

Prejudgment Attachments and Fraudulent Conveyance Claims in Fidelity Litigation Securing Assets Prior to Judgment – East of the Mississippi

By: Robert Warchola & Brian Willis, Shumaker, Loop & Kendrick

I. Introduction

It is not difficult to imagine that you file an action to recover a loss and the defendant hastily transfers the cash to friends, wires money to relatives overseas, hides the vehicles out of state, and dumps his real property (except homestead in Florida). As your action proceeds at a snails pace because of extensive discoveries, quests, and motion practice from defense counsel's delay, any opportunity to recover from the defendant may be dashed by the time the Judge enters judgment and you seek to execute and get nothing. To forestall such a result, it may be possible to secure a defendant's property before he gets rid of it. Absent securing the property before transfers take place, there are also tools to help identify and unwind fraudulent transfers.

The first section of the paper will discuss prejudgment attachment – a statutory remedy available in most states to seize a defendant's property at the commencement of a lawsuit. Although the rules governing prejudgment attachment vary from state to state, we will analyze some of the common features and requirements of prejudgment attachment and then give a summary of the law for the states East of the Mississippi.

The second section of the paper will discuss fraudulent transfers. We first identify the two types of fraudulent transfers – active and constructive – and then discuss remedies available under the Uniform Fraudulent Transfers Act, which has been adopted in most states.

II. Prejudgment Attachments

Prejudgment attachment provides a potential tool to secure the defendant's assets while the lawsuit is pending. Prejudgment attachment authorizes a plaintiff to bring suit and secure the property of the defendant before obtaining final judgment. It is intended to prevent a defendant from selling, transferring, encumbering, hiding real or personal property before the plaintiff is able to obtain and enforce a final judgment.

The exact requirements of prejudgment attachment vary from state to state. In general, prejudgment attachment requires (1) the existence of a suit for damages, (2) identification of property of the defendant, (3) to which the plaintiff claims a legal right, and (4) demonstration of some need to secure the property prior to the conclusion of the lawsuit. You cannot seize a defendant's property without a defendant. In other words, you must file suit before seeking prejudgment attachment. You must also be able to detail the property to be seized with sufficient detail that the Court can issue an Order describing the property to be seized.

Prejudgment attachment is a state law remedy and is purely a statutory right. There is no common law right to prejudgment attachment and there is no federal law which authorizes prejudgment attachment generally. Rather, each state has its own laws and rules that govern (1) what property can be attached, (2) what rights the defendant has to notice of the attachment proceedings, and (3) the procedure for obtaining the prejudgment attachment. The statutes authorizing prejudgment attachment vary widely among the states.

Further, by definition, prejudgment attachment deprives the property owner of his or the property rights prior to full adjudication on the merits. For this reason, prejudgment attachment procedures cannot be considered without analysis of the constitutional right to due process. The seminal case in this area is *Connecticut v. Doehr*, 501 U.S. 1, 14 (1991), which applied the Federal Due Process clause to the prejudgment attachment statute of Connecticut.

a. What Causes of Action Permit a Plaintiff Seek Prejudgment Attachment?

State laws often provide a limit on the types of cases in which a plaintiff can seek prejudgment attachment. The list almost always includes a suit for payment under the terms of a note or a contract with a liquidated damages amount. Each state, however, maintains a different version of what claims it will entertain prior to the entry of a prejudgment attachment order.

Alabama, as is typical of most states with prejudgment attachment rules, limits the types of actions in which a plaintiff may seek prejudgment attachment, as follows:

- (1) To enforce the collection of a debt, whether it be due or not, at the time the attachment is taken out;
- (2) For any moneyed demand, the amount of which can be certainly ascertained;
- (3) To recover damages for a breach of contract, when the damages are not certain or liquidated; or
- (4) When the action sounds in damages merely.

Ala. Code § 6-6-41. As such, in Alabama the plaintiff could not seek prejudgment attachment when bringing suit based on claims of negligence and for injunctive relief. Such a suit would not meet any of the four categories of Ala. Code § 6-6-41. However, if the action was for money damages only, and did not seek injunctive relief, then prejudgment attachment could be obtained pursuant to Ala. Code § 6-6-41(4).

Several states are distinguishable and permit greater attachment rights when the property at issue is owned by a foreign corporation or non-resident. For instance, Wisconsin, Wis. Stat. Ann. § 811.03, and Tennessee, Tenn. Code Ann. § 29-6-106, both permit the attachment of property in a tort action only when the defendant is a foreign corporation or non-resident.

b. What Danger, If Any, Must Exist to the Property to be Attached?

Many states will only issue a prejudgment attachment order in a narrow set of statutorily defined circumstances. For instance, in Florida, the law only authorizes prejudgment attachment if the defendant:

- (1) Is actually removing the property out of the state; (2) Is fraudulently disposing of the property to avoid the payment of his or her debts; [or] (3) Is fraudulently secreting the property to avoid payment of his or her debts.”

Fla. Stat. § 76.05, 76.03 (2012).

Delaware, on the other hand, authorizes prejudgment attachment only when the defendant is out-of-state or otherwise cannot be located. Del. Code tit. 10, §§ 3501-02. Under Delaware's prejudgment attachment scheme, once the defendant makes an appearance in Delaware's court system and submits itself to the jurisdiction of the Delaware court's, the prejudgment attachment will be removed. Thus, in Delaware, prejudgment attachment is designed primarily to compel foreign defendant's to appear in Delaware's court system.

c. Can I Obtain Prejudgment Attachment Without Notifying the Defendant?

Many states permit the plaintiff to attach property of the defendant ex parte, without notice, to the defendant. Pursuant to *Connecticut v. Doehr*, 501 U.S. 1, 16 (1991), where ex parte attachment is authorized by statute, it can only be accomplished upon a sufficient showing of "exigent circumstances." However, the Supreme Court has so far avoided providing a precise definition of exigent circumstances, leaving the matter of exigent circumstances up for analysis and interpretation on a case by case basis. Generally, exigent circumstances are going to constitute evidence that would show that the defendant has, or is about to, transfer, hide, or encumber the property which is the subject of the attachment. See *Connecticut*, 501 U.S. at 16.

Many state statutes attempt to describe those circumstances in which prejudgment attachment may issue, but few attempt to explain whether such circumstances are exigent or not. For instance, in Washington, D.C. prejudgment attachment may be obtained against a domestic defendant that (a) has been absent from the District for at least six months, (b) is avoiding ordinary process through concealment or removal from the District, and (c) has or is in the process of removing, conveying, concealing, assigning, secreting, or disposing of property located in the District so as to defeat any eventual judgment against him. D.C. Code § 16-502. Following the Supreme Courts analysis in *Connecticut*, the above factors would likely be considered exigent circumstances.

Despite the availability of ex parte attachment in some states, the right to obtain an ex parte attachment does not eliminate the requirement for a hearing on the attachment. Indeed, if the Court authorizes an ex parte attachment, the Court must promptly set a hearing and provide notice of the attachment and hearing to the defendant.

Once again practices vary significantly between states as to the procedure for obtaining a hearing following an ex parte attachment. Some states will automatically set the hearing within a set period of time following the attachment of property. Alabama, for instance, will set the hearing within five days of the date of seizure. Ala. R. Civ. P. 64(b)(2)(B). Other states, wait for the defendant to challenge the validity of the attachment. Georgia requires the hearing on prejudgment attachment to be held within ten days from the date the defendant moves to dissolve the attachment. Ga. Code § 18-3-15.

d. Constitutional Barriers to Prejudgment Attachment.

The Supreme Court, in *Connecticut v. Doehr*, indicated that a statute authorizing prejudgment attachment of property without prior notice, without a hearing, and without requiring a showing of exigent circumstances would not meet due process requirements. *Connecticut*, 501

U.S. at 16-18. *Connecticut* involved a prejudgment attachment order obtained by a plaintiff who brought suit for assault and battery. *Id.* at 5. Connecticut law at the time authorized “prejudgment attachment of real estate without affording prior notice or the opportunity for a prior hearing to the individual whose property is subject to the attachment. *Id.* Connecticut did not require a posting of a bond and did not limit the causes of action in which prejudgment attachment could be sought. *Id.* Connecticut only required a minimal showing, through a bare bones affidavit, of the right to the prejudgment attachment.¹ *Id.* at 6.

The Supreme Court found that even the temporary or partial impairments imposed by prejudgment attachment were subject to the requirements of the Due Process Clause. *Id.* at 12. The Supreme Court found that it was “self-evident that the judge could make no realistic assessment concerning the likelihood of an action's success based upon these one-sided, self-serving, and conclusory submissions” in the filed affidavit. *Id.* at 14. Thus Supreme Court determined that the procedure by which Connecticut issued a prejudgment attachment created a substantial risk of erroneous deprivation of property and violated the Due Process Clause. *Id.* at 12, 14. Because of the substantial risk of erroneous deprivation, the Supreme Court found that due process required a showing of “exigent circumstances” before issuing an ex parte prejudgment attachment order. *Id.* at 18.

Four of the nine justices² went on to find that a bond “or other security” was required to be in place in order to issue a prejudgment attachment order. *Id.* These four justices found that a bond was required for any prejudgment attachment. *Id.* at 19. According to the plurality opinion, anytime a court was called on to impair property rights prior to full adjudication of the parties claims on the merits, risk that the court would reach an erroneous decision was present and required the party seeking the prejudgment attachment to post some security to protect the rights of the affected party. *Id.* at 20.

Ultimately, *Connecticut* settled some issues, but raised others. It is clear that prejudgment attachment cannot be issued without a hearing unless “exigent circumstances” are present. Less clear is what it means to have exigent circumstances, since no attempt to define exigent circumstances was even made by the Supreme Court. The decision also leaves open the question of whether a bond is required. The plurality opinion would indicate a bond is always required, but it was supported by only four of the nine justices. The four justices that supported the prejudgment attachment requirements were among the Court’s more liberal justices. It is not clear how today’s Supreme Court would view the issue.

¹ “In five one-sentence paragraphs, DiGiovanni stated that the facts set forth in his previously submitted complaint were true; that ‘I was willfully, wantonly and maliciously assaulted by the defendant, Brian K. Doehr’; that ‘[s]aid assault and battery broke my left wrist and further caused an ecchymosis to my right eye, as well as other injuries’; and that ‘I have further expended sums of money for medical care and treatment.’ The affidavit concluded with the statement, ‘In my opinion, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff.’” *Connecticut*, 501 U.S. at 6-7.

² Justices Marshall, Stevens, O’Connor and White.

e. Prejudgment Attachment by State.

1. Alabama

In Alabama, prejudgment attachment is governed by Alabama Code § 6-6-40 *et seq.*, and by Rule 64 of the Alabama Rules of Civil Procedure to initiate the operation of the code. The plaintiff must file an affidavit describing the property to be attached, the plaintiff's right to the property, why it would be wrongful for the defendant to retain the property, and a statement of risk of injury. Ala. R. Civ. P. 64(b)(1). The court must then, without delay, "examine the complaint, the application and supporting affidavit and its attachments and any further showing offered by the plaintiff in support of the plaintiff's right to the immediate possession of the property." Ala. R. Civ. P. 64(b)(2)(A). If exigent circumstances exist, the Court may attach the defendant's property *ex parte*, but the defendant is entitled to a hearing within five (5) days from the date of seizure" Ala. R. Civ. P. 64(b)(2)(B). The plaintiff is required post a bond equal to double the amount of the property attached. Ala. Code § 6-6-45.

Alabama's prejudgment attachment statute has been found to be constitutional. *Jones v. Preuit*, 822 F.2d 998, 1005 (11th Cir. 1987), *vacated on other grounds*, 833 F.2d 1436 (11th Cir. 1987) (upholding Alabama's prejudgment attachment statute as constitutional); *Ex parte Boykin*, 568 So. 2d 1243 (Ala. Civ. App. 1990)(discussing protections afforded by Ala. R. Civ. P. 64); *GE Commercial Distribution Fin. Corp. v. Carter Bros. Mfg. Co.*, No. 2:10-cv-655-ID, 2010 WL 3118276, at *4-*5 (M.D. Ala. Aug. 5, 2010) (finding Alabama prejudgment attachment procedures constitutional in light of *Connecticut v. Doehr*).

2. Connecticut

After, the Supreme Court's decision in *Connecticut v. Doehr*, Connecticut revised its prejudgment attachment statute to comply with the Supreme Court's requirements. The state's prejudgment attachment statute is set forth in § 52-278a, *et. seq.*, Conn. Gen. Stat. A request for issuance of a writ of attachment is initiated by filing an "application" to the court, along with a supporting affidavit, copy of the complaint, a proposed, unexecuted writ of attachment, and proposed order directing the writ to be issued. *Id.* at § 52-278c. Section 52-278c provides forms of the application and order to be submitted to the court.

In ruling on whether a request for prejudgment attachment should be issued the court is required to determine:

1. whether or not 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.
3. whether payment of any judgment that may be rendered against the defendant is adequately secured by insurance,
4. whether the property sought to be subjected to the prejudgment remedy is exempt from execution

Id. § 52-278d. A bond requirement may be imposed when requested by the defendant. *Id.* at § 52-278d.

Connecticut permits a plaintiff to obtain an *ex parte* prejudgment attachment provided that, in addition to the other requirements, the plaintiff can show that “there is 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.

Id. at § 52-278e. If the court issues the writ of attachment *ex parte*, the summons to the defendant includes additional language that permits that provides an expedited process to challenge the attachment. *Id.*

Connecticut is unique in authorizing a party to a commercial transaction waive the right to notice and hearing prior to prejudgment attachment. *Id.* at § 52-278f.

3. Delaware

Prejudgment attachments in Delaware are governed by Del. Code tit. 10, §§ 3501-3513 and Del. Super. Ct. Civ. R. 4(b) and 12(aa5). Notably, the Delaware scheme exempts the banking/ lending industry and limits the attachments of insurance company assets. See *Provident Trust Co. v. Banks*, 9 A.2d 260 (Del. Ch. 1939) (holding the statutory exemptions include money and other property in the custody and control of a banking institution); see also *Bank of Delaware v. Wilmington Hous. Auth.*, 352 A.2d 420 (Del. Super. 1976) (finding legislative intent of statute exempting banks from attachment scheme was not merely to exempt deposits, but rather to exempt any corporate entity which qualified as bank).

Delaware is also unique in that it limits attachment to when the defendant is out-of-state or otherwise cannot be located. Del. Code tit. 10, §§ 3501-02. Delaware case law notes that the goal of the Delaware prejudgment attachment statutes is to compel an appearance by an otherwise uncooperative defendant. *Brown v. Consol. Fisheries Co*, 17 F.R.D. 86, 88 (D. Del. 1954). Thus, any nonresident defendant whose property has been seized through a writ of foreign attachment may make a general appearance before the court and will likely have their property released. Del. Super. Ct. Civ. R. 4(b)(3).

The constitutionality of the Delaware scheme was analyzed and approved by the Delaware Superior Court in *Hibou, Inc. v. Ramsing*, 324 A.2d 777 (Del. Super. 1974).

4. Florida

Florida law provides that a judge may issue a writ of attachment “when the debtor (1) Is actually removing the property out of the state; (2) Is fraudulently disposing of the property to avoid the payment of his or her debts; [or] (3) Is fraudulently secreting the property to avoid payment of his or her debts.” Fla. Stat. § 76.05, 76.03 (2012). The plaintiff must show grounds for attachment “by a verified complaint or a separate affidavit.” Fla. Stat. § 76.08. A bond equal to double the value of the attached property is required. Fla. Stat. § 76.12.

A defendant “by motion may obtain the dissolution of a writ of attachment unless the plaintiff proves the grounds upon which the writ was issued and a reasonable probability that the final judgment in the underlying action will be rendered in the plaintiff's favor. The court shall set down such motion for an immediate hearing.” *Id.* § 76.24.

5. Georgia

Georgia limits prejudgment attachment to the following situations: The defendant (1) Resides out of the state; (2) Moves or is about to move his domicile outside the limits of the county; (3) Absconds; (4) Conceals himself; (5) Resists legal arrest; or (6) Is causing his property to be removed beyond the limits of the state.” Ga. Code § 18-3-1, 18-3-9 (2012). Georgia requires a bond to issue the attachment. *Id.* § 18-3-10. The attachment may be issued ex parte and the defendant may challenge the attachment at any time once notified. The Court is required to hold a hearing on a challenged attachment within ten days. *Id.* § 18-3-15.

6. Illinois

Illinois law provides that a judge may issue a writ of attachment after commencement of an action in the following circumstances:

1. Where the debtor is not a resident of [the] State;
2. When the debtor conceals himself or herself or stands in defiance of an officer, so that process cannot be served upon him or her;
3. Where the debtor has departed from [the] State with the intention of having his or her effects removed from [the] State;
4. Where the debtor is about to depart from [the] State with the intention of having his or her effects removed from [the] State;
5. Where the debtor is about to remove his or her property from [the] State to the injury of such creditor;
6. 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;

7. 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;
8. Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his or her property or effects, so as to delay his or her creditors;
9. Where the debt sued for was fraudulently contracted on the part of the debtor...;
10. When the debtor is a person convicted of first degree murder, a Class X felony, or aggravated kidnapping, or found not guilty by reason of insanity or guilty but mentally ill of first degree murder, a Class X felony, or aggravated kidnapping, against the creditor and that crime makes the creditor a "victim" under the Criminal Victims' Asset Discovery Act.

735 Ill. Comp. Stat. 5/4-101. Illinois requires a bond to be issued in the amount of double the value of the property to be attached. *Id.* 5/4-107.

Illinois Statute 5/4-101 allows prejudgment attachment without a preattachment hearing only when certain circumstances exist. However, after an ex-parte attachment, and upon filing of a motion, the defendant is entitled to a hearing within five days as to the validity of the attachment. *Id.* 5/4-137.

7. Indiana

Indiana's prejudgment attachment statute is set forth in Ind. Code § 34-25-2, *et seq.* Ind. Code § 34-25-2-1(b) authorizes the use of prejudgment attachment in action for money damages where the defendant:

1. is, or one (1) of several defendants is, a foreign corporation or a nonresident of Indiana;
2. is, or one (1) of several defendants is, secretly leaving or has left Indiana with intent to defraud: (A) the defendant's creditors; (B) the state; (C) a municipal corporation; (D) a political subdivision; or (E) a school corporation (as defined in IC 20-18-2-16(c));
3. is concealed so that a summons cannot be served upon the defendant;
4. is removing or about to remove the defendant's property subject to execution, or a material part of the property, outside Indiana, not leaving enough behind to satisfy the plaintiff's claim;
5. has sold, conveyed, or otherwise disposed of the defendant's property subject to execution, or permitted the property to be sold with the fraudulent intent to cheat, hinder, or delay: (A) the defendant's creditors; (B) the state; (C) a municipal corporation; (D) a political subdivision; or (E) a school corporation (as defined in IC 20-18-2-16(c)); or

6. is about to sell, convey, or otherwise dispose of the defendant's property subject to execution with the fraudulent intent to cheat, hinder, or delay: (A) the defendant's creditors; (B) the state; (C) a municipal corporation; (D) a political subdivision; or (E) a school corporation

The plaintiff must show such grounds for attachment by filing “an affidavit showing: (1) the nature of the plaintiff’s claim; (2) that the plaintiff’s claim is just; (3) the amount that the plaintiff ought to recover; and (4) that one of the grounds for an attachment enumerated in section 1 ... is present.” *Id.* § 34-25-2-4. A bond is required. *Id.* § 34-25-2-5.

Despite the fact that Indiana authorizes the clerk to issue a prejudgment attachment, the constitutionality of Indiana’s prejudgment attachment regime was approved in *Salzer v. Dellinger*, 54 F.3d 779 (7th Cir. 1995).

8. Kentucky

In Kentucky, prejudgment attachments are governed by Ky. Rev. Stat. § 425.301, *et seq.*, which provides, in relevant part, that a plaintiff may, at or after the commencement of an action, obtain an attachment against the property of the defendant as a security for the satisfaction of such judgment as may be recovered. Attachments are available for any action brought for the recovery of money against a defendant who (i) is a nonresident and foreign corporations, (ii) has been absent from the state for four months but is still be considered a resident, (iii) has left the state in order to defraud creditors, (iv) has left his county of residence or concealed himself in order to avoid regular service of process, or (v) is about to remove, sell, or otherwise dispose of his property so as to render it insufficient to satisfy an eventual judgment for the plaintiff. *Id.* However, if the sole basis for seeking an attachment is that the defendant is a nonresident or foreign corporation, attachments are only available in contract actions. *Id.*; *Bates March Co. v. Norton Iron Works*, 68 S.W. 423 (Ky. 1902) (holding that if an attachment is sought on the sole ground that the defendant is a foreign corporation or nonresident an attachment can only be obtained on a claim arising on a contract judgment or award); *Gauen v. Welch*, 350 S.W. 2d 636 (Ky. 1961) (in an action on a contract, it is sufficient to sustain an attachment to allege that the defendant is a nonresident).

Under § 425.301(3), before an order of attachment shall issue prior to judgment, the plaintiff must first make a demand in writing, delivered or mailed (registered or certified) to the debtor, along with a copy of the complaint, motion and summons, to his last known place of residence, at least seven (7) and not more than sixty (60) days before such order is sought. The demand shall contain a statement that the debtor has seven (7) days in which to petition the court for a hearing or in which to pay the claim in full, and that unless a hearing is set or the claim paid, an order will be sought to subject his property to payment of the claim. An affidavit of the plaintiff or his attorney evidencing compliance with this section must be filed before an order of attachment can be issued by the clerk. *Id.* Additionally, the plaintiff must secure a bond of at least double the amount of the total claim against the defendant. § 425.309.

Under § 425.308, an order of attachment may be issued *ex parte* by a “judicial officer”—which notably excludes the clerk of court—prior to a hearing. See *Commonwealth v. Wise*, S.W.2d 491 (1961). *Ex parte* attachment motions must meet the requirements of § 425.307 and also must show that “great or irreparable injury would result to plaintiff if issuance of the

order were delayed until the matter could be heard on notice [to the defendant].” *Id.* An ex parte attachment can be obtained without sending the § 425.301(3) notice. *Nat’l City Bank v. Merchant Mgmt. Sys., Inc.*, 2010 WL 147214, *2 (E.D. Ky. 2010).

Because (a) the clerk is prohibited from issuing ex parte attachment orders, (b) the plaintiff is required to post a double-value bond, and (c) pre-attachment notice or hearing is required absent the showing of “great need” by the plaintiff, the Kentucky scheme appears to be constitutional.

9. Maine

In Maine, prejudgment attachments are governed by Maine Rule of Civil Procedure 4A which provides, in relevant part, that a plaintiff in any action³ may obtain an attachment against the property of the defendant in order to assure eventual satisfaction of damages and costs. Attachments are generally obtained after notice and hearing is provided to the defendant and the court determines that it is more likely than not the plaintiff will obtain a judgment that the defendant would be unable to otherwise satisfy. Maine R. Civ. P. 4A(c). In subsection (g), Maine authorizes *ex parte* prejudgment attachments.

A plaintiff obtains a standard prejudgment attachment by submitting a motion for approval of the attachment along with the complaint. *Id.* The motion must be supported by an affidavit setting forth the specific facts of the case and supporting the need for attachment. *Id.*; Rule 4A(i). The motion, affidavit, and an appropriate notice of hearing on the matter must be served on the defendant along with the initial complaint and summons. Rule 4A(c).

Upon receiving notice, a defendant has 21 days to respond to the motion *Id.*; Rule 7(c). Failure to respond in the time allowed results in the waiver of any potential opposition to the motion and an attachment order may subsequently be issued without a hearing. Rule 4A(c). After the order is issued, attachment is made by the sheriff of the appropriate county within 30 days. *Id.*; Rule 4A(a).

If the defendant responds to the motion for attachment, a hearing is held. If the motion is granted, the defendant has the option of restricting the attachment to a specific piece of property or group of assets upon showing that it is sufficient to satisfy any eventual judgment and that the defendant would suffer hardship if the attachment was not limited in this way. Rule 4A(d)(1). The attachment order may be entirely dissolved if the defendant tenders cash or a sufficient bond from an approved surety to cover any potential judgment. Rule 4A(d)(2).

The Maine Supreme Court has determined that the state’s prejudgment attachment statute is constitutional. *Gen. Commerce & Industry, Inc. v. Hillside Const. Co., Inc.*, 564 A.2d 763 (Me. 1989) (stating that the amendments made in 1973 were for the express purpose of complying with the constitutional notice and hearing requirements).

³ Except that under 4A(a), prejudgment attachments are not available in any action against a consumer for a debt arising out of a consumer credit transaction as defined by the Maine Consumer Credit Code. See Advisory Ruling #32 Formerly Admin. Interpretation #35, 1976 WL 384567 (1976).

10. Maryland

In Maryland, statutes confer on courts their power to authorize the remedy of attachment before judgment, in certain cases, while the Maryland Rules establish the procedure by which that remedy is invoked and opposed. *Phyllis J. Outlaw & Associates v. Graham*, 172 Md. App. 16, 28, 912 A.2d 64, 72 (2006). Md. Code Ann., Cts. & Jud. Proc. § 3-303, limits the issuance of attachment to the following scenarios:

1. The defendant is a nonresident, or corporation with no resident agent in State,
2. Defendant is evading service,
3. Flight of the defendant from state,
4. Defendant engaged in assignment, disposal, concealment, or removal of property with intent to defraud, or
5. Suits involving home improvement transactions.

Maryland Rule of Procedure 2–115 sets out the procedure for obtaining a prejudgment attachment. The plaintiff shall file with the request an affidavit verifying the facts set forth in the complaint and stating the grounds for entitlement to the writ. Md. R. Civ. P. Cir. Ct. 2-115. The request and supporting affidavit may be made *ex parte*. *Id.* A bond is required. *Id.*

Because Maryland authorizes *ex parte* prejudgment attachment without a showing of exigent circumstances, it may be subject to a constitutional challenge per *Connecticut v. Doehr*.

11. Massachusetts

In Massachusetts the seizure of property is governed by Mass. Gen. Laws ch. 223, §§ 42-83 (attachment) and ch. 246 (trustee process), which are implemented through Mass. R. Civ. P. 4.1 and 4.2. Attachment may be entered only:

[U]pon a finding by the court that there is a reasonable likelihood that the plaintiff will recover a judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment [or trustee process] over and above any liability insurance shown by the defendant to be available to satisfy the judgment.

Metro. Prop. & Cas. Ins. Co. v. Boston Reg'l Physical Therapy, Inc., 550 F. Supp. 2d 199, 201 (D. Mass. 2008). “In moving for an order or attachment, the plaintiff must submit affidavits setting forth “specific facts sufficient to warrant the required findings based upon the affiant's own knowledge, information or belief.” *Id.* at 202.

Massachusetts authorizes the use of *ex parte* prejudgment attachment in exigent circumstances, providing:

An order approving attachment of property for a specific amount may be entered ex parte upon findings by the court that there is a reasonable likelihood that the plaintiff will recover judgment in an amount equal to or greater than the amount of the attachment over and above any liability insurance known or reasonably believed to be available, and that either (i) the person of the defendant is not subject to the jurisdiction of the court in the action, or (ii) there is a clear danger that the defendant if notified in advance of attachment of the property will convey it, remove it from the state or will conceal it, or (iii) there is immediate danger that the defendant will damage or destroy the property to be attached.

Mass. R. Civ. P. 4.1.

In *Bay State Harness Horse Racing & Breeding Ass'n, Inc. v. PPG Indus., Inc.*, the United States District Court for the District of Massachusetts determined that Mass. Gen. Laws Ann. ch. 223, §§ 42 and 62-66 were facially unconstitutional. *Bay State Harness Horse Racing & Breeding Ass'n, Inc. v. PPG Indus., Inc.*, 365 F. Supp. 1299, 1306 (D. Mass. 1973). However, the constitutional defects appear to have been cured by the adoption of more stringent procedures for the issuance of prejudgment attachment in the Massachusetts Rules of Civil Procedure.

12. Michigan

Michigan limits the use of prejudgment attachment to those situations where the defendant cannot be served with process. Michigan prejudgment attachment is governed by § 600.4001, *et. seq.*, Mich. Comp. Laws. Michigan's rules of procedure provide that the attachment is to be sought ex parte. 4 Mich. Ct. Rules Prac., Text R 3.103 (5th ed.). To initiate the attachment, the plaintiff files a motion and supporting affidavit. *Id.*

As Michigan only authorizes prejudgment attachment when the Defendant cannot be served, once the defendant submits to the jurisdiction of the court, the court is required to dissolve the attachment. 4 Mich. Ct. Rules Prac., Text R 3.103 (5th ed.) The Defendant may appear specially in the case, without submitting to the jurisdiction of the court, in order to challenge the validity of the attachment. *John D. Gruber Co. v. Davis*, 183 Mich. 477, 149 N.W. 990 (1914).

13. Mississippi

Prejudgment attachment in Mississippi is limited to cases involving a suit on an "indebtedness, or for the recovery of damages for the breach of any contract." Miss. Code. Ann. § 11-33-1. A bond is required. *Williams v. Thigpen*, 217 Miss. 683, 685, 64 So. 2d 765 (1953). The Plaintiff must submit an affidavit stating the basis for the attachment and the amount of the judgment sought. Miss. Code. Ann. § 11-33-9. The affidavit must also state that one of the following situations exists:

1. That the defendant is a foreign corporation, or a nonresident of this state; or
2. That he has removed, or is about to remove, himself or his property out of this state; or

3. That he so absconds or conceals himself that he cannot be served with a summons; or
4. That he contracted the debt or incurred the obligation in conducting the business of a ship, steamboat or other watercraft in some of the navigable waters of this state; or
5. That he has property or rights in action which he conceals, and unjustly refuses to apply to the payment of his debts; or
6. That he has assigned or disposed of, or is about to assign or dispose of, his property or rights in action, or some part thereof, with the intent to defraud his creditors; or
7. That he has converted, or is about to convert, his property into money or evidences of debt, with intent to place it beyond the reach of his creditors; or
8. That he fraudulently contracted the debt or incurred the obligation for which suit has been or is about to be brought; or
9. That he is buying, selling, or dealing in, or has, within six (6) months next before the suing out of the attachment, directly or indirectly bought, sold, or dealt in future contracts, commonly called "futures"; or
10. That he is in default for public money, due from him as a principal, to the state, or some county, city, town, or village thereof; or
11. That defendant is a banker, banking company or corporation, and received deposits of money knowing at the time he or it was insolvent; or has made or published a false or fraudulent statement as to his or its financial condition; or
12. That a judgment lien under Title 93, Mississippi Code of 1972, has been enrolled against said obligor for nonpayment of an order for support as defined by Section 93-11-101, Mississippi Code of 1972, as amended.

Miss. Code. Ann. § 11-33-9.

The Mississippi prejudgment attachment statute may be constitutionally unsound as it authorizes the clerk of court, and, in fact, the mayor of any town, to issue the writ of attachment. *Id.*

14. New Hampshire

New Hampshire authorizes prejudgment attachment pursuant to N.H. Rev. Stat. Ann. § 511-A:1, *et. seq.*, The defendant must be served with notice that the plaintiff intends to attach the defendant's property. *Id.* The defendant then must file an objection to the proposed attachment. Upon the filing of an objection, the court must hold a hearing with 14 days. *Id.* at § 511-A:3. If no objection is filed, then the court issues the attachment. *Id.* at § 511-A:4

Ex parte attachment is authorized if one or more of the following “exigent circumstances” exist:

1. There is substantial danger the property sought to be attached will be damaged, destroyed, concealed, or removed from the state and placed beyond the attachment jurisdiction of the court.
2. An attachment is necessary to vest quasi in rem jurisdiction of the court.
3. In equity cases for specific performance of an agreement to transfer land or a unique chattel, there is imminent danger of transfer to a bona fide third party. In such land cases, as well as those to perfect a labor and materials lien under RSA 447, a writ of attachment may be filed at a registry of deeds without prior application and notice, provided said writ is in the form of a *lis pendens* and specifically restricts its application to the particular real estate described in the writ and the return of attachment.
4. An attachment is necessary to prevent the absolute vesting of title in a purchaser upon the imminent expiration of the notice period under a bulk sale.
5. When necessary to secure an important governmental or general public interest, or when other exceptional circumstances are established to the satisfaction of the court.

N.H. Rev. Stat. Ann. § 511-A:8.

New Hampshire does not require a bond to issue a prejudgment attachment, which was found to be a constitutional problem for a plurality of the judges in *Connecticut v. Doehr*. However, the New Hampshire prejudgment attachment scheme satisfies all of the other requirements of *Connecticut*.

15. New Jersey

New Jersey authorizes the issuance of prejudgment attachment in the following circumstances:

1. Where the facts would entitle plaintiff to an order of arrest before judgment in a civil action; and in such cases the attachment may issue against the property of a female, or of a corporation in the same manner as though the defendant would be liable to arrest in a civil action, except that, in actions founded upon a tort, an attachment shall not issue against a corporation upon which a summons can be served in this State; or
2. Where the defendant absconds or is a nonresident of this State, and a summons cannot be served on him in this State; but an attachment shall not issue hereunder against the rolling stock of a common carrier of another state or against the goods of a nonresident in transit in the custody of a common carrier of this or another state; or

3. Where the cause of action existed against a decedent, which survives against his heirs, devisees, executors, administrators or trustees, and there is property in this State which by law is subject to plaintiff's claim; but no action of attachment may be brought hereunder against the heirs unless they, or some of them, nor against the devisees unless they, or some of them, nor against the executors unless they, or some of them, nor against the administrators unless they, or some of them, nor against the trustees unless they, or some of them, are unknown or nonresident and cannot be served with a summons in this State; or

4. Where plaintiff has a claim of an equitable nature as to which a money judgment is demanded against the defendant, and the defendant absconds or is a nonresident and a summons cannot be served upon him in this State; or

5. Where the defendant is a corporation created by the laws of another state but authorized to do business in this State and such other state authorizes attachments against New Jersey corporations authorized to do business in that state.

N.J. Stat. Ann. § 2A:26-2. Generally a bond is required, but the statute allows the court to issue the writ of attachment without a bond at the Court's discretion. N.J. Stat. Ann. § 2A:26-7.

The use of prejudgment attachment is "generally disfavored." *410 Commerce, L.L.C. v. Geologistics Americas, Inc.*, BER-C-22-06, 2006 WL 337082 (N.J. Super. Ct. Ch. Div. Feb. 10, 2006). A plaintiff seeks issuance of the prejudgment attachment writ by filling a motion with the Court. In order to issue the prejudgment attachment, the Court must find:

(1) there is a probability that final judgment will be rendered in favor of the plaintiff; (2) there are statutory grounds for issuance of the writ; and (3) there is real or personal property of the defendant at a specific location within this State which is subject to attachment.

2 N.J. Prac., Court Rules Annotated R 4:60-5 (2012 PP.) An *ex parte* attachment will issue only if "the defendant is about to abscond or if the court finds from specific facts shown by affidavit or verified complaint that the giving of such notice is likely to defeat the execution of the writ." *Id.*

The New Jersey prejudgment attachment scheme appears to be constitutionally sound.

16. New York

In New York, an order of attachment may be granted in any action for money damages when:

1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. 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.

N.Y. C.P.L.R. § 6201 (McKinney). To obtain the attachment, the plaintiff must submit a motion and supporting affidavit. *Id.* at § 6212(a). A bond, of no less than \$500, is required. *Id.* at § 6212(c). New York permits prejudgment attachment orders to be issued *ex parte*. *Id.* at § 6211. New York also authorizes a party to seek an attachment even where the claims are being pursued through arbitration, rather than through a lawsuit. *Drexel Burnham Lambert Inc. v. Ruebsamen*, 139 A.D.2d 323, 328, 531 N.Y.S.2d 547, 550 (1988) (“the possibility that an arbitration award may be rendered ineffectual in the absence of an order of attachment is sufficient under the statute to support provisional relief”).

17. North Carolina

In North Carolina, prejudgment attachment is only authorized if the defendant is:

1. A nonresident, or
2. A foreign corporation, or
3. A domestic corporation, whose president, vice-president, secretary or treasurer cannot be found in the State after due diligence, or
4. A resident of the State who, with intent to defraud his creditors or to avoid service of summons,
 - a. Has departed, or is about to depart, from the State, or
 - b. Keeps himself concealed therein, or
5. A person or domestic corporation which, with intent to defraud his or its creditors,
 - a. Has removed, or is about to remove, property from this State, or
 - b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property.

N.C. Gen. Stat. Ann. § 1-440.3. A bond is required at an amount to be set by the court. *Id.* § 1-440.10. *Ex parte* attachment is authorized only where notice is published in a paper in which the action is pending for four successive weeks. *Id.* at § 1-440.14.

North Carolina's prejudgment attachment has been found to satisfy the due process requirements of the constitution. *Connolly v. Sharpe*, 49 N.C. App. 152, 153, 270 S.E.2d 564, 566 (1980).

18. Ohio

In Ohio, prejudgment attachment is governed by § 2715.01, Ohio Rev. Code Ann., *et seq.* Prejudgment attachment may only issue in the following statutorily defined situations:

1. Excepting foreign corporations which by compliance with the law therefore are exempted from attachment as such, that the defendant or one of several defendants is a foreign corporation;
2. That the defendant is not a resident of this state;
3. That the defendant has absconded with the intent to defraud creditors;
4. That the defendant has left the county of the defendant's residence to avoid the service of a summons;
5. That the defendant so conceals self that a summons cannot be served upon the defendant;
6. That the defendant is about to remove property, in whole or part, out of the jurisdiction of the court, with the intent to defraud creditors;
7. That the defendant is about to convert property, in whole or part, into money, for the purpose of placing it beyond the reach of creditors;
8. That the defendant has property or rights in action, which the defendant conceals;
9. That the defendant has assigned, removed, disposed of, or is about to dispose of, property, in whole or part, with the intent to defraud creditors;
10. That the defendant has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought;
11. That the claim is for work or labor.

Id. at § 2715.01. The plaintiff must submit a motion to the court seeing the issuance of the writ of attachment and attach a supporting affidavit, which states:

- (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.

Id. at § 2715.03. A bond is required or the plaintiff must deposit cash equal to twice the value of the attached property. *Id.*

Section 2715.045(A) authorizes a trial court to order the *ex parte* attachment of assets and provides in part as follows:

“Upon the filing of a motion for attachment, a court may issue an order of attachment without issuing notice to the defendant against whom the motion was filed and without conducting a hearing 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 the defendant against whom the motion has been filed has been given the opportunity for a hearing. The court's findings shall be based upon the motion and affidavit filed pursuant to section 2715.03 of the Revised Code and any other relevant evidence that it may wish to consider.”

Id., see also *Johnson & Hardin Co. v. DME Ltd.*, 666 N.E.2d 276, 279 (1995). “The defendant may obtain a postattachment hearing by filing a written request for a hearing within five business days of [notice of the prejudgment attachment]”. *Id.*

Ohio's prejudgment attachment scheme has been found to be constitutional. *Johnson & Hardin Co.*, 666 N.E.2d at 282.

19. Pennsylvania

Pennsylvania authorizes prejudgment attachment of property in 42 Pa. Cons. Stat. Ann. § 7501. The statute authorizes the practice only. Prejudgment attachment is implemented through the Pennsylvania Rules of Civil Procedure, in which it is called a Writ of Seizure. Pa.R.C.P. No. 1075.1. Upon an application for a writ of seizure, a hearing is required to be held within 48 hours. *Id.* The plaintiff must make a reasonable attempt to serve the defendant with notice of the hearing. *Id.* If service of notice is not accomplished, the defendant has 72 hours from seizure of his property to petition the court to vacate the seizure. *Id.* A bond equal to double the value of the seized property is required. Pa. R. Civ. P. 1075.3.

Pennsylvania permits a writ of seizure to be issued *ex parte* in only the following two situations:

(1) the value of the property and the plaintiff's interest therein will be adversely affected by the continued possession and use by the defendant; or

(2) the defendant or other person in possession will conceal, dispose, encumber, waste the property or the revenues therefrom, if any, or remove the same from the county.

Pa. R. Civ. P. 1075.2. If the *ex parte* procedure is used, a hearing must be held within 72 hours of seizure of the defendant's property at which time the court will affirm or vacate the seizure. *Id.*

The Pennsylvania writ of seizure scheme appears to be constitutionally sound.

20. Rhode Island

Prejudgment attachment in Rhode Island is governed by § 10-5-2, *et. seq.*, of the Rhode Island General Laws. Against Rhode Island residents, prejudgment attachment may only be obtained in contract cases. *Martin v. Lincoln Bar, Inc.*, 622 A.2d 464, 468 (R.I. 1993). However, prejudgment attachment may be obtained against nonresidents in both contract and tort actions. *Id.* *Ex parte* prejudgment attachment is prohibited. RI. R. RCP. Rule 4. A bond or other security may be required. *Id.*

A plaintiff obtains a prejudgment writ of attachment by submitting the proposed writ along with a supporting motion to the court. *Id.* “[T]he attachment motion must state the day, time and place of hearing and a copy must be served by the process server on the defendant or by leaving it at his or her last and usual place of abode with some person there at least five (5) days before the fixed date of hearing.” R.I. Gen. Laws Ann. § 10-5-2. If the Defendant cannot be served notice of the attachment hearing must be published, once, in the town, city or county where the defendant's assets are situated.” *Id.*

21. South Carolina

South Carolina authorizes the use of prejudgment attachment, but limits the type of actions in which prejudgment attachment can be sought and limits the type of defendant against whom prejudgment attachment may be issued. Prejudgment attachment is available in any action:

1. For the recovery of money;
2. For the recovery of property, whether real or personal, or damages for the wrongful conversion and detention of personal property;
3. For the recovery of damages for injury done to either person or property;
4. Against a corporation created by or under the laws of any other state, government or country;
5. Against a defendant who is not a resident of this State;
6. Against the master, captain or agent of any sailing vessel entering any of the ports of this State for pilotage services rendered such vessel;

7. Against a defendant who has absconded or concealed himself; or
8. When any person or corporation is about to remove any of his or its property from this State, or has assigned, disposed of or secreted or is about to assign, dispose of or secrete any of his or its property with intent to defraud creditors as mentioned in this chapter;

S.C. Code Ann. § 15-19-10.

Prejudgment attachment is only available if the defendant is:

- (1) A foreign corporation or not a resident of this State;
- (2) The master, captain or agent of any sailing vessel entering any of the ports of this State and is about to take such vessel out of any port of this State without paying the pilotage fees provided by law; or
- (3) (a) Has departed from the State with intent to defraud his creditors or to avoid service of a summons or keeps himself concealed therein with the like intent,

(b) has removed or is about to remove any of his property from this State with intent to defraud his creditors or

(c) has assigned, disposed of or secreted or is about to assign, dispose of or secrete any of his property with the like intent, whether such defendant be a resident of this State or not.

S.C. Code Ann. § 15-19-50.

Section 15-19-60, S.C. Code Ann., provides a form Writ. A supporting affidavit is required. *Id.* at § 15-19-50. A bond is required. *Id.* at § 15-19-80.

South Carolina's scheme is subject to constitutional challenge in that it allows for the clerk to issue the writ of attachment, S.C. Code Ann. § 15-19-40., and allows for ex parte attachments without any exigent circumstances requirement, S.C. Code Ann. § 15-19-70.

22. Tennessee

Tennessee authorizes prejudgment attachment where:

1. Where the debtor or defendant resides out of the state;
2. Where the debtor or defendant is about to remove, or has removed, the debtor's or defendant's person or property from the state;
3. Where the debtor or defendant has removed, or is removing, the debtor's or defendant's person out of the county privately;

4. Where the debtors or defendants concealed is so that the ordinary process of law cannot be served upon the debtor or defendant;
5. Where the debtor or defendant absconds, or absconded or concealing the debtor's or defendant's person or property;
6. Where the debtor or defendant has fraudulently disposed of, or is about fraudulently to dispose of, the property;
7. Where any person liable for any debt or demand, residing out of the state, dies, leaving property in the state; or
8. Where the debtor or defendant is a foreign corporation which has no agent in this state upon whom process may be served by any person bringing suit against such corporation; provided, that the plaintiff or complainant need only make oath of the justness of the claim, that the debtor or defendant is a foreign corporation and that it has no agent in the county where the property sought to be attached is situated upon whom process can be served.

Tenn. Code Ann. § 29-6-101. Like South Carolina, prejudgment attachment may be obtained in tort cases where the defendant is a nonresident. *Id.* at § 29-6-106. The attachment may be issued by a judge or by clerk of court. *Id.* at § 29-6-112. At the discretion of the officer to whom the writ is made, a determination of whether to issue the writ may proceed ex parte. *Id.* at § 29-6-142.

An affidavit must be submitted to the Court stating that one of the factors in § 29-6-101 exist and “stating the nature and amount of the debt or demand, and that it is a just claim.” *Id.* at § 29-6-113. If the action is a tort suit against a non-resident, the affidavit must state that “the damages sued for are justly due the plaintiff or plaintiffs, as affiant believes, but that the true amount of such damages is not ascertained” *Id.* A bond is required before the writ will be issued. *Id.* at 29-6-115.

Once a writ of attachment has been issued, the defendant may discharge the writ by applying to the court to set a bond. *Id.* at 29-6-105.

Tennessee’s prejudgment attachment statute may be subject to constitutional challenge as it authorizes the clerk to issue the writ and allows for ex parte attachments without any exigent circumstances requirement.

23. Vermont

Prejudgment attachment in Vermont is governed by Title 12, §§ 3291, *et. seq.*, Vermont Statutes, and Vermont Rule of Civil Procedure 4.1. Title 12, §3295, Vt. Stat. Ann., provides that the procedures to obtain the Writ of attachment will be governed by the Vermont Rules of Civil Procedure.

Prejudgment attachment is available in any action “except an action for malicious prosecution, libel, or slander.” Vt. R. Civ. P. 4.1(a). A motion for issuance of a writ of attachment “shall be filed with the complaint and shall be supported by an affidavit.” *Id.* at

4.1(b). The motion and writ are to be served on the defendant in the same manner as the Complaint. *Id.* If granted, the writ of attachment is issued by the clerk, but must be approved by the court. *Id.* Vermont does not require the plaintiff to obtain a bond before issuing the writ.

Vermont provides a procedure to obtain an *ex parte* writ of attachment. *Id.* In its supporting affidavit, the plaintiff must further explain to the court the existence of “any liability insurance, bond, or other security” that is known to be available to satisfy any eventual judgment. *Id.* Then, to proceed *ex parte*, the court must find:

- (A) that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment over and above any liability insurance, bond, or other security known or reasonably believed to be available to satisfy the judgment, and
- (B) that either (i) there is a clear danger shown by specific facts that the defendant if notified in advance of the attachment will remove from the state or conceal attachable property, leaving insufficient attachable property or other assets to satisfy the judgment; or (ii) there is immediate danger shown by specific facts that the defendant will damage, destroy, or sell to a bona fide purchaser attachable property, leaving insufficient attachable property or other assets to satisfy the judgment.

Id. Vermont provides for, in addition to recording of a lien, the seizure of the attached property, if the court finds on the basis of the facts set forth in the affidavit “a clear danger . . . that the attachable property will be sold to a bona fide purchaser or will be removed, concealed, damaged or destroyed by the defendant, by others or by natural causes.” *Id.*

Vermont’s prejudgment attachment scheme may be subject to constitutional challenge based on the lack of a bond requirement.

24. Virginia

Attachment proceeding may be either independent or ancillary in Virginia. *Bernstein Bros. Mgmt. v. Miller*, 42 Va. Cir. 114 (1997). Virginia authorizes prejudgment attachment if the “principal defendant or one of the principal defendants”⁴:

1. Is a foreign corporation, or is not a resident of this Commonwealth, and has estate or has debts owing to such defendant within the county or city in which the attachment is, or that such defendant being a nonresident of this Commonwealth, is entitled to the benefit of any lien, legal or equitable, on property, real or personal, within the county or city in which the attachment is. The word “estate,” as herein used, includes all rights or interests of a pecuniary nature which can be protected, enforced, or proceeded against in courts of law or equity;

⁴ Va. Code Ann. § 8.01-539 provides: “A person against whom the plaintiff is asserting the claim shall be made a defendant to the petition, and shall be known as a principal defendant. There shall also be made a defendant any person indebted to or having in his possession property, real or personal, belonging to a principal defendant, which is sought to be attached. There may also be made a defendant any person claiming title to, and interest in, or a lien upon the property sought to be attached. A defendant, other than a principal defendant, shall be known as a codefendant.”

2. Is removing or is about to remove himself out of this Commonwealth with intent to change his domicile;
3. Intends to remove, or is removing, or has removed the specific property sued for, or his own estate, or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this Commonwealth so that there will probably not be therein effects of such debtor sufficient to satisfy the claim when judgment is obtained therefor should only the ordinary process of law be used to obtain the judgment;
4. Is converting, is about to convert or has converted his property of whatever kind, or some part thereof, into money, securities or evidences of debt with intent to hinder, delay, or defraud his creditors;
5. Has assigned or disposed of or is about to assign or dispose of his estate, or some part thereof, with intent to hinder, delay or defraud his creditors;
6. Has absconded or is about to abscond or has concealed or is about to conceal himself or his property to the injury of his creditors, or is a fugitive from justice.

Va. Code Ann. § 8.01-534. A plaintiff obtains a writ of attachment by filing a petition with a judge, clerk of court, or magistrate. *Id.* at § 8.01-537. If the underlying claim seeks payment of a debt, damages for breach of contract or tort, the petition must state:

- (i) the plaintiff's claim with such certainty as will give the adverse party reasonable notice of the true nature of the claim and the particulars thereof, (ii) a sum certain which, at the least, the plaintiff is entitled to, or ought to recover, and (iii) if based on a contract and if the claim is for a debt not then due and payable, at what time or times the same will become due and payable.

Va. Code Ann. § 8.01-537. Slightly different allegations are required if the underlying action is to recover personal property in the defendant's possession. *Id.* If the petition is granted, the plaintiff must post a bond of between 1 and 2 times the fair market value of the attached property. *Id.* at § 8.01-537.1. Virginia Code § 8.01-546 requires that each petition for attachment be accompanied by a summons and claim of exemption form. *See also Brin v. A Home Come True, Inc.*, 74 Va. Cir. 45 (2007).

Virginia's prejudgment attachment scheme may be subject to constitutional challenge because the writ can be issued by the clerk of court.

25. Washington, D.C.

Prejudgment attachment in the District of Columbia are governed by D.C. Code § 16-501 *et seq.* Prejudgment attachment may be obtained against a domestic defendant that (a) has been absent from the District for at least six months, (b) is avoiding ordinary process though concealment or removal from the District, and (c) has or is in the process of removing, conveying, concealing, assigning, secreting, or disposing of property located in the District so as to defeat any eventual judgment against him. D.C. Code § 16-502. A plaintiff is entitled to

ex parte prejudgment attachment in all civil actions against non-residents. *Id.* Attachment writs are issued by the clerk without court review, without pre-attachment notice of the defendant, and without a hearing. See *Tucker v. Burton*, 319 F. Supp. 567 (D.D.C. 1970).

The constitutionality of the D.C. scheme has not been challenged on due process grounds post-*Connecticut*, though several provisions appear problematic. First, the mechanism risks erroneous deprivation by permitting *ex parte* attachment through the clerk based on an affidavit that never receives pre-attachment court review or hearing. Second, the scheme fails to provide the defendant pre-attachment notice. Third, because circumstances outlined in statute that allow for *ex parte* prejudgment attachment may not be sufficiently “exigent” pursuant to the Supreme Court’s exigency analysis in *Connecticut*.

26. West Virginia

Prejudgment attachment in West Virginia is authorized pursuant to West Virginia Code § 38-7-1, *et. seq.* Prejudgment attachment may be obtained if one of the following grounds exists:

- a. That the defendant, or one of the defendants, is a foreign corporation or is a nonresident of this State; or
- b. has left, or is about to leave the State, with intent to defraud his creditors; or
- c. so conceals himself that a summons cannot be served upon him; or
- d. is removing or is about to remove, his property, or the proceeds of the sale of his property, or a material part of such property or proceeds, out of this State, so that process of execution on a judgment or decree in such action or suit, when it is obtained, will be unavailing; or
- e. is converting, or is about to convert, his property, or a material part thereof, into money or securities, with intent to defraud his creditors; or
- f. has assigned or disposed of his property or a material part thereof, or is about to do so, with intent to defraud his creditors; or
- g. has property or rights in action, which he conceals; or
- h. fraudulently contracted the debt or incurred the liability for which the action or suit is about to be or is brought.

W. Va. Code Ann. § 38-7-2. Unless the prejudgment attachment is sought against a foreign corporation or nonresident, an affidavit stating the “material facts relied upon” must be filed to obtain the writ of attachment. *Id.* at § 38-7-3. No affidavit is required to attach the property of a foreign corporation or resident of another state or country. *Id.* Upon the filing of an affidavit supporting one of the grounds for attachment, the clerk issues the writ of attachment. *Id.* at § 38-7-4. A bond is only required if the Plaintiffs wants to size person property of the defendant. *Id.* § 38-7-8.

West Virginia's prejudgment attachment scheme is unique in offering the availability of garnishment proceedings to seize property of the defendant held by third parties. *Id.* § 38-7-15.

While not required by the statute, West Virginia's courts have determined that the state's prejudgment attachment scheme is unconstitutional unless the court holds a hearing prior to issuance of the attachment. *State ex rel. Yanero v. Fox*, 163 W. Va. 222, 234, 256 S.E.2d 751, 757 (1979).

27. Wisconsin

Wisconsin's prejudgment attachment statute is codified in Chapter 811 of the Wisconsin Code. Prejudgment attachment may be obtained in a suit on a contract or previously entered judgment. Wis. Stat. Ann. § 811.03. Wisconsin even permits a plaintiff to seek a prejudgment attachment of property for claims based on a debt coming due in the future, provided that the plaintiff posts a bond equal to 3 times the amount claimed. *Id.*

To obtain prejudgment attachment in a case involving a contract or previously entered judgment, one of the following scenarios must be true:

- (a) That the defendant is absent from this state, or is concealed therein so that summons cannot be served on the defendant; or
- (b) That the defendant has disposed of or concealed or is about to dispose of or conceal the defendant's property or some part thereof with intent to defraud the defendant's creditors; or
- (c) That the defendant has removed or is about to remove property out of this state with intent to defraud the defendant's creditors; or
- (d) That the defendant fraudulently incurred the obligation respecting which the action is brought; or
- (e) That the defendant is not a resident of this state; or
- (f) That the defendant is a foreign corporation; or if domestic that no officer or agent thereof on whom to serve the summons exists or resides in this state or can be found; or
- (g) That the action is against a defendant as principal on an official bond to recover money due the state or to some county or other municipality therein, or that the action is against the defendant as principal upon a bond or other instrument given as evidence of debt for or to secure the payment of money embezzled or misappropriated by such defendant as an officer of the state or of a county or municipality therein.

Id. Prejudgment attachment may be sought in tort actions where the defendant is a foreign corporation or non-resident. *Id.* A bond is required before issuance of the writ. *Id.* at § 811.06. A defendant may request additional security. *Id.* at § 811.07.

Though not expressly authorized in the statute, Wisconsin case law explains that a writ of attachment may be issued *ex parte*. *Schroeder v. Wacker*, 616 N.W.2d 524 (Wis. Ct. App. 2000). A defendant against whose property a writ of attachment has been issued, is entitled to a hearing on the validity of the attachment “forthwith.” Wis. Stat. Ann. § 811.19.

Due to the ambiguity of Wisconsin’s procedures for *ex parte* attachment, the state’s prejudgment attachment scheme may be subject to constitutional challenge.

III. Fraudulent Transfers

The typical fraudulent transfer involves a defendant that has transferred personal or business property into the name of his spouse, mother or other family member. Most commonly, these transfers occur on paper, but no consideration is given for the transfer of assets. Fraudulent transfer laws provide the tools to unwind these fraudulent transfers.

a. Remedies Available Under the Uniform Fraudulent Transfers Act (UFTA)

The Uniform Fraudulent Transfers Act (UFTA) was promulgated in 1984 and has been adopted by 44 states and the District of Columbia.⁵ UFTA is the successor to the Uniform

⁵ Alaska, Kentucky, Louisiana, Maryland, New York, South Carolina and Virginia have not adopted UFTA.

<u>Jurisdiction</u>	<u>Adoption Date</u>	<u>Statutory Citation</u>
Alabama	1-1-1990	Code 1975, §§ 8-9A-1 to 8-9A-12.
Arizona	4-4-1990	A.R.S. §§ 44-1001 to 44-1010.
Arkansas	1987	A.C.A. §§ 4-59-201 to 4-59-213.
California	7-16-1986	West’s Ann.Cal.Civ. Code, §§ 3439 to 3439.12.
Colorado	7-1-1991	West’s C.R.S.A. §§ 38-8-101 to 38-8-112.
Connecticut	6-25-1991	C.G.S.A. §§ 52-552a to 52-552l.
Delaware	7-3-1996	6 Del.C. §§ 1301 to 1311.
District of Columbia	2-9-1996	D.C. Official Code, 2001 Ed. §§ 28-3101 to 28-3111.
Florida	1-1-1988	West’s F.S.A. §§ 726.101 to 726.112.
Georgia	7-1-2002	O.C.G.A. §§ 18-2-70 to 18-2-80.
Hawaii	6-4-1985	HRS §§ 651C-1 to 651C-10.
Idaho	1987	I.C. §§ 55-910 to 55-921.
Illinois	1-1-1990	S.H.A. 740 ILCS 160/1 to 160/12.
Indiana	7-1-2002	West’s A.I.C. 32-18-2-1 to 32-18-2-21.
Iowa	1-1-1995	I.C.A. §§ 684.1 to 684.12.
Kansas	1-1-1999	K.S.A. §§ 33-201 to 33-212.
Maine	7-16-1986	14 M.R.S.A. §§ 3571 to 3582.
Massachusetts	7-8-1996	M.G.L.A. c. 109A, §§ 1 to 12.
Michigan	12-30-1998	M.C.L.A. §§ 566.31 to 566.43.
Minnesota	4-7-1987	M.S.A. §§ 513.41 to 513.51.
Mississippi	7-1-2006	Code 1972, §§ 15-3-101 to 15-3-121.
Missouri	8-28-1992	V.A.M.S. §§ 428.005 to 428.059.
Montana	1991	MCA 31-2-326 to 31-2-342.
Nebraska	8-25-1989	R.R.S.1943, §§ 36-701 to 36-712.
Nevada	3-3-1987	N.R.S. 112.140 to 112.250.
New Hampshire	1-1-1988	RSA 545-A:1 to 545-A:12.
New Jersey	1-1-1989	N.J.S.A. 25:2-20 to 25:2-34.

Fraudulent Conveyance Act, which was promulgated in 1918 and ultimately adopted in only 25 jurisdictions. Ref's & Anno's, Unif. Fraudulent Transfer Act (West 2011). UFTA "is largely an adoption and clarification of the standards of the common law of [fraudulent conveyances]", but the available remedies extend beyond those available under the common-law. *Robinson v. Coughlin*, 266 Conn. 1, 9, 830 A.2d 1114, 1119 (2003).

UFTA was also intended to harmonize state law regarding uniform transfers with Bankruptcy law. John E. Sullivan III, *Future Creditors and Fraudulent Transfers: When A Claimant Doesn't Have A Claim, When A Transfer Isn't A Transfer, When Fraud Doesn't Stay Fraudulent, and Other Important Limits to Fraudulent Transfers Law for the Asset*, 22 Del. J. Corp. L. 955, 960 (1997). UFTA frequently parallels key passages of the United States Bankruptcy Code and bankruptcy case law is considered persuasive authority in the analysis of many UFTA provisions. *Id.*

UFTA permits a creditor to unwind, or avoid, a transfer that is deemed to be fraudulent. § 7(a)(1). Remedies of Creditors., Unif. Fraudulent Transfer Act. Avoidance of transfer allows the creditor to execute and levy on the transferred property as if the fraudulent transfer never took place. UFTA also authorizes the appointment of a receiver to manage transferred property, injunctive relief to freeze assets, and for "any other relief the circumstances may require." § 7(a)(3). Remedies of Creditors., Unif. Fraudulent Transfer Act.

Pursuant to UFTA, as adopted by each state, a plaintiff may bring a cause of action for injunctive relief, to prevent further transfers of the property, or for avoidance of the purportedly fraudulent transfer by the debtor. In Florida, claims for avoidance of a fraudulent transfer are brought through proceedings supplementary. Proceedings supplementary are opened by the court after judgment is entered upon filing an affidavit with the court. § 56.29(1), Fla. Stat. In the affidavit, the affiant must attest that he or she holds "an unsatisfied judgment obtained under chapter 55, identify the issuing court and case number, state the unsatisfied amount of the judgment, and confirm that the execution is valid and outstanding." *B & I Contractors, Inc. v. Mel Re Const. Mgmt.*, 66 So. 3d 1035, 1037 (Fla. 2d DCA 2011), *citing* § 56.29(1), Fla. Stat. Once the affidavit is submitted, "the judgment holder or judgment lienholder is entitled to these proceedings supplementary to execution." *Id.*

New Mexico	4-7-1989	NMSA 1978, §§ 56-10-14 to 56-10-25.
North Carolina	10-1-1997	G.S. §§ 39-23.1 to 39-23.12
North Dakota	1985	NDCC 13-02.1-01 to 13-02.1-10
Ohio	1990	R.C. §§ 1336.01 to 1336.11.
Oklahoma	11-1-1986	24 Okl.St.Ann. §§ 112 to 123.
Oregon	1-1-1986	ORS 95.200 to 95.310.
Pennsylvania	2-3-1994	12 Pa. C.S.A. §§5101 to 5110.
Rhode Island	6-25-1986	Gen. Laws 1956, §§ 6-16-1 to 6-16-12.
South Dakota	1987	SDCL 54-8A-1 to 54-8A-12.
Tennessee	7-1-2003	T.C.A. §§ 66-3-301 to 66-3-313.
Texas	9-1-1987	V.T.C.A. Bus. & C. §§ 24.001 to 24.013.
Utah	4-25-1988	U.C.A. 1953, 25-6-1 to 25-6-14.
Vermont	7-1-1996	9 V.S.A. §§ 2285 to 2295.
Washington	7-1-1988	West's RCWA 19.40.011 to 19.40.904.
West Virginia	7-1-1986	Code, 40-1A-1 to 40-1A-12.
Wisconsin	4-8-1988	W.S.A. 242.01 to 242.11.
Wyoming	7-1-2006	Wyo.Stat.Ann. §§ 34-14-201 to 34-14-212.

Ref's & Anno's, Unif. Fraudulent Transfer Act (West 2011).

In the proceedings supplementary, the judgment holder may implead third parties and, pursuant to Florida's enactment of the UFTA, codified at sections 726.105 and 726.106, Fla. Stat., pursue claims to set aside the fraudulent transfers. The creditor must demonstrate that: (1) the validity of the creditor's claim; (2) the debtor intended to fraudulently convey the property; and (3) the property conveyed could have been applied to the payment of the debt due. *Huntsman Pckg'g Corp. v. Kerry Pckg'g Corp.*, 992 F.Supp. 1439, 1446 (M.D.Fla.1998).

b. Active Versus Constructive Fraudulent Transfers

Active fraudulent transfers are made with the intent to hinder, defraud, or delay creditors. The key to understanding active fraud is the transferor's intent. Pursuant to the UFTA and longstanding common law precedent, Court's look to "badges of fraud" to determine whether the transfers were made with the requisite fraudulent intent. §4(b) of the UFTA sets out a nonexclusive list of the most commonly recognized badges of fraud and explicitly adopts them as part of the UFTA, stating:

In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:

1. the transfer or obligation was to an insider;
2. the debtor retained possession or control of the property transferred after the transfer;
3. the transfer or obligation was disclosed or concealed;
4. before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
5. the transfer was of substantially all the debtor's assets;
6. the debtor absconded;
7. the debtor removed or concealed assets;
8. the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
9. the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
10. the transfer occurred shortly before or shortly after a substantial debt was incurred; and
11. the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

However, even where you cannot prove the transferor's fraudulent intent, a transfer can still be considered fraudulent pursuant to the principle of constructive fraudulent transfers. UFTA, § 4(a), provides that:

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor;
or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due.

Thus, a court may find that a transfer involves constructive fraud if a company, at a time when it is already financially impaired or is made so by the transaction itself, does not receive "reasonably equivalent value" in return for the transfer in question.

IV. Conclusion

Prejudgment attachment provides a potentially potent tool to prevent fraudulent transfers of a debtor's assets before they happen. In some states you may even be able to seize a debtor's property without notice and at the outset of the lawsuit through the prejudgment attachment process of the state in which suit is brought. However, prejudgment attachment is fraught with risk. The rules governing prejudgment attachment vary widely from state to state and present complex constitutional issues. If you are unable to prevent the transfer of property before obtaining a judgment, UFTA provides a more predictable and uniform set of tools to unwind fraudulent transfers.