PREJUDGEMENT REMEDIES IN TEXAS

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I. INTRODUCTION

A. OVERVIEW

Prejudgment Remedies are an effective, yet sometimes risky, means of collecting judgments in the State of Texas. Most of these remedies can be obtained on an *ex parte* basis without giving any notice whatsoever to the Debtor.[1] As a result, there are safeguards built into the process that allow a Debtor to recover damages if the Creditor does not proceed with care.

The purpose of most pre-judgment remedies is to secure money or property prior to rendition of a final judgment. These remedies are often used in instances where there is a danger that the Debtor will not have the money or property by the time the final judgment is rendered. From a practical standpoint, the vast majority of the time, the dispute will be quickly resolved when the Debtor discovers what has occurred.

There are three (3) significant pre-judgment remedies that are most commonly used: Garnishment, Sequestration and Attachment. The procedure for obtaining these pre-judgment remedies is similar.

Generally, a Creditor must first file a lawsuit asserting the underlying claims that a debt is due and the basis for that debt. In addition to the Original Petition, the Creditor should also file an Application for the pre-judgment remedy. The Application must be supported by affidavit and must set forth the grounds that are specifically listed in the section of the Civil Practices & Remedies Code authorizing that particular remedy (*See* TEX. CIV. PRAC. & REM. CODE Chapters 61-65). Prior to the issuance of the requested pre-judgment writ, the Court must approve the Application and sign an order granting the issuance of a writ, subject to the filing of a bond. The Court's Order must set an amount for the bond. The Court may grant the Application with or without a hearing. The hearing may be *ex parte*. In cases where there is a danger that the property or assets may be moved or hidden, it is generally advisable not to notify the Debtor of these proceedings. Once the Court has signed the order granting the application, the Creditor must file a bond with the Clerk. After the bond has been filed, the clerk will issue the appropriate writ. The writ should be delivered to a constable or sheriff for service on the party named in the writ.

The statutory procedures such as writs of attachment, sequestration, and garnishment are not classified as injunctive orders. *Khraish v. Hamed***,** 762 S.W.2d 906, 911 (Tex. App.—Dallas 1988, writ denied). As such, no right of interlocutory appeal is available. *Id.*; *Bowden v. Hunt*, 571 S.W.2d 550, 551 (Tex. Civ. App.—Dallas 1978, no writ); *McQuade v. E.D. Systems Corp.*, 570 S.W.2d 33 (Tex. Civ. App.—Dallas 1978, no writ).

While this paper generally describes these procedures in Texas State Court, Federal law adopts the State Court Procedures. Fed. R. Civ. P. 64; Bank. R. 7064. As a result, all of these remedies may be used in Federal Court unless otherwise prohibited by Federal Law. *Id.*

B. CHOOSING THE RIGHT PRE-JUDGMENT REMEDY

The proper pre-judgment remedy will depend upon the property that is being sought. A garnishment action is normally appropriate when a third party is indebted to a Debtor or holds assets that belong to the Debtor. The most common situation arises when a Debtor maintains an account at a financial institution within the State of Texas. In that instance, the financial

[1] For purposes of consistency in this article, the term "Creditor" will always be used for the party seeking to collect money and "Debtor" will refer to the party from whom the money is being sought.

institution is indebted to its account holder (the Debtor) for the amount that is held in the account subject to any offsets. This process is not limited to financial institutions and may be applied in a variety of situations including third parties who owe the debtor money for any other reason (*e.g.* trade debt, unpaid settlement proceeds, *etc.*)

A sequestration action is normally appropriate when the Creditor is seeking possession or title to property or for foreclosure or enforcement of a mortgage, lien, or security interest on that property. A typical situation arises when a Creditor has a purchase money security interest in an item of personal property and the Debtor has defaulted on the loan. The Creditor may seek the issuance of a Writ of Sequestration prior to final judgment in order to obtain and secure the personal property and to protect it from being damaged or hidden.

Attachment is probably the least used of the major pre-judgment remedies. A Writ of Attachment is available to a Creditor if any of the grounds set forth in Section 61.002 of the Texas Civil Practice and Remedies Code are found to exist. These are discussed in more detail in the Writ of Attachment section. It is normally only used when the Creditor is aware of property subject to seizure that may not remain through a final judgment and the Creditor does not have an ownership or security interest in property. Essentially, a Writ of Attachment is the same as a Writ of Execution, except that it is issued before a final judgment.

II. IDENTIFYING THE DEBTOR'S ASSETS

Prior to seeking any pre-judgment remedy, the Creditor should first determine what the Debtor's available assets are. In making this determination, the Creditor should be cognizant of whether or not there are any liens on the property being sought by the Creditor. To the extent the property is already liened, the Debtor may not have any equity in the property. Most of the pre-judgment remedies discussed herein create a lien against the property but, to the extent there is a pre-existing lien, the lien created with the pre-judgment remedy will be subordinate to the pre-existing lien.

There are numerous different ways that a Creditor can identify assets that belong to a Debtor. If the Creditor has previously received documents from the Debtor such as credit applications or financial statements, often those documents will contain large amounts of information about potential assets. There are also numerous public sources of data that are available. Those sources include items such as appraisal district websites, public databases, and various other websites that contain information on assets. A full review of these sources is beyond the scope of this paper. In some cases, it may be advisable to hire a private investigator to identify assets that belong to the Debtor.

The Creditor should also consider whether or not the property is exempt under Texas or Federal law. Certain items of property are exempt from seizure.[2] Some of these items are set forth below:

A. Wages for Personal Services. Texas Constitutional Article XVI, § 28; TEX. CIV. PRAC. & REM. CODE § 63.004; Texas Family Code § 158.001 *et. seq.; Campbell v. Stucki,* 220 S.W.3d 562, 566 (Tex. App.—Tyler 2007, no pet.) (noting that fees received by an attorney engaged in private practice are not wages for personal services and are not exempt from garnishment). *Hennigan v. Hennigan*, 666 S.W.2d 322, 324 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.));

[2] There are certain exceptions to these exceptions in situations involving child support that are not covered in this article.

B. If the Debtor is an individual, property listed in TEX. PROP. CODE SECTION 42.002 (CD's owned by a criminal attorney and used to post bonds for clients are not exempt as "tools of the trade." *Goffney v. Prime Bank*, 2002 WL 122155, *4 (Tex. App.—Houston [14th Dist.] Jan 31, 2002, no writ));

C. The Debtor's homestead and lots used for burial, as well as the proceeds from the sale of a homestead for a period of six months after the sale. TEX. PROP. CODE SECTION 41.001

D. Property held by the RTC when it is acting as a receiver. 12 U.S.C. § 1825(b)(2); *Irving ISD v. Packard Prop.*, 970 F.2d 58, 61 (5th Cir. 1992).

E. U.S. government property and military retirement benefits in the hands of the U.S. government (*U.S. v. Stelter*, 567 S.W.2d 797 (Tex. 1978));

F. Property *in custodia legis* (*i.e.* in the custody of the law) is not subject to garnishment. *Southwestern Bell Tel. Co. v. Watson*, 413 S.W.2d 846, 848 (Tex. Civ. App.—Corpus Christi 1967, no writ); *Goodson v. Carr*, 428 S.W.2d 875, 879 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.). This includes funds that are held in the registry of the court. See *First S. Props., Inc. v. Vallone*, 533 S.W.2d 339, 343 (Tex. 1976) (registry funds exempt from execution); *Daniels v. Pecan Valley Ranch*, 831 S.W.2d 372, 382 (Tex. App.-San Antonio 1992, writ denied) (registry funds exempt from garnishment); *Crouch v. Shields*, 385 S.W.2d 580, 584 (Tex. Civ. App.-Dallas 1964, writ ref'd n.r.e.) (registry funds exempt from sequestration). An exception to this rule occurs when the officer holds the funds after satisfaction of a writ of execution. *Id;*

G. Social Security benefits. 42 U.S.C. § 407;

H. Spendthrift trusts are not subject to garnishment unless the beneficiary was the settlor. *Bank of Dallas v. Republic Nat. Bank of Dallas*, 540 S.W.2d 499 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.); Tex. Prop. Code §112.035 (Vernon Supp. 2002). Trust funds also cannot be garnished for the debts of the trustee. *Oglesby v. Durr*, 173 S.W. 275, 278 (Tex. Civ. App.—Austin 1914, writ ref'd);

I. An IRA account or an ERISSA Plan, such as a 401K or a Keogh Plan, is exempt to the extent that the contributions to the Plan are entitled to tax deferral under the Internal Revenue Code. Texas Property Code § 42.0021

J. Funds of a Debtor-In-Possession in bankruptcy may not be garnished unless the automatic stay is lifted. (11 U.S.C. § 362);

K. Contractor's fees or monies paid to a contractor or subcontractor under a construction contract for the improvement of specific real property are impressed with a trust for the benefit of laborers and materialmen, and are not subject to garnishment. *Red Henry Painting Co. v. Bank of North Texas*, 521 S.W.2d 339, 343 (Tex. Civ. App.—Corpus Christi 1975, no writ);

L. Funds held in accounts established under the Texas Uniform Gift to Minors Act are not subject to garnishment for the debts of the custodian. *See* Texas Property Code § 141.005 *et seq.*

M. Escrow accounts are not subject to garnishment. *Aetna Finance Co. v. First Federal Sav. & Loan Ass'n*, 607 S.W.2d 312, 313 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.);

James Talcott, Inc. v. Valley Federal Sav. & Loan Ass'n, 611 S.W.2d 692, 694 (Tex. Civ. App.—Corpus Christi 1980, no writ);

N. Community property subject to the sole management by the non-debtor spouse, if the underlying claim arose before marriage or it is a vicarious liability arising during marriage. Tex. Fam. Code § 3.202(b).

O. Funds owned under a State Plan for Medical Assistance. 42 U.S.C. §1396a(a)(32).

III. EXPLANATION OF THE SIGNIFICANT REMEDIES AVAILABLE

A. GARNISHMENT

1. Overview

Garnishment is a statutory proceeding whereby the property, money or credits of a Debtor in the possession of a third party are applied to the payment of the debt. *Bank One v. Sunbelt Savings*, 824 S.W.2d 557, 558 (Tex. 1992); *Lozano Assocs. v. La Experencia*, 2008 Tex. App. LEXIS 2696, *1 (Tex. App.—Dallas 2008, no pet.); *Buckeye Ret. Co., LLC, v. Bank of Am., N.A.*, 239 S.W.3d 394, 398 (Tex. App.—Dallas 2007, pet. denied). The third party that holds the assets belonging to the Debtor is described as the "Garnishee." Once a Writ of Garnishment has been served on a Garnishee, the Garnishee must freeze all funds and/or property held by the Garnishee at the time it is served with the Writ of Garnishment and any funds that are received through the date that the Garnishee files its answer. Tex. R. Civ. P. 661. *Matter of Bohart*, 743 F.2d 313, 324 (5th Cir. 1984); *Rome Industries, Inc. v. Intsel Southwest*, 683 S.W.2d 777, 779 (Tex. App.—Houston [14th Dist.], 1984) writ ref'd n.r.e.). The maximum amount that should be frozen is set out in the Order granting the Writ of Garnishment. Tex. R. Civ. P. 658. The Garnishee is required to file a verified answer indicating what, if anything, it is indebted to the Debtor at the time the answer was filed and what it was indebted when the writ was served. Tex. R. Civ. P. 661. Garnishment is a strictly statutory remedy and is governed by Chapter 63 of the Texas Civil Practices and Remedies Code and Rules 657 - 679 of the Texas Rules of Civil Procedure. Because garnishment is an extraordinary remedy, it will only be sustained if the proceedings are in strict conformity with the statutory requirements. *Mendoza v. Luke Fruia Investments*, 962 S.W.2d 650, 651 (Tex. App.—Corpus Christi 1998, no writ); *Cadle Co. v. Int'l Bank of Commerce*, 2007 Tex. App. LEXIS 1952, *5-6 (Tex. App.—San Antonio 2007, pet. denied). Although the Creditor may recover attorney's fees incurred in collecting the underlying debt, the Creditor may not recover attorney's fees that are incurred in connection with the garnishment. *Henry v. Ins. Co. of N. Am.*, 879 S.W.2d 366, 368-69 (Tex. App. — Houston [14th Dist.] 1994, no writ); *Cadle Co.*, 2007 Tex. App. LEXIS 1952 at *14.

2. The Kinds of Property that can be Garnished

A Writ of Garnishment reaches all the Debtor's "effects" in the possession of the Garnishee. The term "effects" means all personal property and interest therein other than those that are exempt from garnishment. TEX. R. CIV. P. 659, 661. After service of a Writ of Garnishment, the Garnishee may not deliver any effects, or pay any debt, to the Debtor. TEX. CIV. PRAC. & REM. CODE § 63.003.

The types of effects that are usually garnished are funds or items of personal property. The personal property may include stock certificates, bonds, settlement proceeds, precious metals or any other non-exempt item. Funds may include those held in a bank account or any other financial institution. Garnishment is generally not appropriate for intangible rights such as

intellectual property or causes of action. This type of property is normally sought through the use of a turnover order post judgment.

Property that is exempt from seizure cannot be garnished. For a list of some property that may be exempt in certain circumstances, see Section II of this paper, "IDENTIFYING THE DEBTOR'S ASSETS."

3. Persons or Entities that may be Garnishees

The garnishment procedure is most often used to seize funds in a Debtor's deposit accounts with a financial institution. *See First Nat. Bank in Dallas v. Banco Longoria, S.A.*, 356 S.W.2d 192 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.). It may also be used to seize personal property that has been loaned, leased or bailed to another or the contents of a safe deposit box. A Writ of Garnishment may be issued against an inmate's trust fund held under the authority of the Texas Department of Criminal Justice to recover money held for the benefit of an inmate. *See* TEX. CIV. PRAC. & REM. CODE § 63.007.

Public entities (including city and county agencies and state institutions), are generally not subject to garnishment for money they owe to Debtor. *National Sur. Corp. v. Friendswood ISD*, 433 S.W.2d 690, 694 (Tex. 1968) (school districts are state agencies exempt from garnishment); *Addison v. Addison*, 530 S.W.2d 920, 921 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) (Texas Southern University and its Board of Regents exempt from garnishment). The United States is not subject to garnishment in state court actions. *Buchanan v. Alexander*, 45 U.S. 20, 4 How. 20, 11 L. Ed. 857 (1846). However, some cases have held that public officials and officers are subject to garnishment when there is nothing remaining for the government entity to do but to make delivery or payment of the funds it holds to the Debtor. *Southwestern Bell Telephone v. Watson*, 413 S.W.2d 846, 848 (Tex. Civ. App.—Corpus Christi 1967, no writ); *Hardy v. Construction Systems, Inc.*, 556 S.W.2d 843, 844 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.). Excess funds held by a sheriff after the satisfaction of a writ of execution may be subject to garnishment. *Goodson v. Carr*, 428 S.W.2d 875, 879 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

The defense of sovereign immunity may only be raised by a sovereign and may not be raised by the Debtor. *Daniels v. Pecan Valley Ranch, Inc.*, 831 S.W.2d 372, 383 (Tex. App.—San Antonio 1992, writ denied). There are also statutory sections that prohibit garnishment in specific instances. *See e.g.,* 42 U.S.C. § 1396a(32)(B) (prohibiting levy against Medicare payments); Texas Human Resources Code § 32.036 (prohibiting levy against Medicaid payments).

When a Creditor wants to challenge title to funds held by a third party, the Creditor should seek a Writ of Garnishment naming the nominal owner, not the true owner. *Bank One v. Sunbelt Savings*, 824 S.W.2d 557, 558 (Tex. 1992). The Court is then responsible for determining true ownership. *Id.*

4. Grounds Required for a Pre-Judgment Writ of Garnishment

Liquidated Debt

A pre-judgment Writ of Garnishment is only available if the debt is for a liquidated amount. *See e.g., A. Wolfson's Sons, Inc. v. First State Bank of Corpus Christi*, 697 S.W.2d 753 (Tex. App.—Corpus Christi 1985, no writ), appeal after remand, 752 S.W.2d 614 (Tex. App.—Corpus Christi 1988, writ denied); *Fogel v. White*, 745 S.W.2d 444 (Tex. App.—Houston [14th Dist.] 1988, no writ). A garnishment is not available if the debt is not liquidated. *Waples-*

Platter Grocery Co. v. Texas & Pac. R.R. Co., 68 S.W. 265, 266 (1902); *Alexander v. Berkman*, 3 S.W.2d 864, 867 (Tex. Civ. App.—Waco 1927, writ ref'd). A liquidated debt is one where the amount owed can be ascertained at the time the garnishee's answer is filed. *Waples-Platter Grocery Co. v. Texas & Pac. Ry. Co*., 95 Tex. 486, 68 S.W. 265, 266 (1902); *Alexander,* 3 S.W.2d at 867. A contingent debt is not subject to garnishment, even if the contingency is later eliminated and the debt becomes fixed. *Palandjoglou v. United Nat'l Ins. Co.*, 821 F.Supp. 1179, 1186 (S. D. Tex. 1993); *Houston Drywall, Inc. v. Construction Systems Inc.*, 541 S.W.2d 220, 222 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ). A Writ of Garnishment may be issued only when the demand is not contingent, is capable of ascertainment by the usual means of evidence, and does not rest in the discretion of the jury. *T-M Vacuum Prods. v. TAISC, Inc.*, 2008 U.S. Dist. LEXIS 39580, *25 (S.D. Tex. 2008). The claim may not be for a tort action, even if it is related to a liquidated debt such as a fraudulent transfer or a piercing of the corporate veil. Tex. Civ. Prac. & Rem. Code § 63.001; *Fogel v. White*, 745 S.W.2d 444, 446 (Tex. App.—Houston [14th Dist.] 1988, no writ) (even if a tort action refers to a liquidated debt, it is still unliquidated until it becomes final). In order for the writ to attach, the debt owed by the third party must be final. *Houston Drywall*, 541 S.W.2d at 222. For example, if the debt owed to the Debtor by the third party is a judgment against the third party for an unliquidated claim, it cannot be garnished until all appeals have expired. *Commercial Credit Corp. v. U.S. Fire Ins. Co.*, 630 S.W.2d 651, 653 (Tex. App.—Houston [1st Dist.] 1981, no writ).

Statutory Requirements

Texas Civil Practice and Remedies Code § 63.001 sets forth the grounds necessary for the issuance of a pre-judgment Writ of Garnishment. There are two possible grounds for a pre-judgment Writ of Garnishment: (1) an original attachment has been issued; or (2) the Creditor sues for a debt and makes an affidavit stating that (a) the debt is just, due and unpaid; (b) within the Creditor's knowledge, the Debtor does not possess property in Texas subject to execution sufficient to satisfy the debt; and (c) the garnishment is not sought to injure the Debtor or the Garnishee. *T-M Vacuum Prods. v. TAISC, Inc.*, 2008 U.S. Dist. LEXIS 39580 at *25.

Generally, the first and third elements of the affidavit are reasonably straightforward. The second element is more problematic. While the statute requires that the Creditor does not have knowledge of assets possessed by the Debtor that are in Texas and subject to execution, it does not specify what, if any, investigation should be done in order to determine if there Debtor has non-exempt assets. In *Black Coral Investments v. Bank of the Southwest*, 650 S.W.2d 135 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.) the appeals court considered whether a writ of garnishment was properly dissolved where there was evidence that the debtor had other non-exempt assets in the State of Texas that were subject to execution. The court noted that the Creditor "introduced evidence of its investigation which resulted in its good faith belief that the debtor had no assets within the state sufficient to satisfy the judgment." Based upon this evidence, the court held that the Creditor was able to prove the grounds that were relied upon in order for the writ of garnishment to issue. While it was not an issue in this case, the use of the term "good faith" seems to imply that a Creditor has some obligation to investigate whether or not the Debtor has assets in Texas that are sufficient to satisfy the judgment. While there are no cases directly on point, it is probably not sufficient to for a Creditor to allege that it does not have knowledge of other non-exempt assets without engaging in some effort to determine if such assets exits.

5. Contents of the Application and Supporting Affidavit

Texas Rules of Civil Procedure 657 - 679, and Texas Civil Practice and Remedies Code Chapter 63 establish the procedure and evidentiary principles that govern garnishments. These statutory provisions are used to determine the respective rights and responsibilities of the

parties in a garnishment action. *Jamison v. National Loan Investors, L.P.*, 4 S.W.3d 465, 468 (Tex. App.—Houston [1st Dist.] 1999, writ denied).

The rules require an application for writ of garnishment and a supporting affidavit. Both the application and the supporting affidavit must contain facts justifying the issuance of the writ. *Russell v. General Sports Mfg. Co.*, 110 S.W.2d 1253, 1257 (Tex. Civ. App.—Amarillo 1937, writ dismissed). These facts are established through the use of the affidavits. Tex. R. Civ. P. 658. The affidavits may be signed by the Creditor, its agent, its attorney or anyone with knowledge of relevant facts.[3] TEX. R. CIV. P. 658. The Application must comply with all statutory requirements, and must state the grounds for issuing the writ including the specific facts relied upon by the Creditor to warrant the required findings by the Court. *Id*. An affidavit that fails to specifically state the grounds upon which such belief is based is not sufficient enough and will not support the application. *El Periodico, Inc. v. Parks Oil Co.*, 917 S.W.2d 777, 779 (Tex. 1996). The facts must be based on the declarant's personal knowledge and not on evidence that is not admissible (*e.g.* hearsay). Tex R. Civ. P. 658; *Metroplex Factors, Inc. v. First Nat. Bank, Bridgeport*, 610 S.W.2d 862, 865 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.). An affidavit stating that the witness is "fully cognizant" of the facts stated therein may be sufficient. *Hudler-Tye Const., Inc. v. Pettijohn & Pettijohn Plumbing, Inc.*, 632 S.W.2d 219, 222 (Tex. App.—Fort Worth 1982, no writ). Where there are several Debtors who are jointly and severally liable, the application and supporting affidavit must state that none of them has property within the state of Texas subject to execution sufficient to satisfy the debt. *Mackey v. Lucey Products Corp.*, 239 S.W.2d 607, 608 (Tex. 1951). A sample Application for Pre-Judgment Writ of Garnishment and supporting affidavit is attached hereto as Exhibit "A."

6. Contents of the Order Granting the Application for Writ of Garnishment

Typically, the applicant will draft the order granting the Application for Writ of Garnishment and submit it to the Court. The order must contain the following:

a. specific findings of fact to support the statutory grounds found to exist (as set forth in Tex. Civ. Prac. & Rem. Code § 63.001);
b. the maximum value of property or indebtedness that may be garnished;
c. the amount of bond the Creditor must file prior to issuance of the writ; and
d. the amount of the bond required of the Debtor to replevy.

Tex. R. Civ. P. 658.

The order may direct the issuance of several writs at the same time, or in succession, to be sent to different counties. *Id.* A sample Order is attached hereto as Exhibit "B."

7. Contents of the Bond for Pre-Judgment Writ of Garnishment

After the order granting the Application for Writ of Garnishment has been signed, it is next necessary to obtain a bond in an amount set forth in the order. The clerk will not issue a pre-judgment Writ of Garnishment until the Creditor has filed, with the clerk, a bond payable to the Debtor in the amount fixed by the Court's order, with sufficient surety or sureties as provided by statute, conditioned that the Creditor will prosecute his suit to effect and pay to the extent of

[3] For a discussion of the risks involved for an attorney to sign the supporting affidavit, see the section of this paper entitled “Ethical Considerations, Attorney as a Witness.”

the penal amount of the bond all damages and costs as may be adjudged against the Creditor for wrongfully suing out such Writ of Garnishment. Tex. R. Civ. P. 658a. After notice to the opposing party, the Court may enter an order increasing or reducing the amount of the bond. *Id.* Although the Rules do not specify the form of the bond for a Writ of Garnishment, the Creditor can use the bond for a Writ of Attachment for guidance. *See* Tex. R. Civ. P. 592b. Although an Attachment Bond is slightly different, the form used can be slightly modified to comply with the requirements of a Garnishment Bond set forth in Tex. R. Civ. P. 658a. A sample form of the bond is attached hereto as Exhibit "C".

It is normally advisable to check with the clerk prior to obtaining the bond to verify that the clerk will approve the language. Given the time constraints that are normally present in a Writ of Garnishment, it is also advisable to provide a copy of the bond along with a bond application and financial information for the Creditor to the surety ahead of time. This will usually expedite the process for obtaining the bond from the surety.

8. Contents of the Writ of Garnishment

Once the bond has delivered to the clerk, the clerk should issue the Writ of Garnishment. The form of the writ is mandated by statute. Tex. R. Civ. P. 661. If the clerk negligently prepares the writ, the Creditor is not liable for wrongful garnishment. *Jamison v. National Loan Investors L.P.*, 4 S.W.3d 465, 469 (Tex. App.—Houston [1st Dist.] 1999, writ denied).

The writ must prominently display on its face, in 10-point type and in a manner calculated to advise a reasonably attentive person of its content, the following:

> "To _____ Defendant:
>
> You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:
>
> YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT."

Tex. R. Civ. P. 663a.

9. Procedure for Obtaining a Pre-Judgment Writ of Garnishment

a. Filing of the Application

The Application for Writ of Garnishment is a separate lawsuit and should be given a separate cause number. TEX. R. CIV. P. 659. The garnishment proceeding is considered an ancillary but separate proceeding from the underlying lawsuit for the debt. *Varner v. Koons*, 888 S.W.2d 511, 513 (Tex. App.—El Paso 1994, no writ). From a practical standpoint, the clerk will normally create a new cause number by adding an extension to the end of the existing cause number (*e.g.,* by adding a -201 to the end of the cause number). Although the statute contemplates a separate docketing, the validity of a judgment is not affected if a clerk fails to properly docket it. *Cloughly v. MBC Bank-Seguin*, 773 S.W.2d 652, 658 (Tex. App.—San Antonio 1989, writ denied). Because the garnishment proceeding is a separate proceeding, an appeal will lie from a final judgment independently of the underlying lawsuit. *Varner*, 888 S.W.2d at 513.

b. Hearing on the Application

It is normally advisable to present the application and the proposed order granting the Writ of Garnishment at an *ex parte* hearing. A pre-judgment Writ of Garnishment is only available upon written order of the Court after a hearing, which may be *ex parte*. Tex. R. Civ. P. 658. Debtors who have been made aware of a Garnishment will normally move the assets to deter effective use of a pre-judgment Garnishment. There is normally no live testimony at the *ex parte* hearing. The Court should be able to make its decision based upon the adequacy of the affidavits presented with the Application for Writ of Garnishment.

c. Serving the Garnishee

The Writ of Garnishment must be served on the Garnishee by a constable or sheriff. Private process servers are prohibited from executing Writs of Garnishment. *See Moody Nat. Bank v. Riebschlager*, 946 S.W.2d 521, 523 n. 1 (Tex. App.—Houston [14th Dist.] 1997, writ denied). *Lawyers Civil Process, Inc. v. State ex rel. Vines*, 690 S.W.2d 939, 942 (Tex. App.—Dallas 1985, no writ). The clerk may deliver the writ to the levying officer or to the Creditor. Tex. R. Civ. P. 662. The Creditor does not have a duty to inspect the writ before it is delivered to the levying officer. *Jamison v. National Loan Investors, L.P.*, 4 S.W.3d 465, 469 (Tex. App.—Houston [1st Dist.] 1999, writ denied). The officer executes the writ by immediately delivering it to the Garnishee and noting the date and time of service on the return citation. Tex. R. Civ. P. 663. A Writ of Garnishment served on a financial institution should be delivered to the address designated as the address of the registered agent of the financial institution in its registration filed with the Secretary of State. Tex. Fin. Code §59.008(a). If the financial institution has not filed a registration with the Secretary of State, then the Writ of Garnishment may be served in accordance with standard service of process rules. See Tex. R. Civ. P. 99-103; Tex. Civ. Prac. & Rem. Code Chapter 17. If the financial institution has registered its agent with the Secretary of State, and the Writ of Garnishment is delivered to a different address, the claim is not effective as to that financial institution. Tex. Fin. Code §59.008(b). In this case, the Debtor has the burden of preventing or limiting the financial institution's response to the Writ of Garnishment. Tex. Fin. Code §59.008(c).

Generally, when a writ of garnishment and summons are issued but not served upon the garnishee, his subsequent appearance and answer give the court no jurisdiction over the funds. *Moody Nat. Bank v. Riebschlager*, 946 S.W.2d 521, 523 (Tex. App.—Houston [14th Dist.] 1997, writ denied). When a garnishee appears for the purpose of filing a motion to quash the garnishment, such an appearance does not confer jurisdiction on the court for all purposes, and does not operate as a waiver of an objection as to jurisdiction. *Id.* at 524. If the writ was not properly served upon the Garnishee, the Garnishee will escape liability. *Id.*

d. Serving the Debtor

Texas Rule 663a requires that the Debtor be served in any manner prescribed for service of citation or as provided in Rule 21a with a copy of the Writ of Garnishment, the application, accompanying affidavits, and order of Court as soon as practicable following service of the writ. Rule 21a permits service of materials upon a party by delivery to the party's attorney, either by hand delivery or certified mail. Therefore, the items may be served on either the Debtor or the Debtor's attorney. In an abundance of caution, it is normally advisable to serve both the Debtor and the Debtor's attorney if both addresses are known.

Most Creditors will not serve the Debtor with these documents until after the Garnishee has been served. This will prevent the Debtor from directing the Garnishee to move funds prior to service. Texas courts have specifically acknowledged that "service of the [Debtor] is

necessarily delayed to ensure that writ serves its intended purpose -- to 'trap' funds belonging to the [Debtor] but in the hands of a third party. *In re L.A.M. & Associates*, 975 S.W.2d 80, 84 (Tex. App.—Austin 1998 no writ).

One Court of Appeals has held that the Debtor's participation in the Garnishment proceeding waives service of a copy of the writ. *DEL-PHI Engineering Associates, Inc. v. Texas Commerce Bank-Conroe, N.A.*, 771 S.W.2d 589, 591 (Tex. App.—Beaumont 1989, no writ). Other Courts of Appeal have held that an appearance by the Debtor does not waive the notice requirement under Tex. R. Civ. P. 663a. *Walnut Equipment Leasing Co. v. J-V Dirt & Loam, a Div. of J-V Marble Mfg., Inc.*, 907 S.W.2d 912, 915 (Tex. App.—Austin 1995, writ denied); *Mendoza v. Luke Fruia Investments, Inc.*, 962 S.W.2d 650, 652 (Tex. App.—Corpus Christi 1998, no writ); *Small Bus. Inv. Co. of Houston v. Champion Int'l Corp.,* 619 S.W.2d 28, 30 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ). These Courts have held that when a Debtor voluntarily answers and appears in a Garnishment proceeding, the Debtor waives only irregularities in the Garnishment, such as defects in the affidavit or bond. *Id.* Voluntary appearance does not waive the requirements of the writ itself. *Id.* Under this line of cases, no control or custody of a Debtor's property can be gained by his answer if he has not been properly served. *Id.*

The Garnishee lacks standing to assert the failure of the Creditor to serve a copy of the writ on the Debtor. *Sherry Lane Nat. Bank v. Bank of Evergreen*, 715 S.W.2d 148, 151 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

10. Garnishee's Response to a Writ of Garnishment

The garnishment action is technically a lawsuit that has been filed against the Garnishee. The Garnishee's response is governed by the Texas Rules of Civil Procedure unless specifically modified by the chapter dealing with garnishments. Generally, the Garnishee's answer is due on the Monday following 20 days after the writ has been served (except in Justice Court wherein the answer is due on the Monday following 10 days after the writ has been served). TEX. R. CIV. P. 659.

The Garnishee's first obligation is to identify any funds and/or property that it holds for the Debtor identified in the Writ of Garnishment. For financial institutions, this normally includes checking accounts, savings accounts, CD accounts and contents of safe deposit boxes. Issues sometimes arise where it is unclear who the actual owner of the funds is. In such cases, a bank may rely on its deposit agreement in determining whether it has funds owned by the named Debtor. *Bank One, Texas. N.A. v. Sunbelt Sav. F.S.B.*, 824 S.W.2d 557, 558 (Tex. 1992); *Newsome v. Charter Bank Colonial*, 940 S.W.2d 157 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

A Writ of Garnishment impounds the alleged money, property or credits of the Debtor. *Mendoza v. Luke Fruia Investments*, 962 S.W.2d 650, 651 (Tex. App.—Corpus Christi 1998, no writ). The Garnishee has an obligation to freeze all funds and/or property owned by the named Debtor up to the amount set forth on the Order granting the Application for Writ of Garnishment. This includes any funds held by the Garnishee at the time the writ was served and any funds that are received through the date that the Garnishee filed its answer. Tex. R. Civ. P. 661. *Matter of Bohart*, 743 F.2d 313, 324 (5th Cir. 1984); *Rome Industries, Inc. v. Intsel Southwest*, 683 S.W.2d 777, 779 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) If the Garnishee fails to freeze the funds, it may become liable to the Creditor for the value of the funds and property that are not frozen. Tex. R. Civ. P. 661; *See Collier Mfg. & Supply, Inc. v. Interfirst Bank Austin, N.A.*, 749 S.W.2d 560 (Tex. App.—Austin 1988, no writ). Additionally, where a Garnishee distributes funds to a Debtor after being served with a Writ of Garnishment, and does so knowingly, willfully, maliciously and with actual intent to injure the Creditor, the Garnishee

may be liable for exemplary damages. *See Falderbaum v. Lowe*, 964 S.W.2d 744 (Tex. App.—Austin 1998, no writ).

The Garnishee is required to file an answer, under oath, in writing and signed by the Garnishee that makes true answers to the several matters inquired of in the Writ of Garnishment. Tex. R. Civ. P. 665. The answer must specify: (1) what funds and/or property belonging to the Debtor that the Garnishee held at the time the writ was served; (2) what funds and/or property belonging to the Debtor the Garnishee held at the time the answer was filed; and (3) what other persons, if any, within the Garnishee's knowledge, have funds or property of the Debtor in their possession. Tex. R. Civ. P. 661, 665; *Consolidated Gasoline Co. v. Jarecki Mfg. Co.*, 72 S.W.2d 351 (Tex. Civ. App.—Eastland 1934), affirmed 129 Tex. 644, 105 S.W.2d 633 (Tex. Comm'n. App. 1937). The Garnishee should also plead for reimbursement of its costs, including reasonable attorneys' fees, incurred in responding to the Garnishment. These costs and fees are recoverable from the garnished funds or, if the Garnishee is discharged, from the Creditor. Tex. R. Civ. P. 667; *Redisco, Inc. v. Laredo Mopac Emp. Credit Union*, 516 S.W.2d 197, 199 (Tex. Civ. App.—San Antonio 1974, no writ). The Garnishee's right to recover costs and attorneys' fees cannot be defeated by nonsuit. *City of Houston v. Blackbird*, 658 S.W.2d 269, 273-74 (Tex. App.—Houston [1st Dist.] 1983, writ dismissed).

If the Garnishee's answer fails to answer all three items above, under oath, the answer may be regarded as no answer and the Creditor may obtain a default judgment. *See Lamb-McAshan Co. v. Ellis*, 270 S.W. 547, 548 (Tex. Comm'n. App. 1925); *Sweeny Bank v. Ritchie, Hobson & Associates, Inc.*, 628 S.W.2d 175, 176 (Tex. App.—Houston [14th Dist] 1982, writ ref'd n.r.e.); *American Exp. Co. v. Monfort Food Distributing Co.*, 545 S.W.2d 49, 52 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ). If the Garnishee files an unsworn answer, a default judgment may be entered against the Garnishee. *Id.*; *Swiderski v. Victoria Bank & Trust Co.*, 706 S.W.2d 676, 679 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

Generally, the Garnishee also has a right of setoff for any debts that the Debtor owes to the Garnishee. *Sears v. Continental Bank & Trust Co.*, 562 S.W.2d 843, 844 (Tex. 1977). This situation often arises when the financial institution holds funds belonging to the Debtor, but the financial institution has also loaned money to the Debtor. In such cases, the Garnishee has a statutory, common law, or contractual lien and right of offset against the garnished funds that may be superior to the Creditor's rights to the funds. The Garnishee should assert any known setoffs when the answer is filed. *See A Bank's Right to Offset After Service of Writ of Garnishment – A Reconciliation of San Felipe National Bank v. Caton*, 54 Tex. B.J. 368 (1991). The Garnishee also has a duty to disclose any defense to the Writ of Garnishment of which it is aware. *Rowley v. Lake Area Nat. Bank*, 976 S.W.2d 715, 720 (Tex. App.—Houston [1st Dist.] 1998, writ denied).

After the Garnishee's answer has been filed, it may be amended to accurately reflect the amount of the funds and/or property held by the Garnishee that belongs to the Debtor if it is done in good faith and according to the applicable procedural rules. *Intercontinental Terminals Co. v. Hollywood Marine, Inc.*, 630 S.W.2d 861, 863 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.). It is generally a good practice for the Garnishee to file its answer early and then amend it after the answer date has passed if there is a change.

Generally, a Garnishee may not file a motion to dissolve the Writ of Garnishment. At least one Court has expressed reservations as to whether a Garnishee has standing to move to dissolve the writ. *Thompson v. Harco Nat. Ins. Co.*, 997 S.W.2d 607, 616 (Tex. App.—Dallas 1998, writ denied). However, in such instances, it is the Creditor's duty to raise the issue of the Garnishee's standing to dissolve the writ. *Id.*

11. Debtor's Response to Writ of Garnishment

a. In General

A Debtor that has received notice of a Garnishment may respond in a number of different ways. The Debtor may file a Motion to Dissolve the Writ of Garnishment, the Debtor may file a Motion to Modify the Bond Amount, the Debtor may file a replevy bond, or the Debtor may simply chose to ignore the Writ of Garnishment and allow for the funds held by the Garnishee to be paid to the Creditor.

b. Dissolving or Modifying the Writ of Garnishment

A Debtor whose property or account has been garnished, or any intervening party who claims an interest in such property or account may seek to vacate, dissolve or modify the Writ of Garnishment, and the order directing its issuance, for any grounds or cause, extrinsic or intrinsic. Tex. R. Civ. P. 664a; *GE Capital Corp. v. ICO, Inc.*, 230 S.W.3d 702, 705 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Mitchell v. Credit Union*, 2007 Tex. App. LEXIS 4346, *2-3 (Tex. App.—Dallas 2007, no pet.); *Cadle Co.*, 2007 Tex. App. LEXIS 1952 at *6-7. The Motion to Dissolve the Writ of Garnishment must be in writing, must be verified, and must specifically admit or deny each of the facts found by the Court in the order that authorized the issuance of the Writ of Garnishment. *Id.* Where the Debtor is unable to admit or deny a finding, the Debtor shall set forth reasons why it cannot admit or deny that finding. *Id.* The motion must be supported by affidavits based upon personal knowledge. *Id.* Once the motion has been filed, it stays any further action except for orders concerning the care, preservation or sale of any perishable property. *Id.*

Unless the parties agree to an extension, the Court must conduct a hearing on the motion to dissolve the writ within 10 days after it is filed. *Id.* It may be heard on less than 3 days' notice. *Id.* The hearing is a distinct proceeding from the Writ of Garnishment proceeding between the Garnishor and the Garnishee. *Swiderski v. Victoria Bank & Trust Co*, 706 S.W.2d 676, 678 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.). The issue to be determined at the hearing is whether the Creditor can prove the grounds that were relied upon for the issuance of the Writ of Garnishment. *Id.* The Creditor does not have to prove that the Garnishee is indebted to the Debtor because this is not one of the grounds necessary for the issuance of a Writ of Garnishment. *Id.; Thompson v. Harco Nat. Ins. Co.*, 997 S.W.2d 607, 624 (Tex. App.—Dallas 1998, writ denied). Because the Creditor has the burden to prove the grounds relied upon for the issuance of the Writ of Garnishment, any failure to carry that burden requires the Trial Court to dissolve the writ. *Huie-Clark J.V. v. American States Ins. Co. of Texas*, 629 S.W.2d 109, 110-11 (Tex. App.—Dallas 1981, writ ref'd n.r.e.). The Creditor is not required to prove that the Debtor does not, in fact, possess non-exempt assets sufficient to satisfy the debt. *Black Coral Investments v. Bank of the Southwest*, 650 S.W.2d 135, 136 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.). The Creditor's burden is only to show a reasonable basis for such belief. *Id.*

If the Debtor contends that the property garnished exceeds the amount necessary to secure the debt, interest for one year, and probable costs, then the Debtor has the burden to prove the reasonable value of the property garnished. Tex. R. Civ. P. 664a. If the Debtor asks the Court to substitute property, the Debtor has the burden to prove justification for this substitution. *Id.* If the Court orders the Writ of Garnishment to be dissolved, that order will terminate the proceedings and it is a final disposition of the subject matter of the proceeding. *A. Wolfson's, Inc. v. First State Bank of Corpus Christi*, 752 S.W.2d 614, 616 (Tex. App.—Corpus Christi 1988, writ denied). This entitles the Garnishee to possession or return of the garnished money or property. *Id.*

The Debtor may also petition the Court for substitution of property. The conditions for substitution of property are as follows:

1. that the Debtor has offered sufficient property to satisfy the Writ of Garnishment;
2. that such property does not have any liens affixed to it since the date of the original Writ of Garnishment; and
3. that the Court has made findings that the value of the property to be substituted equals the value of the property garnished.

Tex. R Civ. P. 664.

The Debtor has the burden to prove justification for the substitution. Tex. R. Civ. P. 664a. If the Court allows substitution of the property, the garnished property is released to the Debtor, the liens created by the original Writ of Garnishment order are terminated and the garnishment lien on the substituted property relates back to the original Writ of Garnishment date. *Id.*

c. Filing a Replevy Bond

If the Debtor wants to release the Garnishment, the Debtor has an option to post a replevy bond. Tex. R. Civ. P. 664. The replevy bond may be posted at any time before a judgment. (This differs from a Writ of Sequestration which requires Debtor to replevy within 10 days following levy of the Writ of Sequestration). A Debtor must post a bond with sufficient surety or sureties as provided by statute. *Id.* The bond must be in an amount equal to the lessor of the value of the garnished property or the amount of the Creditor's claim plus interest for one-year and the estimated costs. *Id.* The bond must be approved by the levying officer and filed with the Court where the action is pending. *Id.* If the levying officer receives notice of the filing of a replevy bond that has been approved and the Creditor does not timely object to the bond, the officer must redeliver the property to the Debtor upon receipt of the fees and necessary expenses for safeguarding the property.

Either party may object to the other party's bond by making a motion to increase the amount of the bond or challenging the sufficiency of the sureties or the estimated value of the property. Although the motion may be determined from the uncontroverted affidavits, it should be anticipated that an evidentiary hearing will be required. Tex. R. Civ. P. 664.

12. Responding to the Garnishee's Answer

If the Garnishee's answer is not disputed, it is presumed to be true. *Crawford Const. v. Lassiter*, 17 S.W.3d 379, 380-81 (Tex. App.-Houston [1st Dist.] 2000, no writ). If the Creditor disputes the statements in the Garnishee's answer, the Creditor may controvert it by filing an affidavit stating that the Creditor has good reason to believe, and does believe, that the answer of the Garnishee is incorrect, stating with particularity what parts are incorrect. TEX. R. CIV. P. 673. If the Creditor believes that the facts stated in the Garnishee's answer are not true, it is the Creditor's duty to file a controverting affidavit. *Goodson v. Carr*, 428 S.W.2d 875, 878 (Tex. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.). Once a controverting affidavit has been filed, the matter will proceed to trial as in other cases. TEX. R. CIV. P. 674-76.

13. Litigating the Garnishment Action

The only real issue in a garnishment proceeding is whether the Garnishee should be discharged or if the property held by the Garnishee should be delivered to the Court. If the

Garnishee resides in another county, then the proceeding must be transferred to the county of the Garnishee's residence for trial. TEX. R. CIV. P. 675; Tex. Civ. Prac. & Rem. Code § 63.005; *S.L. Crawford Const., Inc. v. Lassiter*, 17 S.W.3d 379, 380-81 (Tex. App.—Houston [1st Dist.] 2000, no writ). There are three items required for the Garnishee to obtain a discharge. *Rowley v. Lake Area Nat. Bank*, 976 S.W.2d 715, 720 (Tex. App.—Houston [1st Dist.] 1998, writ denied). These three items are: (1) a denial that the garnishee is indebted to the defendant, (2) a denial that the garnishee has effects of the defendant; and (3) a denial of knowledge of third persons who may be indebted to the defendant or have effects of the defendant, or the names of such persons. *Id.* If the Garnishee denies all these matters, and if Creditor does not controvert these matters with an affidavit, the Garnishee is discharged upon its answer. Tex. R. Civ. P. 666, 673; *A. Wolfson's, Inc. v. First State Bank of Corpus Christi*, 752 S.W.2d 614, 614 (Tex. App.—Corpus Christi 1988, writ denied). In that case, the Garnishee is entitled to recover the costs of the proceeding, including reasonable compensation to the Garnishee, to be taxed as costs. Tex. R. Civ. P. 677.

If the Garnishee's answer admits that the Garnishee is indebted to the Debtor or has effects belonging to the Debtor, then the judgment will be entered in accordance with the answer of the Garnishee. Tex. R. Civ. P. 668, 669; *Healy v. Wick Bldg. Systems, Inc.*, 560 S.W.2d 713, 717 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.). The judgment should direct that the funds be deposited with the registry of the Court pending outcome of the underlying dispute.

If the Garnishee's answer raises doubts about the ownership of the funds, then the Creditor must prove that the Debtor owns the funds. *Putman & Putman, Inc. v. Capitol Warehouse, Inc.*, 775 S.W.2d 460, 463 (Tex. App.—Austin 1989, writ denied). The Creditor in a garnishment action merely steps into the shoes of the Debtor, as against the Garnishee. *Rowley v. Lake Area Nat. Bank*, 976 S.W.2d 715, 719 (Tex. App.—Houston [1st Dist.] 1998, writ denied). The Creditor may enforce whatever rights the Debtor could have enforced had the Debtor been suing the Garnishee directly. *Id.*

The final judgment in the garnishment proceeding may not be entered until after entry of a final judgment in the underlying lawsuit. *Glenn W. Casey Const., Inc. v. Citizens Nat. Bank*, 611 S.W.2d 695, 700 (Tex. Civ. App.—Tyler 1980, no writ); *Southern Pipeline Const. Co., Inc. v. Humble Oil Refining Co.*, 496 S.W.2d 248, 249 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.). For purposes of a garnishment proceeding, a judgment is final upon signing, unless a supersedeas bond is approved and filed. *Thompson v. Harco Nat. Ins. Co.*, 997 S.W.2d 607, 612 (Tex. App.—Dallas 1998, writ denied).

B. SEQUESTRATION

1. Overview

Sequestration is an extraordinary pre-judgment writ whereby property in dispute in a lawsuit may be seized and held by the levying officer until it is sold, replevied or turned over as ordered by the Court. Sequestration proceedings are available when the suit is for possession or foreclosure of property that is in immediate danger of being ill-treated, wasted, destroyed or concealed. This is the remedy that is commonly used by a Creditor that has title to property or a lien upon that property.

Generally, under a Writ of Sequestration, the property is seized and preserved during the pendency of the lawsuit. Where the property is perishable, it may be sold prior to final judgment. Sworn pleadings and a bond are required. The Debtor is required to be served with the writ and has the opportunity to have the property returned during pendency of the lawsuit by

posting a replevy bond. While the property is in the levying officer's possession, the officer is obliged to care for and manage, in a prudent manner, the sequestered property. Chapter 62 of the Civil Practices and Remedies Code and Texas Rules of Civil Procedure 696-716 govern this remedy. The act of sequestering personal property is not an act of conversion and its occurrence does not impact the statute of limitations. *Smart v. Texas American Bank/Galleria*, 680 S.W.2d 896, 898 (Tex. App.—Houston [1st Dist.] 1984, no writ).

2. Property subject to Sequestration

A Writ of Sequestration may be sought against real property, personal property or fixtures. Civ. Prac. & Rem. Code § 62.001. The Creditor must have a fear that there is an immediate danger that the Debtor will conceal, dispose of, ill treat, waste or destroy such property, or (for personal property) remove it from the jurisdiction of the Court during the pendency of the lawsuit. Civ. Prac. & Rem. Code § 62.001; *Marrs v. South Texas Nat. Bank*, 686 S.W.2d 675, 677-78 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

3. Grounds Required for a Pre-Judgment Writ of Sequestration

A Writ of Sequestration may be issued at the initiation of the suit or at any time before final judgment. Civ. Prac. & Rem. Code § 62.002. The Writ may be issued for personal property under a mortgage or a lien even though the right of action on the mortgage lien has not accrued. Civ. Prac. & Rem. Code § 62.003. An example of this type of situation exists when a Debtor has not defaulted on its loan payments, however, the Creditor learns that the Debtor is causing extensive damage to the personal property or plans to remove it from the state and cease to make payments. In situations where a Writ is issued for a claim that is not due, a final judgment on the claim may not be rendered until a right of action has accrued. Civ. Prac. & Rem. Code § 62.003.

A Writ of Sequestration is available to a Creditor in a lawsuit if any of the following exist:

1. The suit is for title or possession of personal property or fixtures or for foreclosure or enforcement of a mortgage, lien or security interest on personal property or fixtures and a reasonable conclusion may be drawn that there is an immediate danger that the Debtor or the party in possession of the property will conceal, dispose of, ill-treat, waste, or destroy the property or remove it from the county during the suit;

2. The suit is for title or possession of real property or for foreclosure or enforcement of a mortgage or lien on real property and a reasonable conclusion may be drawn that there is immediate danger that the Debtor or the party in possession of the property will use its possession to injure or ill-treat the property or waste or convert to his own use, the timber, rents, fruits, or revenue of the property;

3. The suit is for title or possession of property from which the Creditor has been ejected by force or violence; or

4. The suit is to try the title to real property, to remove a cloud from title of real property, to foreclose a lien on real property, or to partition real property and the Creditor makes an oath that one or more of the Debtors is a non-resident of the state.

Tex. R. Civ. P. 62.001.

There are several different types of liens that may be enforced using a Writ of Sequestration. The most common type of lien is a purchase money security interest under the UCC (Tex. Bus. & Comm. Code § 9.001 *et seq.*). Other liens include constitutional liens to original contractors providing goods or services used in construction (Tex. Const. Art. XV1, § 37), statutory liens for mechanics, artisans and materialmen (Tex. Prop. Code § 53.001 *et seq.*), and statutory liens for farm, factory and store workers (Tex. Prop. Code § 58.001 *et seq.*).

4. Contents of the Application and Supporting Affidavit

The application must be supported by affidavits of the Creditor, its agent, its attorney, or other persons having knowledge of relevant facts. Tex. R. Civ. P. 696; *Monroe v. GMAC*, 573 S.W.2d 591, 593 (Tex. Civ. App.—Waco 1978, no writ). The application and the affidavit must contain the following:

1. a statement of the grounds for issuance of the Writ as set forth in Texas Rule of Civil Procedure 62.001;

2. a description of the property to be sequestered with such certainty that it may be identified and distinguished from property of a like kind, giving the value of each article of the property and the county in which it is located;

3. the specific facts relied upon by the Creditor to warrant the required findings by the Court.

Tex. R. Civ. P. 696.

As a practical matter, the application should also contain the specific facts stating the nature of the Creditor's claim and the amount in controversy. The value of the property to be covered must be within the Court's jurisdictional limits. *Moore v. First State Bank of Livingston*, 127 S.W.2d 536, 538 (Tex. Civ. App.—Beaumont 1939, no writ).

The description of the property must be specific enough so that the levying officer can identify the property. Tex. R. Civ. P. 696. Although the description of the property in the Application for Writ of Sequestration must be specific enough so that the property may be identified from property of a like kind, giving the value of each article, when the Creditor is seeking sequestration of an inventory, it is not necessary to allege the value of each individual item. The Creditor may allege the value of the total inventory. *Marrs v. South Texas Nat. Bank*, 686 S.W.2d 675, 678 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.). If the Writ of Sequestration misdescribes the property to be sequestered, it is a fatal error. *Watts v. Overstreet,* 14 S.W. 704, 705-706 (Tex. 1890). As a general rule, if the Creditor has information such as a serial number or a Vehicle Identification Number, that information should be included in the application and supporting affidavit.

The affidavit supporting the Application for Writ of Sequestration shall be made on personal knowledge and shall set forth such facts as would be admissible into evidence provided that they may be stated based on information and belief if the grounds of such belief are specifically stated. Tex. R. Civ. P. 696. The person executing the affidavit must be a person with knowledge of relevant facts. *Monroe v. GMAC*, 573 S.W.2d 591, 593 (Tex. Civ. App.—Waco 1978, no writ). Generally, the Court will focus more on the facts that are based upon personal knowledge and will not look favorably upon matters based on information and belief unless the circumstantial evidence is very strong.

Like the application, the affidavit must state the grounds for issuing the Writ, including the description of the property to be sequestered, with such certainty that it may be identified and distinguished from property of a like kind, giving the value of each article of the property and the county in which it is located, and the specific facts relied upon by the Creditor to warrant the required findings by the Court. Tex. R. Civ. P. 696. The statement of value is important in order to determine the amount of the bond. As a practical matter, it is often advisable to copy the paragraphs from the affidavit into the application almost verbatim. This reduces the probability that the application will be inconsistent with the affidavit. The location of the property is also important because this directs the levying officer where to seek the property. If the property location is not accurate, it may affect the levying officer's ability to seize the property. A sample Application for Writ of Sequestration and supporting affidavit are attached as Exhibit "D."

5. Contents of the Order granting the Application for Writ of Sequestration

Generally, the Creditor will draft the Order granting the Writ of Sequestration. The Order may direct the issuance of several writs at the same time to be sent to different counties. Tex. R. Civ. P. 696. The Order must be written. *Id.* The Order must contain the following:

1. Specific findings of fact to support the statutory grounds found to exist;

2. A description of the property to be sequestered with such certainty that it may be identified and distinguished from property of a like kind, giving the value of each article of the property and the county in which it is located;

3. the amount of the bond required of the Creditor which, in the opinion of the Court, shall adequately compensate the Debtor in the event the Creditor fails to prosecute its suit to effect and pay all damages and costs, including the elements of damages stated in section 62.044 and section 62.045 of the Civil Practice and Remedies Code;

4. the amount of bond required of the Debtor to replevy, which shall be an amount equivalent to the value of the property sequestered or the amount of the Creditor's claim and one year's accrual of interest, whichever is the lesser amount, and the estimated costs of Court; and

5. the county in which each article of property is located.

Tex. R. Civ. P. 696.

The description of the property in the Order should be limited to the property that is easily identified and, if possible, property that is not impressed with superior liens. This allows the officer executing the writ to easily identify the property to be seized. Where the description is too general, the officer executing the writ will often decline to seize the property because of the risks associated with wrongful seizure. Ideally, the Order should specify the collateral by serial number or other identifying characteristics, if possible. The Order should direct the Writ of Sequestration to a levying officer for any county in Texas where the claimed property is located. Tex. R. Civ. P. 699. A sample Order granting Writ of Garnishment is attached hereto as Exhibit "E."

6. Contents of the Bond for Writ of Pre-Judgment Sequestration

No Writ of Sequestration can issue until the Creditor has filed a Bond for Sequestration. Tex. R. Civ. P. 698. The bond must be made payable to the Debtor in an amount fixed by the Court's Order with sufficient surety or sureties as provided by statute and approved by the clerk. *Kelso v. Hanson*, 388 S.W.2d 396, 399 (Tex. 1965). The bond must be conditioned that the Creditor will prosecute its suit to effect and pay, to the amount of the bond, all damages and costs as may be adjudged against the Creditor for wrongfully suing out the Writ of Sequestration. Tex. R. Civ. P. 698. It must bind the sureties to pay all damages and costs the Debtor recovers against the Creditor for wrongfully suing out the Writ of Sequestration. *Barfield v. Brogdon*, 560 S.W.2d 787, 792 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.). It may be advisable to include language in the bond that complies with Tex. R. Civ. P. 708. For a discussion on this issue, see the section titled "Replevy Bond by the Creditor." A sample bond form is attached hereto as Exhibit "F."

As discussed in the section titled "RISKS ASSOCIATED WITH PREJUDGMENT REMEDIES", *supra*, damages for lost profits and punitive damages may be recovered if the sequestration is wrongful. In such case, these damages are not covered by the Sequestration Bond and cannot be recovered from the surety. *See Commercial Credit Equipment Corp. v. Elliott*, 414 S.W.2d 35, 44 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.). Furthermore, if the Debtor replevies (*see* section on Replevy Bond by the Debtor), the judgment must include a finding of the property's value as of the date replevy, or the surety will escape liability. *Musterman v. Acme Engine Rebuilding Co.*, 383 S.W.2d 620, 621 (Tex. Civ. App.—Houston 1964, no writ). The filing of the Sequestration Bond does not preclude actual damages. *Barfield v. Brogdon*, 560 S.W.2d 787, 792 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.). To the contrary, it guarantees the payment of damages and costs in case it is decided that the sequestration was wrongfully issued.

Many Courts struggle with the appropriate amount of the bond. Most Creditors argue that the amount of the Sequestration Bond should be the potential lost profits flowing from the items seized, together with interest on that money for, at most, 10 days. Most Debtors will argue that it should be the value of the property and all lost profits and other damages that will flow from its seizure, which may include lost profits from the cessation of the Debtor's business. Generally, most Courts will set the bond at a nominal amount of five to ten thousand dollars, apparently adopting the view mostly argued by the Creditor. However, it should be noted that some Courts will set a bond at the value of the property. Where the property has an extremely high value, this can be a significant cost to the Creditor and due consideration should be given to this prior to filing the Application for Writ of Sequestration.

It is normally advisable to check with the clerk prior to obtaining the bond to verify that the clerk will approve the language. Given the time constraints that are normally present in a Writ of Sequestration, it is also advisable to provide a copy of the bond, along with a bond application and financial information for the Creditor to the surety ahead of time. This will usually expedite the process of obtaining the bond from the surety.

7. Contents of the Writ of Sequestration

Once the bond has been delivered to the clerk, the clerk should issue the Writ of Sequestration. The form of the writ is mandated by statute. Tex. R. Civ. P. 699. The writ must be directed to the sheriff or any constable within the State of Texas and command him to take possession of the property if it is found within his county, and to keep it subject to further order of the Court unless it is replevied. *Id.* It must describe the property the same as it is described in the application or affidavits. *Id.* The writ must prominently display, on its face, in 10-point

type and in a manner calculated to advise a reasonably attentive person of its contents, the following:

> "YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT."

Tex. R. Civ. P. 699.

Most clerks already have a form of the Writ of Sequestration. However, it should be noted that some Courts, mostly in rural areas, do not have the form of the writ. In such cases, the Creditor must prepare the writ and submit it to the clerk. The Creditor should be very careful to make sure that the writ meets all the requirements of Tex. R. Civ. P. 699. Additionally, in instances where the clerk issues the writ on its own, the Creditor should verify that the writ issued by the clerk conforms with the requirements of Tex. R. Civ. P. 699. While a Creditor is probably not liable for wrongful sequestration if the clerk negligent prepares the writ (*See Jamison v. National Loan Investors, L.P.*, 4 S.W.3d 465, 469 (Tex. App.—Houston [1st Dist.] 1999, writ denied)), problems can be avoided by making sure it is correct.

8. Procedure for Obtaining the Writ of Sequestration

a. Hearing on the Application

The Creditor must file a lawsuit against the Debtor seeking possession or foreclosure of the property to be sequestered. Tex. Civ. Prac. & Rem. Code § 62.002; Tex. R. Civ. P. 697. The application may be filed at the commencement of the lawsuit or anytime before final judgment. Tex. R. Civ. P. 696; Tex. Civ. Prac. & Rem. Code § 62.002.

Because there is a danger that the Debtor may move or conceal the property, it is normally advisable to seek the sequestration on an *ex parte* basis. The statute authorizing the *ex parte* issuance of a Writ of Sequestration has been declared constitutional. *Marrs v. South Texas Nat. Bank*, 686 S.W.2d 675, 678 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

b. Service on the Party in Possession of the Property

Once the Writ of Sequestration has been issued, a sheriff or constable may levy against the property by serving it on any party with immediate possession of the property. Tex. R. Civ. P. 699. This may be the Debtor or the Debtor's agent. Tex. Civ. Prac. & Rem. Code § 62.001. Only a sheriff or constable may execute the Writ of Sequestration. *Lawyers Civil Process, Inc. v. State ex rel. Vines*, 690 S.W.2d 939, 944 (Tex. App.—Dallas 1985, no writ). In instances where somebody is holding the property other than the Debtor, it may be advantageous not to notify the Debtor ahead of time. This will reduce the possibility that the Debtor will remove the property and put it beyond the Creditor's reach. In such situations, it is advisable to allow the constable to execute the writ and seize the property prior to giving the Debtor notice. Once the property has been seized, the Debtor may be served with the necessary papers as set forth below.

c. Service on the Debtor

The Debtor shall be served in any manner provided for service of citation or as provided in Rule 21a, with a copy of the Writ of Sequestration, the application, and accompanying affidavits, and order that the Court, as soon as practicable following the levy of the Writ. Tex. R.

Civ. P. 700a. In addition to the statutory language required on the Writ itself, the copy that is served on the Debtor must include the following:

> To _____ Defendant:
>
> "You are hereby notified that certain properties alleged to be claimed by you have been sequestered. If you claim any rights in such property, you are advised:
>
> YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT."

Tex. R. Civ. P. 700a.

9. Storage of the Property

The officer acts neither as the agent or the servant of either party. *Multi-Moto Corp. v. ITT Commercial Finance Corp.*, 806 S.W.2d 560, 569 (Tex. App.—Dallas 1990, writ denied). After seizure, the levying officer must keep the seized property in a secure place for at least 10 days. Tex. R. Civ. P. 708. During this time period, the officer has an obligation to secure the property. Tex. Civ. & Prac. Rem. Code §34.061. The officer is required to care for and manage the sequestered property in a prudent manner while he retains custody. Civ. Prac. & Rem. Code § 62.061. If the officer entrusts the sequestered property to another person, the officer is responsible for the acts of that person relating to the property. *Id.*

The officer is liable for injuries to the sequestered property resulting from his neglect or mismanagement or from a negligent or mismanagement of a person to whom he entrusts the property. *Civ. Prac. & Rem. Code §62.061.* If the property is damaged, the officer and his sureties are liable for the value of the property lost or the amount of the injury sustained, plus ten percent of the value of that amount. *Id.* The claim against the officer may be filed in any district court that has jurisdiction over the parties. *Freeman v. Wirecut E.D.M., Inc.*, 2005 Tex. App. LEXIS 1227, (Tex. App.—Dallas 2005, no pet.) The claim should be made against the officer individually and not in his or her official capacity. *Id.*

The officer is entitled to just compensation and reasonable charges as to be determined by the clerk that issued the writ and shall be taxed and collected as costs of suit. Civ. Prac. & Rem. Code § 62.062. The officer may retain possession of the property until he is repaid for money expended in the security, management, or care of the sequestered property by the party seeking to replevy the property or that party's agent or attorney. Civ. Prac. & Rem. Code § 62.063. During the time the levying officer has possession of the property, the party securing the writ has no right to disturb the officer's possession of the property. *Tolbert v. McSwain*, 137 S.W.2d 1051, 1054 (Tex. Civ. App.—El Paso 1939, no writ).

10. Debtor's Response to a Writ of Sequestration

a. In General

A Debtor that has received a Notice of Sequestration may respond in a number of different ways. A Debtor may file a Motion to Dissolve the Writ of Sequestration, the Debtor may file a Motion to Modify the Bond Amount, the Debtor may file a Replevy Bond, or the

Debtor may simply chose to ignore the Writ of Sequestration and allow for the Creditor to gain possession of the property.

b. Dissolving or Modifying the Writ of Sequestration

A Debtor whose property has been seized under a Writ of Sequestration can apply for the Writ to be dissolved, vacated or modified and all or part of the property released. Tex. R. Civ. P. 712a. The Motion to Vacate, Dissolve, or Modify the Writ must be sworn. *Id.* It can be based on any grounds or cause, extrinsic or intrinsic, including a Motion to Reduce the Amount of the Property Sequestered when the total amount described and authorized by the Order exceeds the amount necessary to secure the Creditor's claim, one year's interest as allowed by law and interest on the claim, and costs. *Id.* The motion must admit or deny each finding of the Order directing the issuance of the Writ of Sequestration except where the Debtor is unable to admit or deny the finding, in which case the Debtor shall set forth the reasons it cannot admit or deny. *Id.* The motion must be heard promptly, within 10 days after it has been filed. *Id.* Absent an agreement between the parties, if the Motion to Dissolve the Writ of Sequestration is not determined within 10 days, it should be denied. *Breckenridge v. Nationsbank of Texas, N.A*., 79 S.W.3d 151, 156 (Tex. App. —Texarkana 2002, writ denied); Tex. Civ. Prac. & Rem. Code §62.042. The filing of the motion stays any further proceedings except for Orders concerning the care, preservation or sale of perishable property, until the issue has been determined at a hearing. *Id.;* Tex. R. Civ. P. 712a. At the hearing on the Motion to Dissolve, the Court must dissolve the Writ unless the Creditor can prove the grounds relied upon for its issuance. Tex. Civ. Prac. & Rem. Code § 62.043. The Creditor must prove both the facts alleged and the grounds relied upon for issuance of the writ. *Rexford v. Holiday*, 807 S.W.2d 356, 358 (Tex. App.—Houston [1st Dist.] 1991, no writ). If the Debtor alleges that the reasonable value of the property sequestered exceeds the amount necessary to secure the debt, interest for one year and probable costs, the Debtor has the burden to prove the reasonable value of the property. *Id.* The Court may base its decision on uncontroverted affidavits if they set forth facts that would be admissible in evidence. *Id.* If the Court's determination cannot be based upon these affidavits, then the parties must submit evidence. *Id.* The Court may make all Orders, including Orders concerning the care, preservation, or disposition of the property or the proceeds therefrom, as justice may require. *Id.; B & W Cattle Co. v. First Nat. Bank of Hereford*, 692 S.W.2d 946, 949 (Tex. App.—Amarillo 1985, no writ). If the Debtor has filed a Replevy Bond, the Order dissolving the Writ vacates the Replevy Bond and discharges the sureties. Tex. R. Civ. P. 172a. If the Court orders that the writ is dissolved, the action will proceed as if the writ was never issued. *Rexford v. Holliday*, 807 S.W.2d 356, 358 (Tex. App.—Houston [1st Dist.] 1991, no writ). The Debtor does not waive defenses in an action by failing to oppose the issuance of a Writ of Sequestration or failing to rebut the Creditor's evidence at the hearing. *Id.* The determinations made at the dissolution hearing are not dispositive on ownership of the property at issue. *Id.*

If the Motion to Dissolve is timely filed and the officer is given notice, the officer must retain possession of the property until the Court determines the motion and sufficiency of the Bond. Tex. R. Civ. P. 712a. If the Court finds the bond insufficient, the Writ of Sequestration will be vacated and the levying officer (or Creditor) is ordered to return the property to the Debtor, unless the Creditor files a sufficient bond. *Id.* An order to preserve property under the control of the court or to dissolve such an order is interlocutory and is not appealable. *Rexford v. Holliday*, 807 S.W.2d 356, 357 (Tex. App—Houston [1st Dist.] 1991, no writ); *Monroe v. GMAC*, 561 S.W.2d 12, 13 (Tex. Civ. App.—Waco 1978, no writ); *Jackson v. Trustmark Nat'l Bank*, 2008 Tex. App. LEXIS 874, *1-2 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

c. Replevy by the Debtor

The Debtor may defeat the Writ of Sequestration by filing its own Replevy Bond. *Commercial Securities Co. v. Thompson*, 239 S.W.2d 911, 914 (Tex. Civ. App.—Fort Worth 1951, no writ). A Replevy Bond may be filed anytime before judgment if the property has not been previously claimed, replevied or sold. Tex. R. Civ. P. 701. The Debtor must give a bond, with sufficient surety or sureties, as provided by statute, to be approved by the clerk, payable to the Creditor, in an amount fixed by the Court's Order. *Id.* Either party shall have a right to have the amount of the bond increased or decreased. *Id.* The purpose of the Debtor's Replevy Bond is to ensure that the property will be forthcoming after judgment in the same condition as when replevied. *Commercial Securities Co. v. Thompson*, 239 S.W.2d 911, 914 (Tex. Civ. App.—Fort Worth 1951, no writ). If the property seized is personal property, then the bond shall require that the Debtor not remove the property out of the county or that it will not waste, ill-treat, injure, destroy, or dispose of the property, and that the Debtor will have such property, in the same condition as when it as replevied, together with the value of the fruits, hire or revenue thereof, to abide by the decision of the Court or that the Debtor will pay the value thereof, or the difference between the value at the time of the replevy and the time of judgment and of the fruits, hire or revenue of the same, if ordered to do so. Tex. R. Civ. P. 702. The wording of this rule requiring that the Debtor have the property in the same condition as when it was replevied, excludes any ordinary depreciation in market value. *Associates Inv. Co. v. Soltes*, 250 S.W.2d 593, 595 (Tex. Civ. App.—Dallas 1952, writ ref'd n.r.e.). The language that the Debtor will pay the difference between the value at the time of replevy and at the time of judgment refers to damages occasioned by the ordinary use. *Id.* If the property is real estate, the bond shall require that the Debtor not injure the property and that the Debtor will pay the value of the rents of the same, if he is ordered to do so. Tex. R. Civ. P. 703.

If the Debtor has filed a Replevy Bond, the Order dissolving the Writ vacates the Replevy Bond and discharges the sureties. Tex. R. Civ. P. 172a.

If the levying officer receives notice of filing of a Replevy Bond within 10 days after the levy, and the Creditor does not timely object to the bond, the officer must re-deliver the property to the Debtor upon receipt of the fees and necessary expenses for safeguarding the property, including pick up and storage costs. Tex. R. Civ. P. 708.

There is a conflict in the law as to whether or not a Debtor who replevies may be liable for the fruits, hire or revenue of the property. Civ. Prac. & Rem. Code § 62.046 provides that a Debtor who replevies the property is not required to account for the fruits, hire, revenue, or rent of the property. However, Tex. R. Civ. P. 702 provides that the Replevy Bond be in an amount that includes the value of the fruits, hire or revenue thereof. Currently there is no case law resolving this conflict.

11. Replevy by the Creditor

If the Debtor has not replevied the property within 10 days after execution of the Writ of Sequestration *and* service of notice on the Debtor, a Creditor may file a Replevy Bond in an amount fixed by the Court's Order. Tex. R. Civ. P. 708. Upon filing of the bond, the officer must give possession of the property to the Creditor. *Id.* For personal property, the bond must require that the Creditor have the property, in the same condition as when it was replevied, together with the value of the fruits, hire, or revenue thereof, forthcoming to abide the decision of the Court, or that it will pay the value thereof, or the difference between its value at the time of replevy and at the time of judgment (regardless of the cause of such difference in value, and of the fruits, hire or revenue of the same in case it should be ordered to do so). *Id.* For real

property, the bond must require that the Creditor will not injure the property and that it will pay the value of the rents of the same in case it is ordered to do so.

The language in the Sequestration Bond (Tex. R. Civ. P. 698) may be combined with the language for the Replevy Bond (Tex. R. Civ. P. 708). Although the Sequestration Bond required by Rule 698 and the Replevy Bond required by Rule 708 serve two different purposes and are conditioned against different contingencies, the two may be combined in the same bond. *Kelfo v. Hanson*, 388 S.W.2d 396, 399 (Tex. 1965). It is normally advisable to combine the language required by Rule 698 with the language required by Rule 708. This will expedite the process if the Creditor seeks possession of property prior to final judgment.

12. Disposition of the Property

Non-Judicial Foreclosure

The case law is not clear on whether or not a secured creditor who has obtained property through a Writ of Sequestration and the posting of a Replevy Bond may institute a non-judicial foreclosure. In *Moszkowicz v. A. B. Lewis Co.*, 268 S.W.2d 548, 551 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.), the Court held that the filing of a suit to foreclose a security interest and applying for a Writ of Sequestration is an election of remedies against non-judicial foreclosure. However, in *Unicut, Inc. v. Texas Commerce Bank-Chemical*, 704 S.W.2d 442, 445 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.), the Court held that a secured party may sue for possession of collateral and seek a Writ of Sequestration in support thereof and thereafter hold a private foreclosure sale.

Judicial Foreclosure

Normally, the property will be delivered to the party that prevails in the underlying dispute upon a final judgment for that party. However, where the property is the type that will likely be wasted or destroyed, or greatly deteriorate in value and a Replevy Bond has not been filed, the Court may order the seized property sold and the proceeds deposited with the Court. Tex. R. Civ. P. 710. Although the title to this rule references "perishable goods," a reading of the Rule indicates that it applies in virtually every case sequestered property. This Rule applies to property that will decline rapidly in value given its age, or model, or general movement in that particular market. Assuming that the property qualifies under the broad definition in this Rule and Debtor has failed to post Replevy Bond within 10 days from execution of the Writ, either party may file a motion to sell the property as a perishable good. *Id.* A competent witness' declaration or affidavit showing why the property should be sold should accompany the application. *Id.* If the levying officer certified the truth of the affidavit, the Court must order the sale of the property. *Id.* The Order must direct the officer having the property in his possession to sell it in the same manner as under execution. Tex. R. Civ. P. 711. Within 5 days after making the sale, the officer shall return the Order of the sale to the Court and pay over to the clerk the proceeds of the sale. Tex. R. Civ. P. 712.

When property that has been levied upon is claimed by a third party, that party's claim should be adjudicated through a trial of right of property (*See* Tex. R. Civ. P. 717-734).

C. ATTACHMENT

1. Overview

Attachment is the least used of the three significant pre-judgment remedies. An Attachment allows a Creditor holding a secured or unsecured claim to create a judicial lien on a

Debtor's property before final adjudication of the underlying lawsuit. It is usually only used when the Creditor is aware of property subject to seizure that may not remain through a final judgment and the Creditor does not have an ownership or security interest in the property. Essentially, an Attachment is the same as a Writ of Execution, except that it is done pre-judgment. *Lipscomb v. Rankin*, 139 S.W.2d 367, 369 (Tex. Civ. App.—El Paso 1940, no writ).

Attachment is purely a statutory remedy and is subject to strict construction. *Carpenter v. Carpenter*, 476. S.W.2d 469, 470 (Tex. Civ. App.—Dallas 1972, no writ); *Sweatt v. Grogan*, 25 F.Supp. 585, 586 (N.D. Tex. 1938); *In re Argyll Equities, LLC*, 227 S.W.3d 268, 271 (Tex. App.—San Antonio 2007, no pet.).

2. Property Subject to Attachment

A Writ of Attachment may be levied only on property that is, by law, subject to levy under a Writ of Execution. Tex. Civ. Prac. & Rem. Code § 61.041. This may include real property or personal property that is not otherwise exempt. A levy under a Writ of Attachment can only reach property within the state of Texas. *Brand v. Eubank*, 81 S.W.2d 1023, 1027 (Tex. Civ. App.—Texarkana 1935, writ dismissed); *GM Gold & Diamonds, L.P. v. Faberge Co.*, 489 F.Supp. 2d 725, 727 (S.D. Tex. 2007) (holding that attachment orders are proceedings whose jurisdiction extends no further than the territorial boundaries of the forum state). A Texas Federal Court may not use the Texas attachment statutes to seize property beyond the territorial borders of Texas. *Id.* The officer executing the writ and levying on the property can only seize property valued at, or less than, the amount of the writ. *Cornelius v. Burford*, 28 Tex. 202, 210 (1866).

Property that is exempt cannot be seized under a Writ of Attachment. For a list of some property that may be exempt in certain circumstances, see Section II of this paper, “LOCATING THE DEBTOR’S ASSETS.”

3. Grounds Required for a Pre-Judgment Writ of Attachment

Liquidated Debt required in Some Circumstances

A Writ of Attachment is generally only available on a claim for a liquidated debt. *Sharman v. Schuble*, 846 S.W.2d 574, 576 (Tex. App.—Houston [14th Dist.] 1993, no writ); *In re Argyll Equities, LLC*, 227 S.W.3d at 271. Attachment is not appropriate if the amount of the claim is so uncertain that a jury must determine the final amount of damages. *Id.* However, a writ of attachment may issue for unliquidated damages if the underlying contract provides a rule for ascertaining such damages. *Id.* In most instances, a petition seeking a claim for money based upon an expressed or implied contract, and not a tort claim, must be filed prior to filing the Application for Writ of Attachment. *Cleveland v. San Antonio Bldg. & Loan Ass'n*, 148 Tex. 211, 223 S.W.2d 226, 228 (1949); *Sweatt v. Grogan*, 25 F.Supp. 585, 587 (N.D. Tex. 1938). However, a Writ of Attachment may be issued even though a Debtor's demand is not due. Tex. Civ. Prac. & Rem. Code § 61.004. In this instance, the final judgment may not be rendered against the Debtor unless the debt or demand becomes due. *Id.*

There is an exception to the requirement for a liquidated contract when the attachments is sought against a non-resident. Tex. Civ. Prac. & Rem. Code § 61.005. A Writ of Attachment is available in a suit founded in tort or on an unliquidated demand against an individual, partnership, association, or corporation on whom personal service cannot be obtained in this state. *Id.* This applies in cases in which a Trial Court lacks in personam jurisdiction over the Debtor, or where the Creditor has unsuccessfully attempted to serve the Debtor with the lawsuit

itself. *S.R.S. World Wheels, Inc. v. Enlow*, 946 S.W.2d 574, 576 (Tex. App.—Fort Worth 1997, no writ).

Statutory Requirements

A Writ of Attachment is available to a Creditor in a lawsuit if:

1. The Debtor is justly indebted to the Creditor;

2. the Attachment is not sought for the purpose of injury nor harassing the Debtor;

3. the Creditor will probably lose his debt unless the Writ of Attachment is issued; and

4. specific grounds for the Writ exist under Tex. Civ. Prac. & Rem. Code § 61.002.

Tex. Civ. Prac. & Rem. Code § 61.001; *In re Argyll Equities, LLC*, 227 S.W.3d at 271.

Texas Civil Practice and Remedies Code § 61.002 sets forth nine specific grounds for a Writ of Attachment. At least one or more of these grounds must be present in order for a Writ of Attachment to be available. The specific grounds are:

1. the Debtor is not a resident of this state or is a foreign corporation or is acting as such;

2. the Debtor is about to move from this state permanently and has refused to pay or secure the debt due the Creditor;

3. the Debtor is hiding so that ordinary process of law cannot be served on him;

4. the Debtor has hidden or is about to hide his property for the purpose of defrauding his Creditors;

5. the Debtor is about to remove its property from this state without leaving an amount sufficient to pay its debts;

6. the Debtor is about to remove all or part of its property from the county in which the suit is brought with the intent to defraud its Creditors;

7. the Debtor has disposed of, or is about to dispose of, all or part of its property with the intent to fraud its Creditors;

8. the Debtor is about to convert all or part of its property into money for the purpose of placing it beyond the reach of its Creditors; or

9. the Debtor owes the Creditor for property obtained by the Debtor under false pretenses.

Tex. Civ. Prac. & Rem. Code § 61.002.

4. Contents of the Application and Supporting Affidavit

Texas Rules of Civil Procedure 592-609 and Texas Civil Practice & Remedies Code Chapter 61, establish the procedure and evidentiary principles that govern attachments. The application must be supported by affidavits of the Creditor, its agent, its attorney, or other persons having knowledge of relevant facts. Tex. R. Civ. P. 592; *In re Argyll Equities, LLC*, 227 S.W.3d at 271. The application must comply with all statutory requirements and state the grounds for issuing the writ and specific facts relied upon by the Creditor to warrant the required findings by the Court. Tex. R. Civ. P. 592. The application and any affidavits must be based on personal knowledge and must set forth such facts as would be admissible in evidence provided that the facts may be stated upon information and belief if the grounds of such belief are specifically stated. *Id.* A sample application and supporting affidavit is attached hereto as Exhibit "G."

An Application for Writ of Attachment should have the caption from the underlying lawsuit. It should include the name of the Court, the names of the Plaintiff and the names of the Defendant and the cause number. The Defendant's name, capacity and location for service or process should be listed. A Writ of Attachment is enforceable only against property interests of the named Defendants.

Although there is very little case law concerning Writs of Attachment, it is generally understood that the requirements for a Writ of Attachment are similar to those of a Writ of Garnishment or a Writ of Sequestration. An affidavit that does not specifically state the grounds upon which the Creditor's belief is based, is not sufficient enough and will not support the application. *See El Periodico, Inc. v. Parks Oil Co.*, 917 S.W.2d 777, 779 (Tex. 1996). The facts must be based upon the declarant's personal knowledge and not on hearsay. *See Metroplex Factors, Inc. v. First Nat. Bank-Bridgeport*, 610 S.W.2d 862, 865 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

5. Contents of the Order Granting the Application for Writ of Attachment

Typically, the applicant will draft the Order granting the Application for Writ of Attachment. The Order must contain the following:

a. specific findings of fact to support the statutory grounds found to exist (as set forth Tex. Prac. & Rem. Code § 66.001 and § 61.002);
b. the maximum value of property that may be attached;
c. the amount of the bond required of the Creditor;
d. a statement commanding that the attached property be kept safe and preserved subject to further Orders of the Court; and
e. the amount of the bond required of the Debtor to replevy.

Tex. R. Civ. P. 592.

A sample Order on Writ of Attachment is attached hereto as Exhibit “H.”

The amount of the Attachment Bond shall be in an amount that will adequately compensate the Debtor in the event Creditor fails to prosecute its suit to effect, and to pay all damages and costs which may be adjudged against the Creditor for wrongfully suing out the Writ of Attachment. *Id.* The amount of the Replevy Bond shall be in an amount of the Creditor's claim, plus one year's accrual of interest, if allowed by law on the claim, plus the estimated costs

of Court. *Id.* The Order granting the Writ of Attachment should specifically identify the property being attached so that the levying officer will be able to easily identify the specific property.

The Order may direct the issuance of several Writs at the same time, or in succession, to be sent to different counties. Tex. R. Civ. P. 592, 595.

6. Contents of the Bond for Writ of Attachment

After the Order granting the Application for Writ of Attachment has been signed, it is next necessary to obtain a bond in an amount set forth in the Order. The clerk will not issue a Pre-Judgment Writ of Attachment until the Creditor has filed with the clerk a bond payable to the Debtor in the amount fixed by the Court's Order with sufficient surety or sureties as provided by statute, conditioned that the Creditor will prosecute a suit to affect and pay to the extent of the penal amount of the bond all damages and costs as may be adjudged against the Creditor for wrongfully suing out the Writ of Attachment. Tex. R. Civ. P. 592a.

Texas Civil Practice & Remedies Code § 61.023 requires that the before Writ of Attachment may be issued, the Creditor must execute a bond that:

1. has two or more good and sufficient sureties;

2. is payable to the Debtor;

3. is in an amount fixed by the Judge or Justice issuing the Writ; and

4. is conditioned on the Creditor prosecuting its suit to affect and paying all damages and costs adjudged against him for wrongful attachment.

There is a conflict between the rules and the statutes concerning the number of sureties that are necessary for a Writ of Attachment. As noted above, the rules require a "surety or sureties," yet, the Code requires "two or more good and sufficient sureties." While there are no cases that have resolved this apparent conflict, it can be argued that one corporate surety equals two personal sureties pursuant to the Texas Insurance Code Article 7.19-1. However, given the fact that there are no cases resolving this issue, be prepared to post a bond with two or more sureties if the clerk requires you to do so. Additionally, by filing a bond executed by only one surety, you leave yourself open to a possible attack from the Debtor that the attachment was wrongful due to the fact that the bond did not meet the requirements set forth in the Code.

The rules specifically provide a form of bond that may be used by the Creditor. Tex. R. Civ. P. 592b. A copy of a sample bond that is based, in part, on Rule 592b is attached hereto as Exhibit "I."

After notice to the opposing party, even before or after issuance of the Writ, either party may file a motion to increase or reduce the amount of the bond or to question the sufficiency of the sureties thereon. Tex. R. Civ. P. 592a.

7. Contents of the Writ of Attachment

The Writ of Attachment is directed to the sheriff or any constable within the State of Texas and commands him to attach and hold, unless replevied, the property of the Debtor of a reasonable value in approximately an amount fixed by the Court as can be found within that county. Tex. R. Civ. P. 593. Most clerks have a form of Writ that they will typically use.

However, some Courts, especially in rural areas, will ask the Creditor to provide the Court with a form of the Writ. Tex. R. Civ. P. 594 contains a form of Writ that may be used. When asked or requested for the language for the Writ, the Creditor should use the language contained in Rule 594 as well as the notice language contained in Tex. R. Civ. P. 598a.

8. Procedure for Obtaining a Pre-Judgment Writ of Attachment

a. Hearing on the Application

It is normally advisable to present the evidence in support of the Application for Writ of Attachment at an *ex parte* hearing. Debtors who have been made aware of an attachment will normally move the property to deter effective use of a Pre-judgment Attachment. There is normally no live testimony at the *ex parte* hearing. The Court should be able to make its decision based upon the adequacy of the affidavits presented with the Application for Writ of Attachment. A Pre-Judgment Writ of Application is only available upon written Order of the Court after a hearing, which may be *ex parte.* Tex. R. Civ. P. 592.

The clerk may deliver the writ to the Creditor or directly to the sheriff or constable. Tex. R. Civ. P. 596. Only a sheriff or constable may execute the Writ of Attachment. *Lawyers Civil Process, Inc. v. State ex rel. Vines*, 690 S.W.2d 939, 944 (Tex. App.—Dallas 1985, no writ). The officer must execute the Writ by levying upon so much of the property of the Debtor subject to the Writ, and found within his county, as may be sufficient to satisfy the amount of the Writ. Tex. R. Civ. P. 597. The Writ of Attachment is levied in the same fashion that a Writ of Execution would be levied post-judgment. Tex. R. Civ. P. 598. The Writ of Attachment may be served upon anyone with possession of the property or with an ability to control possession of the property.

b. Service upon the Debtor

Texas Rule of Civil Procedure 598a requires that the Debtor be served in any manner prescribed for service of citation or as provided in Rule 21a, with a copy of the Writ of Attachment, the application, the accompanying affidavits, and Orders of the Court, as soon as practicable following levy of the Writ. It is normally advisable not to serve the Debtor with a copy of the Application for Writ of Attachment until the Writ has been executed and the property has been levied upon. This will prevent the Debtor from moving the property prior to execution of the Writ.

The copy of the writ that is served on the Debtor must prominently display on its face, in 10-point type and in a manner calculated to advise a reasonably attentive person of its content, the following:

> "To _____ Defendant:
>
> You are hereby notified that certain properties alleged to be owned by you have been attached. If you claim any rights to such property, you are advised:
>
> YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT."

Tex. R. Civ. P. 598a.

9. Debtor's Response to the Writ of Attachment

a. In General

A Debtor that has received notice of an Attachment may respond in a number of different ways. The Debtor may file a motion to dissolve the writ or a motion to modify the bond amount. The Debtor may also file a replevy bond or simply chose to ignore the Writ of Attachment and allow for the property to be held until final judgment, at which point it will be delivered to the Creditor.

b. Dissolving or Modifying the Writ of Attachment

A Debtor whose property has been attached or any intervening party who claims an interest in the property may file a motion to seek to vacate, dissolve or modify the Writ of Attachment, and the Order directing its issuance, for any grounds or cause, extrinsic or intrinsic. Tex. R. Civ. P. 608. The motion must admit or deny each finding of the Order directing the issuance of the Writ, except where the Movant is unable to admit or deny the finding. *Id.* In that case, the Movant must set forth the reasons why it cannot admit or deny those findings. *Id.* The motion must be supported by affidavits based upon personal knowledge. *Id.* Once the motion has been filed, it stays any further proceedings under the Writ, except for Orders concerning the care, preservation or sale of perishable property. *Id.*

Unless the parties agree to an extension, the Court must conduct a hearing on the motion to dissolve the Writ within 10 days after it is filed. *Id.* It may be heard on less that 3 days notice. *Id.* At the hearing, the Creditor must prove all the grounds relied upon for the issuance of the Writ of Attachment. *Id.*

If the Debtor contends that the property attached exceeds the amount necessary to secure the debt, interest for one year and probable costs, then the Debtor has the burden to prove the reasonable value of the property attached. *Id.* If the Debtor asks the Court to substitute property, the Debtor has the burden to prove justification for this substitution. *Id.* If the Debtor has filed a Replevy Bond, and the Court orders the writ vacated or dissolved, that Order shall vacate the Replevy Bond and discharge the sureties thereon. *Id.* If the Court modifies the Order issuing the writ, it is required to make such further orders with respect to the bond as may be consistent with its modification. *Id.*

There are various grounds upon which a Debtor may attack the validity of an attachment. These grounds include a claim that the property levied upon is exempt from attachment, that the claim upon which the writ is based is not one upon which an attachment may issue, that the value of the property clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment, or that the bond is insufficient because it does not meet the statutory requirements.

At the hearing, the Court may base its determination upon the pleadings, affidavits and other papers of record if the facts are uncontroverted. Tex. R. Civ. P. 608. If the facts are disputed, the Court may receive oral testimony, or additional documentary evidence. *Id.* If the Court finds that the Creditor is not entitled to the Writ of Attachment, the Court must order the Writ dissolved, and any property levied to be released. *Id.*

c. Replevy Bond by the Debtor

If the Debtor wants to release the attachment, the Debtor has an option to post a Replevy Bond. The Replevy Bond may be posted at any time before judgment. Tex. R. Civ. P.

599. (This differs from a Writ of Sequestration, which requires a Debtor to replevy within 10 days following a levy of a Writ of Sequestration). A Debtor must post a bond with sufficient surety or sureties as provided by statute. *Id.* The bond must be in the amount fixed by the Court's Order or, at the Debtor's option, for the value of the property sought to be replevied (to be estimated by the officer), plus one-year's interest. The bond must be approved by the levying officer and filed with the clerk where the action is pending. *Id.*

Either party may object to the other party's bond by making a motion to increase the amount of the bond or challenging the sufficiency of the sureties or the estimated value of the property. Tex. R. Civ. P. 599. Although the motion may be determined from the uncontroverted affidavits, it should be anticipated that an evidentiary meeting will be required. *Id.*

d. Substitution of the Property

On reasonable notice to the opposing party (which may be less than 3 days), the Debtor may move for substitution of property. Tex. R. Civ. P. 599. The Court must make findings as to the value of the property to be substituted. *Id.* If the property is substituted, the property released from attachment shall be delivered to the Debtor and all liens upon such property shall be terminated. *Id.* Attachment of the substituted property is deemed to have existed from the date of the levy on the original property and this will supercede any subsequent liens. *Id.*

10. Disposition of the Property

After the property has been levied upon under a Writ of Attachment, the Court may act upon affidavits, in writing or oral testimony, with or without notice to the parties (depending upon the urgency) directing the levying officer to sell the property at public auction. Tex. R. Civ. P. 601. This is appropriate when it appears that the property is in danger of serious and immediate waste or decay or that keeping the property until the trial will incur such expense or deterioration in value as to gravely lessen the amount likely to be realized therefrom. Tex. R. Civ. P. 600. If a party other than the Debtor files an Application for Order of Sale, the Order can only be granted if the party files a bond, with two or more good and sufficient sureties, to be approved by the Court, conditioned that it will be responsible to the Debtor for such damages as the Debtor may sustain in case the sale is illegal, unjustly applied for, or if illegally and unjustly made. Tex. R. Civ. P. 602. The procedure for such sale is generally the same as that under a Writ of Execution. Tex. R. Civ. P. 603. Once the property has been sold, the levying officer shall return the Order of Sale by sending it to the Court stating the time and place of the sale, the name of the purchaser, the amount of money received and an itemized account of the expenses attending the sale. Tex. R. Civ. P. 604. The Order must be signed by the levying officer and shall be filed with the Court. The sale proceeds that are deposited in the Court are subject to the attachment lien. Tex. R. Civ. P. 604; *Midway Nat. Bank of Grand Prairie v. West Texas Wholesale Co.*, 447 S.W.2d 709, 711 (Tex. Civ. App.—Fort Worth 1969), writ ref'd n.r.e., 453 S.W.2d 460 (Tex 1970).

If the Court does not order the property sold, the property is to be held by a levying officer until resolution of the underlying issues in the lawsuit. Because the levying officer is entitled to recover his reasonable costs, it is possible to incur significant charges prior to the resolution of the lawsuit. Given the fact that most lawsuits take years before they are finally resolved, it is entirely likely that the costs for storing the property will ultimately exceed the value of the property being levied upon. Therefore, in virtually all cases, the Creditor should argue that the property will decline in value and should be disposed of, prior to trial, in order to maximize the value realized and reduce as much as possible any indebtedness that will remain owing by the Debtor.

IV. OTHER POSSIBLE REMEDIES

A full description of the other possible pre-judgment remedies is beyond the scope of this paper. However, a brief discussion follows concerning some of the other remedies that may be available.

A. RECEIVERSHIP

Chapter 64 of the Texas Civil Practice & Remedies Code and Texas Rules of Civil Procedure 695-695a set forth the provisions concerning the appointment of a receiver. A receivership is an equitable doctrine, and the rules of equity govern all manners relating to appointment, powers, duties and liabilities of a receiver and the powers of the Court regarding the receiver. Tex. Civ. Prac. & Rem. Code § 64.004; *Huston v. F.D.I.C.*, 800 S.W.2d 845, 849 (Tex. 1990). The grounds upon which a receivership is available are set forth in Tex. Civ. Prac. & Rem. Code § 64.001. The Creditor should review these grounds to determine whether or not a receivership is available in any particular circumstance. The Creditor should also consider whether or not a temporary restraining order may be a more appropriate remedy given the specific facts of the situation. Generally, the procedure for appointment of a receiver is similar to the procedure for any other pre-judgment Writ. A Creditor must file an application showing the statutory grounds for the receivership. Although a verified pleading is not required, it is recommended in most instances. *Hunt v. State*, 48 S.W.2d 466, 469 (Tex. Civ. App.—Austin 1932, no writ). The Court must base its decision to order a receivership upon admissible evidence. The Creditor must file a bond before a receiver may be appointed. Tex. R. Civ. P. 695a. Upon appointment, the receiver must post a separate bond to faithfully discharge his or her duties and to obey the Court Orders. Tex. Civ. Prac. & Rem. Code § 64.023; *Harmon v. Schoelpple*, 730 S.W.2d 376, 379 (Tex. App.—Houston [14th Dist.] 1987, no writ).

The receiver is a neutral person who acts for the benefit of the property and the receivership estate, not on behalf of any particular party or action. The receiver should carry out the tasks specified in the Order creating the receivership. The receiver's fees are to be considered as part of the Court costs and are generally payable out of the receivership property or its earnings or proceeds. *Hodges v. Peden*, 634 S.W.2d 8, 12 (Tex. App.—Houston [14th Dist.] 1982, no writ).

B. LIS PENDENS

A lis pendens is a notice that an action involving specific real property is pending. Tex. Prop. Code § 12.007. A lis pendens may be filed by a party in an eminent domain proceeding or an action involving real property. *Id.* The purpose of a lis pendens is to put potential transferees on notice if there is a claim against the property. This will have the effect of preventing the property from being transferred until the lawsuit has been reserved. From a practical standpoint, title companies will not generally issue title insurance until the lis pendens has been cancelled. A party also has the opportunity to bond around the lis pendens under the conditions set forth in Chapter 12 of the Texas Property Code.

C. DISTRESS WARRANTS

A distress warrant is a writ intended for the enforcement of a landlord's lien. The statutory provisions dealing with a distress warrant are set forth in Section 54.025 of the Texas Property Code. The property that may be seized under a distress warrant is the personal property on which a landlord's lien exists. *Moore v. Dickson*, 102 S.W.2d 279, 280 (Tex. Civ. App.—Galveston 1937, no writ).

D. TEMPORARY RESTRAINING ORDERS AND TEMPORARY INJUNCTIONS

A temporary restraining order and/or temporary injunction may be obtained to preserve the *status quo* until the controversy can be resolved. The temporary restraining order is an emergency injunction that is issued *ex parte*. The temporary injunction is an injunction issued after notice and hearing and is effective until the final trial. The statutory grounds for obtaining injunctive relief are set forth in Chapter 65 of the Texas Civil Practice & Remedies Code. The rules dealing with injunctive relief are set forth in Tex. R. Civ. P. 680-693a.

Generally, the procedures for obtaining injunctive relief are similar to that of any other pre-judgment remedy. The Creditor must file a lawsuit along with an Application for the injunctive relief. The Wit of Injunction will only issue after a written Order of the Court and upon the posting of a bond by the Creditor. Generally, in order to obtain injunctive relief, the Creditor must demonstrate the following four grounds for relief:

1. One or more wrongful acts;

2. imminent harm;

3. irreparable injury; and

4. no adequate remedy at law.

In addition to these equitable grounds, there are specific statutory grounds set forth in various sections of Texas law. (*See* Tex. Civ. Prac. & Rem. Code § 125.002, 125.022 (nuisance); Tex. Bus. & Comm. Code § 17.59 (deceptive trade practices); and Tex. Civ. Prac. & Rem. Code § 65.011 (statutory grounds for an injunction)).

The petition must ask for a temporary restraining order and a temporary injunction. Tex. R. Civ. P. 682. The petition must be verified and based upon personal knowledge. *Durrett v. Boger*, 234 S.W.2d 898, 900 (Tex. Civ. App.—Texarkana 1950, no writ).

The Order granting the injunctive relief must set forth the specific items listed in Tex. R. Civ. P. 683. These requirements are mandated by statute and must be strictly followed. *InterFirst Bank San Felipe, N.A. v. Paz Const. Co.*, 715 S.W.2d 640, 641 (Tex. 1986). Before issuance of the writ, a bond must be filed. The Application for Temporary Injunction must be set for hearing at the earliest possible date and takes precedence over all other matters except older matters of the same character. Tex. R. Civ. P. 680. The temporary restraining order is effective for a maximum period of 14 days. *Id.* The temporary injunction must be granted before the temporary restraining order expires in order for the Creditor to preserve the *status quo* through trial. The Court's determination on the request for injunctive relief does not effect the underlying action. *Iranian Muslim Organization v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981).

V. RISKS ASSOCIATED WITH PREJUDGMENT REMEDIES

The chapters dealing with these prejudgment remedies in the Civil Practice & Remedies Code are all titled “Extraordinary Remedies.” The meaning of this title should not be understated. There are significant risks for pursuing any of these prejudgment remedies that may result in damages to the Creditor.

Many times it will be discovered that the Garnishee is not indebted to, and does not have effects of, the Debtor or that the Garnishee is entitled to a setoff against the funds held by the

Debtor. In such cases, the Garnishee may be entitled to reimbursement for its reasonable attorneys' fees and costs. TEX. R. CIV. P. 677; *Rowley v. Lake Area Nat. Bank*, 976 S.W.2d 715, 722 (Tex. App.--Houston [1st Dist.] 1998, no writ); *Henry v. Ins. Co. of N. Am.*, 879 S.W.2d 366, 369 (Tex. App.--Houston [14th Dist.] 1994, no writ) The Garnishee can prove up its reasonable costs and fees based upon an attorney's affidavit alone. *Moody Nat. Bank v. Riebschlager*, 946 S.W.2d 521, 525 (Tex. App.—Houston [14th Dist.] 1997, writ denied). As is generally the case, the amount of an award of attorneys' fees rests in the sound discretion of the trial court, and its judgment will not be reversed on appeal absent a clear abuse of discretion. *Rowley*, 976 S.W.2d at 724. In the absence of controverting evidence, the affidavit of counsel regarding attorneys' fees will support the trial court's award of such fees. *Moody*, 946 S.W.2d at 525.

Although TEX. R. CIV. P. 677 provides that the costs of the proceeding shall be taxed against the Creditor where the Garnishee is discharged upon its answer, at least some courts have held that the filing of a non-suit, prior to the due date on the answer, will not relieve the Creditor from liability to pay the attorneys fees and costs. *City of Houston v. Blackbird*, 658 S.W.2d 269, 273-74 (Tex. App.—Houston [1st Dist.] 1983, writ dismissed).

By filing an Application for a Prejudgment Writ, the Creditor is also exposing itself to potential liability for a tort action. The injured Debtor may file an action for wrongful garnishment, sequestration or attachment. Generally, a claim for wrongful sequestration or attachment does not arise out of the same transaction or occurrence as the previous action in which the wrongful sequestration or attachment occurred. *Leasure v. Peat, Marwick, Mitchell & Co*., 722 S.W.2d 37, 39 (Tex. App. —Houston [1st Dist.] 1986, no writ). In a garnishment action, the wrongful garnishment claim may be brought as a counterclaim in the underlying suit or as an independent suit. *See, e.g. Commonwealth of Mass. v. Davis*, 160 S.W.2d 543, 547-48 (Tex. Civ. App.—Austin 1942), rev'd in part on other grounds, 168 S.W.2d 216 (Tex. 1943). If a writ of sequestration is dissolved, any action seeking damages for wrongful sequestration must be brought as a compulsory counterclaim. Civ. Prac. & Rem. Code § 62.044(a); *Dennis v. First Street Bank of Texas*, 989 S.W.2d 22, 27 (Tex. App.—Fort Worth 1998, no writ). The Writ of Sequestration must be dissolved before the claim for wrongful sequestration can be brought. *Id.*

An application for a Prejudgment Writ is wrongful if the matters set forth in the affidavit and/or the application for the writ are untrue. *Jamison v. National Loan Investors, L.P.*, 4 S.W.3d 465, 468 (Tex. App.—Houston [1st Dist.] 1999, writ denied). The action may be wrongful if any of the grounds for the issuance of the Writ are not met. See *Fischl v. Fischl*, 2004 WL 1195705, *5 (Tex. App.—San Antonio 2004, no pet.); *McMillan v. Moon*, 44 S.W. 414, 415-16 (Tex. Civ. App.—1898, no writ); *Graham v. Walters*, 45 S.W.2d 281, 282 (Tex. Civ. App.—Waco 1913, no writ).

Generally, failure to obtain a judgment in an underlying action or dismissal of the suit after service of a Writ of Sequestration renders the Creditor liable for wrongful sequestration. *Burnett Trailers, Inc. v. Polson*, 387 S.W.2d 692, 695 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.). However, if the Court determines that the Creditor did have the right to possess the sequestered property, there is no liability for wrongful sequestration. *See Kirkman v. North State Bank of Amarillo*, 476 S.W.2d 958, 959 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.); *Kelso v. Hanson*, 380 S.W.2d 187, 188-89 (Tex. Civ. App.—Amarillo 1964), rev'd on other grounds, 388 S.W.2d 396 (Tex. 1965); *Darr Equipment Co. v. Holland Page, Inc.*, 355 S.W.2d 595, 597 (Tex. Civ. App.—Austin 1962, writ dismissed).

If the facts giving rise to the statements made in the affidavit supporting the application change, after the writ has been issued, that does not make the application wrongful. *Hobson &*

Associates, Inc. v. First Print, Inc., 798 S.W.2d 617, 620 (Tex. App.—Amarillo 1990, no writ). Similarly, if the judgment is set aside by a bill of review, that does not necessarily make the application wrongful. *Id.*

The Debtor may be entitled to damages for the wrongful conduct equal to the loss sustained as a result. *G-W-L, Inc. v. Juneau*, 486 S.W.2d 812, 814 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.). This may include the loss of use of the property and could extend to consequential damages such as damage to the business. Where no damages can be shown in a garnishment, the measure of damages is the legal rate of interest on the money for the period of its wrongful retention. *Beutel v. Paul*, 741 S.W.2d 510, 513 (Tex. App.—Houston [14th Dist.] 1987, no writ.). Damages for wrongful sequestration include not only the value of the property sequestered, but also consequential damages. *Adams v. Hood County Sand & Gravel Co.*, 354 S.W.2d 593 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.). Damages may include lost profits and loss of use. *Commercial Credit Equipment Corp. v. Elliott*, 414 S.W.2d 35 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.). Damages for mental anguish associated with a wrongful garnishment are generally not recoverable absent direct evidence of the nature, duration and severity of the mental anguish, thereby establishing a substantial disruption in the Debtor's daily routine. *Fischl v.* Fischl, 2004 WL 1195705, *5 (Tex. App.—San Antonio 2004, no pet.).

Damages may not be awarded for the failure of the Creditor to prove, by a preponderance of the evidence, the specific facts alleged, if the failure is the result of a bona fide error. Tex. Civ. Prac. & Rem. Code § 62.045(b). A bona fide error is an error that is made in the course of a good-faith attempt at compliance with statutory requirements. *Callaway v. East Texas Government Credit Union*, 619 S.W.2d 411, 415 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.). It is the Creditor's duty to show that a good faith attempt to comply with the statute was made. *Id.* Absent evidence of any effort by the Creditor to correct defects prior to the issuance of a Writ of Sequestration, bona fide error defense is not available. *Id.* The Creditor must prove the use of reasonable procedures to avoid the error. Tex. Civ. Prac. & Rem. Code § 62.045(c).

Punitive damages are recoverable only if the application was without probable cause and with malice. *O'Hara v. Ferguson Mack Truck Co.*, 373 S.W.2d 507, 510 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.); *Burnettt Trailers, Inc. v. Polson*, 387 S.W.2d 692, 695 (Tex. App.—San Antonio 1965, writ ref'd n.r.e.).

If a Writ of Sequestration for consumer goods is dissolved, the Debtor is entitled to reasonable attorneys' fees and damages equal to the greater of:

1. $100.00

2. the finance charge contracted for; or

3. actual damages.

Civ. Prac. & Rem. Code § 62.045(a).

Another cause of action that the Debtor may bring against the Creditor is malicious prosecution. A plaintiff must suffer a special injury before recovering for malicious prosecution of a civil case. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 209 (Tex. 1996). The special injury required for malicious prosecution is some physical interference with a party's person or property in the form of an arrest, attachment, injunction, or sequestration. *Id.* Therefore, the Creditor should be cognizant that seeking the pre-judgment remedy for the wrong reasons may give rise to a malicious prosecution cause of action.

Due to the fact that a bond is required in order to obtain a prejudgment Writ, the Creditor and its surety may be jointly and severally liable to the Debtor. *Aetna Cas. & Sur. Co. v. Raposa*, 560 S.W.2d 106, 110 (Tex. Civ. App.—Fort Worth 1977, writ granted and cause dism'd).

Generally, the attorney for the Creditor who prepared and filed the Writ is not liable for wrongful litigation conduct. *Renfroe v. Jones & Associates*, 947 S.W.2d 285 (Tex. App.—Fort Worth 1997, writ denied) (holding that the attorneys' actions in representing their clients in a garnishment proceeding were within the context of discharging their duties and the attorneys have no duty to the Debtor). However, where a Debtor asserts that the attorney for the Creditor had a wrongful and malicious motive, the attorney may be liable. *Mendoza v. Fleming*, 41 S.W.3d 781, 787 (Tex. App.—Corpus Christi 2001, no writ) (no attorney immunity if garnishment was sued to injure political campaign by seizing funds that were exempt from garnishment).

Most bonds have a twelve-month premium. Therefore, it is important to factor in the additional bond premium cost if the litigation has not been resolved within one year. The Creditor may have to pay another annual premium.

Generally, a Creditor is not entitled to attorneys' fees for its collection efforts. *Mabon Ltd. v. Afri-Carib Enterprises, Inc.*, 29 S.W.3d 291, 302 (Tex. App.—Houston [14th Dist.] 2000, no writ). With limited exceptions, there is no substantive law permitting an award of attorneys' fees in a suit to collect judgment. *Robertson v. Robertson*, 608 S.W.2d 245, 247 (Tex. Civ. App.—Eastland 1980, no writ). In a garnishment action, attorneys' fees are not recoverable. *Beutel v. Paul*, 741 S.W.2d 510, 513 (Tex. App.—Houston [14th Dist.] 1987, no writ.). However, in a sequestration action, the Debtor can recover attorneys' fees and damages against the Creditor if the writ is dissolved. Tex. Civ. Prac. & Rem. Code § 62.044(b); *Monroe v. GMAC*, 573 S.W.2d 591, 594 (Tex. App.—Waco 1978, no writ).

VI. ETHICAL CONSIDERATIONS

A. ATTORNEY AS A WITNESS

All of the pre-judgment remedies described in this paper require support by an affidavit. In many cases, it is permissible for the counsel representing the Creditor to execute the affidavit if that counsel has personal knowledge of the facts contained therein. Although counsel may execute the affidavit, this practice should be avoided, if possible. When counsel for the Creditor executes the affidavit, it invites the Debtor to argue that the Creditor's counsel should be disqualified from the case as a fact witness. While this is not necessarily the case, it does invite possible unnecessary consequences. When this is necessary, it should be noted that even if counsel has knowledge of relevant facts, counsel is not required to withdraw from the case as an involuntary fact witness unless the testimony would be harmful to the client. Tex. Disciplinary R. Prof. Conduct 3.08(b) (1989), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit G app. (Vernons Supp. 2001) (State Bar Rules art. X, § 9).

B. EX PARTE COMMUNICATIONS WITH THE COURT

Generally, an attorney is prohibited from communicating, or causing another to communicate, *ex parte* with a Court for the purpose of influencing that Court concerning the pending matter. Tex. Disciplinary R. Prof. Conduct 3.05(b). There are certain exceptions where the *ex parte* communications may be permitted by law and not prohibited by applicable rules of practice or procedure. *Id.* A matter is: (1) any adjudicary proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge accusation, arrest, or other similar particular transaction involving a specific party or parties or (2) any other

action or transaction covered by the conflict of interest rules of the appropriate government agency. Tex. Disciplinary R. Prof. Conduct .10(f)(1), (2), 3.05(c)(1). A matter is pending before a particular Court when that Court has been selected to determine the matter or when it is reasonably foreseeable that the Court will be selected to determine the matter. Tex. Disciplinary R. Prof. Conduct 3.05(c)(2).

The comments to Rule 3.05 recognize that there are certain types of adjudicatory proceedings that have permitted pending issues to be discussed *ex parte* with the Court. Rule 3.05 recognizes that there may be instances where an *ex parte* communication is permitted by the rules. The rule is dealing with attachment (Tex. R. Civ. P. 592), garnishment (Tex. R. Civ. P. 658), temporary restraining orders (Tex. R. Civ. P. 680), sequestrations (Tex. R. Civ. P. 696), all specifically contemplate that these remedies may be obtained *ex parte*.

Because the rules authorizing the use of these pre-judgment remedies permit the use of *ex parte* communications, it would appear that communications with the Court in connection with obtaining these extraordinary remedies is not a violation of Rule 3.05. These proceedings appear to fall under the exception in Rule 3.05(b) that permit *ex parte* communications "as otherwise permitted by law…"

Notwithstanding the fact that these communications are permitted, counsel is advised to be very cautions in connection with such proceedings. All attorneys have a duty of candor toward the Court. Tex. Disciplinary R. Prof. Conduct 3.03. This rule prohibits an attorney from knowingly making a statement of material fact to a Court. *Cohn v. Commission for Lawyer Discipline*, 979 S.W.2d 694 (Tex. App.—Houston [14th Dist.] 1998, no writ).