

Attachment: An Extraordi- nary Remedy

Attachment is a remedy available to an unsecured creditor prior to the creditor reducing its claim against its debtor to judgment. It is therefore an extraordinary remedy.

As an extraordinary remedy, it is only available to a creditor under certain limited circumstances. In addition, a creditor must strictly comply with the statutes which provide for the remedy or find that not only will the court deny the remedy, but that it may also assess damages against the creditor for proceeding in any manner not strictly permitted by law.

The remedy of attachment allows a creditor to levy upon property of its debtor prior to judgment even though the creditor has no interest in the specific property which is the subject of the levy. The difference between attachment and replevin (another pre-judgment remedy) is that replevin, which amounts to judicial repossession, is a remedy of secured creditors. Replevin is available to a secured creditor when the debtor does not voluntarily surrender collateral in which the creditor has a security interest. An unsecured creditor, by definition, does not have a security interest in the property which it seeks to attach pre-judgment.

Since the attachment and levy is sought by the creditor/plaintiff prior to the merits of the creditor's case against the debtor being decided by the Court, very special circumstances must exist for this remedy to lie. The laws vary in different jurisdictions, and so our discussion will now be restricted to Kentucky's attachment statutes.

Under Kentucky law a Writ, or Order of Attachment, may be obtained prior to judgment as security for satisfaction of a judgment which may be recovered against certain specific defendants. Examples of such defendants are one which is a foreign corporation or non-resident of the state, or who has been absent therefrom for four months, or has departed therefrom with intent to defraud his creditors, or has left the county of his residence to avoid the service of a summons, or so conceals himself that a summons cannot be served upon him. Other defendants against whom the Writ is available include one who is about to remove or has removed his property out of this state, leaving insufficient property to satisfy the claims of his creditors, or one who has transferred his property with the intent to cheat, hinder or delay his creditors, or is about to do so.

If the action for a Writ of Attachment is grounded upon the fact that the defendant is a foreign corporation or non-resident of Kentucky, then the claim in question must be for a debt or demand arising under a contract, express or implied, or a judgment or award. In such a case, if collection will be endangered by delay in obtaining judgment or a return of "no property found," then the Writ may issue.

The requirements that the plaintiff/creditor must meet in order to obtain the Writ are very specific and strict compliance, rather than substantial compliance, will be required by the Court. A demand in writing must be sent, together with a copy of the Complaint, Summons and Motion for the Writ, by registered or certified mail, return-receipt requested, to the defendant's last known place of residence, and the demand must contain very specific provisions set forth in the statute, including a statement that the debtor has seven days in which to petition the court for a hearing or to pay the claim in full, a statement of the amount of the claim, etc.

The Writ may issue without a hearing if the defendant does not request one within seven days of the demand, but the plaintiff/ creditor must post a bond in twice the amount of its claim with one or more sufficient sureties to cover any losses that the defendant may suffer as a result of the issuance of the Writ should the plaintiff fail to obtain final judgment. If the plaintiff/creditor is a domestic bank, savings and loan institution, or institution which is a member of the farm credit system, it is exempt from the requirement of a surety, but must still post a bond.

In addition, the motion for the Order of Attachment must be executed under oath (or be accompanied by an affidavit) of such a nature as to establish that the plaintiff has complied with the requirements for the issuance of a Writ of Attachment and that it is qualified to receive one in the case in question. If the defendant fails to request a hearing, and the plaintiff has met all of the requirements of the statute, the Writ may be issued by the court clerk. In the event that the defendant requests a hearing, then an evidentiary hearing is held before a "judicial officer" (a judge, a commissioner, or someone else appointed by the local court to hold such hearings), and the plaintiff will have to establish by the evidence that it is entitled to the Writ.

The defendant may post a bond, with sufficient sureties, which ensures compliance with the final judgment, in an amount equal to the plaintiff's claim, including court costs and attorney fees, in order to prevent the issuance of the Writ.

Ex parte writs of attachment are also available under even more restricted circumstances. *Ex parte* is a legal term meaning in this case that the writ would issue without any prior notice to the defendant. Obviously, this is only allowed under very restricted circumstances so as not to violate the Fifth Amendment's prohibition against deprivation of

property without due process. Generally speaking, an *ex parte* writ of attachment is only available when the plaintiff/creditor can demonstrate "irreparable injury" will result if the issuance of the writ was delayed until such time as the usual waiting period would expire for the defendant's opportunity to be heard, or a hearing could be held, and when special care is taken to preserve the defendant's right to challenge the attachment immediately thereafter.

Because courts require technical compliance with the statutes governing Writs of Attachment, a creditor seeking such a remedy should always choose counsel which it knows has the necessary expertise. In the proper situation, however, attachment can be the best possible approach when you cannot wait for a judgment to be entered lest you lose your chance to collect an unsecured claim.

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