suit in equity. See *Levy, supra*, 10 Cal. 4th at 586, fn. 5; *Harris v Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 306.

If the parties themselves sign the settlement agreement (or, if the plaintiff and the claims adjuster in a case where there is ample coverage without any reservations sign the settlement agreement) — are you home free? Not necessarily. A recent Sixth Appellate District decision, *Stewart v. Preston Pipeline Inc.* 134 Cal.App. 4th 1565 (December 20, 2005), grappled with whether the extremely broad mediation confidentiality statute (Evidence Code §1119) may be used as a shield to prevent the admission of a purported settlement document signed at the conclusion of a mediation in subsequent proceedings to enforce the settlement.

In *Stewart*, the court held that the trial court correctly determined the agreement was admissible under §1123 (an exception to §1119), which provides: "A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied: [¶] (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect…"

In *Stewart*, the plaintiff was trying to undo the settlement. One of plaintiff's main arguments was because the settlement agreement was not signed by the defendants themselves or by their insurance carrier, but instead was signed only by defense counsel, it did not meet the requirements of §1123 that the waiver be "signed by the settling parties."

The court addressed *Levy* and distinguished between the types of rights that can be affected by a stipulation entered into by an attorney on behalf of his or her client, and categorized those rights into two groups: (1) rights that are procedural in nature, and (2) rights that are substantial in nature. Those that are procedural in nature can be stipulated to by an attorney without his or her client's signature. However, stipulations involving "substantial rights" require the client's own signature:

> We conclude from a review of the foregoing authorities that a stipulation waiving mediation confidentiality is not one that impacts the substantial rights of the party litigant. The cir-

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> cumstances before us bear little resemblance to those presented in *Levy*. Such a mediation-confidentiality waiver — as contrasted with a settlement stipulation as addressed in *Levy* — is clearly procedural in nature; it is a strategic stipulation allowing for the admissibility of certain evidence.

The pragmatic impact of *Stewart* is that every lawyer participating in memorializing a settlement reached in connection with a mediation should make sure that the Stipulation for Settlement expressly provides something along the lines that "the parties agree that this Stipulation for Settlement is admissible pursuant to Evidence Code section 1123."

The Stipulation for Settlement should likewise contain language that "it is fully binding and enforceable pursuant to California Code of Civil Procedure section 664.6"; and, as stated above, you should make sure that ALL counsel *and* ALL parties (or if the insurance exception applies – that the insurance representative) sign the writing that is used to document the settlement following your mediation.

B. Other Issues Counsel Need to Address In Mediation

It is easy to fumble your settlement from an enforceability standpoint if you don't keep the above do's and don'ts in mind. It is even easier to fumble your settlement if you fail to address the following issues *before* you get to the 1-yard line:

Consent: If you are handling a legal, medical or broker malpractice case in which the defendant lawyer, doctor or broker has E & O insurance, you should (if possible) make sure before you go to the mediation that the defendant is not withholding his or her consent to settle (which they have the right to do under such policies). At the very least, if you are unable to resolve this issue prior to the mediation, you should address it early in the process.

Other Conditions: When you are filling out your Stipulation for Settlement at the end of an exhausting mediation, don't forget to expressly include any material condition(s) precedent or subsequent – *e.g.*, the settlement is expressly conditioned upon the Board of Director's approval; or upon City Council's approval; or, upon Court approval of the minor's compromise; or upon Bankruptcy court's approval; or upon a good faith finding of certain facts.

Confidentiality: This should be addressed *before* you get to your final number. Failure to do so could torpedo all of your efforts. If confidentiality is going to be a material term of a settlement, make sure that you address the scope and breadth of what the defendant wants and what the plaintiff is willing to give. Is the Confidentiality clause that is going to be in the formal Settlement and Release Agreement going to be a "plain vanilla" clause; or, is it going to be an extraordinarily broad clause with a prevailing party attorney fee clause and/or a liquidated damage provision.

Non-Disparagement: In certain business, employment and other tort cases the parties want (or should consider having) a non-disparagement provision. If such a provision is a material term of a settlement, as with confidentiality clauses, it should be addressed before you get to your final number. You should also address the scope and breadth of what both sides have in mind and are willing to agree to or not agree to. Failure to do so before everyone signs off on the Stipulation for Settlement may very well upset the applecart.

Liens & Taxes: If there are actual or potential liens and/or tax-related concerns such as responsibility for liens and/or taxes, and any potentially applicable defense obligation, indemnification and hold-harmless in connection with those liens and taxes should be spelled out.

Payment: In most cases, a single lump sum payment is made anywhere between 10 – 30 days following execution of the formal Settlement and Release Agreement. However, if your case is anything other than a standard case – be careful! For example, if there is no insurance, payment terms may be necessary (and, if that is the case, that is something that should be addressed *long before* you get to the final number.) If it is an employment case, you

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should address whether taxes are going to be withheld from the settlement payment or not.

Another *caveat* to be aware of is that certain insurance companies, on cases exceeding a certain dollar amount, will not fund any settlement sooner than 90 days after execution of the formal settlement agreement and will not agree to contribute to any settlement unless some portion of their contribution is structured by an annuity company on their approved list. Again, this is something that, whenever possible, should be addressed *before* a final number is reached.

Lastly, if plaintiff maintains that "time is of the essence" (*i.e.*, she is willing to forego the entire settlement unless she receives the settlement payment by a certain date), all deadlines, details and ramifications should be spelled out before everyone leaves.

C. Conclusion

Getting to a mutually agreeable number doesn't necessarily guarantee that you will cross the goal line. As we all know, the devil is in the details. Those details can cause you to fumble your settlement on the 1 yard line if they are not addressed before everyone walks out the door. ▲

Writs of Attachment

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careful about submitting declarations in opposition to a TPO or motion for a writ of attachment which would lock his or her client into a position which may later prove untenable. In responding to a motion for a writ of attachment, the defendant's interests are not served if it wins the battle but loses the war. ▲

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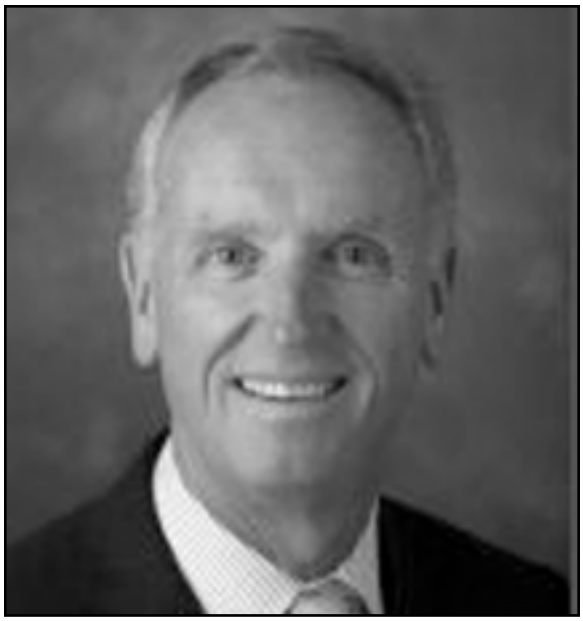

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