

**PREJUDGMENT REMEDIES AVAILABLE
TO CREDITORS UNDER TEXAS LAW**

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This paper addresses the following prejudgment remedies available to creditors under Texas law: Attachment, sequestration, garnishment, injunctions, and compares those remedies to the postjudgment remedy available to creditors in the enforcement of judgments in Texas. These prejudgment remedies allow creditors to obtain control or possession over property pending the outcome of the underlying lawsuit. For this reason, the rules governing these remedies are strict and require absolute compliance. Texas law also provides appropriate safeguards against abuse of these remedies by creditors. Therefore, creditors should exercise these remedies with care.

This paper describes the substantive and procedural legal requirements to obtain these extraordinary remedies, including the availability of seeking *ex parte* relief, the necessity of the use of bonds, the proof that the moving party is required to provide in order to obtain the extraordinary relief requested, and the possibility of an award of damages to the adverse party if the underlying lawsuit is not won by the party seeking the extraordinary prejudgment remedy.

I. Enforcement of judgments

To understand how prejudgment remedies operate and why they are necessary, it is helpful to compare them to the normal procedures for enforcing judgments after a trial. A brief description of postjudgment enforcement procedures

is included here for comparison to demonstrate how prejudgment remedies fit into the grand scheme of Texas collection law. The topic of enforcement of judgments is covered in greater detail elsewhere in these seminar materials.

The entry of a judgment against a defendant creates a debt. A defendant may satisfy that debt by paying the full amount of the judgment. Parties may also enter into postjudgment settlement agreements allowing defendants to pay the judgment in installments in exchange for the judgment creditor forgoing its right to pursue postjudgment collection efforts. Of course, the odds of a defendant voluntarily satisfying a judgment are slight when the original suit itself sought the collection of a debt. If a debtor was not willing or able to pay the debt prior to trial they will probably not be willing or able to pay the judgment after trial -- at least not voluntarily.

In that case, the judgment creditor may seek satisfaction of the judgment by levy or execution of the judgment against the debtor's nonexempt assets in the state. The first step then is to locate the debtor's nonexempt assets. This is done through postjudgment discovery and independent investigation. As far as formal discovery goes, the Texas Rules of Civil Procedure allow creditors to use any method of discovery after trial to determine the existence and location of the debtor's assets. T.R.C.P. 621a. This rule is crucial because information about a party's assets or ability to pay a judgement is generally not discoverable prior to trial. 5 McDonald's Texas Civil Practice § 31:7. Information about a defendant's insurance policies or

indemnity agreements is discoverable, but those items usually do not cover judgments for collection of a debt. T.R.C.P. 192.3(f).

Once the judgment creditor discovers the debtor's assets, it may seek satisfaction of its judgment by levying against those assets. The first step is to file an abstract of judgment in every county in which real property may be held in the name of the judgment debtor. The proper filing and indexing of this abstract create a perfected lien against any presently-owned or subsequently-owned real property in that county held in the name of the judgment debtor and also gives notice to others regarding this indebtedness due on the judgment. The lien provides the creditor with a priority position over most subsequent creditors and lienors. The abstract does not create a lien against personal property of the debtor. Liens against personal property do not arise until a writ of execution is issued and levied against the personal property items and the levying officer takes them into possession.

The next step after recordation of the abstract is to secure the issuance and levy of a writ of execution to satisfy the judgment. A writ of execution is a judicial process used to enforce judgments of the court. It is most commonly used to collect money judgments, such as judgments in a suit on an unpaid debt. The clerk of the court prepares the writ of execution and delivers it to the sheriff or constable for enforcement. The writ describes the type and amount of the judgment against the defendant and directs the executing officer to seize as much of the defendant's property as is necessary to satisfy the judgment. The levy of a writ of execution results from the officer "seizing" the debtor's property and bringing it into the control

and custody of the court. First, the officer seizes the debtor's property. This act of seizure does not require the officer to actually enter upon the defendant's land or real property. It merely requires the officer to "endorse" the writ and sell the real property at public auction at the courthouse door. However, to properly "seize" the debtor's personal property the officer must take physical possession of it. As described above, the "seizure" of personal property, but not the mere filing of the abstract, creates a lien against the personal property items seized. Those items of personal property are then sold at public auction as well. The officers must continue this process until the proceeds from the sale of the debtor's property are sufficient to satisfy the judgment.

The officer may only levy the writ of execution against the debtor's nonexempt assets. Exempt assets include the debtor's homestead, up to \$60,000 in personal property, tools of the trade, and numerous other items as prescribed by statutes. The rules of exemption also vary from debtor to debtor. These rules are covered in greater detail elsewhere in these seminar materials.

In the time that lapses between the filing of suit and the final satisfaction of the judgment, debtor defendants can do many things to hinder the creditor's collection efforts after judgment. Debtors have been known to liquidate assets, transfer cash and other assets to other persons or to jurisdictions, convert nonexempt assets to exempt assets, and even take other action to put their assets out of the reach of their judgment creditors.

The prejudgment remedies discussed in this paper allow a creditor to intervene during the early stages of the lawsuit to prevent the debtor from alienating

its assets. However, many of the remedies require the creditor to prove to the court that such conduct is occurring. But creditors may not engage in extensive pre-trial discovery and therefore may not be able to obtain knowledge of such acts until after they have occurred. Texas law provides several postjudgment remedies that protect creditors who discover, too late, that the debtor has transferred or converted assets in order to hinder collection efforts. Such remedies include the Uniform Fraudulent Transfer Act, and statutory prohibitions against the fraudulent conversion of nonexempt assets to exempt assets. The existence of these remedies may temper the necessity to employ the use of these prejudgment remedies. The prejudgment remedies are not appropriate to be used in every case, nor are they ordinarily used in every instance in which they could be used. The creditor and its counsel should analyze each separate fact situation to determine whether or not that particular situation is appropriate for the use of one of these prejudgment remedies and weigh the costs and risks to be incurred by the use of the prejudgment remedy compared to the results or rewards to be obtained from the use of such prejudgment remedy.

Texas adopted the Uniform Fraudulent Transfer Act in 1987. By making improper transfers voidable, the Act provides remedies to creditors who are defrauded by a judgment debtor. An improper transfer or obligation is one incurred with the actual intent to hinder, delay, or defraud creditors. The Act applies to gifts, sales, and purported transfers for consideration. When a court determines that a debtor fraudulently conveyed assets or assumed an obligation, the court may allow creditors to levy execution on the transferred assets or the proceeds of the transfer.

Even if the creditor can't prove that the transfer was intentionally fraudulent, it may still be voidable as being constructively fraudulent if the conveyance was made without adequate consideration and one of the following conditions is established: (1) the debtor, due to the transferred obligation, is left with an unreasonably limited access to the transactions of the business in which it is engaged; (2) the debtor intended to incur, or believed it would incur, more debts than it would be able to pay; or (3) the debtor was insolvent at the time or became insolvent as the result of the transfer or obligation. Voidable transfers do not include transfers of exempt property.

The Texas Property Code does prohibit debtors from converting nonexempt personal property to exempt property in order to intentionally defraud, delay or hinder a creditor from obtaining satisfaction of debt out of the debtor's assets. If a debtor makes such a conversion, then the converted property is not exempt from seizure for satisfaction of the debtor's liabilities. A prohibited conversion occurs whenever a person uses nonexempt property to acquire, obtain an interest in, make improvement to, or pay an indebtedness on personal property which would otherwise qualify as exempt property. In other words, using nonexempt assets to pay off the mortgage on the homestead would not qualify as a prohibited conversion because the homestead is exempt real property and not exempt personal property.

Certain time limitations apply to pursuing these postjudgment remedies. These remedies may not be available to all creditors against all debtors in all

situations. A complete analysis of these remedies is outside of the scope of this paper.

II. Attachment

At its essence, attachment is a form of pre-trial execution. It is the least-often used of the prejudgment remedies, has the most stringent requirements, and imposes the heftiest penalties for its abuse by creditors.

The procedural and substantive requirements for the issuance of a Writ of Attachment are attached at **Tab 1, pages 1 through 10**.

A. Purpose, nature, and requirements for the issuance of a Writ of Attachment

A writ of attachment directs the sheriff or constable to “seize” the defendant’s nonexempt assets up to a specified amount or value and hold them as security for the plaintiff’s claim pending a final judgment. T.R.C.P. 594. Attachment is a remedy which can be used when the creditor believes the debtor is planning to transfer a substantial portion of its nonexempt assets which will leave the debtor with insufficient property to satisfy the creditor’s claim by the time a judgment can be ultimately obtained at the conclusion of the lawsuit. As demonstrated by the evidentiary requirements for the issuance of the writ, attachment prevents the debtor from alienating any assets against which an unsecured creditor might enforce its judgment. Service of the writ of attachment creates a lien effective from the date of service of the writ.

Attachment may only issue ancillary to a pending lawsuit on a liquidated claim based on collection of a debt based upon an expressed or implied contract to pay a specific sum. Therefore, it is not an appropriate means of obtaining prejudgment execution on tort claims or contract claims for contingent amounts not definitely ascertainable by the usual types of evidence. If the jury must determine the final amount of damages, the prejudgment attachment will not lie. *S.R.S. World Wheels, Inc. v. Enlow*, 946 S.W.2d 574, 576 (Tex. App. -- Fort Worth 1997, no writ).

Liquidated claims include not only suits for debt, but also suits for breach of express or implied contracts. *Cleveland v. San Antonio Bldg. & Loan Ass'n.*, 223 S.W.2d 226, 288 (Tex. 1949). However, attachments may be maintained for many damages growing out of a breach of contract, even though they are unliquidated, if the contract affords a rule for ascertaining the damages, so that the amount may be averred in the affidavit with propriety. *21 Turtle Creek Square Ltd. v. New York State Teachers Retirement System*, 425 F.3d 1366, 1368 (5th Cir. 1970). However, it may issue for a debt that is not yet due.

A writ of attachment is available to a creditor plaintiff in a suit if:

1. the defendant is justly indebted to the plaintiff;
2. the attachment is not sought for the purpose of injuring or harassing the defendant;
3. the plaintiff will probably lose his debt unless the writ of attachment is issued; and

4. one of the specific grounds for issuance exists under Section 61.002 of the Texas Civil Practice and Remedies Code.

Those grounds include the following

- a. The defendant is not a resident of Texas or is a foreign corporation or is acting as such;
- b. The defendant is about to move from this state permanently and has refused to pay or secure the debt due the plaintiff;
- c. The defendant is in hiding so that ordinary process of law cannot be served on him;
- d. The defendant has hidden or is about to hide his property for the purpose of defrauding his creditors;
- e. The defendant is about to remove his property from this state without leaving an amount sufficient to pay his debts;
- f. 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;
- g. The defendant has disposed of or is about to dispose of all or part of his property with the intent to defraud his creditors;
- h. 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; or

- i. The defendant owes the plaintiff for property obtained by the defendant under false pretenses.

B. Procedure for obtaining a Writ of Attachment

A plaintiff may file an application for issuance of a writ of attachment at the commencement of the suit or at anytime during the progress of the suit. T.R.C.P. 592; Tex. Civ. Prac. Rem. Code § 61.003. The application must be supported by an affidavit of a person with knowledge of relevant facts, preferably the plaintiff or an agent of the plaintiff. The affidavit must contain competent, admissible evidence. Testimony should contain direct evidence based on personal knowledge. Affiants may testify as to information and belief if the facts supporting the belief are specifically stated. However, courts may be reluctant to grant issuance of the writ based on such circumstantial evidence. Specifically, the affidavit must contain testimony to the following:

1. The general grounds for issuance under Section 61.001(1), (2), and (3); and
2. The specific grounds for issuance under Section 61.002; and
3. The amount of the demand.

Technically, the statute suggests that a writ can issue if only one of the specific grounds under Section 61.002 exists. Affiants may even testify disjunctively (either/or) that one of two or more possible grounds exists. However, the issuance of the writ of attachment is discretionary, and possibly even disfavored. Therefore, an

affidavit may persuade the judge more effectively if it contains conclusive, conjunctive (and) testimony that two or more grounds for issuing the writ exist.

The court must hold a hearing on the application for writ. The hearing may be held ex parte, outside of the presence and without the knowledge of the defendant. The court must enter a written order granting the writ before the writ may be issued. The court's order must contain the following:

1. Specific findings of fact that the required grounds exist and recitations of the facts supporting those grounds; and
2. The maximum value of the property that may be attached; and
3. The amount of bond required of the plaintiff, which amount is discretionary with the court; and
4. The amount of bond required of the defendant to replevy, which shall be the amount of plaintiff's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court. The defendant, instead of paying a replevy bond, also has the option of substituting property under Rule 599.

The plaintiff must file a bond with the court clerk before the clerk may issue the writ of attachment. The bond must be filed in the amount ordered by the court and must be contingent upon the plaintiff prosecuting the suit to effect. The plaintiff must pay all damages and costs as may be adjudged against him for wrongful attachment. T.R.C.P. 592a. Any writ of attachment issued without a bond is void. *FDIC v. Texarkana Nat'l Bank*, 673 S.W.2d 262 (Tex. App. -- Texarkana 1984, no

writ). Additionally, the Civil Practice and Remedies Code requires that the bond for attachment be payable to the defendant and have two or more good and sufficient sureties. Tex. Civ. Prac. Rem. Code § 61.023.

The writ of attachment is issued and levied in the same manner as a levy of execution. T.R.C.P. 598. The defendant must also be served with a copy of the writ along with a notice that he has the right to file a replevy bond or to file a motion to dissolve the writ. Service may be accomplished in any manner allowed under Rule 21a for the service of citation. T.R.C.P. 598a. The rules allow defendants to be served as soon as practicable following the levy of the writ. *Id.* It is advisable to serve the defendant after its assets have been levied against.

The defendant may post a replevy bond, payable to plaintiff in the amount ordered by the court, at any time before judgment. T.R.C.P. 599. The defendant also has the option of substituting other property for the assets seized under the writ of attachment.

Either party may also seek a modification of the amount of the bonds as entered in the court's previous orders.

The defendant, or any third party with an interest in the attached property, may file a sworn written motion to dissolve, vacate, or modify the writ of attachment. T.R.C.P. 608. The motion must either admit or deny each finding of fact made by the trial court. The motion may be heard on less than three days notice to the plaintiff and the judge must rule on the motion within 10 days of the motion being filed. The movant must prove to the court that the reasonable value of the property exceeds the

amount necessary to secure the debt. He must also prove any fact to justify the substitution of property. The plaintiff has the burden of proof on all other issues. If the plaintiff does not prove the grounds relied upon for the writ's issuance, the writ must be dissolved.

Courts are clothed with discretion in the disposition of attached property prior to trial. If the Court finds that property is perishable, the plaintiff may request the court for an order authorizing sale of the property. T.R.C.P. 600-605. Additionally, after a hearing to dissolve or modify the writ, courts may make any orders, including orders for the disposition of the property, "as justice may require." T.R.C.P. 608. Specifically, the court may order a sale of the property "when it shall be 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 to greatly lessen the amount likely to be realized therefrom." T.R.C.P. 600.

C. Practical Considerations

In many counties with a two or three year docket delay, the storage expenses may eventually exceed the value of the property. In such cases, the utility to the plaintiff of filing the writ of attachment is diminished. This also hurts the defendant because it will have lost the use of its property during the time pending trial and will not be able to satisfy the judgment with proceeds of the sale of the property because those proceeds will be swallowed up in administrative costs. In such a case, it may

be argued that the court should in its discretion order the property sold for the benefit of all parties involved.

Plaintiffs should also consider the expense of obtaining a writ of attachment. The legal fees incurred in the transaction will be higher than would be if the attachment remedy were not sought. Additionally, bonds require annual premiums and if the case is delayed as a result of a heavy trial docket for a period of years, each year that progresses will require the payment by the plaintiff of an additional bond premium to the insurance company issuing the bond. The cost of the bond premium depends on the face amount of the bond. Recently on bonds I have purchased, the bond premium has been \$10 per \$1,000.00 of the face value of the bond. The cost of posting a bond and of hiring an attorney to prepare the tedious documents required are generally not recoverable. These costs should be carefully weighed against the great odds that little or no equity will remain in the attached property with which to satisfy the judgment.

Generally, only unsecured creditors will utilize a writ of attachment since security interests in property may be protected through sequestration and the requirements for a writ of sequestration are much less stringent. Additionally, it does little good to attach property over which third parties possess prior liens because those parties may intervene to dissolve the writ. Therefore, attaching creditors will be seizing the only property in which the debtor has any equity. This may precipitate the debtor filing bankruptcy in order to protect its equity in the attached property.

Plaintiffs should also consider the potential liability for wrongful attachment. Defendants have an independent cause of action whenever a plaintiff is unable to prove up evidence to support the statutory grounds it relied on in its application for the writ. Defendants may recover all actual damages, whether special or general, proximately caused by the wrongful attachment, subject to a duty to mitigate. Defendants may even recover exemplary damages if the attaching creditor has acted with malice and without probable cause. See Dorsaneo, TEXAS LITIGATION GUIDE § 41.05[2][a].

III. Sequestration

Sequestration is similar to the remedy of Attachment in that it prevents the debtor from transferring or disposing of the particular asset during the pendency of the lawsuit. However, this remedy is only available where the creditor plaintiff is seeking to foreclose a security interest which it holds on the specific property in question, or is seeking possession of the specific property in question. Sequestration involves claims directed at specific property. Sequestration is used more frequently than attachment and is the preferred prejudgment remedy of secured creditors. Nevertheless, it comes with its risks and shortfalls as well.

The procedural and substantive requirements for the issuance of a Writ of Sequestration are attached at **Tab 2, pages 1 through 12.**

A. Purpose, nature, and requirements for issuance of a writ of sequestration

While the writ of attachment creates a lien against seized property to secure satisfaction of the creditor's claim, the writ of sequestration merely affects possession of the seized property over which the creditor already has a security interest, ownership interest or other claim. While the writ of attachment prevents the debtor from liquidating assets to avoid levy of a writ of execution, the writ of sequestration prevents the debtor from harming the property which will ultimately be the subject of a foreclosure or judicial sale. The writ directs the sheriff or constable to take possession of the subject property and hold it pending a determination by the court as to which party is entitled to it. T.R.C.P. 699.

The grounds for issuing a writ of sequestration are as follows:

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 on 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, waste, or destroy the property or remove it from the county during suit; or
2. The suit is for title or possession of real property or for foreclosure or enforcement of a mortgage lien on real property and a reasonable conclusion may be drawn that there is immediate danger that the defendant or the party in possession of the property will use his possession to injure or mistreat the property or waste or convert to his own use the timber, rents, fruits, or revenue of the property; or

3. The suit is for title or possession of the property from which the plaintiff has been ejected by force or violence; or
4. The suit is to try the title to real property, to remove a cloud from the title of real property, to foreclose a lien on real property, or to partition real property and the plaintiff makes an oath that one or more of the defendants are nonresidents of this state.

One can notice immediately that the grounds for issuing a writ of sequestration are less severe than for a writ of attachment. While the writ of attachment required evidence that the defendant was actually engaged in fraudulent conduct that would destroy the plaintiff's ability to obtain satisfaction of a judgment, the writ of sequestration only requires "a reasonable conclusion" that a threat exists that the defendant may harm the subject property.

Just as a writ of attachment may be issued to secure a debt that is not yet due, so too may a writ of sequestration be issued on property encumbered by a mortgage or lien that is not yet mature. Tex. Civ. Prac. Rem. Code § 62.003; T.R.C.P. 713.

B. Procedure for obtaining a writ of sequestration

A plaintiff may file an application for the issuance of a writ of sequestration at the commencement of the suit or at any time during the pendency of the proceeding. T.R.C.P. 696, 697; Tex. Civ. Prac. Rem. Code § 62.002.

The application for the writ must contain:

1. The statutory grounds for issuing the writ, stated conjunctively or disjunctively;

2. A description of the property to be sequestered, the value of each item of property, and the county where the property is located; and
3. Specific facts relied upon by the plaintiff to support the grounds.

The application must also be supported by an affidavit of the plaintiff or the plaintiff's agent. The affiant should testify based upon personal knowledge but may testify based upon information and belief if the specific facts giving rise to the belief are stated. Issuance of the writ is discretionary with the court and courts prefer direct evidence to circumstantial evidence.

The court must hold a hearing before issuing the writ but the hearing may be held ex parte. The court's order may direct the issuance of several writs to be sent to different counties. The order must contain the following:

1. Specific findings of fact to support the statutory grounds upon which the court relied in granting the writ.
2. A description of the property to be sequestered, the value of each item of property to be sequestered, and the county where the property is located.
3. The amount of bond required of the plaintiff.
4. The amount of the bond required of the defendant to replevy.

Like the writ of attachment, the bond required of the plaintiff in a sequestration proceeding is discretionary with the court. However, the standard used to guide the amount of the bond is slightly different. The amount of the plaintiff's bond should be enough to adequately compensate the defendant if the plaintiff does

not prosecute the suit and if the defendant prevails in a counterclaim for wrongful sequestration. This amount includes attorney's fees incurred by the defendant in seeking a dissolution of the writ and in counterclaiming for wrongful sequestration. T.R.C.P. 696; Tex. Civ. Prac. Rem. Code § 62.044(b), 62.045. The difference between the plaintiff's bonds in attachment and sequestration proceedings arises from the fact that a wrongful sequestration claim is a compulsory counterclaim and must be brought under the same lawsuit. Tex. Civ. Prac. Rem. Code § 62.044(a). Unlike the plaintiff's bond for attachment, there is no requirement that the plaintiff's bond be guaranteed by surety. However, the judge may order that the writ be supported by a surety bond. T.R.C.P. 698.

The plaintiffs should argue that the amount of its bond should be no more than the lost profits the defendant will suffer due to the sequestration of its property. Many courts, however, will set the bond in an amount equal to the value of the property. Plaintiffs should be prepared to argue that this is an unjust and excessive amount if the defendant purchased the property with the plaintiff's money in the first place and has defaulted on the agreement to repay the purchase money.

The defendant's bond required to replevy must be in the lesser of the following amounts: (1) the amount equal to the value of the property sequestered or (2) the amount of the plaintiff's claim plus one year's accrual of interest. T.R.C.P. 696.

After issuance, the writ will be levied against the specified property by the sheriff or the constable. The writ is levied against any party with immediate

possession of the property. T.R.C.P. 699. The citation, writ of sequestration, application, and accompanying affidavits and orders must be served on the defendant by any method allowable under Rule 21a for service of process. T.R.C.P. 700a. Just as in the writ of attachment, the citation must notify the defendant of the right to file a replevy bond or a motion to dissolve the writ. *Id.*

Unless the property has already been claimed, replevied, or sold by or to another party, the defendant may replevy the sequestered property at any time before trial. The defendant must post a replevy bond in the amount fixed by the court's order.

Either party may seek redetermination of the amount of the bonds required by the court's order. T.R.C.P. 701.

The defendant's replevy bond must be conditioned as provided by Rules 702 and 703.

Rule 702 provides conditions for the defendant's replevy of personal property. Those conditions are that the defendant:

1. Will not remove the property from the county.
2. Will not waste, ill-treat, injure, destroy, or dispose of the property.
3. Will have the property, plus the value of the rents and hire of the property, available to satisfy the court's judgment and the property will be in the same condition as when it was replevied.
4. Or will pay the value of the property plus the value of the fruits, rents, and hire from the property.

Courts have held that defendants are not liable for ordinary depreciation or wear and tear that may occur between the defendant's replevy and the court's entry of judgment. *Associates Inv. Co. v. Soltes*, 250 S.W.2d 593, 595 (Tex. App. -- Dallas 1952, writ ref'd n.r.e.).

Rule 703 provides conditions for the defendant's replevy of real property. The defendant must injure the property and must pay the value of the rents on the property. T.R.C.P. 703.

While the plaintiff may, in certain cases, have property sold in attachment proceedings, the plaintiff may replevy property in sequestration proceedings ten days after the writ of sequestration was levied and the defendant was served. T.R.C.P. 708. The plaintiff must post a bond upon the condition that it will not injure the property and will return the property to abide by the court's decision in the case. T.R.C.P. 708. The conditions upon the plaintiff's replevy bond mimic those of the defendant's. Compare T.R.C.P. 708 with T.R.C.P. 702, 703. The plaintiff may also request the sale of perishable sequestered property. T.R.C.P. 710.

The plaintiff's sequestration bond serves a different purpose than the plaintiff's replevy bond. The sequestration bond insures that the plaintiff will pay the costs of wrongful sequestration or of failing to prosecute the suit. The replevy bond insures that the replevisor, in this case the plaintiff, will return the property in the same condition to abide by the decision of the court. *Kelso v. Hanson*, 388 S.W.2d 396, 399 (Tex. 1965).

The defendant, or any third party with an interest in the sequestered property, may file a sworn written motion to dissolve, vacate, or modify the writ of attachment. The moving party must specifically admit or deny each fact relied on by the court in granting the writ. The motion may be heard on less than three days notice and the judge must rule on the motion within 10 days of filing. The movant must prove that the reasonable value of the property sequestered exceeds the amount necessary to secure the debt. The plaintiff has the burden of proof on all other issues necessary to sustain the writ.

In ruling on the motion, the court has broad discretion to “make all 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.” T.R.C.P. 712a.

C. Practical Considerations

As much specificity as possible should be included in the affidavits and orders describing the property which is sought to be sequestered so that the Sheriff or Constable levying the writ takes possession of the correct property in which plaintiff holds or claims the right of possession or a lien.

Careful consideration should be made in selecting whether to have the writ served by the Sheriff or the Constable. The quality of the service which is obtained by a particular Sheriff’s office or Constable’s office varies from county to county. This is where the prior experience of the creditor’s counsel can come into play because, more likely than not, creditor’s counsel has had prior experience with the

particular Sheriff's office or Constable's office in the county in which the property is located and can, from that prior experience, select the office which can give the best service.

Neither the creditor nor the creditor's counsel should accompany the Sheriff or Constable when he is taking possession of the particular property pursuant to the provisions of the writ of sequestration. An example of problems which can arise and expose the creditor to damages is the case of *Southwestern Bell Telephone v. Wilson*, 768 S.W.2d 755 (Tex. App. -- Corpus Christi 1988, writ denied) in which the judgment creditor was held vicariously liable for the acts of its agents who accompanied the Constable to the debtor's place of business when a writ of execution was being levied. A judgment in favor of the debtor and against the creditor in excess of \$2 Million was upheld. More importantly, the court held that the judgment creditor could not be liable for the actions of the Sheriff's Constable committed in the levying of a writ of execution unless the judgment creditor "directs or participates in the execution." *Id.* at 760.

If the remedy of sequestration is to be used, it should be sought at the outset of the filing of the lawsuit and obtained "*ex parte*." Generally the hearings had before the Court for the issuance of an *ex parte* writ of sequestration are fairly short and straight forward and therefore the costs associated with that in terms of attorney time and resulting attorney's fees are less than in cases in which the debtor and its counsel are present and able to put on any evidence or question witness which

thereby increases the length of the hearing and the amount of time incurred in the preparation for conducting the hearing.

The plaintiff which obtains the issuance of a writ of sequestration should file its bond for both the issuance of the writ of sequestration and for the replevy of the property at the same time and in one bond. Additionally, after the debtor's exclusive ten day right of replevy has passed, the plaintiff should immediately seek to take possession of the property and hold that property in its possession during the pendency of the proceeding and until a final judgment has been entered in the case and after all time periods for appeal have been concluded. This action stops the storage charges that are incurred by the Sheriff's or Constable's office and presumably the creditor will have a location in which it can place the property for storage during the pendency of the suit without incurring third-party out-of-pocket charges for storage during the pendency of the suit. Care needs to be given in the timing of the notice to the debtor after the issuance and service of a writ of sequestration. The creditor should serve the statutory notice of the proceeding upon the debtor only after the property in question has been sequestered by the Sheriff or Constable. Obviously, if notice of the proceeding is given to the debtor prior to taking possession of the property by the Sheriff or Constable the debtor could have the opportunity to hide or secret the property in question.

If the debtor is vigorously defending the case and it appears that the lawsuit will be a long drawn out process, the plaintiff creditor should file a motion with the Court seeking an order of the Court allowing for the sale of the sequestered property

with the proceeds of the sale to be deposited into the registry of the court. The property that was sequestered will in most instances be a depreciating asset declining in value over the passage of time and therefore it would be in the best interest of all parties to obtain the highest, best value from the sale of the property in question earlier in the proceeding rather than allowing the property to sit in storage for a period of time and continue to depreciate or decline in value.

The possibility of a wrongful sequestration claim must also be evaluated. A sequestration is wrongful and actionable if none of the four grounds for sequestration exist. If a motion to dissolve the writ is granted, the plaintiff is still entitled to a trial on the defendant's wrongful sequestration counter claim. Wrongful sequestration is a compulsory counterclaim that must be brought in the same lawsuit as the plaintiff's suit on the original debt. Tex. Civ. Prac. Rem. Code § 62.044(a). If the creditor files suit to foreclose on a mortgage or a lien, however, the defendant would prevail on a wrongful sequestration only if it proves that no "reasonable conclusion" could be drawn that there was an immediate danger of injury to the property in question.

If the defendant prevails on the wrongful sequestration claim, he may recover the following types of damages:

1. Value of the property sequestered.
2. Consequential damages.
3. Loss of use and lost profits
4. Punitive damages.

If consumer goods were sequestered, and the writ is dissolved, the defendant is entitled to the greater of \$100, or the finance charge contracted for, or actual damages. However, the plaintiff will not be liable if the allegations were made in a “bona fide” error. Tex. Civ. Prac. Rem. Code § 62.045(b).

IV. Garnishment

While Attachment and Sequestration are proceedings ancillary to the underlying lawsuit for collection brought by the plaintiff creditor against the debtor, Garnishment is a separate independent lawsuit against a third party (not the debtor) in which the plaintiff creditor seeks to recover from the third party either money that it owes to the debtor or property of the debtor held by the third party. T.R.C.P. 659; *Bank One v. Sunbelt Sav.*, 824 S.W.2d 556, 558 (Tex. 1992). That money or property is then used to satisfy the creditor’s liquidated claim. T.R.C.P. 659. Garnishment is available as both a prejudgment and a postjudgment remedy.

The procedural and substantive requirements for the issuance of a Writ of Garnishment are attached at **Tab 3, pages 1 through 11.**

A. The purpose, nature, and requirements for the issuance of a writ of garnishment

Specifically, a writ of garnishment is available if one of the following three conditions exists:

1. An original attachment has been issued.
2. A plaintiff sues for a debt and makes an affidavit stating that:
 - a. The debt is just, due and unpaid; and

- 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 the garnishee.
3. A plaintiff has a valid, subsisting judgment and makes an affidavit stating that, within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment.

A writ of garnishment is only available to satisfy a debt that is for a definite, certain amount. Garnishment is not available on unliquidated, uncertain, or contingent debts or claims. *A. Wolfson's Sons, Inc. v. First State Bank of Corpus Christi*, 697 S.W.2d 753 (Tex. App. -- Corpus Christi 1985), rev'd on other grounds, 752 S.W.2d 614 (1988, writ denied); *Clapper v. Petrucci*, 497 S.W.2d 120 (Tex. Civ. App. -- Austin 1973, writ ref'd n.r.e.). Secured creditors who possess the debtor's collateral do not have liquidated claims until they foreclose on the collateral and obtain a valid deficiency judgment for a sum certain. *Wolfson's*.

The service of the writ of garnishment upon the third-party ("garnishee") creates a lien. After that lien arises, the garnishee may not "deliver any effects or pay any debt to the defendant." Tex. Civ. Prac. Rem. Code 63.003(a). The term "effects" includes all personal property and interests therein. Tex. Rev. Civ. Stat. Ann. Art. 23(17).

The following property is exempt from garnishment:

1. Current wages for personal services. Tex. Const. Art. XIV § 28; Tex. Civ. Prac. Rem. Code § 63.004.
2. Unpaid commissions for personal services up to \$15,000 or \$7,500 for single adults. Tex. Prop. Code § 42.001.
3. Under the principle of sovereign immunity, property of the U.S. Government and military, including military retirement benefits in the possession of the government. *United States v. Stelter*, 567 S.W.2d 797 (Tex. 1978).
4. Social Security benefits. 42 U.S.C. § 407.
5. Construction funds held in trust under Tex. Prop. Code §§ 162.001-162.004.
6. Spendthrift trust unless the beneficiary was the settlor. *Bank of Dallas v. Republic Nat'l. Bank of Dallas*, 540 S.W.2d 499 (Tex. Civ. App. -- Waco 1976, writ ref'd n.r.e.).
7. Mortgage company escrow accounts. *Aetna Fin. Co. v. First Fed. Sav. & Loan Ass'n*, 607 S.W.2d 312 (Tex. Civ. App. -- Austin 1980, writ ref'd n.r.e.).
8. IRA and ERISA plans. *In re Komet*, 104 B.R. 799 (Bankr. W.D. Tex. 1989); *In re Laxson*, 102 B.R. 85 (Bankr. N.D. Tex. 1989).

B. Procedure for obtaining a writ of garnishment

The plaintiff must file an application for a writ of garnishment at or after the time that the underlying suit on the debt is filed. T.R.C.P. 658. The application must be supported by an affidavit establishing the statutory grounds for issuance and the specific facts proving the plaintiff is entitled to the writ. *Id.* The requirements for the affiant's testimony are the same as those for the writs of attachment and sequestration.

The court must hold a hearing, which may be *ex parte*, before issuing the writ.

The court's order must contain the following:

1. Specific findings of fact supporting the statutory grounds required.
2. The maximum value of property or indebtedness to be garnished.
3. The amount of the bond required of the plaintiff.
4. The amount of the bond required of the defendant to replevy.
5. Though not required, when the writ is issued *ex parte*, the reasons for doing so should be noted.

The plaintiff must file a bond before the clerk will issue the writ. T.R.C.P. 658a. The amount of the plaintiff's bond is discretionary with the court but should be sufficient to compensate the defendant if the plaintiff fails to prosecute the suit or is held liable for wrongful garnishment. T.R.C.P. 658. No bond is required if the plaintiff seeks garnishment after a final judgment. T.R.C.P. 658a.

The amount of the defendant's replevy bond is the amount of the plaintiff's liquidated claim plus one year's interest and costs. T.R.C.P. 658.

Once the plaintiff has paid the bond, the clerk of the court issues the writ and docket the garnishment suit in the name of the plaintiff versus the third-party garnishee as the defendant. The writ must be levied upon the garnishee by the sheriff or constable but may be served upon the debtor by a private process server, certified mail, etc. T.R.C.P. 663a; T.R.C.P. 21a.

A defendant may replevy garnished property at any time before judgment. This differs from sequestration where the plaintiff may have already replevied the property 10 days after the writ's issuance. T.R.C.P. 664.

The defendant may file a motion to dissolve the writ. The defendant has the burden of proving that the amount garnished is excessive. The plaintiff carries the burden of proof on all other issues. However, the plaintiff must only prove a "reasonable basis" for believing that the defendant does not have sufficient assets to satisfy the debt. The plaintiff need not prove the defendant's insolvency "in fact." *Black Coral, Inc. v. Bank of the Southwest*, 650 S.W.2d 135 (Tex. App. -- Houston [14th Dist.] 1983, writ ref'd n.r.e.). Neither does the plaintiff have the burden of proving that the garnishee is indebted to the defendant. *Swiderski v. Victoria Bank & Trust Co.*, 706 S.W.2d 676 (Tex. App. -- Corpus Christi 1986, writ ref'd n.r.e.).

The garnishee must file an answer to the writ of garnishment containing statements under oath that:

1. The garnishee is not indebted to the defendant;
2. The garnishee was not indebted to the defendant when the writ of garnishment was served upon them;

3. The garnishee does not possess any effects of the defendant and did not when the writ was served;
4. The garnishee does not know of any other persons within their knowledge who are indebted to the defendant or have in their possession effects belonging to the defendant, or else has already named such persons.

T.R.C.P. 666.

If the garnishee fails to answer all of these issues under oath, they may be held in default. *Sweeney Bank v. Ritchie, Hopson & Assoc., Inc.*, 628 S.W.2d 175 (Tex. App. -- Houston [14th Dist.] 1982, writ ref'd n.r.e.). However, the default judgment cannot be entered against the garnishee until the court enters a final judgment in the underlying suit on the debt. *Glenn W. Casey Constr., Inc. v. Citizen's Nat'l. Bank*, 611 S.W.2d 695 (Tex. Civ. App. -- Tyler 1980, no writ).

If the garnishee properly denies each of those issues, they will be discharged unless the plaintiff files a controverting affidavit. T.R.C.P. 673. A discharged garnishee is entitled to recover the costs of suit, including compensation and attorney's fees, from the plaintiff. T.R.C.P. 677.

If the plaintiff files a controverting affidavit, the issues contested will be heard at a trial as in other cases. T.R.C.P. 674. If, at trial, it is determined that the garnishee is indebted to the defendant in any amount, the court shall enter judgment for the plaintiff against the garnishee for the amount determined, unless the amount exceeds the amount of the plaintiff's liquidated claim against the defendant, plus

interest and costs. T.R.C.P. 668. If the garnishee refuses to pay the judgment, the plaintiff may proceed against the garnishee with any method to enforce judgments. Id.

C. Practical Considerations

One advantage to garnishment is that storage costs are not a factor since usually the garnished property is in the form of cash or other liquid assets. Even if the garnished property is tangible, the garnishee is currently storing the property and delivers the property immediately to the plaintiff upon entry of the judgment against him or her.

However, the creditor may be liable to the garnishee for their attorney's fees. The garnishee is entitled to recover its costs for responding to the writ from the property in question and if such is not sufficient then may recover those costs from the creditor. T.R.C.P. 677.

The plaintiff may also be liable to the defendant for wrongful garnishment. A wrongful garnishment claim may be brought as a counter claim or as an independent suit. *Chandler v. Cashway Bldg. Mat'l., Inc.*, 584 S.W.2d 950, 952 (Tex. Civ. App. - El Paso 1979, no writ); *Commonwealth of Mass. v. Davis*, 160 S.W.2d 543, 547-48 (Tex. Civ. App. -- Austin 1942). Damages for wrongful garnishment include interest on the property garnished at the legal rate for its period of wrongful detention plus consequential damages proximately caused by the loss of use of the money. *Aetna Cas. & Sur. Co. v. Raposa*, 560 S.W.2d 106 (Tex. Civ. App. -- Fort Worth 1977, writ

dism'd); *Beutel v. Paul*, 741 S.W.2d 510 (Tex. App. -- Houston [14th Dist.] 1987, no writ).

V. Temporary Injunctions and Restraining Order

An injunction is a form of equitable relief. It seeks an order from the court to either prohibit or require the defendant to engage in certain conduct. Parties may seek a permanent injunction as part of the ultimate relief requested in the trial on the merits. Temporary injunctions and temporary restraining orders merely regulate a defendant's conduct until the court renders a final decision on the merits of the case. General principles of equity govern the granting of injunctive relief whether it be permanent or temporary in nature.

The procedural and substantive requirements for the issuance of a Temporary Injunction and Restraining Order are attached at **Tab 4, pages 1 through 12.**

A. Purpose, nature, and requirement for issuance of Temporary Restraining Order and Injunctions

Injunctive relief is a means of mandating or prohibiting a certain course of conduct by the adverse party. While an award for money damages is enforceable by means of execution against non-exempt assets, an award of injunctive relief is enforceable by fine or by an order of contempt when the enjoined party violates the injunction.

Injunctions can be categorized in several different ways. Injunctions may be prohibitive if they forbid a party from acting in a certain way or mandatory if they require a party to act in a certain way. Injunctions may also be either primary or

ancillary. An injunction is primary when it is the ultimate, final form of relief requested by the plaintiff. An injunction that is the primary relief requested in a lawsuit is called a Permanent Injunction. An injunction is ancillary when it merely requests pre-trial relief in a suit for money damages. Ancillary injunctions take the form of Temporary Restraining Orders and Temporary or Preliminary Injunctions. Temporary Restraining Orders and Temporary Injunctions may also be requested as pre-trial relief ancillary to a suit for a Permanent Injunction.

This paper addresses issues surrounding the requirements, procedures, advantages and disadvantages of seeking pre-trial injunctions ancillary to a suit for the collection of a money debt. For reasons discussed in greater detail below, the instances in which a creditor may seek a pre-trial injunction in a suit for debt are rare.

However, there are times when a pre-trial injunction may be available and desirable as a means of enhancing the creditor's efforts to collect a debt.

The purpose of a pre-trial injunction is to preserve the status quo pending a trial on the merits. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). The status quo is the last, actual, peaceable, non-contested status that preceded the controversy. *State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975). Injunction proceedings are governed by principles of equity as long as those principles are not in conflict with the injunction statute. TEX. CIV. PRAC. & REM. CODE § 65.001; T.R.C.P. 693. To be entitled to injunctive relief under the common law, an applicant must plead and prove the following:

1. A wrongful act. The plaintiff must plead and prove a valid cause of action against the Defendant. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993); *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993); *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968).
2. Probable right to relief. The plaintiff must prove it is likely to succeed on the merits of the underlying lawsuit. *Sun Oil Co.*, 424 S.W.2d at 218.
3. Probable injury. The plaintiff must prove that it will suffer a probable injury if the injunction does not issue. Probable injury includes all three of these elements:
 - a. Imminent harm.
 - b. Irreparable harm.
 - c. No adequate remedy at law. If money damages are available to compensate the plaintiff for the defendant's violation of the law, then an injunction is not available. For a remedy to be adequate it must give the plaintiff complete, final, and equal relief. *Henderson v. KRTS, Inc.*, 822 S.W.2d 769, 773 (Tex. App. -- Houston [1st Dist.] 1992, no writ). There is no adequate remedy at law if the defendant is judgment proof. *Texas Ind. Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529, 533 (Tex. App. -- Houston [1st Dist.] 1992, no writ).

A Temporary Restraining Order is an emergency remedy. It may be issued ex parte, without the presence of or notice to the defendant. However, the TRO may only remain in effect for 14 days, with the possibility of one additional 14-day extension. T.R.C.P. 680. The purpose of the TRO is merely to preserve the status quo until the court can hold a hearing on the request for a Temporary Injunction.

B. Procedure for obtaining a Temporary Restraining Order

The application for a TRO must contain the following:

1. Plead a cause of action.
2. State the necessary equitable grounds.
3. State facts necessary to prove injury and emergency to justify issuing the TRO ex parte.
4. State the plaintiff's willingness to post bond.
5. A verification or supporting affidavits based on personal knowledge.
6. Identify the relief sought.

After the hearing, the judge grants the TRO by entering an order. Once the injunction is ordered the clerk of the court issues a writ which is then served upon the defendant by the sheriff or constable. To be valid the court's order must contain the following:

1. Grounds for issuing the TRO ex parte.
2. Description of the irreparable and imminent injury that justifies issuance of the TRO.
3. Description of the act sought to be restrained.

4. The date and hour of issuance.
5. The date the order expires.
6. The date for the hearing on the Temporary Injunction.
7. The amount required of the Plaintiff for the TRO bond.

T.R.C.P. 680, 683.

The writ of injunction must be in the following form, according to T.R.C.P.

687:

1. It must be styled “The State of Texas”
2. It must be directed to the person enjoined.
3. It must state the names of the parties to the proceedings, the nature of the plaintiff’s application, and the action of the trial court.
4. It must command the person to whom it is directed to desist and refrain from the commission or continuance of the act enjoined or to obey and execute such order as the trial court has seen proper to make.
5. It must state the day and time for the hearing on the temporary injunction, which cannot exceed 14 days from the date of the court’s order granting the TRO.
6. It must be dated and signed by the clerk, attested with the seal of the clerk’s office, and endorsed with the date of its issuance.

C. Procedure for obtaining an Injunction

After the writ of injunction for the TRO has issued, the court will hold a hearing on the plaintiff's application for a Temporary Injunction within 14 days of entering the Temporary Restraining Order. The grounds for a temporary injunction are as follows:

1. The applicant is entitled to the relief demanded, and all or part of the relief requires the restraining of some act prejudicial to the applicant.
2. A party performs or is about to perform, or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual.
3. The applicant is entitled to a writ of injunction under the principles of equity and the laws of Texas relating to injunctions.
4. A cloud would be placed on the title of real property being sold under execution, against a party having no interest in the real party.
5. Irreparable injury to real or personal property is threatened, irrespective of any remedy at law.

Injunctions are also authorized by other statutes to enjoin such activities as deceptive trade practices, TEX. BUS. & COM. CODE § 17.50(b)(2); and nuisances, TEX. CIV. PRAC. & REM. CODE § 125.002, 125.022; and to enforce a judgment, TEX. CIV. PRAC. & REM. CODE § 31.002(a).

The hearing on the Temporary Injunction is not a full trial on the merits.. The only issue is whether a need exists for immediate relief. The plaintiff must establish

by competent evidence its a probable right to recovery and a probable injury that is immediate and irreparable. Notice and an opportunity to be heard are required for the defendant and a Temporary Injunction may not be issued ex parte. T.R.C.P. 681.

In order to be valid, the court's order granting the Temporary Injunction must be in writing, signed by the judge, and entered into the minutes of the court. The order must also conform to other mandatory requirements. The order must include:

1. The reasons for the issuance, including a description of the injury and why it is irreparable.
2. A reasonably detailed definition of the act sought to be enjoined. It may not be described by reference to other documents.
3. An order setting the case for trial on the merits.
4. A fixed amount of the bond.

The amount of the bond required of the plaintiff must have some relation to the potential damages in the lawsuit and it must adequately protect the defendant from wrongful injunction damages. T.R.C.P. 684; *Lancaster v. Lancaster*, 291 S.W.2d 303, 308 (Tex. 1956).

The court may enforce an injunction through several means. It may hold the party violating the injunction in contempt. T.R.C.P. 692. It may impose a fine of up to \$500.00. GOVT CODE § 21.002(b). It may impose a jail sentence. T.R.C.P. 692.

D. Practical Considerations

As indicated above, injunctions are generally not available for a creditor seeking to collect a debt. That is because a suit to collect a debt is purely a suit for

money damages. When money damages are available, the creditor generally has an adequate remedy at law and an injunction will not be allowed under equitable principles.

There may be instances, however, where an injunction would be available to require adherence to a contractual provision that is ancillary to a debt. Injunctions are available to prevent a threatened breach of a contract. Often creditors will require debtors to agree to undertake certain obligations in addition to their promise to repay the money. An injunction may be available to enforce those collateral obligations if the creditor can prove that failure to do so will make it impossible to collect its debt and thus will cause immediate and irreparable injury.

Creditors may also seek injunctions to enforce contractual agreements where the debtor agrees not to encumber collateral with additional debt.

Another use of injunctions is as an aid to discovery and as a supplement to the other prejudgment remedies. As noted earlier, plaintiffs generally cannot discover information about a defendant's financial assets. However, in an injunction proceeding, the defendant's financial solvency may become relevant if the plaintiff alleges the defendant's insolvency as a ground for the injunction. To avoid the injunction, the defendant may provide testimony that would inform the plaintiff of other assets that might be available for attachment, garnishment, or sequestration.

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