

THE PROVISIONAL REMEDY OF ATTACHMENT IN COMMERCIAL TRANSACTIONS MAY ASSIST THE CREDITOR IN SWIFT COLLECTION

Sometimes a debtor will file a formal answer to a lawsuit consisting of a general denial to the creditor's civil complaint with the objective of delaying entry of a judgment against him. The creditor's attorney will prosecute the civil action as quickly as possible but the trial may not be set for hearing for several months or even years. The Courts vary in the speed with which they set cases for trial.

Sometimes a debtor is intending to sell his business or go out of business and there is great urgency in obtaining immediate recovery. Any delay will result in permanent loss to the creditor.

In these cases, the legislature has provided a remedy for the creditor in the form of "attachment." Attachment is a provisional remedy given to a creditor prior to entry of judgment which enables the unsecured creditor to secure his claim. A creditor can apply for a right to attach order and a writ of attachment if:

- 1) his claim is unsecured and arises out of a claim for money under a contract, express or implied,
- 2) the claim exceeds \$500,
- 3) the claim amount is readily ascertainable or is a fixed amount,
- 4) if the claim is against an individual, the claim arises out of the conduct by the debtor of a trade, business, or profession, and
- 5) the claim does not arise from a transaction primarily for personal, family or household purposes.

To succeed, the creditor must establish in a summary hearing before a Judge that his claim is *probably valid*. The application is based upon a declaration and supporting documents, such as contracts, invoices and/or statements of account.

Ordinarily the creditor must give the debtor notice prior to hearing of the application.

However, if there is a danger that the debtor will conceal assets or that assets will be lost, the Court may issue a right to attach order and writ of attachment *ex parte* (without notice).

Armed with a writ of attachment, the creditor can levy attachment on the money in a debtor's bank account or levy on some other asset (receivables, equipment). The creditor can levy on non-exempt real property or personal property of the debtor. If the debtor is a corporation then it cannot claim exemption of any of the attached assets or money.

The Sheriff will hold the money or other asset upon which attachment has been levied until judgment has been entered in favor of the creditor. At that time, the creditor can obtain recovery from the debtor's property held by the Sheriff.

In practice, the debtor will usually settle with the creditor before his property is seized by the Sheriff.

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