

Memorandum 72-26

Subject: Study 39.70 - Attachment, Garnishment, Execution (Prejudgment Attachment Procedure--Plaintiff's Protective Order)

At various times and in connection with various aspects of the revision of the prejudgment attachment procedure, the idea has been suggested that the court should perhaps have some power to enjoin the defendant from putting his property beyond the eventual reach of the plaintiff. The idea has never taken very concrete form, and the purpose of this memorandum is to present the idea in the context of the presently proposed statute so that the Commission may give the staff some direction as to what, if any, form should be given to it. For convenience, we will refer to the relief suggested as a "plaintiff's protective order."

Very briefly, the proposed statute (see Memorandum 72-25) now generally requires a noticed hearing on the probable validity of the plaintiff's claim (Article 4), followed by the issuance of a writ of attachment either upon ex parte application (Article 6) or after a noticed hearing (Article 7). (Both Article 6 and Article 7 require a showing by affidavit that the property sought to be attached is subject to attachment, i.e., not exempt property.) In so-called exceptional circumstances, that is, where the plaintiff can show that he will suffer "great or irreparable injury" if the matter is heard on notice, he may apply ex parte for an order authorizing the issuance of a writ of attachment (Article 5). Such application may be combined with an ex parte application for the writ itself. Finally, the defendant is given an opportunity in the various situations to contest the issuance of a writ and to claim exemptions.

There are two basic issues in regard to the plaintiff's protective order. One, under what circumstances may it be used; two, what is the scope of the relief which it may provide. The idea was originally presented by Professor Riesenfeld in a draft statute that required a noticed hearing in every case and which limited the grounds for attachment more narrowly than does Section 538.010. In that context, it seemed necessary to provide some relief in the nature of a temporary restraining order so that the defendant would have property left to be levied upon following the hearing. A similar approach was taken by Mr. Marsh, whose statute also provided an opportunity for a hearing in every case before an attachment would issue and, therefore, provided for the issuance of a TRO in every case. You will recall, however, that he also attempted to limit his statute to so-called commercial attachments. In our present draft, we have a procedure for obtaining a writ of attachment itself upon ex parte application in the circumstances where a temporary prior restraint would be most needed. Moreover, Section 538.010 rather broadly states the cases in which an attachment may issue. The first issue then is whether a plaintiff's protective order should be available in (1) all cases where an attachment may be issued, (2) only those cases in which exceptional circumstances are shown (as defined in Section 541.040), or (3) in some intermediate situations. The staff believes that the grounds stated in Section 541.040, as presently drafted, are sufficiently broad to cover all those circumstances where a protective order would be necessary or desirable, and we suggest, therefore, that the granting of such an order be provided as an alternative to the order authorizing the issuance of a writ of attachment. The question immediately arises whether the alternative should be available (1) at the option of the plaintiff or (2) in the discretion of the court or (3) both. We think the plaintiff should be able to request a protective order in lieu of a writ, and,

even if the plaintiff does not request the order, we think the court should be able to grant a protective order and deny the writ (on the basis that the latter remedy has too serious consequences).

As to the scope of the order, we present below two possible drafts. The first is Mr. Marsh's section. The second draft is based in part on Professor Riesenfeld's draft and an earlier staff draft.

Mr. Marsh provided:

538.3. The temporary restraining order issued pursuant to Section 538.1 of this Code shall prohibit any transfer by the defendant of any of his property subject to the levy of a writ of attachment, otherwise than in the ordinary course of business, prior to the hearing and the issuance by the defendant of any checks against any of his bank accounts to withdraw any sums subject to such levy and the opening of any new bank accounts by the defendant. Without limiting the generality of the phrase, the payment by the defendant of an antecedent debt shall not be considered in the ordinary course of business within the meaning of this Section. Notwithstanding the foregoing, checks may be issued by the defendant:

- (a) To cover any payrolls (including all fringe benefits and withholding taxes) falling due in the regular course after the service of the temporary restraining order and prior to the levy of the writ of attachment, but not exceeding the amount of \$600 for any individual employee for any pay period; and
- (b) In payment for goods delivered to the defendant C.O.D.; and
- (c) In payment of taxes which are past due; and
- (d) In payment of legal fees for the representation of the defendant in the action.

The temporary restraining order shall expire by its terms unless a writ of attachment is issued and levied within thirty days after the service of the order.

The staff proposed:

_____. The protective order issued pursuant to Section _____ shall provide such relief as the court deems appropriate to protect the creditor against frustration of the enforcement of his claim pending a hearing pursuant to Section _____. In no event, however, shall such order deny the defendant the ability to use, consume, sell, or otherwise dispose of [exempt "necessities"] nor deny the defendant the ability to deal with any other property in the ordinary course of his business.

Both versions, we believe, provide better relief in some circumstances than the issuance of a writ of attachment. However, we wonder whether the court will in fact use the opportunity to frame a more equitable decree. There is also the danger that the order might be used by a plaintiff to harass in circumstances where the court would not issue a writ if it were faced with only the choice between a writ or no writ--rather than a writ, an order, or no writ. At the next meeting, we hope that the Commission will consider these questions and give us some direction as to how to proceed.

Respectfully submitted,

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