

APPLICATION AND USE OF PREJUDGMENT ATTACHMENT PROCEEDINGS

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Do you often represent plaintiffs with a worry that the defendant may disburse, convert or conceal property and assets so as to become uncollectable on a future judgment? Do you wish there was a way to attach property or freeze assets in order to ensure a defendant's collectability?

Prejudgment attachment is a remedy that can prevent a defendant from fraudulently or improperly conveying property or assets to ensure a plaintiff's recovery on a judgment. What makes prejudgment attachment unique is in the name itself — it attaches a defendant's property before a judgment has been issued by the court.

Black's Law Dictionary defines fraudulent conveyance as a transfer of an interest in property for the purpose of hindering or delaying a creditor by putting the property beyond the creditor's reach. This is exactly what the prejudgment attachment process seeks to prevent. Metaphorically speaking, the fraudulent conveyance claim is the anvil while the prejudgment attachment motion is the hammer that results in up-front disclosure of property and assets.

Chapter 2715 of the Ohio Revised Code governs prejudgment attachment. This rare and unusual remedy will

only be granted by the court if one or more of the grounds for prejudgment attachment are present, as set forth in R.C. 2715.01(A)(1)-(11). If such grounds exist and the procedural requirements have been met, the court may issue an order attaching the property or assets described in the affidavit.

Under R.C. 2715.03, in order to begin the prejudgment attachment process, a plaintiff must file a written motion for the attachment of the defendant's property. However, this cannot include a defendant's personal earnings. This motion may be made at any time after the commencement of the action. In addition to the motion, an affidavit of the plaintiff or an agent or attorney of the plaintiff must be included. The requirements for what must be included in the affidavit are set forth in R.C. 2715.03 as follows:

- (A) The nature and amount of the plaintiff's claim, and if the claim is based upon a written instrument, a copy of that instrument;
- (B) The facts that support at least one of the grounds for an attachment contained in section 2715.01 of the Revised Code;

(C) A description of the property sought and its approximate value, if known;


(D) To the best of plaintiff's knowledge, the location of the property;

(E) To the best of the 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 or execution.

(F) If the property sought is in the possession of a third person, the name of the person possessing the property.

As stated above, R.C. 2715.01(A) provides eleven grounds on which a plaintiff can base his or her right to a prejudgment attachment. Several grounds include, but are not limited to, the defendant being an out-of-state resident, the defendant concealing himself or herself to avoid service, the defendant is about to remove property with the intent to defraud creditors, and that the defendant has fraudulently contracted the debt or incurred the obligations for the underlying lawsuit.

Another important aspect of the prejudgment attachment process is that




it may be done without issuing notice to the defendant and without conducting a hearing. Specifically provided in R.C. 2715.045(A), the ex parte attachment is applicable “if the court finds that there is probable cause to support the motion and that the plaintiff that filed the motion for attachment will suffer irreparable injury if the order is delayed” until an evidentiary hearing is held. The probable cause determination is defined in R.C. 2715.011 as being “likely that a plaintiff who files a motion for attachment...will obtain judgment against the defendant against whom the motion was filed that entitled the plaintiff to a money judgment that can be satisfied out of the property that is the subject of the motion.” The court will base its determination for the ex parte attachment on the motion and the affidavit and “any other relevant evidence that it may wish to consider.” However, R.C. 2715.04 states that within five business days of receiving notice of the attachment, the defendant may obtain a hearing by filing a written request to the court.

The prejudgment attachment process is not without high risk. In addition to the motion and affidavit, under R.C. 2715.044, the plaintiff must also file

with the court “a bond to the defendant against whom the motion was filed, executed by the plaintiff’s surety, in an amount twice the approximate value of the property to be attached under the order.” This is required so that “should judgment be issued against the plaintiff, the plaintiff will return the property taken or pay the value so assessed, at the election of the defendant, and also pay the damages suffered by the defendant as a result of the taking and detention of, and any injury to, the property and the costs of the action.” Instead of the bond, a plaintiff may deposit with the clerk of the court a cash value in the similar amount of the bond.

The next time that you find yourself concerned that a defendant has, or will, fraudulently convey his or her property, look to see if any of the grounds set forth in R.C. 2715.01(A) apply to your case. The prejudgment attachment remedy, when applicable, can advance your case one way or another — you will find out whether or not the defendant has sufficient property and assets to be collectible on a judgment. If so, the prejudgment attachment will ensure that property and assets are available upon a judgment in favor of the plaintiff. If not, you may need to settle the case sooner

rather than later. Keep in mind the requirement of the bond or cash deposit in addition to the motion and affidavit under R.C. 2715.044. According to R.C. 2715.044, in the event your client is indigent, the court can consider waiving the bond requirement. 

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