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Is Attachment Once Again Safe?

ROGER BERNHARDT

Among the new legislation summarized in the Reporter's January 1998 issue is AB 1258 (Stats 1997, ch 222), a bill that revised California attachment procedures, which authorize an undersecured real or personal property lender to obtain a prejudgment attachment on the debtor's other assets. Former CCP §483.010. Had AB 1258 not been enacted, however, the right of secured creditors to attach other assets would have terminated under the sunset provisions of the previous law. The new legislation reversed the repeal, and revised certain attachment procedures. New CCP §483.010(b) provides in part:

[A]n attachment may be issued where the claim was originally so secured [by real estate] but, without any act of the plaintiff or the person to whom the security was given, the security has become valueless or has decreased in value to less than the amount then owing on the claim, in which event the amount to be secured by the attachment shall not exceed the lesser of the amount of the decrease or the difference between the value of the security and the amount then owing on the claim.

Thus, the unpaid mortgagee who is owed \$1 million, but is secured by property currently worth only \$750,000, is legally entitled to attach \$250,000 of the mortgagor's other assets.

This statutory right has existed since 1976; however, not many lenders' attorneys advised their clients to take such steps because of the risk that a real-property-secured lender's prejudgment attachment would violate the one-action rule (CCP §726), thus causing waiver of the lender's security interest in the real property collateral and possibly forfeiture of its right to recover on the debt against the mortgagor or any of the debtors. See *Shin v Superior Court* (1994) 26 CA4th 542, 31 CR2d 587 (prejudgment attachment in Korea constituted an action in California for CCP §726 purposes). Hopes that *Shin* would be limited to foreign attachments were killed last year when a bankruptcy court imposed the same sanction for obtaining a local attachment. *In re Prestige* (Prestige Ltd. Partnership-Concord v East Bay Car Wash Partners) (Bankr ND Cal 1997) 205 BR 427. See also *In re Sunnymead* (Metropolitan Life Ins. Co. v Sunnymead Shopping Ctr. Co.) (Bankr 9th Cir 1995) 178 BR 809 and *In re Kristal* (Carnation Co. v Lampi) (1985) 758 F2d 454.

"It doesn't do an undersecured creditor much good to exercise the statutory right of attachment if the cost of exercising it is to lose either the security or perhaps the right to recover the balance of the debt."

It doesn't do an undersecured creditor much good to exercise the statutory right of attachment if the cost of exercising it is to lose either the security or perhaps the right to recover the balance of the debt. Attachment made sense for undersecured personal property creditors—who are not subject to the one-action rule—but was much too risky for real property mortgagees, who dare never forget what CCP §726 can do to them.

New CCP §483.012

The legislature responded to the lenders' dilemma by including in AB 1258 new CCP §483.012, which provides:

Subject to the restrictions of Sections 580b and 580d, in an action to foreclose a mortgage or deed of trust on real property or an estate for years therein, pursuit of any remedy provided by

this title shall not constitute an action for the recovery of a debt for purposes of subdivision (a) of Section 726 or a failure to comply with any other statutory or judicial requirement to proceed first against security.

Does the new law mean that real property lenders can now safely attach? The State Bar's Business Law Section thought so because they sponsored the bill, but it does not look as though the State Bar's Real Property Section joined in; perhaps that is because real property lawyers have become less confident about the effectiveness of legislation intended to limit the reach of CCP §726.

Our Peculiar One-Action Rule

The one-action rule begins: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property." CCP §726. The rule effectively makes foreclosure the unpaid mortgagee's sole remedy; the mortgagee cannot sue independently on the note.

Our one-action rule has a peculiar history. California copied it from New York, but New York decided then not to enact it, preferring instead a form of election-of-remedies statute. The fact that our statute was originally worded as "but one action," rather than "but one form of action" makes me think that its purpose was to permit the mortgagee to get all the relief it needed in one action rather than the many separate actions it was forced to file under the old common law system (foreclosure in equity to obtain title to the property; ejectment at law to obtain possession of the property; and a money action for collection of the debt—some of which judgments might undo the effects of the others).

Today, however, our courts see the one-action rule as a necessary barrier to protect debtors from harassment, under the assumption that creditors would otherwise regularly file multiple actions against their debtors to recover their single debts (an unlikely strategy for parties who have to pay attorney fees, which are probably unrecoverable from defaulting debtors). The judicially created and enthusiastically applied "sanction effect" of causing the misstepping creditor to lose its security or its debt (which led the new Restatement (Third) of Mortgages §8.2, Reporters' Note (1996) to call the rule a "trap for the unwary") may well survive this latest legislative favor.

Legislative Responses to Judicial Activism

Traditionally, the California legislature has responded to judicial activism in the one-action field by drafting statutes that attempt to undo some of the harm while leaving the basic principle intact. Thus, after various California courts held that steps relating to receivers (*Resolution Trust Corp. v Bayside Dev.* (9th Cir 1995) 43 F3d 1230), guarantors (*Cathay Bank v Lee* (1993) 14 CA4th 1533, 18 CR2d 420; *Bank of S. Cal. v Dombrow* (ordered not published March 14, 1996; CAVEAT: Cal Rules of Ct 977 restricts citing former opinion at 39 CA4th 1457 (advance reports), 46 CR2d 656)), and letters of credit (the superseded court of appeal opinion in *Western Sec. Bank v Superior Court* (1997) 15 C4th 232, 62 CR2d 243) all constituted actions or violated the deficiency rules, the legislature each time said the opposite. CCP §564d, CC §2856, CCP §580.5, respectively. The legislature did the same with fraud recoveries (CCP §726(f)), insurance claims (Fin C §779), and environmental remedies (CCP §726.5), although it always left the central one-action rule alone. As the superseded second court of appeal decision in *Western Sec. Bank* illustrates, however, many judges resent such legislative interference and will do everything they can to resist it. I think it is safe to assume that new CCP §483.012 could receive a very cramped reading in court.

Potential Dangers

What should lenders anticipate from hostile judges if they try to do what the new section seems now to validate? Two amendments to the bill in committee suggest some dangers.

The Minimum Price: No Trustee Sale

As introduced on February 28, 1997, the bill's original version did not contain the first nine words of the existing statute ("Subject to the restrictions of Sections 580b and 580d"); they were apparently added at the request of the California Association of Realtors. Obviously, the holder of a purchase money mortgage should not expect to be able to attach; attachment makes sense only if a deficiency judgment is obtainable, and CCP §580b, which bars deficiency judgments on purchase money loans, removes that prospect. The applicability of CCP §580d, which bars deficiency judgments after nonjudicial foreclosure, is less clear, but I think the added language means that a lender who wants to attach and then reach other assets will have to confine itself to a judicial foreclosure—a trustee sale will probably release any attached assets and discharge the attachment. Attachments will not work like receiverships, which allow lenders to file judicially to get rents while simultaneously proceeding with trustee's sales; attached assets are not additional security (like rents) that can be reached despite CCP §580d. Lenders will not be able to sell attached assets without a real deficiency judgment following a judicial foreclosure (and fair value hearing under CCP §§580a and 726(b)). (This was probably the case even without the amending CCP §580d language.)

A Higher Price: No Recovery?

More ominously, I worry about another revision that occurred during the legislative process. As introduced on February 28, 1997, the bill originally provided that "neither the filing of any application or motion pursuant to this title, nor the issuance of an order or writ pursuant to this title [would constitute an action]," but that language was replaced with "pursuit of any remedy provided by this title shall not constitute an action." Perhaps the change was made purely for brevity, but it may do more. Under both the original and the final versions, an application for attachment does not constitute an action. But what if the application is granted? The original version expressly declared that issuance of an order or writ was not an action, but those words are gone from the final version; only "pursuit" of the attachment remains. In the antideficiency field, pursuing relief is not the same as obtaining relief. See *e.g.*, Com C §9501(4)(a)(ii); *In re Madigan* (Madigan v Portrans Int'l) (Bankr 9th Cir 1991) 122 BR 103; *In re Tidrick* (Tidrick v General Bank) (Bankr CD Cal 1989) 105 BR 584; and *Resolution Trust Corp. v Bayside Dev.* (9th Cir 1995) 43 F3d 1230.

"It would be a painful irony to discover that an undersecured lender can ask for an attachment, but must hope that it is never granted."

It would be a painful irony to discover that an undersecured lender can ask for an attachment, but must hope that it is never granted, lest the security or the debt be lost! It would not, however, be the first time that such a surprise has occurred.

► **NOTE:** I earlier made reference to the new Restatement of Mortgages produced by the American Law Institute. Although it takes positions opposed to many California statutes and rules (*e.g.*, contrary to CCP §§726, 580b, and 580d), it is a repository of sensible and thoughtful concepts and arguments that real property litigators might find helpful in trying to persuade judges to see things their way.