New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.law.com/ny
VOLUME 230—NO. 94 WEDNESDAY, NOVEMBER 12, 2003

OUTSIDE COUNSEL

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Connecticut's Prejudgment Remedy Statute

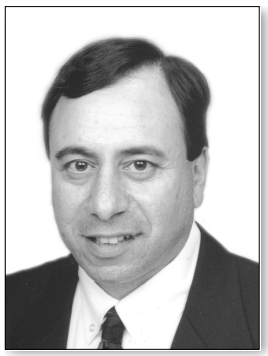
New York lawyers who encounter Connecticut's prejudgment remedy (PJR) statute for the first time — the statute applies equally in state and federal court in Connecticut[1] — may feel like they have fallen asleep and awakened in Wonderland. Here's a summary of what to expect when crossing the Mianus River.

The Connecticut statute allows a plaintiff in a civil action to obtain security for the claim, in the form of an attachment, garnishment and/or replevin, at any time before final judgment, if the court finds "there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff."[2]

In the absence of exigent circumstances, described below, the determination of probable cause vel non is made at an evidentiary hearing, brought on by application on notice, at which the defendant has the right to offer evidence and be heard.[3]

The probable cause hearing commonly takes place at the beginning of a case; the statute contemplates that it may be brought on by application before commencement of the plenary action, based on an attached unsigned summons and complaint, and an application that recites that the applicant "is about to commence an action."[4]

Such hearings are commonly held without discovery. Indeed, because discovery is permitted in "civil actions,"[5] and because, at least for purposes of tolling the statute of limitations, a PJR hearing based on an unsigned pleading is not a civil action,[6] there is an argument that discovery may not be permitted, even in the discretion of the court, in connection with such a hearing. Nonetheless, there is one reported case at the trial level holding that, even when the PJR application is based on an unsigned complaint, discovery may be permitted as a matter of judicial discretion.[7]



The statute authorizes the court, in its discretion to require the plaintiff to post a bond, to protect the defendant against damages resulting from the lost use of the defendant's property, if the defendant ultimately wins the case.

The probable cause standard is explained in case law as a "a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it."[8]

The probable cause burden of proof is extremely low, substantially lower than the familiar "likelihood of success" showing commonly required of injunction applicants. As a practical matter, sustaining the probable cause burden requires no more than establishing a prima facie case.

The aspect of the PJR process that most surprises non-Connecticut lawyers is that neither exigent circumstances nor the defendant's financial condition has any place in the PJR calculus. All that matters is probable cause. In other words, it makes no difference how much money the defendant has and/or how easy or difficult it will be for the defendant to pay a possible judgment. Every plaintiff may secure its claim if it establishes probable cause.

Disclosure of Assets

PJR applications are commonly accompanied by the plaintiff's statutory motion for disclosure of assets.[9] If the court finds probable cause, and if the plaintiff does not already know of Connecticut assets against which the consequent PJR may be enforced, the court usually requires the defendant to disclose Connecticut assets sufficient to secure the probable cause amount.

The defendant may avoid the disclosure by posting a bond for that amount.[10] Indeed, the defendant may post a PJR bond at any point in the process; it may avoid the probable cause hearing altogether if it wishes to post such a bond before the hearing.[11] Similarly, after a PJR is granted and secured, a defendant may move to substitute alternative security.[12] Such motions are commonly granted.

An example is a court order allowing the defendant to sell real estate encumbered by a PJR attachment, and to replace that security with a cash escrow account, funded by the proceeds of sale.

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discretion, to require the plaintiff to post a bond, to protect the defendant against damages resulting from the lost use of the defendant's property, if the defendant ultimately wins the case.[13] Such a plaintiff's bond is not commonly required, and there is sparse case law informing the exercise of judicial discretion on whether and when to require one.

The reason for that seemingly anomalous absence of authority is no doubt historical: Until 1991, by statute, PJRs were granted ex parte, based only on a plaintiff's affidavit. The evidentiary hearing was held afterwards, on the defendant's motion to dissolve.

When the U.S. Supreme Court held that procedure unconstitutional, in *Connecticut v. Doehr*,[14] the statute was amended to provide, as it does now, that the hearing must be held before the PJR is granted.

The statutory provision permitting, but not compelling, the court to require a plaintiff's bond was added to the statute in the post-*Doehr* amendments.[15] However, because there was a firmly entrenched PJR culture before *Doehr*, in which ex parte PJRs were the norm and the notion of a plaintiff's bond did not exist, the plaintiff's bond provision in the new statute has thus far received scant attention in the case law. Perhaps that will change.

The current statute still provides for a PJR, without a hearing or notice to the defendant, based on a plaintiff's affidavit, if that affidavit establishes the existence of statutorily enumerated exigent circumstances, involving the actual or imminent sequestration or fraudulent disposal of assets by the defendant, or the defendant's attempt to flee the state.[16] When such a PJR is granted, the defendant is entitled to a prompt evidentiary hearing on a motion to dissolve.[17] The exigent circumstances enumerated in this provision are familiar to lawyers in other states, because they are of a kind usually required (elsewhere) as an absolute condition to the award of any prejudgment remedy.[18]

Perfection of a PJR is accomplished in a manner analogous to enforcement of a judgment. Specifically, a PJR attachment of real estate is perfected by recording an appropriate writ of attachment on the subject land records.[19]

A PJR attachment or garnishment of personal assets is perfected through service by a Connecticut marshal of an appropriate writ on any person or entity holding the subject assets, such as, for example, a bank.[20] Accordingly, as is true for judgment enforcement purposes, a PJR may be enforced only against assets located in Connecticut.

If a defendant's bank account is out of state, but the bank has a branch or office in Connecticut, it is an open question — on which no reported case is known — as to whether service of the appropriate writ on the bank in Connecticut may be sufficient to reach the foreign account.

Courts have held, in situations where a plaintiff sought to attach the defendant's certificated securities located out of state, that the defendant may properly be subjected to a mandatory injunction requiring the defendant to bring the certificates to Connecticut to subject them to the PJR.[21] Those cases relied, in part, on provisions of Article 8 of the UCC governing certificated securities.[22]

No Connecticut case is known in which the court ordered the defendant to bring into Connecticut any out of state property other than certificated securities for purposes of satisfying a PJR. It is possible, however, to have PJR orders accompanied by conventional prohibitory injunctions and/or temporary restraining orders, providing, in substance, for the freezing of the defendant's specified Connecticut assets pending the perfection of a PJR.

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The proceedings on a PJR application are ancillary to, and separate and distinct from, the plenary action.[23] Accordingly, a PJR has no res judicata or other effect on the merits.[24] Moreover, a PJR ruling is considered a final one and carries its own right of appeal.[25]

Although the PJR process and the related plenary action are separate and distinct, a PJR at the beginning of a case can obviously have an enormous impact on a case's settlement dynamic.

Potential plaintiffs with jurisdictional options should consider the Connecticut PJR process in their forum selection calculus. Potential defendants considering forum selection clauses at the time of contract should do likewise.

And New York litigators preparing to visit southern New England should have some idea of what they may be in for.

(1) See D. Conn. L. Civ. R. 4(c) ("In addition to remedies otherwise provided by federal law, a party may secure a prejudgment remedy, as permitted by, and in accordance with, the law of the State of Connecticut").
(2) Conn. Gen. Stats §§52-278d, 52-278a(d).
(3) See Conn. Gen. Stats. §§52-278c, 52-278d.
(4) Conn. Gen. Stats. §52-278c.
(5) Connecticut Practice Book §§13-2, et seq.
(6) See, e.g., *Raynor v. Hickock Realty Corp.*, 61 Conn. App. 234, 763 A.2d 54 (2000); *Howard v. Robertson*, 27 Conn. App. 621, 608 A.2d 711 (1995).
(7) See *Motiva Enterprises, LLC v. Wyatt Energy, Inc.*, Docket No. X02CV020172116S, 2002 WL 31462502 (Conn. Super. Oct. 16, 2002).
(8) *Three S. Development Co. v. Santore*, 193 Conn. 174, 175, 474 A.2d 795, 796-97 (1984).
(9) See Conn. Gen. Stat. §52-278n.
(10) See Conn. Gen. Stat. §52-278n(d).
(11) See Conn. Gen. Stat. §52-278c(g).
(12) See Conn. Gen. Stat. §52-278n(d).
(13) See Conn. Gen. Stat. §52-278d(d).
(14) 501 U.S.1, 111 S.Ct. 2105 (1991).
(15) See 1993 Conn. Acts 93-431 (Reg. Sess.).
(16) See Conn. Gen. Stat. §52-278e (requiring a showing "that there is a reasonable likelihood that the defendant (1) has hidden or will hide himself so that process cannot be served on him or (2) is about to remove himself or his property from this state or (3) is about to fraudulently dispose of or has fraudulently disposed of any of his property with intent to hinder, delay or defraud his creditors or (4) has fraudulently hidden or withheld money, property or effects which should be liable to the satisfaction of his debts").
(17) See Conn. Gen. Stat. §52-278e(d)-(e).
(18) See, e.g., N.Y. Civil Practice Law and Rules §6201(3) (McKinney 2002) (allowing order of attachment where "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts. . .").
(19) See Conn. Gen. Stat. §52-285.
(20) See Conn. Gen. Stat. §52-329.
(21) See *Inter-Regional Financial Group, Inc. v. Hashemi*, 562 F.2d 152 (2d Cir. 1977); *Hamma v. Gradco Systems, Inc.*, Docket No. B:88-115, B:89-437, 1992 U.S. Dist. LEXIS 17601 (D. Conn. Nov. 4, 1992); *Rhode Island Hosp. Trust Nat'l Bank v. Trust*, Docket No. 0700674, 1 Conn. L. Rptr.442 (1990).
(22) Id.
(23) See *Union Trust Co. v. Heggelund*, 219 Conn. 620, 625, 594 A.2d 464, 466 (1991); *E. J. Hanson Elevator, Inc. v. Stoll*, 167 Conn. 623, 628-29, 356 A.2d 893, 896 (1975).
(24) See *E.J. Hanson Elevator*, 219 Conn. at 629-30, 356 A.2d at 896.
(25) See Conn. Gen. Stat. §52-278l.