PREJUDGMENT REMEDIES

BRUCE A. ATKINS
Attorney at Law
12826 Willow Centre Drive, Suite A
Houston, Texas 77066-3028
(832) 249-7900, telephone
(832) 249-7901, facsimile
http://www.baatkins.com

State Bar of Texas
COLLECTIONS AND CREDITORS' RIGHTS COURSE
May 4-6, 2016
Dallas, Texas

CHAPTER 9

BRUCE A. ATKINS

Attorney at Law
12826 Willow Centre Drive, Suite A
Houston, Texas 77066-3028
(832) 249-7900, telephone
(832) 249-7901, facsimile
http://www.baatkins.com

BIOGRAPHICAL INFORMATION

EDUCATION

B.A. in Economics with High Honors, Hampton Institute, Hampton, Virginia
J.D., the University of Virginia, Charlottesville, Virginia

STATE BAR ADMISSIONS

The State Bar of Texas
The State Bar of Georgia

PROFESSIONAL ACTIVITIES

Bruce A. Atkins, Attorney at Law, Houston, Texas, practitioner
Editorial Committee, Texas Collections Manual, 3d Edition
Past Member, Board of Directors, Texas Bar Journal

LAW RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS

Editor and Contributing Author, Texas Collections Manual, 3d Edition and Supp.

Author and Speaker for the State Bar of Texas Annual Meeting 2004, The Ultimate Trial Notebook, Debtor and Creditor

Supreme Court of Texas, Ancillary Proceedings Task Force, Misc. Docket No. 08-9032

Moderator, State Bar of Texas, Minorities at the Podium, June, 2008

Author and Speaker for The State Bar of Texas, Professional Development Programs, 1990 - 2015

Collections and Creditor's Rights, 2005 - 2016
(Summary Judgment in Collection Cases; Prejudgment Remedies; Nuts & Bolts of Collections; Course Director, 2007)
Texas Bar 2004 Annual Meeting (Ultimate Transactions; Debtor & Creditor)
Collections and Creditors' Rights 2004 (Prejudgment Remedies)
Collections Practice 2003, 2001 (Prejudgment Remedies)
Advanced Business Bankruptcy Course (In-House Counsel) (1993)

Practice Skills Course, Business and Consumer Bankruptcy (1990)

Author, The Advocate, Litigation Section Report, State Bar of Texas
Amended Service Rules, Vol. 33, Winter, 2005

Author, The Advocate, Litigation Section Report, State Bar of Texas
Prejudgment Remedies, Vol. 32, Fall, 2005

Author, Corporate Counsel Review, State Bar of Texas
Bankruptcy Reform Act of 1979, Vol. 2. No. 3, June, 1979

Author and Speaker for The University of Texas, School of Law, CLE, 2010 - 2012
Mastering the Art of Collecting Debts and Judgments
(Summary Judgment Proof; Summary Judgment Evidence and Affidavit Toolkit;
Presiding Officer, 2011)

Author and Speaker for The University of Houston Law Foundation, 1988 thru 2009
Advanced Civil Litigation (Evidence Law Update)
Advanced Civil Litigation (Summary Judgment)
Collecting Debts and Judgments (Self-Help Repossession)
Collecting Debts and Judgments (Summary Judgment)
Collecting Debts and Judgments (Contempt and Attachment)
Collections: Drafting Documents for a Collections Practice (Summary Judgment)
General Practice Institute (Summary Judgment)
Litigation and Trial Tactics (Summary Judgment)

Adjunct Professor of Law, University of Houston School of Law

Author, Rules of Evidence, 1975, Attorney General of the State of Virginia,
Criminal Justice Officer's Training Standards Commission

TABLE OF CONTENTS

PREJUDGMENT REMEDIES

I. INTRODUCTION

This Chapter discusses remedies that are available after suit is filed, but before judgment is obtained, to preserve the debtor's assets for satisfaction of anticipated final judgment. The Chapter reviews mechanic's liens not involving real property (constitutional mechanic's liens), garnishment, sequestration, and attachment.

A mechanic's lien is a substantive right emanating from the Texas Constitution. Tex. Const. art. XVI, § 37. Attachment, sequestration and garnishment are extraordinary remedies ancillary to an underlying claim. Tex. R. Civ. P. Part VI.

Though not discussed in this Chapter, injunction may be used to maintain the status quo regarding property in dispute pending outcome of the litigation. See Transport Co. of Texas v. Robertson Transports, Inc, 261 S.W.2d 549, 553 (Tex. 1953); Tex. Civ. Prac. § Rem. Code Ann., ch. 65 [Injunction]; Tex. R. Civ. P. Part VI, Sec. 5 [Injunctions].

This Chapter does not discuss worker's possessory liens (farm, factory or store worker's liens) or various mechanic's liens applicable exclusively to real property, such as Hardeman Act liens (Mechanic's, Contractor's, or Materialman's Lien) (Tex. Prop. Code Ann. ch. 53 (Vernon 2008 & Supp. 2015)) and McGregor Act liens for public works construction (Public Work Performance and Payment Bonds) (Tex. Gov't Code Ann. ch. 2253 (Vernon 2008 & Supp. 2015)). The State Bar of Texas, *Texas Real Estate Forms Manual, 2nd Edition. (2011, Supp. 2014)* includes a discussion of such liens.

II. CAUTION IN USE OF PREJUDGMENT REMEDIES

A. Effect on Debtor

A creditor's use of prejudgment remedies may have such a profound effect on the debtor that he may respond by filing a petition for bankruptcy thereby invoking the automatic stay and thereafter using avoidance powers of the Bankruptcy Code to nullify prejudgment remedies. See 11 USC §§362, 547(b), 548(a), 550, 551, 552 and 553.

Or, if a consumer, the debtor may respond by filing a counterclaim (for FDCPA or TDPA violations) in an amount greater than the creditor's claim. 15 USC §1692 (FDCPA); Tex. Fin. Code, Ch. 392 (TDCA).

The application of the FDCPA and TDCA is limited to consumer debt and does not apply to commercial or business transactions.

Under the FDCPA the term "consumer" means "any natural person obligated or allegedly obligated to pay any debt." 15 USC §1692(3). And, under the FDCPA the term "debt" is defined as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment." 15 USC §1692(5).

Under the TDCA, the term "debt collection" means "any action, conduct, or practice in collecting or in soliciting for collection, consumer debts that are due or allegedly due a creditor." Tex. Fin. Code §392.001(5) (Vernon 2008, Supp. 2015). The term "consumer" means "an individual who has a consumer debt." Tex. Fin. Code §392.001(1) (Vernon 2008, Supp. 2015). And, the term "consumer debt" means "any obligation, or alleged obligation for personal, family, or household purposes arising from a transaction or alleged transaction." Tex. Fin. Code §392.001(2) (Vernon 2008, Supp. 2015).

Or, the debtor may respond by filing a counterclaim (for unfair or deceptive acts or practices, DTPA or for tortious injury to business, for example) in an amount greater than the creditor's claim. 15 USC §45; Tex. Bus. & Com. Code §§17.41 - 63.

The Federal Trade Commission is empowered to prevent persons, partnerships, or corporations, except certain banks, savings and loan institutions, Federal credit unions, common carriers, air carriers and foreign air carriers from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce. 15 USC §45(a)(2).

The DTPA definition of consumer includes an individual, a partnership, and a corporation.

The Texas DTPA, Tex. Bus. & Com. Code §§17.41- 63 (Vernon 2011, Supp. 2015), is recognized as one of the foremost consumer protection statutes in the country. Its broad applicability, no-fault liability, and attractive remedial provisions, encourage attorneys to

represent consumers. Courts at all levels followed the mandate of section 17.44 to liberally interpret the DTPA consistent with its stated purpose, which was to "protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection." This mandate, coupled with the language of section 17.43 making it clear that the remedies provided by the DTPA are cumulative to any other procedures or remedies provided for in any other law, resulted in an extremely favorable climate for plaintiffs and plaintiffs' attorneys.

The DTPA applies to a broad range of individuals and businesses. It includes any individual purchasing anything, as well as the vast majority of businesses buying for a business purpose. The DTPA defines a consumer as: an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more. Tex. Bus. & Com. Code §§17.45(4). Note the difference in the definition of the term consumer under the FDCPA, DPA and the DTPA. Compare 15 USC §1692(3) with Tex. Fin. Code §392.001(1) and Tex. Bus. & Com. Code §§17.41 - 63.

After numerous amendments over the years, the DTPA still provides a no-fault standard of recovery, the lowest causation standard, the most liberal standard for the award of exemplary damages, and mandatory attorneys' fees. See Alderman, *The Texas Deceptive Trade Practices Act, 2005, Still Alive and Well*, Journal of Texas Consumer Law (2005).

B. Affidavits and Unsworn Declarations

Although the applicable statutes allow it, attorneys should not sign affidavits on their clients' behalf unless they have actual knowledge of the facts set out in the affidavit. Only a person with actual, personal knowledge of the facts, preferably the creditor or a personal representative of the creditor, should sign an affidavit supporting an application for a writ or for any of these prejudgment remedies. It is provident that the creditor's attorney not sign an affidavit on his client's behalf in a collections case, although it is permitted by applicable law when the attorney has personal knowledge of the facts contained in the affidavit. In most instances, the creditor's attorney will not have such personal knowledge. See Tex. Disciplinary R. Prof'l Conduct 3.03 [A lawyer shall not knowingly make a false statement of material fact or law to a tribunal]. See also Tex. Comm. On Prof'l Ethics, Op. 405, 46 Tex. B.J. 722 (1983) [knowing verification of a false pleading may subject an attorney to disciplinary action and constitutes perjury]. Even when the creditor's attorney has personal knowledge of the facts, it is preferable that the creditor or a representative of the creditor sign the affidavit supporting an application for prejudgment remedies. The creditor's attorney can then avoid ethical problems identified above, avoid characterization as a fact witness in the case, and devote his full attention to advocacy.

A recent applicable amendment to the Texas Civil Practices and Remedies Code authorizes the use of an unsworn declaration in lieu of an "affidavit required by statute or required by rule, order, or requirement adopted as provided by law." Tex. Civ. Prac. & Rem. Code §132.001, Amended by Acts 2013, 83rd Leg. - Regular Session, Ch. 515, Sec. 1, eff. September 1, 2013.

The unsworn declaration must be (1) in writing; (2) subscribed by person making the declaration as true under penalty of perjury; and (3) must include a jurat in prescribed form. The substantial form of the required jurat is set forth in Tex. Civ. Prac. & Rem. Code §132.001(d).

The second requirement (subscription as true under penalty of perjury) appears to supplant an affidavit's requirements showing affirmatively that it is based on personal knowledge, that the facts sought to be proved would be "admissible in evidence" at a conventional trial, and that the facts recited therein are "true and correct."

Neither Tex. Civ. Prac. & Rem. Code § 61.022 (attachment) (last amended by Acts 2009, 81st Leg., R.S., Ch. 946, Sec. 2, eff. September 1, 2009), §63.001(2) (garnishment) Acts 1985, 69th Leg., Ch. 959, Sec. 1, effective September 1, 1985), Tex. R. Civ. P. 592 (attachment) (as amended through September 1, 2015), Tex. R. Civ. P. 658 (garnishment) (as amended through September 1, 2015), nor Tex. R. Civ. P. 696 (sequestration) (as amended

through September 1, 2015) has yet been amended to address unsworn declarations authorized by Tex. Civ. Prac. & Rem. Code §132.001.

Attorneys should not sign an unsworn declaration under Tex. Civ. Prac. & Rem. Code §132.001 in support of a prejudgment remedy for the same reasons stated above concerning affidavits.

C. Detailed Pleadings

The creditor's attorney is advised to exercise extraordinary care in drafting an application for a writ and a supporting affidavit or unsworn declaration in pursuit of prejudgment remedies. These documents are not routine forms. They must detail the unique nature of the "immediate danger" or threat to the likelihood of the plaintiff's recovery on the debt. In addition, constitutional issues and challenges attendant to prejudgment remedies and the possibilities of damages arising from a successful counterclaim mitigate against use of form pleadings as they may not adequately address these concerns.

D. Indemnity Bonds

An officer must execute a writ issued by a Texas court without requiring a bond indemnifying him, and he is not liable for damages resulting from execution of a writ if he executes it in good faith as provided by law and if he uses reasonable diligence in performing his duties. Tex. Civ. Prac. & Rem. Code Ann. § 7.003 (Vernon 2008 & Supp. 2015). See Richardson v. Parker, 903 S.W.2d 801, 804 (Tex. App - Dallas 1995, no writ) [Both official immunity and §7.003 immunity involve an official's performance of his duties and contain a good faith component.] An officer acts in good faith when he shows that a reasonably prudent officer, under the circumstances, could have believed that the officer's conduct was justified based on the information the officer possessed when the conduct occurred. See Tex. Civ. Prac. & Rem. Code 7.003(c). See Abercia v. Kingvision Pay-Per-View, Ltd., 217 S.W.3d 688 (Tex. App. – El Paso, 2007) [Constable failed to establish that his deputies acted in good faith and reasonable diligence in attempting to execute a writ against a debtor's property where, among other things, there was evidence that the constable was aware of property subject to execution but did not act on creditor's requests to execute.]

However, an officer is liable for injury or loss resulting from his own negligence. Tex. Civ. Prac. & Rem. Code Ann. § 34.061(b) (Vernon 2008, Supp. 2015) [If an injury or loss to an injured party results from the negligence of the officer, the officer and his sureties are liable for the value of the property lost or damaged.] If an officer fails to levy on property and the levy could have taken place, he and his sureties are liable to the plaintiff for the full amount of the debt plus interest and costs. Id. at § 34.065. See Abercia v. Kingvision Pay-Per-View, Ltd., 217 S.W.3d 688.

An officer who neglects or refuses to return an execution or makes a false return is liable to the person entitled to receive the money collected on the execution for the full amount of the debt, plus interest and costs. Id. at § 34.064.

E. Hearing

A hearing must be held on an application for prejudgment remedy before a writ may issue. The hearing may be ex parte. Tex. R. Civ. P. 696 (sequestration), 592 (attachment) and 658 (garnishment).

If a judge for the court in which the application is pending is unavailable, the party requesting sequestration may be able to have the order signed by another judge sitting in that county, subject to local rules. See, e.g., Tex. Gov't Code § 74.094(a) (Vernon 2013, Supp. 2015) (District and statutory county court judges have authority to conduct hearings and sign orders for other courts without transferal of case. The judgment, order, or action is valid and binding as if the case were pending in the court of the judge who acts in the matter). Id.

III. SEQUESTRATION

A. Seminal Authority

1. Statute

Tex. Civ. Prac. & Rem. Code Ann. § 62.001 – 0.063 (Vernon 2008 & Supp. 2015)

2. Rules

Tex. R. Civ. P. 696 - 716

B. Purpose and Use

The purpose of sequestration is to empower a secured creditor to control possession before

judgment of collateral securing his debt or to empower one claiming title to disputed property to control possession of that property until the dispute is justly settled. The main object of sequestration is to preserve and protect the value of the property during pendency of the suit. American Mortg. Corp. v. Samuell, 108 S.W.2d 193 (Tex. 1937). In causing a writ of sequestration to be issued and levied a creditor is merely pursuing a remedy for the preservation and protection of its security that is expressly accorded it by statute. Smart v. Texas American Bank/Galleria, 680 S.W.2d 896 (Tex. App. – Houston (1st Dist.) 1984, no writ).

Sequestration is most commonly sought by secured creditors whose collateral is personal property, frequently movable collateral as automobiles, trucks, trailers, boats and airplanes. In the oil patch, it may apply to loans secured by drilling rigs and drilling or oilfield equipment. Sequestration is also available to a creditor whose collateral is fixtures or real property. Tex. Civ. Prac. & Rem. Code Ann. § 62.001(1), (2) (Vernon 2008 & Supp. 2015).

Sequestration is a conservatory act; it does not affect the question of title to property involved. Radcliff Finance Corp. v. Industrial State Bank of Houston, 289 S.W.2d 645 (Tex. Civ. App. – Beaumont 1956, no writ). Possession under writ of sequestration, as to the suit and the parties thereto, is legal. Id. The act of sequestering personal property is not an act of conversion. Smart v. Texas American Bank/Galleria, 680 S.W.2d 896, 898 (Tex. App. – Houston (1st Dist.) 1984, no writ).

Through sequestration, property is physically (or constructively, in the case of real property) possessed by a sheriff or constable and placed in the court's custody until the underlying claim is adjudicated. During the pendency of the levy the sequestered property remains in the custody of the law. Id.

Sequestration, as distinguished from attachment, requires the claimant to have an interest in the sequestered property. See Tex. Civ. Prac. & Rem. Code Ann. § 62.001 (Vernon 2008 & Supp. 2015).

C. Constitutionality

The Texas sequestration statutes and rules are constitutional. Marrs v. South Texas National Bank, 686 S.W.2d 675, 678 (Tex. App. – San Antonio 1985, writ ref'd n.r.e.) [Grant of creditor's application for writ of sequestration was not in violation of due process of law where initial seizure was followed by early opportunity to put creditor to his proof.].

D. Availability

1. Title, Possession, Enforcement of Lien

Sequestration is available to the plaintiff if he sues for title to or possession of real property, personal property, or fixtures or for the foreclosure or enforcement of a mortgage, lien, or security interest in the property, and a reasonable conclusion may be drawn that there is immediate danger that the defendant or the party in possession will conceal, dispose of, ill-treat, waste, or destroy the property or remove it from the county. Tex. Civ. Prac. & Rem. Code Ann. § 62.001(1), (2) (Vernon 2008 & Supp. 2015).

Sequestration is available to a plaintiff in a suit to try title to real property, to remove a cloud on title, to foreclose a lien, or to partition real property if the plaintiff makes an oath that one or more of the defendants is a nonresident of Texas. Tex. Civ. Prac. & Rem. Code Ann. § 62.001(4) (Vernon 2008 & Supp. 2015); but see Shaffer v. Heitner, 97 S. Ct. 2569 (1977) [minimum contacts required for sequestration of nonresident's property].

2. Ejectment

Sequestration is available to a plaintiff if he sues for title to possession of property from which he has been ejected by force or violence. Tex. Civ. Prac. & Rem. Code Ann. § 62.001(3) (Vernon 2008 & Supp. 2015).

3. Claim on Personal Property

A writ of sequestration may be issued for personal property under a mortgage or lien even though the right of action on the mortgage or lien has not accrued. In these circumstances, final judgment may not be rendered against the defendant until the right of action has accrued. Tex. Civ. Prac. & Rem. Code Ann. § 62.003 (Vernon 2008 & Supp. 2015).

E. Procedure

Sequestration proceedings are summary in their nature and must comply strictly with the statutes. American Mortg. Corp. v. Samuell, 108 S.W.2d 193 (Tex. 1937).

1. When Writ is Available

A writ of sequestration may be issued at the initiation of a suit or at any time before final judgment. Tex. Civ. Prac. & Rem. Code Ann. § 62.002 (Vernon 2008 & Supp. 2015); Tex. R. Civ. P. 696 ("at the commencement of a suit or at any time during its progress"). A writ of sequestration issued before commencement of suit against the named defendant is void. Watt v. Parlin & Orendorff Co., 98 S.W. 428 (Tex. Civ. App. - 1906).

2. Grounds

The grounds most applicable for sequestration are set forth in Tex. Civ. Prac. & Rem. Code §62.001(1). That statute provides that "a writ of sequestration is available to a plaintiff in a suit if: (1) the suit is for title or possession of personal property or fixtures or for foreclosure or enforcement of a mortgage, lien or security interest in personal property or fixtures and a reasonable conclusion may be drawn that there is immediate danger that the defendant or the party in possession of the property will conceal, dispose of, ill-treat, waster or destroy the property or remove it from the county during the suit." Other grounds are set forth in Tex. Civ. Prac. & Rem. Code §62.001(1) - (4).

3. Application

a. Requisites of the Application. The application must be made under oath and must set forth: (1) the specific facts stating the nature of the plaintiff's claim; (2) the amount in controversy, if any; and (3) the facts justifying issuance of the writ. Tex. Civ. Prac. & Rem. Code Ann. § 62.022 (Vernon 2008 & Supp. 2015). Tex. R. Civ. P. 696 requires that the application be supported by affidavits. See Monroe v. General Motors Acceptance Corp., 573 S.W.2d 591, 593 (Tex. App. - Waco 1978, no writ). Two or more grounds may be stated conjunctively or disjunctively. The property to be sequestered must be described with such certainty that it may be identified and distinguished from like property, and the value of each article and the county in which each article is located must be stated. Tex. R. Civ. P. 696. Where the collateral is inventory, a creditor may allege the value of the total inventory; it is not necessary to allege the value of each item. Marrs v. South Tex. Nat'l Bank, 668 S.W.2d 675 (Tex. App. - San Antonio 1985, writ ref'd n.r.e.).

b. Affidavit Required.

The application must be supported by an affidavit of the plaintiff, his agent, his attorney, or other persons having knowledge of relevant facts. Tex. R. Civ. P. 696. The rule has not been amended to address unsworn declarations authorized by Tex. Civ. Prac. & Rem. Code §132.001.

Paragraph II.B. discusses use of an unsworn declaration in lieu of an affidavit authorized by Tex. Civ. Prac. & Rem. Code §132.001.

c. Personal Knowledge or Information and Belief. The application must be made on personal knowledge and must state facts that would be admissible in evidence. However, the facts may be stated on information and belief if the grounds of such belief are specifically stated. Tex. R. Civ. P. 696

4. Order

No writ of sequestration may issue except on written order of the court. Tex. R. Civ. P. 696.

The Order must include –

1. specific findings of fact supporting the statutory grounds for the issuance of the writ found by the court to exist;
2. a clear description of each item of property to be sequestered so that it may be identified and distinguished from like property;
3. the value of each item of property to be sequestered;
4. the county in which each item is located;
5. the amount of bond required of the plaintiff; and
6. the amount of bond required of the defendant to replevy.

Tex. R. Civ. P. 696. The order may direct the issuance of several writs at the same time or in succession, to be sent to different counties. Id.

5. Applicant's Bond

a. Filing Requirement

No writ of sequestration shall issue until the party applying for it has filed with the officer authorized to issue such writ a bond payable to the defendant in an amount fixed by the court's

order, with sufficient surety or sureties as provided by statute, conditioned that the plaintiff prosecute his suit to effect and pay to the extent of the penal amount of the bond all damages and costs as may be adjudged against him for wrongfully suing out such writ of sequestration. Tex. R. Civ. P. 698. See Kelso v. Hanson, 388 S.W.2d 396, 399 (Tex. 1965).

It is good practice to contact the sheriff or constable to whom the writ will be sent before drafting the order, so that the order may address any particular concerns or requirements of that office. For example, some constables require that the order specify that the property may be returned to the plaintiff without the requirement of a replevy bond, as long as the sequestration bond complies with the requirements of rule 708 of the Texas Rules of Civil Procedure. Additionally, some constables will allow the plaintiff to select the location for storage of the sequestered property during the ten-day replevy period, as long as the order contains language to that effect. There may be other concerns or requirements.

It is also advisable to obtain a certified copy of the order and the sequestration and replevy bonds, because some sheriffs and constables require production of these documents before the sequestered property will be released to the plaintiff.

b. Amount of Bond

Bond shall be in an amount which, in the opinion of the court, shall adequately compensate defendant in the event plaintiff fails to prosecute his suit to effect and pay all damages and costs as shall be adjudged against him for wrongfully suing out the writ of sequestration including elements of damages stated in Tex. Civ. Prac. & Rem. Code Ann § 62.044 [Compulsory Counterclaim for Wrongful Sequestration] and §62.045 [Wrongful Sequestration of Consumer Goods], (Vernon 2008 & Supp. 2015); Tex. R. Civ. P. 696, 698.

c. Increase or Reduction in Amount of Bond

After notice to the opposite party, either before or after issuance of the writ, the defendant or plaintiff may file a motion to increase or reduce the amount of such bond, or to question the sufficiency of the sureties thereon, in the court in which such suit is pending. Upon hearing, the court shall enter its order with respect to such bond and sufficiency of the sureties as justice may require. Tex. R. Civ. P. 698.

d. Release of Bond

The plaintiff should remember to include in any judgment, settlement, or other order disposing of the litigation language releasing the plaintiff and its surety from continued liability on the sequestration bond.

6. Writ of Sequestration

A pending suit is required. A writ of sequestration may be issued at the initiation of a suit or at any time before final judgment. Tex. Civ. Prac. & Rem. Code §62.002 (Vernon 2008 & Supp. 2015); Tex. R. Civ. P. 696.

a. Requisites of the Writ

The form for a Writ of Sequestration is prescribed by the rules. Tex. R. Civ. P. 699. The writ of sequestration shall be directed "To the Sheriff or any Constable in the State of Texas" (not naming a specific county) and shall command him to take into his possession the property, describing the same as it is described in the application or affidavits, to be found in his county, and to keep the same subject to further orders of the court, unless the property is replevied. Tex. R. Civ. P. 699. There shall be prominently displayed on the face of the writ, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following.

> 'YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT."

Tex. Civ. Prac. & Rem. Code Ann. § 62.023 (Vernon 2008 & Supp. 2015); Tex. R. Civ. P. 699.

b. Service of the Writ on Defendant

The defendant shall be served in any manner provided for service of citation or as provided in Rule 21a with a copy of the writ of sequestration, the application, accompanying affidavits, and orders of the court as soon as practicable following levy of the writ. There

shall also be prominently displayed on the face of the copy of the writ served on defendant, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents the following:

> "To _____, Defendant
>
> "You are hereby notified that certain properties alleged to be claimed by you have been sequestered. If you claim any rights in such property, you are advised:
>
> "YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT."

Tex. R. Civ. P. 700a.

c. Errors in the Affidavit, Bond, or Writ

(1) A writ of sequestration issued in a name different than that of the defendant is void. Watt v. Parlin & Orendorff Co., 98 S.W. 428 (Tex. Civ. App. 1906, no writ).

(2) Clerical errors in the affidavit, bond, writ of sequestration, or officer's return may be amended. An application in writing must be made to the judge of the court in which the suit was filed. After notice to the opponent, the writ may be amended in the manner and on the terms the court authorizes. However, the amendment can reach only clerical errors and may not change or add to the grounds for sequestration stated in the affidavit. In addition, the amendment must appear to the judge to be in furtherance of justice. Tex. R. Civ. P. 700.

7. Dissolution or Modification of Writ of Sequestration

Dissolution of a writ of sequestration is sought by filing a sworn written motion with the court. The right to seek dissolution of a writ of sequestration is in addition to the defendant's right to replevy. The filing of a motion to modify stays further proceedings under the writ until a hearing on the motion is conducted and the motion is ruled upon. Tex. Civ. Prac. & Rem. Code Ann. § 62.041; Tex. R. Civ. P. 712a.

a. Motion to Dissolve Writ

A defendant whose property has been sequestered or any intervening party who claims an interest in such property, may by sworn written motion, seek to vacate, dissolve or modify the writ and the order directing its issuance, for any grounds or cause, including a motion to reduce the amount of property sequestered when the total amount described and authorized by the order exceeds the amount necessary to secure the plaintiff's claim, one year's interest if allowed by law on the claim, and costs. Tex. R. Civ. P. 712a.

The motion must admit or deny each finding of the court directing the issuance of the writ except where the movant is unable to admit or deny the finding, in which case, movant shall set for the reasons why he cannot admit or deny. Id.

b. Notice and Hearing

Unless the parties agree to an extension of time, the motion shall be heard promptly, after reasonable notice to the plaintiff (which may be less than three days) and the issue shall be determined not later than ten days after the motion is filed. Tex. Civ. Prac. & Rem. Code Ann. § 62.042 (Vernon 2008 & Supp. 2015); Tex. R. Civ. P. 712a. If the trial court does not hold a hearing on the motion to dissolve within ten days after the motion is filed, the motion shall be denied. Breckenridge v. Nationsbank of Texas, N.A., 79 S.W.3d 151 (Tex. App. - Texarkana 2002, no pet.) [Hearing on motion to dissolve writ of sequestration was scheduled within ten days of its filing but was postponed by informal agreement of the parties and there was no written agreement in the record showing the parties had agreed to the postponement].

The burden is on the party who obtains the writ of sequestration to prove both the facts alleged and the grounds relied on for its issuance; and, if the party fails to meet its burden, the writ must be dissolved. Rexford v. Holliday, 807 S.W.2d 356 (Tex. App. - Houston [1 Dist.] 1991, no pet.); Tex. Civ. Prac. & Rem. Code § 62.043(a) (Vernon 2008 & Supp. 2015); Tex. R. Civ. P. 712a [The court may modify its previous order granting the writ and the writ issued pursuant thereto].

The movant, however, shall have the burden to prove that the reasonable value of the

property sequestered exceeds the amount necessary to secure the debt, interest for one year, and probable costs. Tex. R. Civ. P. 712a.

The court may determine the issue on the basis of uncontroverted affidavits setting forth such facts as would be admissible in evidence. Otherwise, the parties must submit evidence. Id.

The court may make such orders, including the care, preservation, or disposition of the property (or its proceeds if it has been sold) as justice may require. Id.; Tex. Civ. Prac. & Rem. Code Ann. § 62.041 - 0.43 (Vernon 2008 & Supp. 2015).

c. Interlocutory Nature of Order on Motion

A writ of sequestration and the denial of motion to dissolve it exist only as part of main suit, and an order granting or denying the motion to dissolve the writ is not appealable. See Monroe v. General Motors Acceptance Corp., 561 S.W.2d 12. (Tex. Civ. App. - Waco 1978, no writ) [Order denying motion was not appealable; an order to preserve property under the control of the court or to dissolve such an order is interlocutory and is not appealable]. An appeal from such order should be dismissed. East & West Texas Lumber Co. v. Williams, 9 S.W.436 (Tex. 1888).

d. Effect of Dissolution

If the writ is dissolved, the action proceeds as though no writ had been issued. Tex. Civ. Prac. & Rem. Code Ann. § 62.043(b) (Vernon 2008 & Supp. 2015).

And, if a writ is dissolved, any action for damages for wrongful sequestration must be brought as a compulsory counterclaim. Tex. Civ. Prac. & Rem. Code Ann. § 62.044(a) (Vernon 2008 & Supp. 2015).

In addition to other damages, the defendant may recover reasonable attorney's fees incurred in dissolution of the writ. Monroe v. General Motors Acceptance Corp., 573 S.W.2d 591 (Tex. Civ. App. - Waco 1978, no writ) [attorney's fees authorized only if the writ is dissolved]; Tex. Civ. Prac. & Rem. Code Ann. § 62.044(b) (Vernon 2008 & Supp. 2015).

e. Damges for Wrongful Sequestration of Consumer Goods

If the sequestered personalty is consumer goods, the defendant is entitled to recover, in addition to reasonable attorney's fees, the greater of $100, the finance charge contracted for, or actual damages. These damages may not be awarded if the plaintiff shows that his failure to prove his specific allegations was the result of a bona fide error and that he used reasonable procedures to avoid such error. Tex. Civ. Prac. & Rem. Code Ann. § 62.045 (Vernon 2008 & Supp. 2015).

8. Officer's Liability and Duty of Care

Neither party controls the manner in which the constable performs his obligation of looking after the property. The constable acts as neither the agent nor servant of either party. Multi-Moto Corp v. ITT Commercial Fin. Corp., 806 S.W.2d 560, 569 (Tex. App. - Dallas 1990, writ denied).

An officer who executes a writ of sequestration shall care for and manage in a prudent manner the sequestered property he retains in custody. Tex. Civ. Prac. & Rem. Code Ann. § 62.061(a) (Vernon 2008 & Supp. 2015). If the officer entrusts sequestered property to another person, the officer is responsible for the acts of that person relating to the property. Id. at § 62.061(b). The officer is liable for injuries to the sequestered property resulting from his neglect or mismanagement or from the neglect or mismanagement of a person to whom he entrusts the property. Id. at § 61.061(c).

An officer who retains custody of sequestered property is entitled to just compensation and the court shall determine reasonable charges, which shall be taxed and collected as a cost of suit. Tex. Civ. Prac. and Rem. Code §62.062 (Vernon 2008 & Supp. 2015). See Multi-Moto Corp. v. ITT Commercial Fin. Corp, 806 S.W.2d 560, 569. [The statute does not fix a fee for the care of property, but does authorize reasonable charges. The claimant has the burden to prove the reasonableness of expenses and evidence of the amount paid is generally sufficient to establish reasonableness].

If an officer is required to expend money in the security, management or care of sequestered property, he may retain possession of the property until the money is repaid by the party seeking to replevy the property or by that party's agent or attorney. Tex. Civ. Prac. and Rem. Code § 62.063 (Vernon 2008 & Supp. 2015).

9. Defendant's Replevy

a. Right to Replevy

At any time before judgment, if the sequestered property has not been previously claimed, replevied, or sold, the defendant may replevy the same, or any part of thereof, or the proceeds from the sale of the property if it has been sold under order of the court, by giving bond. Tex. R. Civ. P. 701.

b. Defendant's Replevy Bond

(1) Requirement for Bond.

To replevy either the property or the sale proceeds, the defendant must first make a bond, with sufficient sureties as provided by statute, to be approved by the officer who levied the writ, payable to the plaintiff in an amount fixed by the court's order. Tex. R. Civ. P. 701. The purpose of the replevy bond is to insure that the property will be forthcoming after judgment in the same condition as when replevied. Commercial Svcs. v. Thompson, 239 S.W.2d 911, 914 (Tex. App. - Forth Worth - 1951, no writ.).

(2) Condition of Bond

(a) Personalty. If the property to be replevied is personal property, the condition of the bond shall be that the defendant will not remove the same out of the county, or that he will not waste, ill-treat, injure, destroy, or dispose of the same, and that he will have such property, in the same condition as when it is replevied, together with the value of its fruits, hire or revenue, pending decision of the court, or that he will pay the value thereof, or said difference between its value at the time of replevy and the time of judgment. Tex. R. Civ. P. 702. See Associates, Inc. v. Soltes, 250 S.W.2d 593, 595 (Tex. App. - Dallas 1952, writ ref'd n.r.e.) [The term same condition in the rule excludes ordinary depreciation in market value.]

(b) Realty. If the property is real estate, the condition of such bond shall be that the defendant will not injure the property and that he will pay the value of the rents generated by the real property if he is required to do so. Tex. R. Civ. P. 703.

c. Adverse Judgment

If the suit is decided against the defendant, judgment must be rendered against all the obligors on the defendant's bond, jointly and severally, for the value of the property replevied, as of the date of the execution of the replevy bond, and the value of the fruits, hire, revenue, or rent derived therefrom. Tex. R. Civ. P. 704.

10. Plaintiff's Replevy

a. Right to Replevy

The plaintiff may replevy the property if the defendant has not done so within ten days after levy and service of the writ of sequestration. Tex. R. Civ. P. 708.

b. Plaintiff's Replevy Bond

(1) Requirement for Bond

To replevy the property sequestered, the plaintiff must first make a bond payable to defendant in the sum of money not less than the amount fixed by the court's order, with sufficient surety or sureties as provided by statute to be approved by such officer. Id.

(2) Conditions on Bond.

Rule 708 provides conditions for personalty and realty on plaintiff's replevy bond comparable to those for defendant's replevy bond. See Tex. R. Civ. P. 708 and Para. III.E.9.b.2 infra.

11. Sale of Perishable Goods

a. Affidavit

If after ten days from levy of the writ of sequestration the defendant has not replevied the property, the plaintiff or defendant may make affidavit in writing that the property levied upon, or any portion thereof, is likely to be wasted or destroyed or greatly depreciated by keeping; and the officer having possession of such property shall certify to the truth of such affidavit. Tex. R. Civ. P. 710.

b. Order for Sale

It shall be the duty of the judge to whose court the writ is returnable, upon presentation of such affidavit and certificate to order the sale of said property or so much thereof as is likely to be so wasted, destroyed or depreciated in value by keeping, but either party may replevy the property before such sale. Tex. R. Civ. P. 710. The judge granting the order shall issue an order

directed to the officer having such property in possession, commanding such officer to sell such property in the same manner as under execution. Tex. R. Civ. P. 711.

c. Return of Order

The officer making such sale shall, within five days thereafter, return the order of sale to the issuing court, with proceedings thereon, and shall, at the time of making such return, pay over to the clerk the proceeds of such sale. Tex. R. Civ. P. 712.

12. Wrongful Sequestration

If a writ of sequestration is dissolved, any action for wrongful sequestration must be brought as a compulsory counterclaim. Tex. Civ. Prac. & Rem. Code Ann. § 62.044(a) (Vernon 2008 & Supp. 2015). Relief for wrongful sequestration is not available when the trial court refused to dissolve the writ. Espinoza v. Wells Fargo Bank, N.A., No. 02-13-00111-CV (Tex. App. - Fort Worth, November 14, 2013, pet. denied); No. 13-1039 (Tex. August 1, 2014, reh. denied) [Court denied several motions to dissolve the writ and also ordered the truck sold and the proceeds applied to the balance of the amount due under the note].

A creditor may be guilty of wrongful sequestration if he has obtained a prejudgment writ of sequestration, seized the property, and then voluntarily dismissed the suit without returning the property to the debtor. In that instance, the debtor has a right to bring an independent action to recover damages suffered by reason of the wrongful sequestration. Further, a voluntary dismissal is a final judgment in favor of the debtor, and the debtor is entitled to return of the property or a judgment against the obligors on the replevy bond. See Burnett Trailers, Inc. v. Polson, 387 S.W.2d 692, 694-95 (Tex. Civ. App. - San Antonio 1965, writ ref'd n.r.e.).

To obtain exemplary damages, there must be "a finding that in bringing suit and causing the writ of sequestration to issue, the plaintiff was activated by malice, or that the plaintiff caused the writ of sequestration to issue without probable cause. Id. at 695).

Paras. III.E.7.d, e infra include a discussion damages for wrongful sequestration.

IV. ATTACHMENT

A. Seminal Authority

1. Statute. Tex. Civ. Prac. & Rem. Code Ann § 61.001 - .063 (Vernon 2008 & Supp. 2015)

2. Rules
Tex. R. Civ. P 592 – 609

B. Purpose and Use

The purpose of attachment is to empower a creditor to seize the debtor's property to secure payment of a probable judgment on an otherwise unsecured debt. Reported decisional law states that the purpose of prejudgment writ of attachment is to enable plaintiff to secure debt by seizure of defendant's property before judgment. E.E. Maxwell Co., Inc. v. Arti Decor, Ltd., 638 F.Supp. 749 (N.D. Tex. 1986).

Strategically, attachment may be used against a debtor in two ways:

- To prevent a debtor from alienating, destroying, or removing property from the jurisdiction, which would frustrate recovery on the debt; or
- To obtain jurisdiction over a nonresident debtor who has property located within the jurisdiction. However, minimum contacts between the defendant and the foreign state must be found in order to confer in personam jurisdiction over the debtor. See Shaffer v. Heitner, 97 S.Ct. 2569 (1977) (sequestration).

Attachment is distinguished from sequestration, as attachment does not require the claimant to have an interest in the seized property. Compare Tex. Civ. Prac. & Rem. Code Ann. § 61.001 (Vernon 2008 & Supp. 2015) with Tex. Civ. Prac. & Rem. Code Ann. § 62.001 (Vernon 2008 & Supp. 2015).

C. Constitutionality

The Texas attachment statutes have not been reviewed for due-process compliance in a recently published opinion. However, early reported cases provide that due process of law requires the owner have an opportunity to be heard and be notified in some manner beyond the notice of seizure, prescribing the time within which appearance must be made. Windsor v. McVeigh, 93 U. S. 274 (1876); Connell v.

Nickey, 167 S.W. 313 (Tex. Civ. App. 1914, error refused).

D. Availability of Remedy

Attachment is available to a plaintiff in a suit if: the defendant is justly indebted to the plaintiff; the attachment is not sought for the purpose of injuring or harassing the defendant; the plaintiff will probably lose his debt unless the writ of attachment is issued; and there are specific statutory grounds for the writ. Tex. Civ. Prac. & Rem. Code Ann. § 61.001. Generally, a writ of attachment is not available when the applicant's claims are for unliquidated damages. In re Argyll Equities, LLC, 227 S.W.3d 268, 271 (Tex. App. - San Antonio 2007, orig. proceeding).

E. Procedure

Attachment is available only if and when the safeguards of the statute are strictly observed. Sweatt v. Grogan, 25 F.Supp. 585 (N.D. Tex 1938). Remedy by attachment is oppressive and harsh and therefore is subject to rigid rules of construction. Carpenter v. Carpenter, 476 S.W.2d 469 (Tex. Civ. App. - Dallas 1972, no writ) ["Since an early date in the history of our jurisprudence it has been said that the remedy by attachment is oppressive and harsh and therefore is subject to rigid rules of construction."].

1. When Writ is Available

An application for writ of attachment may be filed either at the commencement of suit or at any time during its progress. Tex. Civ. Prac. & Rem. Code Ann. §61.003 (Vernon 2008 & Supp. 2015); Tex. R. Civ. P. 592. Attachment may not be issued before a suit has been instituted. Id.

a. Availability Against Financial Institutions

Prejudgment attachment is not available against a financial institution with its principal or a branch office in Texas. Tex. Fin. Code § 59.007(a) (Vernon 2008, Supp. 2015) (prohibition of issuance of writ before judgment is final and non-appealable). An attachment may not be issued against or served on a financial institution that has its principal office or a branch in this state to collect a prospective money judgment against the financial institution before the judgment is final and all appeals have been foreclosed by law. Id.

"Financial institution" means "a bank, savings association, or savings bank maintaining an office, branch, or agency office in this state." Tex. Fin. Code § 31.002(25) (Vernon 2008, Supp. 2015).

b. Availability Against a Customer of a Financial Institution

Prejudgment attachment is available against a customer of a financial institution. Tex. Fin. Code § 59.007(b) (Vernon 2008, Supp. 2015) (securing a prospective money judgment against a customer of the financial institution. "An attachment ... issued to or served on a financial institution for the purpose ... securing a prospective money judgment against a customer of the financial institution is governed by Tex. Fin. Code § 59.008…"; § 59.008 (Vernon 2008, Supp. 2015) (procedure for claims against customers of financial institutions).

"A claim against a customer of a financial institution shall be delivered or served as otherwise required or permitted by law at the address designated as the address of the registered agent of the financial institution in a registration filed with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution." Tex. Fin. Code § 59.008(a).

"If a financial institution files a registration statement with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution, a claim against a customer of the financial institution is not effective as to the financial institution if the claim is served or delivered to an address other than that designated by the financial institution in the registration as the address of the financial institution's registered agent." Tex. Fin. Code § 59.008(b).

"The customer bears the burden of preventing or limiting a financial institution's compliance with or response to a claim subject to this section by seeking an appropriate remedy, including a restraining order, injunction, protective order, or other remedy, to prevent or suspend the financial institution's response to a claim against the customer." Tex. Fin. Code § 59.008(c).

"A financial institution that does not file a registration with the secretary of state pursuant

to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution, is subject to service or delivery of all claims against customers of the financial institution as otherwise provided by law." Tex. Fin. Code § 59.008(d).

2. General Grounds

A writ of attachment may issue if three general grounds and any one of nine specific grounds described hereinafter exist. The general conditions are that—

1. the defendant is justly indebted to the plaintiff;
2. the attachment is not sought to injure or harass the defendant; and
3. without the attachment the plaintiff's debt would be lost.

Tex. Civ. Prac. & Rem. Code § 61.001.

The "indebtedness" can be based in tort, and the amount in controversy need not be liquidated, if personal service on the defendant cannot be effected within the state. Tex. Civ. Prac. & Rem. Code § 61.005. Otherwise, attachment is not available for a tort action, and the amount in controversy must be liquidated. Cleveland v. San Antonio Building & Loan Ass'n, 223 S.W.2d 226, 228 (Tex. 1949).

3. Specific Grounds

In addition to meeting the general grounds set out hereinabove, an applicant for a writ of attachment must show at least one of the following nine specific grounds:

1. The defendant is not a resident of Texas or is a foreign corporation or is acting as such (but see section 8.25:3 above regarding minimum contacts).
2. The defendant is about to move from Texas permanently and has refused to pay or secure the debt due the plaintiff.
3. The defendant is in hiding so that ordinary process of law cannot be served on him.
4. The defendant has hidden or is about to hide his property for the purpose of defrauding his creditors.
5. The defendant is about to remove his property from Texas without leaving an amount sufficient to pay his debts.
6. The defendant is about to remove all or part of his property from the county in which the suit is brought with the intent to defraud his creditors.
7. The defendant has disposed of or is about to dispose of all or part of his property with the intent to defraud his creditors.
8. The defendant is about to convert all or part of his property into money for the purpose of placing it beyond the reach of his creditors.
9. The defendant owes the plaintiff for property obtained by the defendant under false pretenses.

Tex. Civ. Prac. & Rem. Code § 61.002 (Vernon 2008 & Supp. 2015).

4. Application

a. Requisites for the Application

Tex. R. Civ. P. 592 provides that "(t)he application shall comply with all statutory requirements and shall state the grounds for issuing the writ and the specific facts relied upon by the plaintiff to warrant the required findings by the court. Tex. Civ. Prac. & Rem. Code § 61.001 and .002 state the general and specific grounds for attachment.

b. Affidavit Required

To apply for a writ of attachment, the plaintiff must file with the court an affidavit that states general statutory grounds for issuance; the amount of the demand; and specific grounds for issuance. Tex. Civ. Prac. & Rem. Code Ann. § 61.022 (Vernon 2008 & Supp. 2015); Tex. R. Civ. P. 592; see Grupo Consejero Mundial, S.A. de C.V. v. Salinas, 13-11-00471-CV, 13-11-00493-CV (Tex. App. - Corpus Christi 2012).

c. Personal Knowledge or Information and Belief

The application must be made on personal knowledge and must state facts that would be admissible in evidence. However, the facts may be stated on information and belief if the grounds of such belief are specifically stated. Tex. R. Civ. P. 592. See Para. II.B. infra on execution of an affidavit by the creditor's attorney. The validity of a writ of attachment does not depend on the truthfulness of the allegations, but on compliance with the statute in making the affidavit.

d. Statutory Requirements for Affidavit or Unsworn Declaration in Lieu Thereof

The affidavit must state that –

1. the debt is just, due, and unpaid;
2. within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and
3. the garnishment is not sought to injure the defendant or the garnishee.

Tex. Civ. Prac. & Rem. Code § 63.001(2) (Vernon 2008 & Supp. 2015).

Neither Tex. Civ. Prac. & Rem. Code § 61.022 nor Tex. R. Civ. P. 592 has yet been amended to address unsworn declarations authorized by Tex. Civ. Prac. & Rem. Code §132.001.

Paragraph II.B. discusses use of an unsworn declaration in lieu of an affidavit authorized by Tex. Civ. Prac. & Rem. Code §132.001.

The application shall comply with all statutory requirements and shall state the grounds for issuing the writ and the specific facts relied upon by the plaintiff to warrant the required findings by the court. Tex. R. Civ. P. 592; see Behringer Harvard Royal Island, LLC v. Skokos, No. 05-09-00332-CV (Tex. App. - Dallas, 2009) [Applicant filed suit and sought a temporary restraining order and temporary injunction requiring defendants to deposit $19.5 million of funds allegedly belonging to the Applicant into the court's registry. Applicant did not file an application for a writ of attachment or purport to meet the requirements of such a writ. Rather, the only basis for the trial court's order is the Applicant's petition for a temporary injunction. A litigant cannot avoid the strict requirements of a writ of attachment by calling it by another name. Under these circumstances, the Applicant and the trial court did not strictly comply with Tex. Civ. Prac. & Rem. Code, Chap. 61 and Tex. R. Civ. P. 592 which concern the requirements for issuance of writs of attachment. Because the statute and the rule were not strictly followed, the trial court clearly abused its discretion in ordering that $10 million of defendants' funds remain in the registry of the court pending trial on the merits].

The object of attachment affidavit is to protect debtor against improvident or malicious use of process, both by appeal to affiant's conscience and by holding up penalties of perjury before him. Gulf Paving Co. v. Lofstedt, 188 S.W.2d 155 (Tex. 1945).

The writ is authorized, not upon a given state of facts, but upon an affidavit to certain facts. The validity of the writ depends, not upon the truth of the facts stated in the affidavit, but upon the fact that they are so stated.

The bond protects the defendant whose property is attached. The injury done him is compensated in the damage he recovers. The plaintiff, in the terms prescribed by law in the bond, has contracted with the defendant for his remedy. He expiates in advance the possible wrong he may do the defendant. From the earliest recorded Texas Supreme Court decisions, it has been the practice to give the plaintiff the benefit of attachment, and leave the defendant to his remedy on the bond. Craig v. Taylor, 46 S.W.2d 353, 354 (Tex. Civ. App. - Galveston 1932), citing Cloud v. Smith, 1 Tex 611 (Tex. 1846).

5. Order

No writ of attachment may issue except on written order of the court after a hearing, which may be ex parte. Tex. R. Civ. P. 592.

The order must include –

1. specific findings of facts to support the statutory grounds found to exist;
2. the maximum value of property that may be attached;
3. the amount of bond required of plaintiff;
4. command that the attached property be kept safe and preserved subject to further orders of the court; and
5. the amount of bond required of defendant to replevy.

Id.

6. Applicant's Bond

a. Filing Requirement

No writ of attachment shall issue until the party applying for it has filed with the officer authorized to issue such writ a bond payable to the defendant in the amount fixed by the court's order, with sufficient surety or sureties as provided by statute, conditioned that the plaintiff will prosecute his suit to effect and pay to the extent of the penal amount of the bond all damages and costs as may be adjudged against his for wrongfully suing out such writ of attachment. Tex. Civ. Prac. & Rem. Code Ann. § 61.023 (Vernon 2008 & Supp. 2015); Tex. R. Civ. P. 592a; see FDIC v. Texarkana Nat'l

Bank, 673 S.W.2d 262, 263 (Tex. App. - Texarkana 1984, no writ) [Federal agency is not exempt from the bond requirement when it chooses to litigate in the courts of Texas; it must abide by the provisions of the Texas statutes the same as any other litigant]; Carpenter v. Carpenter, 476 S.W.2d at 470 [Original attachment bond was not in compliance with the statutory requirements when it was not made payable to Defendant but was made payable to Plaintiff. Attempted correction of clerical error pursuant to Tex. R. Civ. P. 609 was insufficient to correct the error].

b. Amount of Bond

The bond shall be in an amount fixed by the judge or justice issuing the writ. Tex. Civ. Prac. & Rem. Code Ann. § 61.023(a)(3). The bond shall be in an amount which, in the opinion of the court, will adequately compensate the defendant in the event plaintiff fails to prosecute is suit to effect, and to pay all damages and costs which may be adjudged against him for wrongfully suing out the writ of attachment. Tex. R. Civ. P. 592.

c. Form of the Attachment Bond

The form of the attachment bond is prescribed by the rules. Tex. R. Civ. P. 592b.

d. Increase or Reduction in Amount of Bond

After notice to the opposite party, either before or after issuance of the writ, the defendant or plaintiff may file a motion to increase or reduce the amount of such bond, or to question the sufficiency of the sureties thereon, in the court which such suit is pending. Upon hearing, the court shall enter its order with respect to such bond and sufficiency of the sureties. Tex. R. Civ. P. 592a.

e. Review of Amount of Bond

On reasonable notice of the opposing party, which may be less than three days, either party shall have the right to prompt judicial review of the amount of bond required, denial of bond, sufficiency of sureties, and estimated value of the property, by the court which authorized issuance of the writ. Tex. R. Civ. P. 599. The court's determination may be made upon the basis of affidavits, if uncontroverted, setting forth facts as would be admissible in evidence; otherwise, the parties shall submit evidence. The court shall forthwith enter its order either approving or modifying the requirements of the officer or the court's prior order, and such order of the court shall supersede and control with respect to such matters. Id.

7. Writ of Attachment

A pending suit is required. A writ of attachment may not be issued before a suit has been initiated. Tex. Civ. Prac. & Rem. Code Ann. § 61.003.

a. Prerequisite for Issuance

No writ of attachment shall issue until the party applying therefor has filed with the officer authorized to issue such writ a bond payable to the defendant in the amount fixed by the court's order, with sufficient surety or sureties provided by statute to be approved by such officer, conditioned that the plaintiff will prosecute his suit to effect and pay to the extent of the penal amount of the bond all damages and costs as may be adjudged against him for wrongfully suing out such writ of attachment. Tex. R. Civ. P. 592a.

b. Requisites of Writ

The writ shall be directed to the sheriff or any constable within the State of Texas. It shall command him to attach and hold, unless replevied, subject to the further order of the court, so much of the property of the defendant, of a reasonable value in approximately the amount fixed by the court, as shall be found within his county. Tex. R. Civ. P. 593.

c. Form of the Writ

The form for a writ of attachment is prescribed by the rules. Tex. R. Civ. P. 594.

d. Several Writs

Several writs of attachment may, at the option of the plaintiff, be issued at the same time, or in succession and sent to different counties, until sufficient property shall be attached to satisfy the writ. Tex. R. Civ. P. 595.

e. Service of the Writ on Defendant

The defendant shall be served in any manner prescribed for service of citation, or as proved in Rule 21a, with a copy of the writ of attachment, the application, accompanying affidavits, and orders of the court as soon as practicable following the levy of the writ. Tex. R. Civ. P. 598a. There shall be prominently displayed on

the face of the copy of the writ served on the defendant, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following:

> "To _____, Defendant:
> "You are hereby notified that certain properties alleged to be owned by you have been attached. If you claim any rights in such property, you are advised:
>
> "YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT."

Tex. R. Civ. P. 598a.

f. Errors in Affidavit, Bond, or Writ

Clerical errors in the affidavit, bond, or writ of attachment, or the officer's return thereof, may be upon application in writing to the judge of the court in which the suit is filed, and after notice to the opponent, be amended in such manner and on such terms as the judge shall authorize by order, provided the amendment does not change or add to the grounds of such attachment as stated in the affidavit, and provided such amendment appears to the judge to be in furtherance of justice. Tex. R. Civ. P. 609.

8. Duty of Officer

The sheriff or constable receiving the writ shall immediately proceed to execute the same by levying upon so much of the property of the defendant subject to the writ, and found within his county, as may be sufficient to satisfy the command of the writ. Tex. R. Civ. P. 597.

9. Levy of Attachment

A writ of attachment may be levied only on property that by law is subject to levy under a writ of execution. Tex. Civ. Prac. & Rem. Code Ann. § 61.041 (Vernon 2008 & Supp. 2015). The writ of attachment shall be levied in the same manner as is, or may be, the writ of execution upon similar property. Tex. R. Civ. P. 598.

a. Personal Property

The officer attaching personal property shall retain possession until final judgment unless the property is either replevied; sold as provided by law; or claimed by a third party who posts bond and tries his right to the property. Tex. Civ. Prac. & Rem. § 61.042 (Vernon 2008 & Supp. 2015).

b. Personalty Held by a Financial Institution

Service of a writ of attachment on a financial institution relating to personal property held by the financial institution in the name of or on behalf of a customer of the financial institution is governed by Section 59.008, Finance Code. Tex. Civ. Prac. & Rem. § 61.045 (Vernon 2007 & Supp. 2015). A claim against a customer of a financial institution shall be delivered or served as otherwise required or permitted by law at the address designated as the address of the registered agent of the financial institution in a registration filed with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution. Tex. Fin. Code Ann. § 59.008 (Vernon 2007 & Supp. 2015).

c. Real Property

To attach real property, the officer levying the writ shall immediately file a copy of the writ and the applicable part of the return with the county clerk of each county in which the property is located. Tex. Civ. Prac. & Rem. § 61.043(a) (Vernon 2008 & Supp. 2015).

d. Attachment Lien

Unless quashed or vacated, an executed writ of attachment creates a lien from the date of levy on the real property attached, on the personal property held by the attaching officer, and on the proceeds of any attached personal property that may have been sold. Tex. Civ. Prac. & Rem. § 61.061 (Vernon 2008 & Supp. 2015). Lien of attaching creditor is fixed at time of levy of attachment, and he is entitled or not entitled to immediate possession through an officer at that time. Sanders v. Farrier, 271 S.W. 293 (Tex. Civ. App. - Texarkana 1925, dismissed w.o.j.).

10. Return of Writ

The officer executing the writ of attachment shall return the writ, with his action endorsed thereon, or attached thereto, signed by him

officially, to the court from which it issued, at or before 10 o'clock a.m. of the Monday next after the expiration of fifteen days from the date of issuance of the writ. The return shall describe the property attached with sufficient certainty to identify it, and state when the same was attached, and whether any personal property attached remains still in his hands, and, if not, the disposition made of the same. When property has been replevied, he shall deliver the replevy bond to the clerk to be filed with the papers of the cause. Tex. R. Civ. P. 606.

11. Claim on Attached Personalty by Third Party.

A person other than the defendant may claim attached personal property by making an affidavit and giving bond in the manner provided by law for trial of right of property. Tex. Civ. Prac. & Rem. Code §61.044 (Vernon 2008 & Supp. 2015).

12. Dissolution or Modification of Writ of Attachment

a. Motion to Dissolve Writ

A defendant whose property has been attached or any intervening party who claims a interest in such property, may by sworn written motion, seek to vacate, dissolve, or modify the writ, and the order directing its issuance for any grounds or cause, extrinsic or intrinsic. Tex. R. Civ. P. 608.

Such motion shall admit or deny each finding of the order directing the issuance of the writ except where the movant is unable to admit or deny the finding, in which case movant shall set forth the reasons why he cannot admit or deny. Id.

b. Notice and Hearing

Unless the parties agree to an extension of time, the motion shall be heard promptly, after reasonable notice to the plaintiff, which may be less than three days, and the issue shall be determined not later than ten days after the motion is filed. Id.

The writ shall be dissolved unless at such hearing, the plaintiff shall prove the grounds relied upon for its issuance, but the court may modify its previous order granting the writ and the writ issued pursuant to it. Id.

The movant shall have the burden to prove that the reasonable value of the property attached exceeds the amount necessary to secure the debt, interest for one year, and probable costs. Id.

The court may determine the issue upon the basis of affidavits, if uncontroverted, setting forth such facts as would be admissible in evidence. Otherwise, the parties must submit evidence. Id.

The court may make such orders, including orders concerning the care, preservation, or disposition of the property, or the proceeds therefrom if the same has been sold, as justice may require. Id.

If the movant has given a replevy bond, an order to vacate or dissolve the writ shall vacate the replevy bond and discharge the sureties thereon. If the court modifies its order or the writ issued pursuant thereto, it shall make such further orders with respect to the bond as maybe consistent with its modification. Id.

13. Defendant's Replevy

a. Right to Replevy

At any time before judgment, should the attached property not have been previously claimed or sold, the defendant may replevy the same, or any part thereof, or the proceeds from the sale of the property if it has been sold under order of the court, by giving bond. Tex. R. Civ. P. 599.

b. Defendant's Replevy Bond

To replevy either the property or the sale proceeds, the defendant must first make a bond, with sufficient surety or sureties as provided by statute, to be approved by the officer who levied the writ, payable to plaintiff, in the amount fixed by the court's order, or, at the defendant's option, for the value of the property sought to be replevied (to be estimated by the officer), plus one year's interest thereon at the legal rate from the date of the bond, conditioned that the defendant shall satisfy, to the extent of the penal amount of the bond, any judgment which may be rendered against him in such action. Tex. R. Civ. P. 599.

14. Substitution of Property

On reasonable notice to the opposing party, which may be less than three days, the defendant shall have the right to move for a substitution of property, of equal value as that attached, for the property attached. Provided there has been

located sufficient property of defendants to satisfy the order of attachment, the court may authorize substitution of one or more items of defendant's property for all or for part of the property attached,. The court shall first make findings as to the value of the property to be substituted. If the property is substituted, the property released from attachment shall be delivered to defendant, if such property is personal property, and all liens upon such property from the original order of attachment or modification thereof shall be terminated. Tex. R. Civ. P. 599.

15. Sale of Perishable Property

a. Proof of Immediate Waste, Decay, Expense or Deterioration in Value

Whenever personal property which has been attached has not been claimed or replevied, the judge out of whose court the writ issue may order the same sold, when it made to appear that such property is in danger of serious and immediate waste or decay, or that the keeping of the same until the trial will necessarily be attended with such expense or deterioration in value as greatly to lessen the amount likely to be realized therefrom. Tex. R. Civ. P. 600.

b. Bond of Applicant for Sale

The applicant for an order of sale shall file a bond payable to defendant, with two or more good and sufficient sureties, to be approved by the court, conditioned that they will be responsible to the defendant for such damages as he may sustain in case such sale be illegally and unjustly applied for, or be illegally and unjustly made. Tex. R. Civ. P. 602.

c. Procedure for Sale

A sale of attached perishable personal property shall be conducted in the same manner as sales of personal property under execution. However, the time of the sale and the manner of advertisement may be fixed by the judge at a time earlier than ten days, according to the exigency of the case. Tex. R. Civ. P. 603.

d. Return of Sale

The officer making a sale of personal property shall promptly pay the proceeds of the sale to the clerk of court and shall make written return of the order of sale signed by him officially, stating the time and place of the sale, the name of the purchaser, and the amount of money received, with an itemized account of the expenses attending the sale. Tex. R. Civ. P. 604.

16. Return of Writ

The officer executing the writ of attachment shall return the writ, with his action endorsed thereon, or attached thereto, signed by him officially, to the court from which it issued, at or before 10 o'clock a.m. of the Monday next after the expiration of fifteen days from the date of issuance of the writ. Such return shall describe the property attached with sufficient certainty to identify it, and state when the same was attached, and whether any personal property attached remains still in his hands, and, if not, the disposition made of the same. When property has been replevied he shall deliver the replevy bond to the clerk or justice of the peace to be filed with the papers of the cause. Tex. R. Civ. P. 606.

17. Report of Disposition of Property

When the property levied on is claimed, replevied or sold, or otherwise disposed of after the writ has been returned, the officer having custody of the same shall immediately make a report in writing, signed by him officially, to the clerk showing such disposition of the property. Such report shall be filed among the papers of the cause. Tex. R. Civ. P. 607.

18. Amendment

Clerical errors in the affidavit, bond, or writ of attachment, or the officer's return thereof, may be upon application in writing to the judge of the court in which the suit is filed, and after notice to the opponent, be amended in such manner and on such terms as the judge shall authorize by order, provided the amendment does not change or add to the grounds of such attachment as stated in the affidavit, and provided such amendment appears to the judge to be in furtherance of justice. Tex. R. Civ. P. 609.

Requirements of this rule must be satisfied before an attachment bond may be corrected or substituted. Carpenter v. Carpenter, 476 S.W.2d at 470 [Where the original attachment bond did not comply with statutory requirements and the requirements of rule 609 were not complied with prior to the filing of a second attachment bond, the writ of attachment, based upon bond, was invalid].

19. Judgment and Foreclosure

a. Personal Property

If the plaintiff recovers in the suit, the attachment lien is foreclosed as in the case of other liens. The court shall direct proceeds from personal property previously sold to be applied to the satisfaction of the judgment and the sale of personal property remaining in the hands of the officer and of the real property levied on to satisfy the judgment. Tex. Civ. Prac. & Rem. Code Ann. § 61.062(a) (Vernon 2008 & Supp. 2015).

b. Real Property

If the writ of attachment on real property was issued from a county or justice court, the court is not required to enter an order or decree foreclosing the lien, but to preserve the lien the judgment must briefly recite the issuance and levy of the writ. The land may be sold under execution after judgment, and the sale vests in the purchaser all of the estate of the defendant in the land at the time of the levy. Tex. Civ. Prac. & Rem. § 61.062(b) (Vernon 2008 & Supp. 2015).

c. Judgment on Replevied Property

A judgment against a defendant who has replevied attached personal property shall be against the defendant and his sureties on the replevy bond for the amount of the judgment plus interest and costs or for an amount equal to the value of the replevied property plus interest, according to the terms of the replevy bond. Tex. Civ. Prac. & Rem. § 61.063 (Vernon 2008 & Supp. 2015).

V. PREJUDGMENT GARNISHMENT

A. Seminal Authority

1. Statute

Tex. Civ. Prac. & Rem. Code Ann. § 63.001 – .008 (Vernon 2008 & Supp. 2015)

2. Rules

Tex. R. Civ. P. 657 - 679

B. Purpose and Use

The purpose of prejudgment garnishment is to prevent a third party in possession of effects of a defendant or indebted to defendant from delivering those effects or paying that debt to the defendant while the action is pending. Tex. Civ. Prac. & Rem. Code, §63.001 et seq.; Tex. R. Civ. P. 657 et seq. See Bank One v. Sunbelt Sav., 824 S.W.2d (Tex. 1992) [Garnishment is a statutory proceeding whereby the property, money, or credits of a debtor in the possession of another are applied to the payment of the debt.]

Reported decisional law states that the purpose of a "writ of garnishment" is to notify garnishee when and where he is required to answer interrogatories propounded and to impound assets and property of a debtor in hands of a third person which cannot ordinarily be seized by writs of execution and attachment. Hanson v. Guardian Trust Co., 150 S.W.2d 465 (Tex. Civ. App. - Galveston 1941, writ dismissed).

The writ of garnishment challenges title to funds held by a third party, naming the nominal owner not the true owner. The court is then responsible for determining true ownership. Bank One v. Sunbelt Sav., 824 S.W.2d 557, 558.

If the garnishee is a corporation or a joint-stock company, after service of the writ the garnishee may not permit or recognize a sale or transfer of shares or an interest alleged to be owned by the defendant. Tex. Civ. Prac. & Rem. Code Ann. § 63.003 (Vernon 2008 & Supp. 2015).

When damages are unliquidated and in their nature uncertain, the demand is not subject to garnishment. Cleveland v. San Antonio Bldg. & Loan Ass'n, 148 Tex. 211, 223 S.W.2d 226, 228 (Tex. 1949). Further, a tort action is not subject to garnishment because it is both contingent and unliquidated. Albright v. Regions Bank, No. 13-08-262-CV (Tex. App. - Corpus Christi October 29, 2009, no pet.) [Pre judgment garnishment is not available when the plaintiff's actions against the defendant clearly sound in tort. Prejudgment garnishment was improperly granted when bank sued the owner for fraud and fraudulent misrepresentation]; In re Tex. Am. Express, Inc., 190 S.W.3d 720, 726 (Tex. App.-Dallas 2005).

The remedy of garnishment is summary and harsh. It may impound property, money, or credits of an alleged debtor before a judgment is rendered against him in the main suit. A creditor who pursues prejudgment garnishment is at risk that the debtor may institute proceedings for wrongful garnishment. This risk is heightened when issuance of a writ of garnishment before judgment forces a defendant out of business or

causes him severe economic loss. The creditor's attorney should ensure that the applicable prerequisites for issuance of the prejudgment writ of garnishment are satisfied. See Tex. Civ. Prac. & Rem. Code Ann. § 63.001(1), (2) (Vernon 2008 & Supp. 2015).

C. Constitutionality

The Texas prejudgment garnishment statutes and rules provide prior notice and hearing and meet federal Constitutional requirements. Southwest Metal Fabricators v. Internacional de Aceros, S.A., 503 F. Supp. 76 (S.D. Tex. 1980); Lincoln Ten, Ltd. v. White, 706 S.W.2d 125 (Tex. App. – Houston [14th Dist.] 1986, no writ].

D. Availability of Remedy

1. Availability Against Financial Institutions

Prejudgment garnishment is not available against a financial institution with its principal or a branch office in Texas**.** Tex. Fin. Code § 59.007(a) (Vernon 2008 & Supp. 2015) (prohibition of issuance of writ before judgment is final and non-appealable). Garnishment may not be issued against or served on a financial institution that has its principal office or a branch in this state to collect a prospective money judgment against the financial institution before the judgment is final and all appeals have been foreclosed by law. Id.

"Financial institution" "means a bank, savings association, or savings bank maintaining an office, branch, or agency office in this state." Tex. Fin. Code § 31.002(25) (Vernon 2008 & Supp. 2015).

2. Availability Against a Customer of Financial a Institution

Prejudgment garnishment is available against a customer of a financial institution. Tex. Fin. Code § 59.007(b) (securing a prospective money judgment against a customer of the financial institution); § 59.008 (procedure for claims against customers of financial institutions).

"... (A) writ of garnishment issued to or served on a financial institution for the purpose of collecting a money judgment or securing a prospective money judgment against a customer of the financial institution is governed by Tex. Fin. Code § 59.008…" Tex. Fin. Code § 59.007(b) (Vernon 2008 & Supp. 2015).

"A claim against a customer of a financial institution shall be delivered or served as otherwise required or permitted by law at the address designated as the address of the registered agent of the financial institution in a registration filed with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution." Tex. Fin. Code § 59.008(a) (Vernon 2008 & Supp. 2015).

"If a financial institution files a registration statement with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution, a claim against a customer of the financial institution is not effective as to the financial institution if the claim is served or delivered to an address other than that designated by the financial institution in the registration as the address of the financial institution's registered agent." Tex. Fin. Code § 59.008(b).

"The customer bears the burden of preventing or limiting a financial institution's compliance with or response to a claim subject to this section by seeking an appropriate remedy, including a restraining order, injunction, protective order, or other remedy, to prevent or suspend the financial institution's response to a claim against the customer." Tex. Fin. Code § 59.008(c).

"A financial institution that does not file a registration with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution, is subject to service or delivery of all claims against customers of the financial institution as otherwise provided by law." Tex. Fin. Code § 59.008(d).

E. Procedure

Garnishment proceedings are purely statutory; they are unknown to common law. Beggs v. Fite, 106 S.W.2d 1039 (Tex.1937); See Bank One v. Sunbelt Sav., 824 S.W.2d (Tex. 1992). Garnishment proceedings cannot be sustained unless they are in strict conformity with statutory requirements and related rules. Id.; Walnut Equipment Leasing Co. v. J-V Dirt & Loam, a Div. of J-V Marble Mfg., Inc., 907 S.W.2d 912 (Tex. App. - Austin 1995, writ denied).

1. When Writ is Available

Either at the commencement of a suit or at any time during its progress the plaintiff may file an application for a writ of garnishment. Tex. R. Civ. P. 658.

2. Grounds

The grounds for prejudgment garnishment are set forth in Tex. Civ. Prac. & Rem. Code Ann. § 63.001(1), (2) (Vernon 2008 & Supp. 2015). A prejudgment writ of garnishment is available if –

1. an original attachment has been issued; or

2. the plaintiff sues on the debt and makes an affidavit that –

a. the debt is just, due, and unpaid;

b. within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and

c. the garnishment is not sought to injure the defendant or garnishee.

Tex. Civ. Prac. & Rem. Code Ann. § 63.001(1), (2) (Vernon 2008 & Supp. 2015); see Simulis, L.L.C. v. G.E. Capital Corp, 276 S.W.3d 109 (Tex. App. - Houston [1 Dist.] 2008) [Subsection (2) of section 63.001 applies to pre-judgment writs of garnishment; subsection (3) plainly applies to post-judgment garnishment.]

3. Application

a. Requisites of Application

Tex. R. Civ. P. 658 provides that the application "shall be supported by affidavits of the plaintiff, his agent or his attorney or other person having knowledge of relevant facts. The application shall comply with all statutory requirements and state the grounds for issuing the writ and the specific facts relied upon by the plaintiff to warrant the required findings by the court."

b. Affidavit Required. The application must be supported by an affidavit of the plaintiff, his agent, his attorney, or another person having personal knowledge of relevant facts. It must meet all statutory requirements and must state grounds for issuing the writ and specific facts relied on by the plaintiff sufficient to warrant the required findings by the court. The writ shall not be quashed because two or more grounds are stated conjunctively or disjunctively. Tex. R. Civ. P. 658. The garnishor has the burden to "prove the grounds relied upon" for issuance of writ and any failure on its part to carry such burden with respect to each ground in statute authorizing issuance of prejudgment garnishment would require trial court to deny the writ. See Huie-Clark Joint Venture v. American States Ins. Co. of Texas, 629 S.W.2d 109 (Tex. App. - Dallas 1981, writ ref'd n.r.e.) [applying principle to dissolution of writ of garnishment]; Tex. Civ. Prac. & Rem. Code § 63.001(2) (Vernon 2008 & Supp. 2015).

Neither Tex. Civ. Prac. & Rem. Code §63.001(2) nor Tex. R. Civ. P. 658 has not been amended to address unsworn declarations authorized by Tex. Civ. Prac. & Rem. Code §132.001.

Paragraph II.B. discusses use of an unsworn declaration in lieu of an affidavit authorized by Tex. Civ. Prac. & Rem. Code §132.001.

c. Personal Knowledge or Information and Belief.

The affidavit must be based on personal knowledge, be positive and unequivocal in stating that allegations are true and that matters sworn to are within personal knowledge of affiant. It must contain facts that would constitute admissible evidence. Facts may be stated on information and belief but only if the grounds for such belief are specifically stated. The trial court has discretion to determine whether an affidavit meets the "personal knowledge" requirement of Tex. R. Civ. P. 658. See Metroplex Factors, Inc. v. First National Bank, 610 S.W.2d 862, 865 (Tex. Civ. App. - Fort Worth 1980, writ ref'd n.r.e.).

An application for a pre-judgment writ of garnishment (and its supporting affidavit) will necessarily contain some different recitations from those in an application for a post-judgment writ of garnishment (and its supporting affidavit). Simulis, L.L.C. v. G.E. Capital Corp, 276 S.W.3d 109 (Tex. App. - Houston [1 Dist.] 2008).

An affidavit not affirmatively stating the specific grounds for issuance and the specific acts of the defendant entitling plaintiff to issuance of the writ will not support issuance of the writ. If the affidavit is made on information and belief, the grounds for that belief must be specifically stated. El Periodico, Inc. v. Parks Oil Co., 917 S.W.2d 777, 778-79 (Tex. 1996) (The allegation of garnishee's indebtedness to

the judgment debtor made on belief of counsel did not meet the requirements or rule 658 as the grounds for such belief were not specifically stated). Paragraph II.B. cautions against a creditor's attorney signing an affidavit.

d. Statutory Requirements for Affidavit or Unsworn Declaration in Lieu Thereof

The affidavit must state that –

1. the debt is just, due, and unpaid;
2. within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and
3. the garnishment is not sought to injure the defendant or the garnishee.

Tex. Civ. Prac. & Rem. Code § 63.001(2) (Vernon 2008 & Supp. 2015); see Simulis, L.L.C. v. G.E. Capital Corp, 276 S.W.3d 109 [Subsection (2) of section 63.001 applies to pre-judgment writs of garnishment; subsection (3) plainly applies to post-judgment garnishment.]

Neither Tex. Civ. Prac. & Rem. Code § 63.001(2) nor Tex. R. Civ. P. 658 has yet been amended to address unsworn declarations authorized by Tex. Civ. Prac. & Rem. Code §132.001.

The plaintiff is not required to prove as a matter of fact that the debtor does not have assets sufficient to satisfy the debt. The statute requires only that the plaintiff have no knowledge of any property owned by the defendant within the state sufficient to satisfy the debt. Tex. Civ. Prac. & Rem. Code Ann. § 63.001(2)(B), (3) (Vernon 2008 & Supp. 2015).

The fact that the affidavit fails to state that within the plaintiff's knowledge the debtor does not possess property in Texas subject to execution sufficient to satisfy the debt does not give the debtor grounds for wrongful garnishment, although it may serve as a basis for quashing the writ on the garnishee's motion. Cf. Canyon Lake Bank v. Townsend, 649 S.W.2d 809 (Tex. App. - Austin 1983, writ ref'd n.r.e.) (postjudgment garnishment case construing affidavit requirement identical to affidavit requirement for prejudgment under Tex. Civ. Prac. & Rem. Code Ann. § 63.001(2)(B)). Significant defects in a garnishor's affidavit may be waived if the garnishee fails to appear and answer. See Sherry Lane National Bank v. Bank of Evergreen, 715 S.W.2d 148, 150 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.).

4. Order

An order granting the application must be issued before a writ may issue. Tex. R. Civ. P. 658. The court in its order granting the application must make specific findings of fact to support the statutory grounds found to exist, and shall specify the maximum value of property or indebtedness that may be garnished and the amount of bond required of plaintiff. Id.

5. Applicant's Bond

a. Filing Requirement

No writ of prejudgment garnishment shall issue until the party applying for it has filed with the officer authorized to issue such writ a bond payable to the defendant in the amount fixed by the court's order, with sufficient surety or sureties as provided by statute, conditioned that the plaintiff will prosecute his suit to effect and pay to the extent of the penal amount of the bond all damages and costs as may be adjudged against him for wrongfully suing out such writ of prejudgment garnishment. Tex. R. Civ. P. 658a.

b. Amount of Bond

Bond shall be in an amount which, in the opinion of the court, shall adequately compensate defendant in the event plaintiff fails to execute his suit to effect, and pay all damages and costs as shall be adjudged against him for wrongfully suing out the writ of garnishment. Tex. R. Civ. P. 658.

c. Increase or Reduction in Amount of Bond

After notice to the opposite party, either before or after issuance of the writ, the defendant or plaintiff may file a motion to increase or reduce the amount of such bond, or to question the sufficiency of the sureties. Upon hearing, the court shall enter its order with respect to such bond and the sufficiency of the sureties. Tex. R. Civ. P. 658a.

6. Case Docketing

Once the application, affidavit and bond are filed, the case must be docketed in the name of the plaintiff as plaintiff and the garnishee as defendant; and a writ of garnishment shall immediately issue directed to the garnishee, commanding him to appear before the court out of which the same is issued at or before 10 o'clock a.m. of the Monday next following the

expiration of twenty days from the date the writ is served. Tex. R. Civ. P. 659. The statute contemplates separate docketing under a different cause number. See Cloughy v. NBC Bank-Sequin, 773 S.W.2d 652 (Tex. App. - San Antonio 1989, writ denied) (In post judgment garnishment, the validity of the judgment was not affected by filing of a writ of garnishment under same cause number as the judgment).

7. Form of the Prejudgment Garnishment Writ

The form for a writ of garnishment is set out in Tex. R. Civ. P. 661.

8. Delivery of Writ

The writ of garnishment may be delivered to the sheriff or constable by the officer who issued it, or may deliver it to the plaintiff, his agent or attorney, for that purpose. Tex. R. Civ. P. 662.

9. Execution and Return of Writ

The sheriff or constable receiving the writ or garnishment shall immediately proceed to execute the same by delivering a copy of it to the garnishee and shall make a return as of other citation. Tex. R. Civ. P. 633.

Amendments to Rules 103 and 536(a) of the Texas Rules of Civil Procedure appear to authorize execution of a writ of garnishment by a certified process server. Service of a writ of post judgment garnishment does not involve actual taking of possession of a property or thing and does not require that an enforcement action be physically enforced by the person delivering the process. *See* Goldberg, *Dealing With Sheriffs and Constables*, Collecting Debts and Judgments, University of Law Foundation, 2005. There is authority before the amended rules prohibiting private process servers from executing writs of garnishment. Moody Nat'l Bank v. Riebshlager, 946 S.W.2d 521, 523 n.1 (Tex. App. - Houston [14th Dist.] 1997, writ denied).

There is another view on the effect of the amended rules on garnishment. Donna Brown, author of the article on Post Judgment Remedies in the Fall Edition of The Advocate 200_, opines that the amendment requires a written court order for private process servers to serve writs of garnishment as the rules contemplate an officer taking "effects."

After service of the writ "the garnishee may not deliver any effects or pay any debt to the defendant." Any such delivery or payment is void. Tex. Civ. Prac. & Rem. Code § 63.003(a), (b) (Vernon 2008 & Supp. 2015).

10. Impoundment

Execution of a writ of garnishment on the garnishee impounds alleged money, property, or credits of the debtor. Beggs v. Fite, 106 S.W.2d 1039, 1042; Mendoza v. Luke Fruia Investments, Inc., 962 S.W.2d 650, 651 (Tex. App. - Corpus Christi 1998, rev'd on other grounds, 41 S.W.3d 781, Tex. App. - Corpus Christi, 2001). See Tex. R. Civ. P. 663a [notice to debtor of the right to regain possession of property garnished].

After service of a writ of garnishment, the garnishee may not deliver any effects or pay any debt to the defendant. If the garnishee is a corporation or a joint-stock company, after service of the writ the garnishee may not permit or recognize a sale or transfer of shares or an interest alleged to be owned by the defendant. Tex. Civ. Prac. & Rem. Code Ann. §63.003 (Vernon 2008 & Supp. 2015).

The funds captured by the writ of garnishment are those held by the garnishee in the account of the judgment debtor on the date the writ is served, and any additional funds deposited through the date the garnishee is required to answer. Wrigley v. First Nat'l Sec. Corp., 104 S.W.2d 259, 264 (Tex. App. - Beaumont 2003, no pet.); Chandler v. El Paso Nat. Bank, 539 S.W.2d 832 (Tex. Civ. App. - El Paso 1979, no writ) [A writ of garnishment impounds funds in hands of a bank when the writ is served and also impounds such funds belonging to the debtor up to and including the date the garnishee has to answer.] See Citizens Nat. Bank of Dallas v. Hill, 505 S.W.2d 246, 248 (Tex.1974); Hudnall v. Tyler Bank and Trust Co., 458 S.W.2d 183, 186 (Tex.1970) [Funds placed with a bank ordinarily become general deposits which create a debtor-creditor relationship between the bank and its depositor.]

11. Service of Writ on Defendant

The defendant shall be served in any manner prescribed for service of citation or as provided by Rule 21a with a copy of the writ of garnishment, the application, accompanying affidavits and orders of the court as soon as practicable following service of the writ. The copy of the writ served on the defendant must include, in ten-point type and in a manner

calculated to advise a reasonably attentive person of its contents, the following statement:

> To _____, Defendant
>
> You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:
>
> YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BE FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

Tex. R. Civ. P. 663a.

Some court clerks provide additional copies of the writs with the notice language. Others do not. In that case, it is necessary to photocopy the writ and type the notice language on the face of the copy before serving it on the defendant.

The debtor must be given notice of the garnishment and of his rights to regain his property, and about the specific information that must be provided so that the writ may be contested. Abdullah v. State, 211 S.W.938, 943 (Tex. App. - Texarkana 2009, no pet.) (stating that Rule 663a is unambiguous); see Walnut Equipment Leasing Co. v. J-V Dirt & Loam, a Div. of J-V Marble Mfg., Inc., 907 S.W.2d 912 (Tex. App. – Austin, 1995) [post judgment writ of garnishment dissolved when garnishor failed to serve judgment debtor with a copy of the writ.] Actual knowledge or voluntary appearance by the debtor is insufficient and does not waive rule 663a's requirement of service of the writ. The debtor has the right of service of the writ of garnishment and related documents "as soon as reasonably practicably following the service of the writ" on the garnishee. Lease Fin. Grp. v. Childers, 310 S.W. 120, 125 (Tex. App. - Fort Worth 2010, no pet.)

Failure to serve the debtor with notice may be procedurally defective and fatal to the prejudgment garnishment action. Id.; See Walnut Equipment Leasing Co. v. J-V Dirt & Loam, 907 S.W.2d 912, 916 (Tex. App. – Austin 1995, writ denied) [a postjudgment garnishment case in which the court held that the garnishor's failure to serve the debtor under Tex. R. Civ. P. 663a was fatal to the garnishment action, even though the debtor may have had actual notice of it].

Although the debtor must be served with notice of the garnishment proceedings, the garnishee does not have standing to sue or to appeal based on a right of service belonging to the debtor. Sherry Lane National Bank v. Bank of Evergreen, 715 S.W.2d 148, 151-52 (Tex. App. - Dallas 1986, writ ref'd n.r.e.). It is a fundamental rule of law that only the person whose primary legal right has been breached may seek redress for an injury. Nobles v. Marcus, 533 S.W.2d 923, 927 (Tex. 1976). Without breach of a legal right belonging to the garnishee no cause of action can accrue to its benefit. See Id. at 927.

12. Answer to Writ

a. Garnishee's Answer

The answer of the garnishee shall be under oath, in writing and signed by him, and shall make true answers to the several matters inquired of the writ of garnishment. Tex. R. Civ. P. 665.

b. Traverse to Garnishee's Answer

(1) Right to Traverse. If the plaintiff should not be satisfied with the answer of the garnishee, he may controvert the same by his affidavit stating that he has good reason to believe, and does, believe, that the answer of the garnishee is incorrect, stating in what particular he believes the same to be incorrect. In like manner, the defendant may also controvert the answer of the garnishee. Tex. R. Civ. P. 673.

(2) Issue Formation. If the garnishee whose answer is controverted is a resident of the county in which the proceeding is pending, an issue shall be formed and tried as in other cases. Tex. R. Civ. P. 674.

(3) Docketing, Notice and Trial. When the garnishee's answer is controverted, the clerk of court shall docket the case in the name of the plaintiff as plaintiff and the garnishee as defendant, issue a notice to the garnishee, stating that his answer has been so controverted, and that such issue a notice to the garnishee stating

that the issue will stand for trial on the docket of such court. Tex. R. Civ. P. 675. Upon return of the notice, the issue shall be tried as in other cases. Tex. R. Civ. P. 676.

13. Discharge of Garnishee

a. Garnishee Not Indebted to Defendant [Discharge by Court]

If the answer shows that the garnishee is not indebted to the defendant, and was not so indebted when the writ of garnishment was served on him, and that he does not have in his possession any effects of the defendant and had none when the writ was served, and if he has either denied that any other persons within his knowledge are indebted to the defendant or have in their possession effects belonging to the defendant, or else named such persons, the court shall enter a judgment discharging the garnishee unless the answer of the garnishee is controverted. J. C. Hadsell & Co., Inc. v. Allstate Ins. Co., 516 S.W.2d 211 (Tex. Ct. Civ. App. - Texarkana 1974, writ dismissed); Tex. R. Civ. P. 666.

b. Garnishee Indebted and Delivers Property to Sheriff [Discharge of Defendant's Claims].

It shall be sufficient answer to any claim of the defendant against the garnishee founded on an indebtedness of such garnishee, or on the possession by him of any effects, for the garnishee to show that such indebtedness has been paid or such effects have been delivered to any sheriff or constable. Tex. R. Civ. P. 678.

14. Amendment

Clerical errors in the affidavit, bond, or writ of garnishment or the officer's return thereof, may upon application in writing to the judge or justice of the peace in which the suit is filed, and after notice to the opponent, be amended in such manner and on such terms as the judge or justice shall authorize by an order entered in the minutes of the court, provided such amendment appears to the judge or justice to be in furtherance of justice. Tex. R. Civ. P. 679. Rule 679 authorizes correction of clerical errors (such as a missing seal) but does not apply to substantive matters, such as the sufficiency of the required supporting affidavits or other deficiencies in the application for writ of garnishment.

15. Default Judgment

If a garnishee fails to file an answer to the writ of garnishment at or before the time directed in the writ, the court may render judgment by default against the garnishee, as in other civil cases, for the full amount of such judgment against the defendant together with all interest and costs that may have accrued in the main case and also in the garnishment proceedings.

The answer of the garnishee may be filed as in any other civil case at any time before such default judgment is rendered. Tex. R. Civ. P. 667.

Default judgment may be entered for the full amount of the original debtor's indebtedness against a garnishee that files a defective answer. Falderbaum v. Lowe, 964 S.W.2d 744, 747 (Tex. App. - Austin 1998, no pet.) (Garnishee could not claim that the district court lacked subject matter jurisdiction to enforce the garnishment order when she failed to properly challenge the trial court's jurisdiction when the writ of garnishment was originally issued).

Observe that under Tex. R. Civ. P. 667 the court may not award the garnishor reasonable attorney's fees. Compare Tex. Fin. Code §276.002(c) with Tex. R. Civ. P. 667. The assessment of damages against the defaulting garnishee is premised on a presumption that the garnishee is indebted to the debtor in an amount sufficient to satisfy the claim of the garnishor. Norton v. B. & A. Drilling Co., 34 S.W.2d 1095, 1097 (Tex. Comm'n App. 1931).

16. Costs

When the garnishee is discharged upon his answer, the costs of the proceeding, including reasonable compensation to the garnishee, shall be taxed against the plaintiff. Where the answer of the garnishee has not been controverted and the garnishee is held thereon, such costs shall be taxed against the defendant and included in execution. Where the answer is contested, the court shall determine taxation for costs. Tex. R. Civ. P. 677.

The term "costs" in Rule 677 has repeatedly been interpreted to include attorney's fees. Rule 677 gives only a garnishee the right to recover attorney's fees, and nothing in the rule allows a garnishor to recover attorney's fees from the debtor. The rule does not provide for the debtor to recovery attorney's fees, any more than it

provides for the garnishor's recovery of fees. General Elec. Capital Corp. v. ICO, Inc., 230 S.W.3d 702, 710 (Tex. App. - Houston 2007, pet denied).

17. Replevy by Defendant

a. Right to Replevy

At any time before judgment, the defendant may replevy all or part of the garnished property (or the proceeds from sale of the garnished property if it has been sold under order of the court) by posting bond. Tex. R. Civ. P. 664.

c. Replevy Bond

The court must find in its order for issuance of a writ of garnishment the amount of bond required for the defendant to replevy. Tex. R. Civ. P. 658.

The defendant's replevy bond must be in the amount of the plaintiff's claim, one year's interest if allowed by law on the claim, and the estimated costs of court, unless the defendant exercises his option under rule 664 to post bond in the amount of the value of the property, as estimated by the officer who levied the writ, plus one year's interest at the legal rate. Tex. R. Civ. P. 658, 664.

A replevy bond assumes liability of garnishee and simply stands in place of funds held by garnishee as far as payment of judgment against judgment debtor is concerned. See First Nat. Bank in Dallas v. Banco Longoria, S. A., 356 S.W.2d 192 (Tex. Civ. App. - San Antonio 1962, writ ref. n.r.e.).

No judgment should be rendered against a garnishee if a proper replevy bond is made by the principal defendant. Thomas v. Beuhler, 254 S.W.2d 223, 224 (Tex. Civ. App. - Austin 1953, no writ).

18. Motion to Review Garnishment Bond

One reasonable notice, which may be less than three days, the amount or denial of the bond, the sufficiency of the sureties, or the estimated value of the property may be reviewed, on motion of either party, by the court that authorized issuance of the writ. Tex. R. Civ. P. 664.

19. Motion to Substitute Property

On motion by the defendant, which may be made less than three days, the defendant may move to substitute other property for the property garnished. Tex. R. Civ. P. 664.

20. Dissolution or Modification of Writ of Garnishment

a. Sworn Written Motion

A defendant whose property or account has been garnished or any intervening party claiming an interest in garnished property may, by sworn written motion, seek to dissolve or modify the writ. Tex. R. Civ. P. 664a. There is decisional authority that a garnishee's unsworn motion to dissolve a writ may be sufficient. See Central Park Bank v. LeBlanc, 659 S.W.2d 872 (Tex. App. - San Antonio 1983, no writ) [saying the error, if any, was harmless]. The better practice is to comply with the express provision of rule 664a and file a sworn written motion when seeking to vacate, dissolve or modify a writ of garnishment. It would be improvident knowingly to file an unsworn motion to dissolve a writ of garnishment in planned reliance on court's subsequent finding of harmlessness.

b. Content of Motion

The motion to dissolve or modify "shall admit or deny each finding of the order directing the issuance of the writ except where the movant is unable to admit or deny the finding, in which case movant shall set forth the reasons why he cannot admit or deny." Tex. R. Civ. P. 664a.

This requirement does not necessarily mean that the denial must appear on the face of the motion, or that each individual finding must be separately denied. See Glassman & Glassman v. Somoza, 694 S.W.2d 174, 177 (Tex. App. - Houston [14th Dist.] 1985, no writ) [motion set forth findings of court and attached affidavit denied "the findings set out above" were sufficient, because requirements of rule 664a were met by reading motion and affidavit together]; see also Metroplex Factors, Inc. v. First National Bank, 610 S.W.2d 862, 866-67 (Tex. Civ. App. - Fort Worth 1980, writ ref'd n.r.e.) [defendant's motion to quash was sufficient to comply with rule 664a when it discussed court's findings but did not specifically enumerate admissions or denials of those findings].

A Rule 664a hearing is a distinct proceeding from the writ of garnishment proceeding between a garnishor and garnishee. The issue to be determined in a Rule 664a hearing is that "the

plaintiff shall prove the grounds relied upon for issuance of the writ of garnishment). Swiderski v. Victoria Bank & Trust Co., 706 S.W.2d 676, 678 (Tex. App. - Corpus Christi, writ ref'd n.r.e.).

c. Hearing on Motion

(1) Time for Hearing

The motion to dissolve must be heard promptly, after reasonable notice to the plaintiff, which may be less than three days, and the issue must be determined not later than ten days after the motion is filed. The parties may agree to an extension of time. Filing a motion to dissolve stays further proceedings under the writ until after the hearing on the motion. There are exceptions for perishable property. Tex. R. Civ. P. 664a.

(2) Burden of Proof

(a) Movant's Burden

The movant for dissolution or modification has the burden to prove that the reasonable value of the property garnished exceeds the amount necessary to secure the debt, interest for one year, and probable costs. The movant also has the burden to prove facts to justify substitution of property.

(b) Plaintiff's Burden

The plaintiff has the burden to prove the grounds relied on for issuance of the writ. Tex. R. Civ. P. 664a. Any failure to carry this burden with respect to each statutory ground will require the trial court to dissolve the writ. Huie-Clark Joint Venture v. American States Insurance Co., 629 S.W.2d 109, 110-111 (Tex. App. - Dallas 1981, writ ref'd n.r.e.). See Cadle Co. v. Davis, No. 04-09-00763 (Tex. App. - San Antonio 2010, pet. denied) ["Rule 664a provides a writ shall be dissolved unless at the hearing on the motion to dissolve the garnishor proves the grounds relied upon for its issuance.]

21. Third Party Rights to Garnished Property

Garnishment of a debt represented by a promissory note does not affect the rights of a holder in due course, even though the garnishment action occurred before the negotiation of the note. The debtor has the responsibility to protect himself by bringing into the garnishment case all claimants to the property garnished. Failure to do so may subject the debtor to double liability. Williams v. Stansbury, 649 S.W.2d 293, 296 (Tex. 1983).

One who would be deprived of a substantial right to assert a security interest to the fund that is subject of the garnishment should be permitted to intervene in a garnishment proceeding. See Apparel Contractors v. Vantage Properties, 620 S.W.2d 666, 668 (Tex. Civ. App. - Dallas 1982, writ ref'd n.r.e.) [postjudgment garnishment proceeding in which the trial court abused discretion by denying intervention].

22. Wrongful Garnishment

Reported Texas cases concerning wrongful garnishment are based on post judgment garnishment proceedings.

A garnishment is wrongful if the facts set forth in the affidavit are false. Chandler v. Cashway Building Materials, Inc., 584 S.W.2d 950, 952 (Tex. Civ. App. - El Paso 1979, no writ) [post judgment garnishment case]. However, even if the applicant for the writ swears falsely that he knows of no property in Texas possessed by the debtor subject to execution and sufficient to satisfy the debt, the debtor may not recover for wrongful garnishment unless he pleads and proves that he does in fact have nonexempt property in Texas sufficient to satisfy the debt and that the plaintiff knew as much before applying for the writ. King v. Tom, 352 S.W.2d 910, 913 (Tex. Civ. App. - El Paso 1961). But see Barr v. Cardiff, 75 S.W. 341 (Tex. Civ. App. 1903, writ ref'd) [grounds alleged by plaintiff for suing out writ of garnishment did not in fact exist, and even though affiant believed its existence, writ was held to be wrongly sued out, resulting in actual damages to defendant).

A garnishment is not wrongful when the district court clerk improperly prepares a writ that causes injury on wrongly named debtor when served. Jamison v. National Loan Investors, L.P., 4 S.W.3d (Tex. App. - Houston [1 Dist.] 1999, no writ) [There is no statutory requirement that the writ be given to a plaintiff before it is executed by the sheriff or constable. Constable who served writ on bank is not the garnishor's agent.]

VI. CONSTITUTIONAL MECHANIC'S LIEN

A. Seminal Authority

Tex. Const. art. XVI, § 37, provides:

> Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens.

B. Self-executing Feature

The constitutional provision is self-executing between owner and laborers and materialmen who contract directly with the owner, without reliance on any statutory provisions. The lien created thereby exists independently of the statute providing for the enforcement of liens. Hayek v. Western Steel Co., 478 S.W.2d 786 (Tex. 1972); Rhoades v. Miller, 414 S.W.2d 942 (Tex. Civ. App. - Tyler 1967, no writ).

The self-executing feature of the constitutional lien means that the lien is valid against the property owner even if the claimant takes no affirmative steps, such as recording the contract, to perfect the lien. Strang v. Pray, 35 S.W. 1054, 1056 (Tex. 1896) [between the contracting parties, the lien attached under the state constitution and was not lost by failure to record the contract or a bill of particulars, as directed by state statutes].

C. Scope and Utility of Constitutional Lien

Between the owner and the original contractor, the constitutional lien extends as far as a statutory lien. Dee's Cabinet Shop, Inc. v. Weber, 562 S.W.2d 945 (Tex. Civ. App. - Fort Worth 1978, no writ).

The constitutional lien on manufactured chattels is available to the manufacturer only upon articles made especially for a purchaser pursuant to a special order and in accordance with the purchaser's plans or specifications. First Nat. Bank in Dallas v. Whirlpool Corp., 517 S.W.2d 262, 268 (Tex. 1975).

The lien of a mechanic or materialman, like the vendor's lien, arises out of the transaction, and exists independent of contract. Myers v. Houston, 30 S.W. 912, 913 (Tex. 1895). The constitutional lien for goods and services provided is useful where the claim is unsecured, undersecured, or secured but there is a defect in perfection of the lien (as an inadequate property description in a lien affidavit).

The lien is enforceable between the owner and the original contractor, without filing the contract or account. Farmers' & Mechanics' Nat. Bank Of Ft. Worth et al. v. Taylor et al., 40 S.W. 876 (Tex. 1897) [those coming within the terms of the constitutional provision are not compelled to take any steps to fix the liens as between themselves and the owners]. See Ball v. Davis, 18 S.W. 1063 (Tex. 1929) [the drilling of an oil well is not either the erection or repair of a building to which a constitutional mechanics lien could attach].

The constitutional lien is not binding on subsequent purchasers who are without actual or constructive notice of the constitutional lien. Dee's Cabinet Shop, Inc. v. Weber, 562 S.W.2d 945, supra [Cabinet supplier, which filed with county clerk two instruments to which no affidavits were attached, could not avail itself of statute providing methods whereby original contractor can enforce his constitutional lien against third parties by way of constructive notice by filing affidavits with county clerk; and instruments filed by cabinet supplier did not give constructive notice to purchasers and holder of deeds on theory that instruments were eligible to be recorded under statute governing what may be recorded]; Stone v. Pitts, 389 S.W.2d 601 (Tex. Civ. App. - Waco 1965, no writ); Newman v. Coker, 310 S.W.2d 354 (Tex. Civ. App. - Amarillo 1958, no writ).

The statutory time and place requirements for filing a lien must be satisfied to make a constitutional lien enforceable against a subsequent bona fide purchaser. Strang v. Pray, 35 S. W. at 1056.

D. Distinction from Statutory Mechanic's Lien

The statutory mechanic's lien, derived from Tex. Prop. Code Ann. ch. 53 (Vernon 2007 & Supp. 2015), is distinguished as, unlike the constitutional mechanic's lien, it may be claimed by both original and derivative claimants such as subcontractors. Id. at §53.022. The statutory mechanic's lien is further distinguished as it is more widely applicable than the constitutional mechanic's lien, but its notice and filing provisions contain detailed requirements.

E. Who May Claim Constitutional Lien

1. Original Contractor

Only an original contractor, one in privity with the property owner, may claim a constitutional lien. Da-Col Paint Manufacturing Co., v. American Indemnity Co., 517 S.W.2d 270, 273 (Tex. 1974). "Original contractor" means a person furnishing material directly to the owner, regardless of whether the contract for material was oral or written. Oil Field Salvage Co. v. Simon, 168 S.W.2d 848 (Tex. 1943).

2. Subcontractor

A subcontractor is a derivative claimant and, unlike a general contractor, has no constitutional, common-law, or contractual lien on property of owner; a subcontractor's lien rights are totally dependent on compliance with statutes authorizing lien. First National Bank v. Sledge, 653 S.W.2d 283, 285 (Tex. 1983); Vernon's Ann. Texas Civ. St. arts. 5452- 5472e (repealed; see, now, Tex. Prop. Code Ann. §§ 53.001, 53.002, 53.021 to 53.025 and 53.051 (Vernon 2007 and Supp. 2015)).

However, a subcontractor can claim a constitutional lien if the original contractor, in dealing with the subcontractor, is found to be the owner's agent. Da-Col Paint Mfg. Co. v. American Indem. Co., 517 S.W.2d 270 (Tex. 1974) [Where prime contractor was controlled by owner of apartment building, notice to such owner of amount due for paint supplied by materialman to subcontractor was also notice to prime contractor]; Gilbert Manufacturing Co. v. Connellee, 265 S.W.2d 375 (Tex. Comm'n App. 1924, judgm't adopted) [holding codified as Tex. Prop. Code Ann. § 53.206].

Similarly, a subcontractor can claim a constitutional lien when the prime contractor is a sham. A prime contractor is a sham where the original contractor is was controlled by the owner. Da-Col Paint Mfg. Co. v. American Indem. Co., 517 S.W.2d 270 [notice of unpaid balance due for labor or material to owner is also notice to sham prime contractor][construing Vernon's Ann. Texas Civ. St. arts. 5452-1, 54,53, 5472d (repealed; see, Tex. Prop. Code Ann. §§ 53.026 (Vernon 2007, Supp. 2015)].

3. Materialman

A materialman supplying materials to another materialman has no lien on the money due the materialman he supplied and has no standing to assert a constitutional lien Huddleston v. Nislar, 72 S.W.2d 959, 962 (Tex. Civ. App. - Amarillo 1934, writ ref'd).

F. Attachment of Lien

Identifying the building or article on which the constitutional lien is based is important as the constitutional lien is restricted, by its terms, to work or material furnished for construction or repair of buildings or articles. Tex. Const. art. XVI, § 37.

1. Real Property

Although the constitutional provision refers to buildings and articles and not to the land underlying a building, decisional law has consistently found the lien to attach also to the land on which the building sits. Houston v. Myers, 30 S.W. 912 (Tex. 1895) [description of property must be sufficient to identify it].

Some actual construction must be made before a constitutional lien attaches. See Branecky v. Seaman, 688 S.W.2d 117, 120 (Tex. App. - Corpus Christi 1984), writ ref'd n.r.e.) [Labor expended by architect in preparing plans and specifications for improvements to land which were never commenced was not labor expended in making or repairing a building and was not proper subject for constitutional lien].

A constitutional lien cannot attach to a homestead unless the claimant has complied with other constitutional or statutory requirements for perfecting a lien. J.D. McCollom Lumber v. Whitfield, 59 S.W.2d 1106, 1107 (Tex. Civ. App. - Austin 1933, writ ref'd).

Similarly, a constitutional lien cannot attach to public buildings or grounds unless the claimant has complied with other constitutional or statutory requirements for perfecting a lien. Atascosa County v. Angus, 18 S.W. 563 (Tex. 1892). As recited above, attachment of liens to public property, McGregor Act liens for public works construction, is beyond the scope of this Chapter.

2. Personal Property

The term "articles made" is restricted to articles specially fabricated according to the purchaser's specifications, rather than articles manufactured for inventory or for sale on the open market. First National Bank v. Whirlpool Corp., 517 S.W.2d 262, 268 (Tex. 1974) [standard refrigerators and ranges installed in an

apartment complex]. If the articles are specially made in accordance with the ultimate purchaser's instructions, the lien will attach. In re A & M Operating Co., 182 B.R. 986 (Banrk. E.D. Tex. 1993), rev'd in part, 192 B.R. 997 (E.D. Tex. 1993), aff'd, 84 F.3d 433 (5th Cir. 1996).

G. Waiver of Lien

There is some authority that a constitutional as well as a statutory mechanics and materialman's lien can be waived by subsequent conduct inconsistent with the lien. See San Antonio Bank & Trust Co. v. Anel, Inc., 613 S.W.2d 55 (Tex. Civ. App. - Texarkana 1981, no writ) [foregoing perfection and enforcement of its statutory lien, coupled with the entry into the participation agreement (of ownership of property upon foreclosure), is totally inconsistent with the subsequent assertion and enforcement of a constitutional mechanic's and materialman's lien upon the property. Lien sought to be enforced has been waived.]

H. Enforcement

1. Suit to Enforce

A lien claimant must file suit to enforce its lien. There is no requirement for notice or fulfillment of other statutory obligations before filing suit. Dee's Cabinet Shop, Inc. v. Weber, 562 S.W.2d 945 (Tex. Civ. App. - Fort Worth 1978, no writ). The creditor's attorney should also file a notice of lis pendens when a suit for foreclosure of real property under a constitutional lien is filed. See Tex. Prop. Code Ann. § 13.004 (Vernon 2007 & Supp. 2013).

2. No Possessory Rights in Property

A constitutional lien claimant has no authority under the implementing provision to keep or repossess a repaired article pending payment. Garcia v. Rutledge 649 S.W.2d 307, 311 (Tex. App. - Amarillo, no writ); Tex. Const. art. XVI, § 37. The right to a constitutional lien, which may be foreclosed in the Courts, and any right to retain possession until the debt is paid are two separate and distinct rights. Paul v. Nance Buick Company, 487 S.W.2d 426 (Tex. Civ. App. - El Paso 1972, no writ). If the constitutional lien claimant either keeps or repossesses repaired property, it may be liable for conversion. Clifton v. Jones, 634 S.W.2d 883, 886 (Tex. App. - El Paso 1982, no writ).

The creditor's attorney may find it empowering to file a writ of sequestration in conjunction with his suit to enforce the constitutional lien so that lawful possession may be asserted over the repaired article(s) pending conclusion of the action. This is in contrast to certain statutory liens that expressly grant a right to retain possession of property until the amount due under the contract for the repairs is paid; or if no amount is specified by contract, the reasonable and usual compensation is paid. See e.g. Tex. Prop. Code Ann. § 70.001 (Vernon 2007 & Supp. 2015).

3. Owner Not Personally Liable Under Constitutional Lien

A constitutional lien, of itself, does not create personal liability for the owner of the repaired article. Fox v. Christopher & Simpson Iron Works Co., 199 S.W. 833, 835 (Tex. Civ. App. - Galveston 1917, writ ref'd) [a constitutional lien against the property in question in favor of the original contractor did not create personal liability of the owners of the property for the payment of the debt].

4. Third Party Liability

a. Chattel

The self-executing feature of a constitutional lien does not protect the claimant if the property is sold or mortgaged to a bona fide purchaser. Third parties may cut off the constitutional lien claimant's rights to the property unless they have notice of the claim. Irving Lumber v. Alltex Mortgage Co., 446 S.W.2d 64, 72 (Tex. Civ. App. - Dallas 1969), aff'd, 468 S.W.2d 341 (Tex. 1971).

A debtor can defeat a constitutional lien by selling or mortgaging the property to a third party without giving actual or constructive notice of the alleged constitutional lien. This may be an act of fraud against the constitutional lien claimant. The practical problem associated with enforcing a constitutional lien against third parties is that there is no place designated by the Texas Constitution or by statute to file notice of the lien for purpose of constructive notice.

The creditor's attorney may try filing notice of the alleged constitutional lien in the records of the county clerk in the county where the property is located. Establishing constructive notice of a constitutional lien against chattel would be unlikely under ordinary circumstances.

See M.K. Woodward, "The Constitutional Lien on Chattels in Texas." 28 Texas L. Rev. 305, 312 - 15 (1950).

Alternatively, the creditor may seek an injunction prohibiting sale of subject property after filing suit to enforce his lien. See Tex. Civ. Prac. & Rem. Code Ann. Ch. 65; Tex. R. Civ. P. 680 et seq.

b. Construction

Where the constitutional lien attaches to construction, constructive notice of the constitutional lien protects the lien claimant. Some authorities hold that anyone acquiring an interest in property while it is under construction has constructive notice of a potential constitutional lien. Inman v. Clark, 485 S.W.2d 372, 374 (Tex. Civ. App. - Houston [1st Dist.] 1972, no writ).

Bona fide purchaser status is an affirmative defense and the party claiming has the burden of proving the absence of actual or constructive notice. Valley Ready-Mix Concrete Co. v. Valley State Bank, 227 S.W.2d 231 (Tex. Civ. App. - San Antonio 1950, no writ); see also Contract Sales Co., v. Skaggs, 612 S.W.2d 652, 653 (Tex. Civ. App. - Dallas 1981, no writ) [Foreclosure permitted when appellees neither pleaded nor proved that they were bona fide purchasers. The evidence precluded the possibility that appellees took without notice, because it is established that they had personal knowledge of the improvements being made on the property by Contract Sales at or shortly before the time they took possession.]; Kurz v. Soliz, 231 S.W. 424 (Tex. Civ. App. - San Antonio 1921, no writ).

c. Bankruptcy

If the property subject to an alleged constitutional lien is property of the estate in a bankruptcy proceeding, the trustee or debtor-in-possession can avoid the constitutional lien unless some notice of the lien has been recorded. See In re Mid-America Petroleum, Inc., 83 B.R. 937 (Bankr. N.D. Tex. 1988).

5. Attorney's Fees

The constitutional lien exists only for labor done or materials furnished. The lien provided for therein does not include attorney's fees. Rhoades v. Miller, 414 S.W.2d 942, 944 (Tex. Civ. App. - Tyler 1967, no writ); Tex. Const. art. XVI, § 37. However, the lien claimant may be entitled to recover attorney's fees either by contract or by statute. See Wood v. Barnes, 420 S.W.2d 425, 429 - 30 (Tex. Civ. App. - Dallas 1967, ref'd n.r.e.); Tex. Civ. Prac. & Rem. Code Ann. ch. 38 (Vernon 2008 & Supp. 2015).

6. Priority

a. Chattel

If the property is chattel subject to a competing secured claim under the Uniform Commercial Code, resolution of the priority conflict depends, in part, on whether the constitutional lien claimant has possession of the chattel. The constitutional provision does not authorize possession pending payment of the debt. Garcia v. Rutledge 649 S.W.2d 307, 311 (Tex. App. - Amarillo 1982, no writ). However, if possession is authorized by another statute, such as Tex. Prop. Code Ann. § 70.001 (Vernon 2007 & Supp. 2015), a valid constitutional lien may take priority over a perfected security interest under Tex. Bus. & Com. Code Ann. § 9.310 (Vernon 2011 & Supp. 2015). See Nelms v. Gulf Coast State Bank, 516 S.W.2d 421 (Tex. Civ. App. - Houston [1st Dist.] 1974, aff'd, 525 S.W.2d 866 (Tex. 1975).

A bank holding a security interest in the property subject of an alleged constitutional lien should be given notice of the constitutional lien. If the bank becomes insolvent and is then subject to FDIC receivership, a mechanic's lien of which the bank has no record cannot be enforced against the FDIC. See D'Oench, Duhme & Co. v. FDIC, 62 S.Ct. 676 (1942). The existence of federal recording statutes governing certain types of property may also preempt state statutes governing mechanic's liens. See Aero Support systems v. FDIC, 726 F. Supp. 651, 653 (Bankr. N.D. Tex. 1989).

b. Construction

If property involved in construction is subject to an alleged constitutional lien, lien priorities among competing claimants are generally determined by the date of inception of the liens. See University Savings & Loan Ass'n v. Security Lumber Co., 423 S.W.2d 287, 293 – 96 (Tex. 1967).