

Memorandum 72-20

Subject: Study 39.70 - Prejudgment Attachment (Issuance of Writ of Attachment)

Background

Memorandum 72-18 provides the procedure for the granting of an "order authorizing the issuance of a writ of attachment." Such an order is granted if the plaintiff establishes the probable validity of his claim and that grounds for attachment exist (proper type of case for attachment).

This memorandum presents statutory provisions that deal with the issuance of the writ when the plaintiff has obtained an order authorizing the issuance of a writ of attachment. Two alternative procedures are provided. Article 5 (commencing with Section 541.010) provides an ex parte procedure for obtaining the writ. If this procedure is used, the defendant may claim his exemption when a levy is made under the writ. We have incorporated the procedure provided in Section 690.50 for claiming the exemption, but we probably will have to provide a comparable procedure in Article 5 at a later time when we have determined the levy procedure under a writ of attachment. It should be noted that the writ may be issued under Article 5 at the hearing on probable validity if the plaintiff makes application for the writ and makes the necessary showing. The plaintiff, in such case, does not give notice to the defendant of the property to be attached and the defendant can claim that the property is exempt when it is levied on.

The second alternative procedure is provided in Article 6 (commencing with Section 542.010). This procedure provides for a noticed hearing on whether plaintiff is entitled to the writ. Any claim that the property sought to be attached is exempt must be made by the defendant as a part of the proceedings for the issuance of the writ or it is waived. The plaintiff may notice the hearing under Article 6 at the same time as the hearing on probable validity, but he is not required to do so.

We do not attempt to deal in this memorandum with the problem of whether attorney fees and other damages should be recoverable, depending on the procedure used. We will discuss that problem in another memorandum.

We do not attempt to develop ex parte attachment in extraordinary circumstances in this memorandum. We will discuss that matter in another memorandum.

The following matters are noted for special attention:

Hearing procedure. We have based the hearing procedure for obtaining an order authorizing the issuance of a writ of attachment (see Memorandum 72-18) and for obtaining a writ of attachment (this memorandum) primarily on Section 690.50. The provisions drafted by the staff should be compared with that drafted by Mr. Marsh. The pertinent provision drafted by Mr. Marsh reads:

538.4. The hearing shall be held before the court or a commissioner thereof on the day specified and shall take precedence over all other matters pending on that day. The hearing date shall not be continued except by stipulation of both parties. Each party shall serve upon the other at least twenty-four hours before the hearing any affidavits intended to be introduced at the hearing, unless the court at the hearing for good cause shown permits the introduction of affidavits not previously served. Either party may also introduce oral evidence at the hearing and the defendant, upon the written demand of the plaintiff served at least two days prior to the hearing, must make available for oral examination at the hearing a responsible financial officer of the defendant organization with knowledge of the transaction on which the complaint is based, unless the court finds that compliance with the demand was impractical. Upon the basis of the evidence introduced at the hearing, the court shall determine whether the case is one in which an attachment is properly issuable and whether there is any reasonable probability that the defendant can establish a successful defense to the claim asserted by the plaintiff. If the court finds that such grounds exist and that there is no reasonable probability that such a defense can be established, the court shall direct the clerk to immediately issue a writ of attachment; otherwise, the court shall dissolve the temporary restraining order.

Are there any provisions in the draft quoted above that should be incorporated into the staff draft?

Effect of waived exemption under Section 542.010(b). Consideration will need to be given to the waiver provision with respect to at least two matters. (1) If we have a "necessity" case, should consideration be given to changed circumstances after the hearing and issuance of the writ? (2) Should the right of the defendant to claim an exemption from execution be waived by failure to claim the exemption from attachment?

We plan to go through the staff draft at the meeting section by section.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

Article 5. Ex Parte Issuance of Writ of Attachment

§ 541.010. Writ of attachment may be issued ex parte; effect on defendant's right to claim exemption

541.010. (a) A writ of attachment may be issued ex parte as provided in this article by a judicial officer of the court in which the action is brought.

(b) If a writ of attachment is issued under this article, the defendant's right to claim his exemption right as to the property levied upon under the writ is not affected, whether or not he appears at the hearing on the issuance of the writ. The procedure set forth in Section 690.50 shall be followed in claiming the exemption. For this purpose, references in Section 690.50 to "the debtor" shall be deemed to be references to the defendant, and references in Section 690.50 to "the creditor" shall be deemed to be references to the plaintiff.

§ 541.020. Application for writ

541.020. The plaintiff may apply for a writ of attachment under this article at any time after he has filed his complaint by filing an application with the court in which the action is brought.

§ 541.030. Contents of application

541.030. The application shall be executed under oath and shall include all of the following:

(a) A statement that the plaintiff has been granted, or is applying for, an order authorizing the issuance of the writ.

(b) A statement of the amount claimed as owed by the defendant over and above all legal setoffs [and claims of the defendant arising out of the same transaction or occurrence] or, if an attachment is sought for only a part thereof, such partial amount.

(c) A description of the property sought to be attached, including the plaintiff's estimate of its fair market value.

§ 541.040. Affidavits in support of application

541.040. The application shall be accompanied by affidavit of the plaintiff, or any other person or persons having knowledge of the facts, containing facts sufficient to establish that the property sought to be attached is subject to attachment. The affidavits shall conform to the standards prescribed for affidavits filed pursuant to Section 437c.

§ 541.050. Time of hearing on application

541.050. The hearing on the application for the writ of attachment may be held:

(a) At any time after the plaintiff has been granted an order under Article 4 (commencing with Section 540.010) authorizing the issuance of the writ; or

(b) If the plaintiff so requests, at the same time the judicial officer hears the plaintiff's application under Article 4 (commencing with Section 540.010) for an order authorizing the issuance of the writ.

§ 541.060. Issuance of writ

541.060. At the hearing, the judicial officer shall review the application and the accompanying affidavit or affidavits and shall issue the writ of attachment, which shall specify the amount to be secured by the attachment and the property to be levied on, if he finds all of the following:

(a) An order authorizing the issuance of a writ of attachment has been granted to the plaintiff pursuant to Article 4 (commencing with Section 540.010).

(b) The affidavits accompanying the application contain facts sufficient to establish that the property sought to be attached is subject to attachment.

(c) The plaintiff has provided the undertaking required by Article 9 (commencing with Section 546.010).

Article 6. Issuance of Writ of Attachment

After Noticed Hearing

§ 542.010. Issuance of writ of attachment after noticed hearing; effect on defendant's right to claim exemption

542.010. (a) A writ of attachment may be issued after the defendant has had notice and an opportunity to be heard as provided in this article by a judicial officer of the court in which the action is brought.

(b) If the plaintiff complies with the provisions of this article, the defendant's right to claim his exemption right as to the property specified in the application for the writ is waived if such exemption is not claimed in the manner provided in this article.

§ 542.020. Application for writ

542.020. The plaintiff may apply for a writ of attachment under this article at any time after he has filed his complaint by filing an application that meets the requirements of Section 541.030 with the court in which the action is brought.

§ 542.030. Notice to defendant

542.030. No writ of attachment shall be issued under this article unless the plaintiff has served on the defendant at least 20 days prior to the hearing:

- (a) A Notice of Application and Hearing.
- (b) A copy of the application.

§ 542.040. Contents of Notice of Application and Hearing

542.040. The "Notice of Application and Hearing" shall inform the defendant of all of the following:

(a) The plaintiff has applied for a writ of attachment to attach the property specified in the application.

(b) A hearing will be held at a place and at a time, both to be specified in the notice, to determine whether the plaintiff is entitled to the writ.

(c) If the defendant desires to make a claim that the property specified in the application, or a portion thereof, is exempt from attachment, he must file with the court and serve on the plaintiff, not less than 10 days before the date set for the hearing, a claim of exemption and supporting affidavits as required by Section 542.050 of the Code of Civil Procedure. Any claim that the property sought to be attached is exempt from attachment must be made as provided in Section 542.050 or it shall be deemed to be waived.

(d) The plaintiff's address within this state for the purpose of permitting service by mail upon him of any claim of exemption and supporting affidavits referred to in subdivision (c).

(e) The defendant may be present at the hearing in person or represented by attorney.

§ 542.050. Claim of exemption and supporting affidavit

542.050. (a) If the defendant opposes the issuance of the writ on the ground that the property specified in the application for the writ, or a portion of such property, is exempt from attachment, he shall file with the court and serve on the plaintiff, not less than 10 days before the day set for the hearing, a claim of exemption and supporting affidavits.

(b) The claim of exemption shall:

(1) Specify the property claimed to be exempt from attachment.

(2) Specify the statute section or sections on which the defendant relies for his claim of exemption.

(3) State the defendant's address within this state for the purpose of permitting service by mail upon him of the counteraffidavit referred to in Section 542.060.

(c) The claim of exemption shall be supported by affidavit of the defendant or any other person or persons having knowledge of the facts. The affidavit or affidavits together must state facts sufficient to establish that the property specified in the application, or a portion thereof, is exempt from attachment. The affidavits shall conform to the standards prescribed for affidavits filed pursuant to Section 437c by a party resisting a motion for summary judgment.

§ 542.060. Plaintiff's counteraffidavit

542.060. (a) If the defendant files a claim of exemption as provided in Section 542.050 and the plaintiff desires to contest the claim of exemption, he shall file with the court and serve on the plaintiff, not less than five days before the day set for the hearing, a counteraffidavit alleging that the property is not exempt from attachment.

(b) If the defendant files a claim of exemption as provided in Section 542.050 and the plaintiff does not file a counteraffidavit as provided in subdivision (a), no writ of attachment shall be issued as to the property claimed to be exempt.

§ 542.070. Time of hearing on application

542.070. Subject to Section 542.030, the hearing on the application for the writ of attachment may be held:

(a) At any time after the plaintiff has been granted an order under Article 4 (commencing with Section 540.010) authorizing the issuance of the writ; or

(b) If the plaintiff so requests, at the same time the judicial officer hears the plaintiff's application under Article 4 (commencing with Section 540.010) for an order authorizing the issuance of the writ.

§ 542.080. Hearing

542.080. (a) At the hearing, the defendant shall have the burden of proof whether the property is exempt from attachment.

(b) The affidavits and counteraffidavits shall constitute the pleadings, subject to the power of the judicial officer to permit an amendment in the interests of justice. The affidavit or affidavits in support of the claim of exemption shall be deemed controverted by the counteraffidavit and both shall be received in evidence.

(c) If no evidence other than the affidavit or counteraffidavit is offered, the judicial officer, if satisfied that sufficient facts are shown thereby, may make his determination thereon. The judicial officer shall continue the hearing for the production of other evidence, oral or documentary, or the filing of other affidavits and counteraffidavits if he is unable to determine the issue on the basis of the affidavit, counteraffidavit, and any additional evidence produced at the hearing.

(d) At the conclusion of the hearing, the judicial officer shall give judgment determining whether the claim of exemption shall be allowed or not, in whole or in part, which judgment shall be determinative as to whether such property is or is not exempt from attachment.

Comment. Based on Section 690.50(i).

§ 542.090. Issuance of writ

542.090. The judicial officer shall issue the writ of attachment, which shall specify the amount to be secured by the attachment and the property to be levied on, if he finds all of the following:

(a) An order authorizing the issuance of a writ of attachment has been granted to the plaintiff pursuant to Article 4 (commencing with Section 540.010).

(b) The property sought to be attached, or the portion thereof specified in the writ, is subject to attachment.

(c) The plaintiff has provided the undertaking required by Article 9 (commencing with Section 546.010).

§ 542.100. Manner of service

542.100. When any documents required under this article are served by mail, the provisions of this code relating to service by mail shall be applicable thereto.

Comment. Same as Section 690.50(k).

§ 542.110. Appeal

542.110. An appeal lies from any judgment under this article. Such appeal shall be taken in the manner provided for appeals in the court in which the proceeding is had.

Comment. Same as Section 690.50(m).

Article 7. Ex Parte Attachment in Extraordinary
Circumstances

Note: This article is not yet drafted.