

If your client is a victim of fraud and the tortfeasor has assets in Illinois, prejudgment attachment can be a way to stop the defendant from dissipating assets before you win your case.

Once Cheated, Twice Shy:

Using Prejudgment Attachment to Help Your Defrauded Client Recover

By Patrick M. Kinnally



Since the onset of our statewide recession, a few trusted employees have made their employers victims of embezzlement and fraud. It has happened to a variety of businesses, large and small. It has occurred at law firms.¹

Those who have suffered monetary damages have asked the criminal justice system to provide a remedy in a criminal restitution order.² Although this may seem sufficient, it provides little solace where the criminal defendant/civil tortfeasor has transferred or otherwise disposed of assets while the criminal action wends its way ad infinitum.

Is there a better remedy? Perhaps. Our Code of Civil Procedure's prejudgment attachment rule³ offers an aggressive procedure by which a plaintiff who is a creditor of the fraudster-defendant can, upon filing of a complaint for fraud, seek to freeze the defendant's assets before judgment is obtained.

It is a device unknown at common law. It is an attempt by a creditor to secure the debtor's property before the creditor establishes entitlement at trial.⁴

Do not forget that "fraud" is a serious charge. It requires a high level of proof.⁵ Attachment prevents the defendant from liquidating, hiding, or transferring assets to another person or entity once the attachment order issues, but before you have proven your client's case by clear and convincing evidence. It is not for the faint of heart.

The Illinois statute meets due process requirements

Of course, this remedy seems antithetical to American jurisprudence, which generally does not condone imposing damages before the right to a remedy has been proven. Correctly, our United States Supreme Court has found that prejudgment attachment statutes must provide notice and the opportunity to be heard.⁶

For example, in *Mitchell*, a Louisiana attachment rule was upheld against a constitutional due process challenge.⁷ The Louisiana law provided that a state court could authorize an attachment of property pending the adjudication of the underlying litigation for the payment of a debt.

The Court found that constitutional due process requirements were met by the Louisiana statute. The law required the creditor-plaintiff to verify under oath the facts, not conclusions, in his complaint, and to allege he believed the defendant would dispose of assets he owned. Also, a judge supervised the entire process.

The Illinois attachment statute meets these procedural safeguard requirements. It requires specific fact pleading. It provides for judicial supervision⁸ and permits counterclaims.⁹ Finally, it affords the debtor an immediate hearing.¹⁰

Still, some Illinois courts have been reluctant to provide prejudgment relief. These courts confuse the statutory remedy of attachment with the

equitable one of injunctive relief.¹¹ This confusion results because the requirement of "irreparable harm" necessary for injunctive relief is engrafted onto the statutory remedy of attachment.

Furthermore, in Illinois the concept of equitable attachment does not exist.¹² The second district's opinion in *Hensley Construction LLC v. Pulte Home Corp.* provides a good overview of what *not* to do in seeking to obtain the prejudgment attachment of property.¹³

The importance of following the statute to the letter

Hensley installed water and sewer lines for Pulte Corporation (Pulte) and Del Webb (Webb) for residences. Hensley's complaint alleged it had performed all of its obligations under the contracts signed by the parties. Hensley claimed Pulte and Webb owed it money for the work performed.

The prejudgment attachment rule can enable a plaintiff who is a creditor of the fraudster-defendant to freeze the defendant's assets before a judgment is won.

Hensley then filed a "Motion to Compel Deposit of Retention Funds in Escrow Account."

Under the agreements with Pulte and Webb, 10 percent of the contract price was to be retained by

1. See Jannan Hanna, *How Not to Be a Victim of Law Firm Embezzlement*, 101 Ill. B.J. 456 (Sept. 2013).

2. 735 ILCS 5/5-5-6; see, e.g., *People v. Williams*, 2012 IL App (2d) 11157.

3. 735 ILCS 5/4-101.

4. *In re Marriage of Logston*, 103 Ill. 2d 266 (1984).

5. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100 (2005).

6. See Connie Koshiol, *Strict Scrutiny Sounds the Death Knell for New York's Son of Sam Law*, 17 S. Ill. U. L.J. 599, 608-09 (1993).

7. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

8. 735 ILCS 5/4-104.

9. *Id.* § 5/4-135; *id.* § 5/4-131.

10. *Id.* § 5/4-137.

11. See, e.g., *Franz v. Calaco Development Corp.*, 322 Ill. App. 3d 941 (2d Dist. 2001).

12. *Hensley Construction, LLC v. Pulte Home Corp.*, 399 Ill. App. 3d 184 (2d Dist. 2010).

13. See *id.*

Pulte or Webb until either final approval by themselves or the local municipality where the homes and sewer installation occurred. Hensley wanted these funds, and two different trial court judges or-

crow account's existence.

The appellate court reversed. It held that an equitable attachment is the restraining of defendant's control over property in its possession to satisfy a claim not yet reduced to judgment, and no such process exists in Illinois. It held the trial court's orders were nothing more than taking away the defendant's property in an anticipation of a judgment. This is especially inappropriate, the court concluded, where the funds ordered to be paid were not specifically identified.

The lesson: if you intend to seek attachment of property prejudgment, follow the statute precisely. Prejudgment attachments are quite common in Europe. In England, attachment rules emanate from what is called a *Mareva injunction*.¹⁴ The rules require great specificity. Claimants must include

a factual basis in the complaint and state what are believed to be any defenses, where the assets are located in the United Kingdom, and why the assets are at risk for dissipation. Finally, the plaintiff must assure payment of damages if the injunction is wrongfully issued.

The Illinois attachment rule, as we shall see, is quite similar. It is an effective civil remedy against a person or entity that decides they can steal without impunity. Here is a fact pattern, which unfortunately, is all too familiar.

Counseling the hypothetical BB Company

Jess has been BB Company's (BB) entrusted employee as its accountant/bookkeeper for 10 years at its manufacturing firm that makes hickory baseball bats for Major League Baseball teams. Jess made unauthorized payments from BB of \$300,000 in checks made payable to Pie Traynor Sports, which he owns.

When asked about those transactions, Jess did not respond and vacated his office. BB learns he is trying to sell his boat and motor home, which are worth \$200,000. Jess has been indicted by the state's attorney's office for theft. The president of BB asks you what you, as corporate counsel, can do. Unfortunately, you learn, BB has no insurance coverage for employee theft.

In BB's scenario, the company has lost \$300,000. Should it seek to attach Jess's \$200,000 in assets prejudgment based upon his apparent theft? Let's take a look. In this context, attachment is a damage control device. Does the investment in a bond and attorney's fees make economic sense? Can you freeze the asset before the debtor liquidates or disposes of it? Being able to move expeditiously is paramount in a case like this.

In an attachment action, BB will have to post a bond in double the sum of the *value* of the alleged claim.¹⁵ This can occur *ex parte* without notice.¹⁶ So the surety amount would be twice the value,¹⁷ not necessarily the price, of the property in question.

If the value of the property claimed is \$200,000, the amount of the bond

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dered them turned over.

This happened even though both defendants denied the allegations in each complaint. No bond was posted. No hearing was held to adduce any evidence concerning dissipation or even the es-

Prejudgment Attachment in Fraud Cases Under 735 ILCS 5/4-101 et seq.

1. Defendant fraudulently acquires the plaintiff's property.
2. Plaintiff files civil action against defendant, with fact-specific verified complaint.
3. Plaintiff seeks prejudgment attachment by filing the requisite affidavit, which must state
 - the amount of the claim
 - facts establishing the fraud
 - the defendant's place of residence, if known and
 - facts establishing the cause of action.
 - A statutory affidavit form is located at 735 ILCS 5/4-105.
4. Plaintiff obtains and files (simultaneously with the affidavit described above) a bond for twice the *value* of its claim against defendant, or twice the *value* of the property to be attached.
5. Court enters an Order of Attachment, which is directed to the sheriff and must be returnable not less than 10 days or more than 60 days after it is issued.
6. Sheriff carries out the attachment of defendant's property and defendant is served with a certified copy of the Order of Attachment.
7. Defendant has option to file motion demanding a hearing on the Order of Attachment or the affidavit filed by plaintiff.
8. At hearing, the Order of Attachment is required to be vacated unless plaintiff
 - proves, by a preponderance of the evidence, that "a cause for the entry of the order exists" and
 - "demonstrates to the court the probability that he, she or it will ultimately prevail in the action."

14. *Mareva Compania Naviera SA v International Bulk Carriers SA*, 2 Lloyd's Rep. 509 (Eng. C.A. 1975); see also Manuel Juan Dominguez, *Using Prejudgment Attachments in the European Community and the U.S.*, 5 J. Transnat'l L. & Pol'y 41, 50-52 (1995-1996).

15. 735 ILCS 5/4-107.

16. *Id.* § 5/4-108.

17. *Id.*

would be \$400,000. For most insurers, the bond would cost \$10-15 per thousand insured, or \$40-60,000 in a premium cost.

Is BB willing to invest this sum? Remember, they have to pay you as well. Don't skimp on the bond. Note that it must be filed before the attachment order issues.¹⁸ The value of the assets are the key determinant as to how quickly they can be liquidated. Bank or brokerage accounts may also be fair game, but only if you proceed quickly.

The reality for BB is that if it does not invest in the process, the likelihood of recovery is negligible. Whatever assets the debtor has will almost certainly disappear before the criminal case concludes and any restitution order is conferred.

The affidavit is key

The Code of Civil Procedure contains a listing of situations where prejudgment attachment is available, including cases

...Where the debtor has within 2 years preceding the filing of the affidavit required, fraudulently conveyed or assigned his or her effects, or a part thereof, so as to hinder or delay his or her creditors.

...Where the debtor has, within 2 years prior to the filing of such affidavit, fraudulently concealed or disposed of his or her property so as to hinder or delay his or her creditors.

...Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his or her property or effects, so as to hinder or delay his or her creditors.

...Where the debt sued for was fraudu-

lently contracted on the part of the debtor. The statements of the debtor, his or her agent or attorney, which constitute the fraud, shall have been reduced to writing, and his or her signature attached thereto, by himself or herself, agent or attorney.¹⁹

And where fraud is involved, including theft or embezzlement, these rules are to be construed in a most liberal manner for the claimant.²⁰

The most important document other than the fact-specific verified complaint in an attachment case is the affidavit.²¹ It must verify not only the entity bringing the claim, but the defendant's identity and the value of the asset(s), including any set offs or credits. It must also list the basis for the claim for recovery, the residence of the debtor, and the reason to believe dissipation of the asset(s) will occur if an attachment order does not issue.

Prepare the affidavit with care and precision. Plead facts, not conclusions. Make your client read it, discuss it with him or her, then verify it.

The order of attachment

The order of attachment is provided by rule.²² It directs the sheriff to attach the alleged debtor's property to satisfy the debt and costs claimed in the plaintiff's affidavit as found in the county where the assets are located. The order of attachment is directed to the sheriff or any person authorized to serve a summons.²³ It must be returnable not fewer than 10 or more than 60 days after its issuance.

Its command is to attach the property of the debtor as found in the county for the value of the debt sought to be satisfied consistent with the plaintiff's affidavit. Specific property, such as a home, motor home, or boat, must be described in the order.

The order of attachment requires the defendant to appear and answer the attachment complaint at a specific time. The order may only be levied in the county which it is entered,²⁴ unless the defendant is in the act of removing personal property.²⁵ In that case, the officer may pursue the defendant.

The right remedy under the right facts

The civil rule of prejudgment attachment may provide a remedy in fraud cases where liability is clear and the debtor's assets are easily reachable by a prejudgment attachment and of sufficiently high value.

Of course, this only makes sense if the cost of recovery is not too high. But in the right case, the Illinois prejudgment attachment rule can be the right remedy. ■

18. *ABN AMRO Services Co. v. Navarrete Industries*, 383 Ill. App. 3d 138 (1st Dist. 2008).

19. 735 ILCS 5/4-101.

20. *Id.* § 5/4-102.

21. *Id.* §§ 5/4-104, 105; see, e.g., *Martin v. Schillo*, 389 Ill. 607 (1945).

22. 735 ILCS 5/4-110.

23. *Id.*

24. *Id.* § 5/4-112.

25. *Id.* § 5/4-116.

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