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Prejudgment Attachment and the Uniform Fraudulent Transfer Act

by Brenda M. Johnson

Every once in a while we encounter a defendant whose insurance coverage may be limited, but who may possibly have sufficient assets to satisfy a judgment. In those cases, you may need to make sure that the defendant doesn't dissipate or otherwise dispose of those assets before a judgment is obtained. In other cases, you may find that the defendant *had* such assets, but recently disposed of them. This article is meant to be a quick guide to two statutory tools by which you can ensure those assets will be available once judgment is rendered in your client's favor – namely, prejudgment attachment and the Uniform Fraudulent Transfer Act.

A. Prejudgment Attachment

1. Obtaining an Order of Attachment.

Prejudgment attachment is a statutory procedure, codified at Chapter 2715 of the Revised Code, by which a defendant's assets (other than personal earnings) can be taken into legal custody when there is a risk that a defendant will dissipate those assets before a judgment can be entered.[1] The grounds for attachment are set forth in R.C. § 2715.01, which provides that attachment may be had when:

- The defendant is not a resident of Ohio;
- The defendant has "absconded with the intent to defraud creditors;"
- The defendant has left the county of residence to avoid service, or is otherwise avoiding service of process;
- The defendant is about to remove property from the jurisdiction of the court "with the intent to defraud creditors;"
- The defendant is about to convert property to money in order to place it out of the reach of creditors;
- The defendant has property or property rights that the defendant conceals;
- The defendant has "assigned, removed, disposed of, or is about to dispose of," property "with the intent to defraud creditors;"
- The defendant "fraudulently or criminally" contracted the debt or incurred the obligation that is the subject of suit; or
- When the claim is for work or labor.[2]

Attachment can be sought upon commencement of the underlying action, or at any time afterward, by filing a written motion with the court in which your case is pending.[3] The motion must be supported by an affidavit from either the plaintiff, his or her agent, or the attorney, setting forth the following:

- The nature and amount of the plaintiff's claim;
- Facts to support at least one of the grounds for attachment in R.C. § 2715.01;
- A description of the property sought to be attached, and its approximate value if that is known;
- The location of the property, to the best of the plaintiff's knowledge;
- "To the best of plaintiff's knowledge, after reasonable investigation, the use to which the defendant has put the property," and that the property is not exempt from attachment; and

- If the property is in the possession of a third person, the identity of that person or entity.[4]

Few opinions address the level of specificity with which these elements must be attested; however, *Kalmbach Feeds, Inc. v. Lust*[5] a 1987 opinion from the Third District and *Johnson & Hardin Co. v. DME Ltd.*,[6] a 1995 opinion from the Twelfth District, both quote extensively from affidavits deemed by those courts to satisfy statutory requirements, and thus present useful models to work from.

The trial court is required to set the matter for hearing within twenty days of filing of the motion of attachment.[7] It is incumbent on the movant to ensure that the clerk of courts is instructed to issue a notice of the motion and hearing, in a form prescribed by statute, designed to inform the defendant of its rights.[8] Among other things, the notice is designed to inform the defendant that the scheduled hearing, known as a "20 day hearing," will go forward only upon the defendant's request, and that the request must be made within five business days of receipt of the motion.[9]

If the defendant does not make a timely request for a 20 day hearing, and "the court finds, on the basis of the affidavit, that there is probable cause to support the motion,"[10] the trial court may issue an immediate order of attachment *ex parte*.[11] If, however, prior to the scheduled hearing date or the issuance of an attachment order, the defendant provides a reasonable justification for not having requested a 20 day hearing within the prescribed time, the trial court can grant a continuance of the hearing, but the continuance cannot extend beyond five business days from the original hearing date without the plaintiff's consent.[12]

In the event a 20 day hearing is conducted, its scope is "limited to a consideration of whether there is probable cause to support the motion and whether any of the property of the defendant is exempt from attachment."[13] "Probable cause to support the motion," in turn, is defined to mean "that it is likely that a plaintiff who files a motion for attachment . . . will obtain judgment against the defendant against whom the motion was filed that entitles the plaintiff to a money judgment that can be satisfied out of the property that is the subject of the motion.[14] Moreover, though the statute is silent in this regard, courts have not required a full evidentiary hearing in order to establish that attachment is proper.[15]

Chapter 2715 also provides for the issuing of an order of attachment without notice or hearing when the plaintiff can show, and the court determines, that the plaintiff has shown probable cause to support the motion, and that the plaintiff will suffer irreparable injury if the order is delayed.[16] For purposes of such an order, "irreparable injury" consists only of "a present danger that the property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the court," or a risk that "the value of the property will be impaired substantially if the issuance of an order of attachment is delayed."[17]

Upon the issuance of such an order, it is again incumbent on the plaintiff to file a praecipe requiring the clerk of courts to issue a notice to the defendant in a statutorily-prescribed form informing the defendant that (among other things) the defendant has five business days in which to request a hearing, which, while identical in scope to a 20 day hearing, must be conducted within three business days of the court's receipt of the request.[18] And while an order of attachment obtained after notice and an opportunity for hearing may be served on the defendant in the same manner as other papers filed after the original complaint, an order issued without notice or hearing must be served in the same manner as an original complaint.[19]

2. Procedure after an order is obtained.

An order of attachment is not effective until the plaintiff files a bond with the court, in favor of the defendant, in approximately twice the value of the property subject to attachment under the order, or its cash equivalent, though an indigent plaintiff may seek waiver or reduction of this requirement.[20] The defendant, in turn, can discharge the attachment by filing similar security in favor of the plaintiff.[21]

An order of attachment can be directed to a levying officer in any county, and must include (a) the names of the parties and the court in which the action is brought; (2) a statement that the debtor may recover the property by filing a proper bond; and (c) a commandment that the levying officer attach the non-exempt property of the debtor located in the levying officer's county.[22]

A defendant subject to an attachment order may move to have the attachment discharged at any time before a judgment has been rendered.[23] An order granting or denying a motion for attachment is a final order for purposes of appeal, since attachment is defined as a "provisional remedy" under R.C. § 2505.02(A)(3), and an order granting or denying attachment would clearly meet the requirements of R.C. § 2505.02(B)(4), since it would determine the issue with respect to attachment, and an appeal following final judgment would not provide a meaningful or effective remedy.[24] Moreover, an order discharging or refusing to discharge an order of attachment is subject to immediate appeal under Chapter 2715.[25]

3. Dissolving the Order

As noted above, an attachment order can be discharged by a defendant through posting an appropriate bond, and it may be discharged by subsequent order of the court. A judgment in favor

of the defendant, as well as a dismissal of the underlying action, automatically discharges the attachment as well.[26]

B. Uniform Fraudulent Transfer Act

When facing the possibility of a money judgment, tortfeasors will sometimes try to protect or hide their assets by transferring them to someone, perhaps a relative or an entity under the defendant's control, or by disposing of them for less than market value. When that happens, it may still be possible to reach those assets under the Uniform Fraudulent Transfer Act (UFTA), which has been codified by the General Assembly at Chapter 1336 of the Ohio Revised Code.

1. What Constitutes Fraudulent Transfer.

The UFTA provides a number of possible remedies when it can be shown that a defendant has transferred assets or incurred obligations either "with actual intent to hinder, delay, or defraud any creditor of the debtor," as that term is used in R.C. § 1336.04(A), or when the debtor did not receive a reasonably equivalent value for the asset or obligation and either of the following applies:

- "the debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction," or
- "the debtor incurred, or believed or reasonably should have believed he would incur, debts beyond his ability to pay as they became due."[27]

Section 1336.04(B) sets forth a series of factors, commonly known as "badges of fraud," which a court may consider in determining whether the debtor acted with "actual intent to hinder, delay, or defraud any creditor of the debtor" for purposes of R.C. § 1336.04(A). Though this list is not exhaustive, these include

- whether the transfer was to an "insider," as that term is defined in R.C. § 1336.01(G);[28]
- whether the debtor maintained possession or control;
- whether the debtor tried to conceal the transfer;
- whether the debtor had been sued or threatened with suit before the transfer occurred;
- whether the transfer was of substantially all of the debtor's assets;
- whether the debtor absconded;
- whether the debtor removed or concealed assets;
- whether the debtor received reasonably equivalent value for the assets;
- whether the debtor was insolvent or became insolvent shortly after the transfer;
- whether the transfer occurred shortly before or after the debtor incurred substantial debt; and
- whether the debtor transferred essential business assets to a lienholder who then transferred the assets to an insider of the debtor.[29]

If the "actual fraud" standard set forth in R.C. § 1336.04(A) can be met, or the transfer is for less than reasonable value as described above, the transfer is fraudulent as to your client regardless of whether your client's claim arose before or after the transfer was made.[30] If the transfer occurs after your client's claim arose, however, your client can also recover under R.C. § 1336.05 if it can be shown that the transfer was either (a) for less than equivalent value and the tortfeasor was either already insolvent or rendered insolvent by the transfer; or (b) the transfer was made to an insider to satisfy an antecedent debt, the tortfeasor was insolvent, and the insider had reason to know of the tortfeasor's insolvency.[31]

2. What Constitutes Fraudulent Transfer.

In the event that assets have been transferred, or are likely to be transferred, under the circumstances set forth above, your client is entitled bring an action for a number of different remedies, depending on the circumstances. These are set forth in R.C. § 1336.07, and include

- Avoidance of the transfer;
- Attachment under Chapter 2715, as described in the first part of this article;
- Injunctive relief against any further transfers or disposition of assets;
- The appointment of a receiver; and
- If a judgment has been obtained against the tortfeasor, your client may levy execution on the asset.[32]

The initial burden of going forward is on the creditor; however, if the indicia of fraud are established, the burden then shifts to the tortfeasor to rebut the presumption.[33] Moreover, it is important to note that the UFTA provides certain protections to good faith transferees even when the tortfeasor actually intended to hinder or defraud creditors.

If the transfer was for reasonably equivalent value, for instance, it is not considered fraudulent regardless of the tortfeasor's intent. [34] Nor is it considered fraudulent if it involves the termination of a lease upon the tortfeasor's default; the enforcement of a valid security interest; or, if it involves a transfer under R.C. § 1336.05, if it involved new value provided by an insider, occurred in the ordinary course of the tortfeasor's business, or if it was made pursuant to a good faith effort to rehabilitate the debtor.[35] In addition, if the transfer was for less than reasonable value, a good faith transferee is entitled to any of the following: a lien on or right to retain an interest in the asset in question; an enforcement of any obligation incurred;

or a reduction in liability on the judgment.[36]

Finally, actions under UFTA are subject to either a one year or a four year statute of limitations, depending on the nature of the transfer involved. If the transfer was made with actual intent to defraud as contemplated under R.C. § 1336.04(A)(1), an action must be brought within four years after the transfer or within one year of discovery, whichever is later.[37] If it is brought to set aside transfers to insiders under R.C. § 1336.04(A)(2), the action must be brought within four years after the transfer.[38] If it is brought to set aside a transfer made for less than reasonably equivalent value under R.C. § 1336.05(B), however, the action must be brought within one year of the transfer.[39]

Conclusion

This article is not intended to serve as a comprehensive survey of the procedures involved in pursuing either prejudgment attachment or remedies under the Uniform Fraudulent Transfer Act. Such resources already exist, and I would be remiss if I did not mention that Anderson's Ohio Civil Practice With Forms, along with Anderson's Ohio Creditors Rights, contain much of what you would need from a practical perspective to pursue either remedy if necessary. This article is meant to serve as a reminder that these tools are available to us. Though we may not often find it necessary to use these tools, we should not forget they are resources that we can use to our clients' benefit under the appropriate circumstances. ■

End Notes

1. To satisfy due process requirements, prejudgment attachment statutes must, at a minimum,
   - Require the party seeking attachment to provide an affidavit "alleging personal knowledge of specific facts forming a basis for prejudgment seizure;"
   - Require a judicial officer to make a determination as to the sufficiency of the allegations in the affidavit;
   - Require the plaintiff to furnish a bond or other security to compensate the defendant in the event of wrongful seizure;
   - Provide for an immediate right of hearing in which the plaintiff must prove the attachment is warranted; and
   - Provide for the dissolution of the attachment upon the posting of a bond by the defendant.

   Peebles v. Clement, 63 Ohio St. 2d 314, 321, 408 N.E.2d 689 (1980). *Peebles* struck down a prior version of Chapter 2715 that permitted initial prejudgment attachment orders to be issued without judicial supervision. *See Peebles* at 321-22 (describing previous procedure). The current version of Chapter 2715 was designed to rectify this defect.
2. R.C. § 2715.01(A)(2)-(11). Attachment may also be had against property of foreign corporations, but not if the corporation has complied with the requirements of Chapter 1703 of the Revised Code. *See* R.C. § 2715.01(A)(1); R.C. 1703.20.
3. R.C. § 2715.03.
4. *Id.*
5. 36 Ohio App. 3d 186, 521 N.E.2d 1126 (3d Dist. Crawford Cty. 1987)
6. 106 Ohio App. 3d 377, 666 N.E.2d 276 (12th Dist. Warren Cty. 1995)
7. R.C. § 2715.043.
8. R.C. § 2715.041.
9. *See* R.C. § 2715.041 (notice requirements); R.C. § 2715.04 (right to request hearing).
10. R.C. § 2715.042(A)(4).
11. R.C. § 2715.04.
12. R.C. § 2715.042(B).
13. R.C. § 2715.043(B).
14. R.C. § 2715.011(A).
15. *Johnson & Hardin Co. v. DME Ltd.*, 106 Ohio App.3d 377, 381, 666 N.E.2d 276 (12th Dist. Warren Cty.1995) (court complied with statute when it decided issue on oral argument and affidavits).
16. R.C. § 2715.045.
17. R.C. § 2715.045(B).
18. R.C. § 2715.045(C)(1).
19. R.C. § 2715.045(C)(1); R.C. § 2715.05(C). Section 2715.041(C) requires the motion, affidavit, notice,and request for hearing form to be served no less than seven days prior to the scheduled date for a 20 day hearing.
20. R.C. § 2715.044.
21. R.C. § 2715.26.
22. R.C. § 2715.05(A).
23. R.C. § 2715.44.
24. R.C. § 2505.02.
25. R.C. § 2715.46.
26. R.C. § 2715.36; *see also Wellborn v. K-Beck Furniture Mart*, 54 Ohio App. 2d 65, 375 N.E.2d 61 (10th Dist. Franklin Cty. 1977)
27. R.C. 1336.04.
28. As defined in R.C. § 1336.01(G), if the debtor is a natural person, "insider" includes (a) relative of the debtor or of a general partner of the debtor; (b) a partnership in which the debtor is a general partner; (c) a general partner of the debtor; and (d) a corporation of which the debtor is a director, officer or person in control. *See* R.C. § 1336.01(G)(1). If the debtor is a corporation, "insider" also includes directors, officers, persons in control, and relatives of those persons. *See* R.G. § 1336.01(G)(2). If the debtor is a partnership, "insider" includes general partners of the debtor, their relatives, any partnership in which the debtor is a general partner, and any general partner of such a partnership. *See* R.C. § 1336.04(G)(3). "Insider" also includes a managing agent of the debtor. *See* R.G. § 1336.01(G)(5). Finally, any person or entity who meets the definition of an "affiliate," as set forth in R.C. § 1336.01(A), is also an "insider," as are those persons who would be "insiders" to the affiliate if the affiliate were the debtor. *See* R.C. § 1336.01(G)(4). "Affiliates" include, with certain exceptions:
   - any person who directly or indirectly owns, controls or holds the power to vote, twenty percent or more of the debtor's outstanding voting securities;
   - any corporation of which twenty percent or more of the outstanding voting securities are held directly or indirectly by the debtor or by a person who holds, directly or indirectly, twenty percent of the outstanding voting securities of the debtor:
   - a person whose business is operated by the debtor under a lease or other agreement, or by a person whose assets are controlled by the debtor; and
   - a person who operates the business of the debtor under a lease or other agreement, or who controls the assets of the debtor.

   R.C. § 1336.01(A)
29. R.C. § 1336.04(B).
30. R.C. § 1336.04(A).
31. R.C. § 1336.05.
32. R.C. § 1336.07.
33. *See, e.g., Baker & Sons Equip. Co. v. Gso Equip. Leasing*, 87 Ohio App. 3d 644, 622 N.E.2d 1113 (10th Dist. Franklin County 1993). Among other things, a demonstration that the tortfeasor received reasonably equivalent value for the asset involved will rebut a presumption of fraud. *See id.* at 650-51; *see also* R.C. § 1336.03 (defining reasonably equivalent value).
34. R.C. § 1336.08(A).
35. R.C. § 1336.08(D).
36. R.C. § 1336.08(C).
37. R.C. § 1336.09(A).
38. R.C. § 1336.09(B).
39. R.C. § 1336.09(C).