RULE 4A. ATTACHMENT

(a) Availability of Attachment. In any action under these rules, real estate, goods and chattels and other property may, in the manner and to the extent provided by law, but subject to the requirements of this rule, be attached and held to satisfy the judgment for damages and costs which the plaintiff may recover. Attachment under this rule shall not be available before judgment in any action against a consumer for a debt arising from a consumer credit transaction as defined in the Maine Consumer Credit Code.

(b) Writ of Attachment: Form. The writ of attachment shall bear the signature or facsimile signature of the clerk, be under the seal of the court, contain the name of the court, the names and residences of the parties and the date of the complaint, be directed to the sheriffs of the several counties or their deputies, and command them to attach the goods or estate of the defendant to the value of a specified amount ordered by the court, or to attach specific property of the defendant designated by the court, and to make due return of the writ with their doings thereon. The writ of attachment shall also state the name of the justice or judge who entered the order approving attachment of property, if any, and the date thereof.

(c) Same: Service. The writ of attachment may be procured in blank from the clerk and shall be filled out by the plaintiff's attorney as provided in subdivision (b) of this rule. The writ of attachment shall be served by a sheriff or a deputy within the sheriff's county. The plaintiff's attorney shall deliver to the officer making the attachment the original writ of attachment upon which to make return and a copy thereof.

No property may be attached unless such attachment for a specified amount is approved by order of the court. Except as provided in subdivision (g) of this rule, the order of approval may be entered only after notice to the defendant and hearing and upon a finding by the court that it is more likely than not that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the aggregate sum of the attachment and any liability insurance, bond, or other security, and any property or credits attached by other writ of attachment or by trustee process shown by the defendant to be available to satisfy the judgment.

An attachment of property shall be sought by filing, with the complaint or during the pendency of the action, a motion for approval of the attachment. The motion shall be supported by affidavit or affidavits meeting the requirements set forth in subdivision (i) of this rule. Except as provided in subdivision (g) of this rule, the motion and affidavit or affidavits shall be served upon the defendant in the manner provided by either Rule 4 or as permitted by Rule 5. In the case of an attachment approved ex parte as provided in subdivision (g) of this rule, the defendant shall also be served with a copy of the writ of attachment with the officer's endorsement thereon of the date or dates of execution of the attachment or, if attachment has been perfected by filing under 14 M.R.S. § 4154, with a copy of the order of approval with the acknowledgment of the officer receiving the filing endorsed thereon.

A defendant opposing a motion for approval of attachment shall file material in opposition as required by Rule 7(c). If the defendant is deemed to have waived all objection to the motion as provided in Rule 7(c) for failure to file opposition material within the time therein provided or as extended, the court shall, without hearing, upon a finding that the plaintiff is entitled to an attachment under the terms of this subdivision (c), enter an order of approval of attachment in an appropriate amount.

Any attachment shall be made within 30 days after the order approving the writ of attachment. When attachments are made subsequent to service of the summons, complaint, and notice regarding Electronic Service upon the defendant, a copy of the writ of attachment with the officer's endorsement thereon of the date or dates of the attachments shall be promptly served upon the defendant in the manner provided by Rule 5. When an attachment made subsequent to the service of the summons, complaint, and notice regarding Electronic Service has been perfected by filing under 14 M.R.S. § 4154, a copy of the order of approval, with the acknowledgment of the officer receiving the filing endorsed thereon, shall be promptly served upon the defendant in the same manner.

(d) Approval of Limited Attachment or Substituted Security.

(1) *Attachment of Specific Property.* In the order approving an attachment, the court shall specify that the attachment is to issue solely against particular property or credits upon a showing by the defendant (A) that the property or credits specified are available for attachment and would, if sold to

satisfy any judgment obtained in the action, yield to the plaintiff an amount at least equal to the amount for which attachment is approved in accordance with the criteria of subdivision (c), and (B) that the absence of such a limitation will result in hardship to the defendant.

(2) *Alternative Security for a Single Defendant.* At the hearing on a motion for approval of an attachment against the property of a single defendant, the defendant may tender cash or bond at least equal to the amount of any attachment to be approved in accordance with the criteria of subdivision (c). If the court finds that the defendant has tendered cash in sufficient amount, it shall order that amount to be deposited with the court as provided in Rule 67 to be held as security for any judgment that the plaintiff may recover. If the court finds that the defendant has tendered a bond of sufficient amount and duration and with sufficient sureties, the court shall order the bond to be filed with the court. A surety upon a bond filed under this rule is subject to the terms and conditions of Rule 65(c). Upon such deposit or filing, the court shall further order that any prior attachment against the defendant to satisfy a judgment on the claim for which security has been tendered shall be dissolved. Thereafter, no further attachment shall issue against the defendant except on motion of the plaintiff and a showing that the cash deposited or bond filed has become inadequate or unavailable to satisfy the judgment.

(3) *Single Security for Multiple Defendants.* At the hearing for approval of attachment against the property of two or more defendants alleged to be jointly and severally liable to the plaintiff, one or more of the defendants may tender cash or bond sufficient, in the aggregate, to satisfy the total amount the plaintiff would be entitled to recover upon execution against all such defendants. Upon the findings required by paragraph (2) of this subdivision for a single defendant, the court may order the cash to be deposited or the bond filed with the court on the same conditions and with the same effect provided in that paragraph.

(e) Attachment on Counterclaim, Cross-Claim or Third-Party Complaint. An attachment may be made by a party bringing a counterclaim, a cross-claim, or a third-party complaint in the same manner as upon an original claim.

(f) Subsequent or Additional Attachment. If no writ of attachment has issued, or if the time period prescribed in subdivision (c) of this rule for making attachments has expired, the court on motion may issue an order of approval

for attachment of real estate, goods and chattels or other property. The provisions of subdivisions (c), (d), and (g) of this rule apply to the motion and any attachment ordered thereunder, except that notice if appropriate shall be served upon the defendant in the manner provided in Rule 5.

(g) Ex Parte Hearings on Attachments. An order approving attachment of property for a specific amount may be entered ex parte only if the court grants an ex parte motion for approval of the attachment as provided in subdivision (c) of this rule. Upon the filing of the motion, the hearing on the motion shall be held forthwith. Such order shall issue if the court finds that it is more likely than not that the plaintiff will recover judgment in an amount equal to or greater than the aggregate sum of the attachment and any insurance, bond, or other security, and any property or credits attached by other writ of attachment or by trustee process known or reasonably believed to be available to satisfy the judgment, and that either (i) there is a clear danger that the defendant if notified in advance of attachment of the property will remove it from the state or will conceal it or will otherwise make it unavailable to satisfy a judgment, or (ii) there is immediate danger that the defendant will damage or destroy the property to be attached. The motion for such ex parte order shall be accompanied by a certificate by the plaintiff's attorney of the amount of any insurance, bond, or other security, and any other attachment or trustee process which the attorney knows or has reason to believe will be available to satisfy any judgment against the defendant in the action. The motion, in the filing of which the plaintiff's attorney shall be subject to the obligations of Rule 11, shall be supported by affidavit or affidavits meeting the requirements set forth in subdivision (i) of this rule.

(h) Dissolution or Modification of Attachments. On 2 days' notice to the plaintiff or on such shorter notice as the court may prescribe, any person having an interest in property that has been attached pursuant to an ex parte order entered under subdivision (g) of this rule may appear, without thereby submitting to the personal jurisdiction of the court, and move the dissolution or modification of the attachment, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. At such hearing the plaintiff shall have the burden of justifying any finding in the ex parte order that the moving party has challenged by affidavit.

Upon motion and notice and a showing by any defendant that specific property or sufficient cash or bond is available to satisfy a judgment as

provided in subdivision (d) of this rule, the court may modify an order of attachment, whether issued ex parte or after hearing, to limit the attachment to particular property or to order cash or bond to be held by the court as security for the judgment, and to dissolve the prior attachment as to all other property of the defendant. If a prior attachment has been perfected as to property specified in the modified order, the modified order shall relate back to the original attachment.

Nothing herein shall be construed to abolish or limit any means for obtaining dissolution, modification or discharge of an attachment that is otherwise available by law.

(i) Requirements for Affidavits. Affidavits required by this rule shall set forth specific facts sufficient to warrant the required findings and shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, shall state that the affiant believes this information to be true.

Advisory Note – November 2023

In the third paragraph of subdivision (c), a notice of hearing is no longer to be included with service of the motion and affidavit or affidavits because the court now sends the notice of hearing. Language is also modified to clarify that a motion for attachment may be filed and served either at commencement or during the pendency of the action. The fifth paragraph of subdivision (c) is modified to reference the notice regarding Electronic Service described in Rule 5(b). The subdivision is also amended to update the statutory citations to reference the M.R.S. instead of the M.R.S.A.

Subdivision (g) is amended to clarify that an ex parte motion for attachment may be filed either at commencement or during the pendency of the action.

Advisory Committee's Notes
May 1, 2000

The specific statutory citation in subdivision (a) is replaced by the general reference to the Maine Consumer Credit Code so that the Rules are not impacted by statutory changes.

Advisory Committee's Notes
1993

Rule 4A(c) as amended effective February 15, 1992, is further amended to eliminate the 10-day period for filing material in opposition to a motion. Under the amended rule, filing will be subject to the 21-day period provided by Rule 7(c) for all types of motions. Experience under the rule as originally adopted indicated that the 10-day period was unrealistically short for parties to obtain counsel, in light of the 20 days allowed for answer. The change will not significantly affect the purpose of the 1992 amendment to assure expeditious proceedings.

Advisory Committee's Notes
1992

Rule 4A is amended in a number of respects to address growing concerns of both bench and bar that the standards for granting attachment were not stringently or consistently applied and that the procedure was too cumbersome. Simultaneous amendments to the same effect have been made in Rule 4B. Forms 6.10 and 6.20 are simultaneously amended for conformity with the amendments to Rules 4A and 4B.

Rule 4A(b) is amended to make the writ of attachment consistent with existing provision of Rule 4A(c) that an order granting an attachment fixes the amount of the attachment and to take into account the prospect that under new Rule 4A(d)(1) an order granting an attachment may be limited to specific property.

Rule 4A(c) is amended to change the "reasonable likelihood" standard to one requiring a showing that it is "more likely than not" that the plaintiff will recover judgment in an amount that equals or exceeds "the aggregate sum" of the attachment sought and other available security. The latter phrase is included in the amendment to make clear that the amount to be approved for attachment is the difference between the amount of the potential judgment that the court finds to be "more likely than not" and the other security.

The change in the standard for attachment responds to prevailing concerns that attachments are too freely given under the existing standard. The

"reasonable likelihood" standard was intended only as a constitutional minimum. *See* M.R. Civ. P.. 4A Advisory Committee's Note to January 1973 amendment, 1 Field, McKusick & Wroth, *Maine Civil Practice* 62 (2d ed. Supp. 1981). As the Law Court has recently affirmed, that standard "requires only that the plaintiff claim 'is not of such insubstantial character that its invalidity so clearly appears as to foreclose a reasonable possibility of recovery,'" and abuse of discretion in the trial court application of the standard will be found only where the record shows "that the plaintiff had 'virtually no chance of recovery'" on the claim. *Bay of Naples Condominium Ass'n v. Lewis,* 582 A.2d 1210, 1212 (Me. 1990), quoting *Northeast Inv. Co. v. Leisure Living Communities, Inc.,* 351 A.2d 845, 852 (Me. 1976); *Herrick v. Theberge,* 474 A.2d 870, 874 (Me. 1984). *See also Precision Communications, Inc. v. Rodrigue,* 451 A.2d 300, 301 (Me. 1982); *DiPietro v. Casco N. Bank,* 490 A.2d 215, 218 (Me. 1985); *Barrett v. Stewart,* 456 A.2d 10, 11 (Me. 1983); *Anderson v. Kennebec River Pulp & Paper Co.*, 433 A.2d 752, 756 (Me. 1981).

The present amendment is adopted as a matter of policy rather than constitutional mandate. The constitutional minimum has not changed. *See Connecticut v. Doehr*, --- U.S. ---, 111 S.Ct. 2105, 2114, 115 L.Ed.2d 1 (1991). The purpose of the increased standard is to strike a more even balance between plaintiff and defendant in the use of attachment. Its effectiveness in achieving this goal will be subject to continuing review.

Under the "reasonable likelihood" standard, it was expressly held that plaintiffs need not show that it was more likely than not that they would prevail. *See Northeast Inv. Co. v. Leisure Living Communities, Inc*., *supra*; *Bowman v. Dussault*, 425 A.2d 1325, 1328 (Me. 1981). Under the amended standard that showing will be required. A moving party must show a greater than 50% chance of prevailing. This change in the threshold for obtaining an attachment, which applies to the showing of success on both liability and damage issues, will not cause the procedure for obtaining an attachment to be more complicated. No other change in the practice is intended. The type of evidence to be submitted will be the same as under existing law. The required showing is to be made through affidavits; there is no right to an evidentiary hearing. *Atlantic Heating Co., Inc. v. John Lavin,* 572 A.2d 478, 479 (Me. 1990). As under existing law, specificity is required in the showing for the amount of the attachment, and this amount cannot be offset by claims of the non-moving party. *See Casco N. Bank, N.A., et al. v. New England Sales, Inc., et al.*, 573 A.2d 795, 797 (Me. 1990).

To expedite proceedings, Rule 4A(c) is further amended to provide a kind of default procedure. An attachment "in an appropriate amount" will be ordered without hearing if there is no opposition filed in accordance with Rule 7(c) within ten days after service of the motion and if the plaintiff affidavit shows on its face that the claimed recovery is "more likely than not."

The Advisory Committee originally proposed that Rule 4A(c) also be amended by adding provisions requiring plaintiff to schedule a hearing with the clerk and providing that the hearing on an attachment with notice should be scheduled on an expedited basis, "at the earliest possible date requested by the plaintiff" more than 20 days after service on the defendant. *See* Advisory Committee on Civil Rules, *Annual Report*, p. 2 and Appendix A (10/29/91). The proposed amendment was intended to eliminate extensive delays in obtaining hearings on notice that had caused counsel to seek ex parte attachments in cases where they were not necessary or warranted. The Court, recognizing the need for expedited hearings, prefers to achieve the goal by administrative means. If delays persist, the Court will consider appropriate further amendment of the rule.

A new Rule 4A(d) is added concerning the attachment of specific property and substitution of security. Rule 4A(d)(1) explicitly requires the motion justice to limit the attachment to certain specific property or credits upon a showing by the defendant that the property or credits offered by the defendant are adequate and available to satisfy the judgment and that, otherwise, hardship to defendant will result. The showing of adequacy should value the offered property under the assumption that a sale may take place upon execution of a judgment. Under present law, the Superior Court has some limited discretion to select particular property or credits to be attached but is not required to exercise that discretion. *Compare Maine National Bank v. Anderschat,* 462 A.2d 482 (Me. 1983), *with Sinclair v. Anderson,* 473 A.2d 872, 874-75 (Me. 1984). The amendment is intended to prevent inequities that may arise if the motion justice cannot specify limitations on the attachment upon an appropriate showing of the defendant. However, the defendant must justify the need to go through that exercise based on a showing that prejudice would occur in the absence of such limitations.

New Rule 4A(d)(2) permits substitution of a bond or cash for an attachment consistent with the bonding provision of 14 M.R.S.A. § 4613. The

amendment makes clear that this substitution can occur before the fact, at the attachment hearing, as well as after the attachment has actually been issued. The paragraph also sets forth procedural guidelines, incorporating existing provisions of Rules 67 and 65(c).

New Rule 4A(d)(3) allows a single bond or cash to be substituted for multiple attachments against defendants alleged to be jointly and severally liable to the plaintiff on a single debt. The intent of the provision is to eliminate the potential for over-securing a single debt, which can occur under present law. *See Chase Commercial Corp. v. Hamilton & Son,* 473 A.2d 1281 (Me. 1984).

The remaining subdivisions of the rule are redesignated "(e)" through "(i)."

Redesignated Rule 4A(f) is amended to make clear that the provisions of new Rule 4A(d) for limitation to specific property and substitution of security apply to additional or subsequent attachments.

Redesignated Rule 4A(g), covering hearings on attachments, is amended to provide that the hearing on an ex parte motion should be held "forthwith"; to substitute the "more likely than not" standard for the "reasonable likelihood" showing; and to incorporate the "aggregate sum" language of amended Rule 4A(c).

Redesignated Rule 4A(h) is amended to allow an existing attachment, whether ex parte or on notice, to be modified by substitution of specific property, cash or bond in the manner provided by new Rule 4A(d) for obtaining initial attachments.

Advisory Committee's Notes
1991

Rule 4A(c) is amended for consistency with new M.R. Civ. P.. 4(c) adopted simultaneously. Under that Rule, service of the summons and complaint may now be made by mail with notice and acknowledgement. The present amendment makes clear that a writ of attachment may be served only by a sheriff or deputy. *See* Rule 4A(b).

Advisory Committee's Notes
1988

Rule 4A(c) is amended for consistency with 14 M.R.S.A. § 4154, as amended by P.L. 1983, ch. 125; P.L. 1985, ch. 187. That section now permits real or personal property subject to attachment to be attached by filing an attested copy of the court's order of approval in the registry of deeds for the county where real property is located or, for personal property, in the filing office appropriate under 11 M.R.S.A. § 9-401(l). The order is to be filed within 30 days after its entry unless the court allows additional time on motion. Recording or filing fees are to be paid as for other documents. The statute expressly provides that filing constitutes perfection of the attachment and requires service of a copy of the court order upon the defendant "in accordance with the Maine Rules of Civil Procedure pertaining to service of writs of attachment."

The amendment to the rule addresses two questions. First, it provides, in the third paragraph of subdivision (c), that when an attachment which has been ordered ex parte is perfected by filing under the statute, the defendant is to be served with a copy of the order of approval containing the filing officer's acknowledgement of receipt, rather than with the writ of attachment itself. The second situation is that in which an attachment is made after the filing of the summons and complaint, whether upon ex parte order or after order of approval granted upon motion and affidavits served with the summons and complaint. In such a case, when the attachment has been perfected by filing under the statute, an amendment to the fourth paragraph of subdivision (c) provides that a copy of the order of approval with acknowledgement of filing is to be served upon the defendant in the same manner as a copy of the writ and return are served in the case of a possessory attachment.

In both situations, the effect of the statute is that no writ of attachment is prepared. It is service of the order, rather than the writ, which gives the defendant notice of the attachment.

Advisory Committee's Notes
1981

Rule 4A(c) as originally promulgated required that an action in which attachment was sought could be commenced only by filing the complaint -- the

second method provided in Rule 3. Experience under the rule has shown that there is no practical purpose to this limitation and that inconvenience arises from it. Accordingly, Rule 4A(c) is amended to permit the action to be commenced by either service or filing. Whichever method is used, the procedure is the same: the motion for approval of attachment and its supporting affidavits must be filed with the complaint and served with the summons and complaint, regardless of the order in which these steps are taken. Of course, attachment subsequent to the commencement of the action may still be had under Rule 4A(e).

Rule 4A(c) is also amended to make clear that for attachment to be appropriate a plaintiff's probable recovery must exceed the amount, not only of available liability insurance, but of any other fund available to satisfy the judgment.

Rule 4(f) is amended to take account of the decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), that attachment of assets at the commencement of an action is no longer a constitutionally valid way of obtaining jurisdiction over a nonresident in the absence of any other contacts with the state. *See* Advisory Committee's Note to simultaneous amendment of Rule 4(f).

The present amendment deletes as a ground for ex parte attachment the fact that the defendant is not personally subject to the jurisdiction. That provision is no longer needed or appropriate, because under *Shaffer* the fact of absence by itself will not support jurisdiction. In a case in which under the long-arm statute, 14 M.R.S.A. § 704-A, defendant is subject to jurisdiction and service, he can be served personally under Rule 4 (e), by mail if appropriate under amended Rule 4 (f), or by publication if necessary under Rule 4(g). Attachment can then be sought on notice and hearing under Rule 4A(c). Only if there is danger that defendant will abscond with or imperil the security, may ex parte attachment issue under Rule 4A(f) as here amended.

Rule 4A(f) is also amended for consistency with the simultaneous amendment of Rule 4A(c). The amendment limits the availability of ex parte attachment to actions commenced by filing the complaint -- except when subsequent attachment is appropriate under Rule 4A(e). The amended rule makes clear that the court must have the complaint before it when it passes on an ex parte motion for attachment and that the motion must be acted upon before it is served on defendant.

Rule 4A(g) is amended to make clear that an ex parte attachment obtained under Rule 4A(f) may be quashed by a person other than the defendant if that person has an interest in the property.

Advisory Committee's Note
September 1, 1980

This rule is amended to conform to statutory requirements. The Uniform Consumer Credit Code, 9-A M.R.S.A. § 5.104, expressly forbids attachment or garnishment before judgment "in an action against the consumer for debt arising from a consumer credit transaction." A creditor authorizing such a procedure may be subject to penalties under 9-A M.R.S.A. § 5.201. A consumer credit transaction is defined by 9-A M.R.S.A. § 1.301(12) as "a consumer credit sale, consumer lease or consumer loan or a modification thereof including a refinancing, consolidation or deferral." Definitions of "consumer credit sale", "consumer lease", and "consumer loan", §§ 1.301(11), (13), (14), make clear that these are non-business transactions.

Advisory Committee's Note
April 15, 1975

This amendment cures a practical problem that has arisen in the use of Rules 4A and 4B. A comparable change is being made simultaneously in the latter rule. These amendments will be applicable in the District Court as well, because the Civil Rules are incorporated by District Court Rules 4A and 4B.

Rules 4A and 4B as originally promulgated and as amended in 1973 treated attachment and trustee process as incident to the commencement of an action. Accordingly, subsequent attachment was available under Rules 4A(e) and 4B(g) only when such process had been employed at the outset. Since under the amended rules neither property nor credits of any kind may be attached without hearing and consequent expense and delay, it is no longer feasible for plaintiffs to commence virtually every action with an attachment, as was common in prior practice. A plaintiff who has not attached, however, has no protection against changes in the debtor's financial position and is unable to attach assets discovered or acquired after the action is commenced. The present amendments to Rules 4A and 4B are intended to remedy that situation by making attachment and trustee process available in circumstances

where they are otherwise appropriate not only at the commencement of the action but at any time during the pendency of the action in the Superior Court.

Rule 4A(a) is amended to eliminate the limitation of attachment to the commencement of the action.

Rule 4A(c) is amended to provide that to approve an attachment the courts must find that the plaintiff is likely to recover an amount in excess not only of defendant's liability insurance but of any other attachments under this rule or Rule 4B. The new provision applies whether other attachments have been made previously or are being made simultaneously with. the attachment before the court. The amendment thus requires an aggregating of all assets available that was not required in former practice. The effect is to prevent plaintiffs from combining a series of motions for attachment and trustee process that would encumber more of defendant's assets than are necessary to secure the judgment.

Amended Rule 4A(e) provides for two distinct types of attachment after the action has commenced. "Subsequent" attachment may be approved by the court at any time, if no attachment has previously issued under this rule. "Additional" attachment may be approved if attachment has previously issued either at the commencement of the action. under subdivisions (c) or (f) or subsequently or additionally under this subdivision. As under former Rule 4A(3), "additional" attachment is appropriate only after expiration of the time for making an attachment already issued. Other changes in the subdivision make clear that the motion .and findings upon which the court may approve subsequent or additional attachment are the same as those required at the commencement of the action. The motion may either be on notice under subdivision (c) or ex parte under subdivision (f) according to the circumstances of the case. The only difference with procedure at the commencement of the action is that, under the present subdivision, notice to the defendant if otherwise required may be given under Rule 5 rather than Rule 4, because he has already appeared.

The amendment is silent as to the availability of subsequent or additional attachment after judgment and pending appeal. Although an order of attachment presumably may be granted during the automatic 30-day stay of execution provided by Rule 62(a) and thereafter if an appeal is taken, an order for immediate execution or bond in lieu thereof under Rule 62(c), or

commencement of disclosure proceedings under 14 M.R.S.A. § 3121 *et seq*., may be more effective remedies. If there is an appeal, the power of the Superior. Court to act is terminated by the transmission of the record to the Law Court under Rule 74(p). In an extreme situation, however, the Law Court might be persuaded to exercise its inherent power, reserved under Rule 62(g), "to preserve . . . the effectiveness of the judgment." On remand to the Superior Court for new trial, that court regains the power to order subsequent or additional attachment under amended Rule 4A(e).

Rule 4A(f) is amended for consistency with the amendment of Rule 4A(c). At the same time subdivision (f) is amended to provide that an ex parte order for attachment is available if "there is a clear danger that the defendant if notified in advance of attachment of the property will . . . make it unavailable to satisfy a judgment." The quoted language is from item (ii) as amended and recognizes the practical fact that the defendant if forewarned may sell or encumber the property. The amendment generalizes on the occasions (previously only threatened removal from the state, concealment or destruction) when an attachment may be obtained without notice to the defendant. Both the affidavit filed with a motion for such an ex parte order and also the finding of the court should identify with specificity the nature of the action the defendant is in danger of taking if forewarned.

Advisory Committee's Note
August 1, 1973

These amendments, and the simultaneous amendments of Form 2, Alternate Form 2, and Forms 2D through 2G, are made for the purpose of applying to real estate attachments the identical procedures required on personal property attachments by the amendments which became effective on January 1, 1973. Those January 1, 1973, amendments, as explained in the accompanying Advisory Committee's Notes, did not go beyond the requirements of the cases previously decided in the First Circuit. At that time *Gunter v. Merchants Warren Nat. Bank,* 360 F.Supp. 1085 (D.Me.1973), testing the constitutionality of the Maine real estate attachment procedure, was pending before a three-judge district court in the District of Maine. On June 25, 1973, that court decided the *Gunter* case and a companion case, *Lake Arrowhead Estates, Inc. v. Cumming,* 360 F.Supp. 1085 (D.Me.1973), holding that a defendant is constitutionally entitled to the same prior notice and opportunity to be heard on a real estate attachment as on a personal property

attachment and on trustee process. The present amendment brings the real estate attachment procedure into conformity with the requirements of due process as construed by the three-judge federal district court. All of the procedures which previously applied only to "attachments of property other than real estate" will hereafter apply generally to "attachments".

Advisory Committee Note
January 1, 1973

The amendment of this rule, as well as the simultaneous amendments to Rule 4B, Rule, 64 and the associated official forms, are made for the purpose of complying with the constitutional requirement of notice and hearing on mesne process as recently laid down by the United States Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) [rehearing denied 409 U.S. 902, 93 S.Ct. 177, 34 L.Ed.2d 165], and subsequent decisions of three-judge federal district courts in the First Circuit, namely, *McClellan v. Commercial Credit Corp.*, 350 F.Supp. 1013 (D.R.I.1972) [affirmed *sub nom*. *Georges v. McClellan,* 409 U.S. 1120, 93 S.Ct. 935, 35 L.Ed.2d 253 (1973)], and *Schneider v. Margossian*, 349 F.Supp. 741 (D.Mass.1972) . Each of those cases --*Fuentes* (replevin), *McClellan* (tangible personal property attachment) and *Schneider* (trustee process)--held that mesne process of a type similar to that used in Maine was constitutionally deficient for failure to give the defendant notice and opportunity to be heard. There is now pending before a three-judge district court in the District of Maine a case testing the constitutionality of real estate attachments in Maine, which attachments by recording in registries of deeds have continued to be made, at least in Cumberland County and some other counties of the State. *Gunter v. Merchants Warren Nat. Bank*, Civil Action Docket No. 13-117, now pending in the District of Maine (real estate attachment) [360 F.Supp. 1085 (1973)].

The constitutional deficiency of the existing rules in regard to personal property attachment, trustee process and replevin cannot be ignored, and the pertinent rules are here promptly amended in order to provide the notice and hearing that are constitutionally required. The amendments do not, however, go beyond the requirements of the decided cases. The amendment of Rule 4A does not modify the procedures for making real estate attachments. *Fuentes* and the cases thus far decided in the First Circuit do not in terms outlaw real estate attachments which do not disturb the defendant's possession. of the attached property. The Committee also wishes to avoid causing any prejudice

to either party in the pending *Gunter* case, *supra*. No inference, one way or the other, as to the views of members of this Committee on the merits of the *Gunter* case is to be drawn from the retention of the present rule as to real estate attachments.

Furthermore, the amendments of these rules do not go beyond the decided cases in that they do not completely eliminate personal property attachment or trustee process, as has been urged upon the Committee by some members of the Bar. These mesne attachment procedures have been a part of the legislative policy of Maine and Massachusetts since the Colonial Ordinances of the 17th Century (*see* the history of attachment in Massachusetts and Maine set forth in *McInnes v. McKay*, 127 Me. 110, 141 A. 699 (1928), *affirmed McKay v. McInnes*, 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975 (1929), limited in *Fuentes*, *supra* at n. 23), and were reexamined as recently as the 1971 Legislature, L.D. 1614, after *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), had held trustee process of wages without prior notice and hearing to be unconstitutional. This matter will almost certainly be the subject of debate in the 1973 Legislature where the whole policy question may be fully debated in committee hearings and on the floor of the two houses by interested members of the public.

The finding which the Superior Court justice must make before approving attachment of property other than real estate is "that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment . . . ." This finding wraps into itself both a finding of probable cause to believe that the plaintiff will succeed on the merits of the dispute and a finding that the attachment is reasonable in amount. The *Fuentes, McClellan* and *Schneider* cases, *supra*, do not require any greater showing. The *Fuentes* case at footnote 33 states:

"Leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the writ has *little probability of succeeding on the merits of the dispute*." (Emphasis added)

Immediately thereafter the *Fuentes* decision quotes with approval the concurring opinion of Justice Harlan in the *Sniadach* case as follows:

"[D]ue process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the *probable* validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property . . . ." (First emphasis added, second in original) (92 S.Ct. at 2002-03)

Similarly the three-judge District Court in *Schneider*, holding a hearing prior to attachment on trustee process to be constitutionally required, stated:

"Absent some such justification, reflecting an 'important governmental or general public interest', however, a defendant's property could not be subject to attachment unless he had an opportunity to contest at least the *probable validity of the underlying claim* before the attachment." (Emphasis added)

There is nothing in this cases to indicate that the Constitution requires the additional showing "that there is good cause for the attachment", as required in Vermont Rule 4.1 (personal property attachment) and Vermont Rule 4.2 (trustee process). The Vermont Reporter's Note to its Rule 4.1 explained the "good cause" requirement of the rule as follows: "it may be assumed that a showing that defendant is beyond the reach of process or is about to dissipate assets or take some other step that would frustrate satisfaction of a judgment will be necessary". These showings may well be necessary to justify an ex parte order approving an attachment, as provided by the present amendments which add subdivision (f) to Rule 4A and subdivision (h) to Rule 4B, but the decided cases do not lay down any constitutional requirement of such showing in an adversary hearing on the proposed attachment.

The required finding "that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment" does, however, require more than a mere finding that plaintiff makes out a prima facie case or that there is probable ground to support plaintiff's claim. The defendant has an opportunity through affidavits and other evidence under oath to contradict the plaintiff's initial showing of "reasonable likelihood" through contrary evidence and through the assertion of affirmative defenses such as the statute of limitations or discharge in bankruptcy.

Also the amount of the attachment must be reduced to the extent of any liability insurance which the defendant shows is available to satisfy any judgment that may be obtained against him in the action. Although this provision of the amendment in its specificity goes beyond the decided cases, it is consistent with the constitutional requirement declared by *Fuentes* that any attachment (including its amount) be supported by a "probable cause" type finding by the court after hearing the defendant. It is the defendant that has the burden of establishing to the satisfaction of the court the amount of liability insurance that will be available. In situations where potentially there are multiple claimants against a single liability insurance fund, this showing by the defendant may be very difficult if not impossible. In Rule 4A(f) providing for ex parte approval of attachment in certain specified special situations, the plaintiff's attorney is required to certify, subject to the obligations of Rule 11, the amount of liability insurance that he knows or has reason to believe will be available.

The procedure in commencing an action will be unchanged by the amendments of Rule 4A if the plaintiff does not seek to go beyond an attachment of real estate. On the other hand, if the attachment of either tangible personal property or attachment on trustee process is desired, the new procedures as specified in the amendments to Rules 4A and 4B must be followed. In a case where one or both of those forms of attachment are sought, the action can be commenced only by the method of filing the complaint with the court, the second method specified in Rule 3. Along with the complaint there will be filed a motion for approval of the attachment supported by one or more affidavits setting forth specific facts showing that there is a reasonable likelihood that the plaintiff will recover in judgment at least as much as the attachment. In many instances the plaintiff will seek approval for both attachment of tangible personal property and attachment on trustee process. The motions for approval of both forms of attachment may be combined as a single motion and the official form that is added simultaneously with the amendment of Rules 4A and 4B, namely, Form 2D, as well as the order thereon, Form 2E contemplate the combination of both motions.

The next step will be service on the defendant of the summons and complaint, together with the motion for approval of attachment, with the supporting affidavits. A real estate attachment may also have been made even prior to filing the complaint with the court ; and if so, the copy of the writ of

attachment with the officer's endorsement of the date of the real estate attachment must also be served on the defendant at the same time as the summons and complaint. The notice of hearing (see new Form 2D) also served upon the defendant will state the time and date of the hearing on the motion, which in accordance with Rule 6(d) must be not sooner than seven days after service on the defendant. Also by Rule 6(d) the defendant should file any opposing affidavits not later than one day before the hearing. The court may hear the motion on the affidavits presented by the parties, but is also authorized by Rule 43(e) to hear the matter partly on oral testimony, and, in the event that the defendant appears at the hearing with witnesses ready to testify, reasonable opportunity should be accorded the defendant to present such evidence consistent with "minimiz[ing] unnecessary cost and delay" (*Fuentes, supra*, n. 33). Upon making the required finding of "reasonable likelihood" the judge will sign the order approving the attachment, which order may combine approval of trustee process under Rule 4B. *See* Form 2E. The motion for an approval order may be granted by default if the defendant does not file counter affidavits or otherwise appear.

After court approval of the attachment and/or trustee process, the plaintiff's attorney will, as now, fill out the writ of attachment and/or the trustee summons which he has procured in blank from the clerk. However, under the amendment of Rules 4A(b) and 4B(b), both the writ of attachment and the trustee summons contain a specific recitation of the amount of attachment approved by the court, the name of the justice of the court granting the order of approval, and the date of the order. *See* the additions made to Forms 2 and 2A and Alternate Form 2 and Alternate Form 2A. Any attachment of personal property or on trustee process must be made within 30 days after the order approving the attachment subject, as at present, to the court's permitting a subsequent attachment on motion and notice and for cause shown. *See* Rule 4A(e); *cf.* Rule 4B(g). Any such order for additional attachments will of course also require the same finding of "reasonable likelihood" and may be granted ex parte on a proper showing by affidavit.

The addition of subdivision (f) to Rule 4A, and the simultaneous addition of subdivision (h) to Rule 4B, make a limited exception to the constitutional requirements for notice and hearing where necessary to serve an important governmental or general public interest. *Fuentes* recognized, at note 23, that no notice and hearing are required where the defendant is not subject to personal jurisdiction of the courts of the state so that attachment is necessary

for the state court to secure quasi-in-rem jurisdiction, called by *Fuentes* "clearly a most basic and important public interest." *Fuentes* cited *Ownbey v. Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921). The *Ownbey* case involved the situation where the defendant could not be served personally within the state. Our Maine "long arm" statute substantially extends the jurisdiction of Maine courts over out-of-state defendants as to causes of action having the required nexus with Maine, *see* 1 *Maine Civil Practice* § 4.10, and in the same measure restricts the availability of ex parte attachment orders. Although Rule 4A (f)(i) speaks of "the person of the defendant", obviously the defendant may be a corporation and an ex parte order for attachment may be rendered against a corporate defendant which is beyond the personal jurisdiction of the court. Very recently the Delaware Chancery Court, citing *Fuentes* and also *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113, 119 (1971) [conformed to 329 F.Supp. 844 (D.Conn.)], which recognized "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event," held that the state's interest in aiding its citizens in prosecuting claims against nonresidents with property in the state justified ex parte attachment of Delaware property owned by a foreign corporation sued in a stockholder's derivative suit. *Gordon v. Michel*, 41 U.S.L.W. 2264 (Del.Chan.Ct., Oct. 24, 1972). Prior notice and hearing would, the Delaware court said, permit the defendant to defeat a "most basic and important public interest." *Ibid.*

Under Rules 4A(f) and 4B(h) the second ground for permitting an ex parte order of approval, that is, where there is a clear danger that the defendant will conceal the property to be attached or will remove it from the state if given prior notice of the attachment, has much the same purpose as the old *ne exeat* writ, namely, the protection of the power of the court to enforce a judgment in the action. The *Fuentes* case, in recognizing that special situations may demand prompt action, points by way of illustration to "cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods." (92 S.Ct. at 2000-01) The third ground stated in Rule 4A(f) for permitting an ex parte order approving an attachment is where "there is immediate danger that the defendant will damage or destroy the property to be attached."

Except for the elimination of notice to the defendant and of an adversary hearing, the procedure for obtaining ex parte an order of approval of personal property attachment or of trustee process is generally the same as for an

adversary hearing. However, the plaintiff's attorney is required to certify to the court the amount of any liability insurance which he knows or has reason to believe will be available. Furthermore the plaintiff's attorney is, in filing the motion for an ex parte order with the supporting affidavits, subject to the obligations of Rule 11; that is, he certifies "that to the best of his knowledge, information and belief there is good ground to support it." In any event, the absence of any notice to the defendant and any opportunity for him to be heard puts an extra obligation upon the court to scrutinize with particular care the affidavits presented by the plaintiff on the "reasonable likelihood" issue.

Subdivision (g) of Rule 4A, and subdivision (i) of Rule 4B, are added in order to give the defendant whose property is attached without notice an opportunity to get the plaintiff promptly into court to justify the attachment. The ex parte order approving attachment is closely analogous to a temporary restraining order issued ex parte under Rule 65(a). The defendant whose property is attached is given a similar opportunity to move its dissolution or modification, and at the hearing on that motion there is put on the plaintiff the burden of justifying any of the findings in the ex parte order which the defendant challenges by affidavit. Fairness requires that a defendant beyond the reach of process be able to challenge an ex parte attachment order without thereby submitting to personal jurisdiction, and Rule 4A(g) and Rule 4B(i) so provide. Also, the defendant whose demand bank account is trusteed on an ex parte order is given a $100 exemption representing living expenses pending the hearing on a dissolution. or modification hearing. *See* Advisory Committee's Note to Rule 4B(h).

The modification and dissolution procedures of Rule 4A(g) and Rule 4B(i) apply to personal property attachments and to attachments on ex parte orders. Real estate attachments are also made subject to modification or dissolution on an expedited hearing. These rules are in addition to any other means which are available for obtaining dissolution, modification or discharge of attachments, *see, e. g.*, 1.4 M.R.S.A. §§ 4601-13, and each of the new provisions expressly excludes any intention to abolish or limit those other remedies.

Rule 4A(h) setting forth the required contents of affidavits filed in support of motions for attachment is drawn from the comparable provision of Rule 65(a) relating to affidavits in support of motions for temporary restraining orders. Rule 4B relating to trustee process and Rule 64 relating to replevin require the same contents for affidavits filed under those rules. It is to be noted

that the affidavits must set forth specific facts sufficient to warrant the required findings. Compliance with this requirement may well be difficult with reference to the danger of removal or concealment of the property. It is contemplated that the plaintiff must show specific facts applicable to the particular case and not merely rely upon the possibility, present in every case, that the property to be attached may be removed or concealed if prior notice to the defendant is given.

Explanation of Amendment
February 1, 1960

The amendment eliminated the necessity for the officer to transcribe a complete copy of his return of service on the copy of the writ of attachment which he delivers to the defendant, often difficult and sometimes impossible to do under the usual circumstances of making a personal property attachment. All the officer need do now is indorse the writ in the appropriate space, as follows: "Writ executed on _________ (date)." A number of different dates, all of which should be indicated in the indorsement, may be involved in attachments under the same writ. Of course, if the officer does place a complete copy of his return, describing the property attached, etc., upon the copy given the defendant (as he might well do in the case of a real estate attachment), then he has more than adequately complied with the rule.

Reporter's Notes
December 1, 1959

The purpose of this rule is to preserve the essentials of existing practice with respect to attachment. Subdivision (a) incorporates existing statutory law by reference. Thus R.S.1954, Chap. 112, Sec. 24 ff. [now 14 M.R.S.A. §§ 4151 ff.] will continue to control the manner in which and extent to which attachment may be used.

The form of the writ of attachment is prescribed by subdivision (b). *See* Form 2 and Alternate Form 2 in the Appendix of Forms. The plaintiff's attorney fills out the writ and delivers the original and a copy thereof to the officer for service. When the summons and complaint are served upon the defendant, he is also to be served with a copy of the writ of attachment and the return of

service thereof.[*] As with other process, the serving officer makes proof of service upon the original writ of attachment and returns it to the plaintiff's attorney. In substance and effect this reproduces existing practice. Although the rule requires a separate writ of attachment, summons and complaint, in contrast to the existing practice of inserting the declaration in a writ of attachment, the summons and writ of attachment might well be combined in printing so as to minimize the number of separate papers to be handled.

The amount of the attachment, as filled in by the plaintiff's attorney, should include a reasonable allowance for interest and costs. The intention is to do away with the arbitrarily fixed ad damnum of existing practice, which has the effect of attaching property of substantially greater value than the plaintiff's real expectations of recovery, and at the same time to assure an attachment sufficient in amount to satisfy the judgment, including interest and costs.

The rule prescribes a uniform time limit of 30 days from the date of the complaint for the making of an attachment, but this time is subject to enlargement under Rule 6(b). Under present law this limit is a variable one, depending upon the relationship between the date of commencement of the action and the return term.

Subdivision (d) makes it clear that attachment is available to a party bringing a counterclaim, cross-claim, or third-party complaint.

Subdivision (e) permits a subsequent attachment by order of the court after service upon the defendant. This is to cover the situation where the plaintiff's attorney later learns about property subject to attachment. It incorporates R.S.1954, Chap. 113, Sec. 20 (amended in 1959) [now 14 M.R.S.A. § 4102].

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[*] [Field, McKusick & Wroth note: "By virtue of the amendment of February 1, 1960, the officer's endorsement on the writ of the date of execution is sufficient." 1 Field, McKusick & Wroth, *Maine Civil Practice* at 118 (2d ed. 1970)].