LITIGATION MINUTE: PROVISIONAL REMEDIES IN FEDERAL COURT: A MINUTE ON PREJUDGMENT WRITS

Date: 23 June 2021

U.S. Complex Commercial Litigation and Disputes Alert

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

Provisional remedies are critical tools for preserving the parties' status quo until the court has had an opportunity to decide the case and issue a final judgment. Examples include injunctions, restraining orders, attachments, sequestration, and garnishments—most of which can be obtained *ex parte*, depending on the jurisdiction. The most common are restraining orders and injunctions. However, before moving for injunctive relief, consider whether a prejudgment writ would be better suited to accomplish the client's intended goals. Because prejudgment writs are primarily state law remedies, they vary from state to state, but can also be obtained in federal court.

These writs have distinct advantages over injunctions where the client seeks to secure (a) property in which parties have conflicting interests, (b) critical evidence, or (c) funds or property from which a judgment will ultimately be paid from a defendant at risk of dissipating, destroying, or concealing these items. It is worth noting that if the property at issue needs to be actively managed during the litigation rather than seized and held, a receivership may be considered.

Prejudgment writ of attachment

A writ of attachment is available where damages are liquidated, undisputed, and typically based on a written contract (although other factual scenarios may lend themselves to an attachment proceeding). A bond is usually required. The writ of attachment is ancillary to the main litigation and can be used to levy, seize, or place a lien on the defendant's property for various reasons—the most common of which is to secure payment of a judgment. For example, in *Maaco Franchising, LLC v. 5296, LLC*, the court issued a prejudgment writ attaching all of the defendants' property to secure payment of overdue franchise fees. 2017 WL 10543655, at *7 (C.D. Cal. Apr. 24, 2017). A writ of attachment is an extraordinary remedy and requires a plaintiff to affirmatively show that the defendant will irretrievably conceal, transfer, or remove the property at issue without the writ. The strategic benefit of the writ of attachment is it effectively converts an unsecured claim into a secured one and potentially enhances settlement opportunities.

Prejudgment writ of garnishment

Another remedy is a prejudgment garnishment which, unlike a writ of attachment, allows a plaintiff to prevent a third party from transferring the defendant's property in its possession (or paying a debt owed) to the defendant.

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Unlike a post-judgment garnishment, a prejudgment garnishment orders the third party to hold or freeze the defendant's property until final judgment. While garnishments are most commonly used for freezing bank accounts, the remedy could also be used for settlement proceeds, stock certificates, or any other non-exempt property. For example, in *Shandong Airlines, Co., Ltd. v. CAPT, LLC*, the court issued a prejudgment writ against a third-party auction service garnishing US$4 million from the anticipated sale of the defendant's assets where the plaintiff established it was entitled to damages stemming from a breach of contract. 2009 WL 1861997, at *3 (M.D. Fla. June 25, 2009). A temporary restraining order preventing the sale might have seemed like the likely remedy; however, a prejudgment garnishment writ was the better solution, allowing the plaintiff to freeze sale proceeds that could satisfy a judgment. Most jurisdictions have statutory provisions for obtaining a garnishment writ, although the process may have different labels, including "trustee process" or writ of attachment.

Prejudgment writ of sequestration

A writ of sequestration allows a party with an existing security interest in property to ask the court to take custody of that property to prevent its disposition, concealment, waste, removal, or destruction pending final judgment. The typical example is an installment sale of the goods to the defendant, the defendant stops paying and the vendor seeks sequestration of the goods sold to enforce a vendor's lien. *See, e.g., Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974). In *Mitchell*, the court issued the writ, pending resolution of the conflicting claims upon an evidenced likelihood that the defendant would sell or otherwise dispose of the goods. While not a provisional remedy or an ancillary proceeding, a plaintiff may seek a writ of replevin under similar facts if the plaintiff can establish an exclusive right to possession.

Final thoughts

Each remedy has its specific purpose and provides strategic benefits for a litigator when considering ways to maintain the status quo or secure property pending a final resolution of the litigation. Sometimes, a combination of remedies may be necessary, depending on the unique circumstances.

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