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THE REGISTER CITIZEN

BUSINESS

Today's Business: State's prejudgment remedy statute helps businesses when considering litigation

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Internet: April 16, 2021; Print, April 18, 2021



David A. Slossberg; Contributed photo

To litigate or not to litigate?

That is a common question facing businesses seeking damage recovery from a vendor or competitor for breach of agreements, unpaid funds or other issues. In some cases, even if the claim is strong on the merits, there is uncertainty about whether the defendant will be able to pay an eventual judgment.

There is a relatively economical way to evaluate your options. It is the result of Connecticut's one-of-a-kind prejudgment remedy statute ("PJR statute"), which provides an opportunity for early case assessment — and a measure of financial security prior to a final judgment as well as leverage to encourage a quick settlement.

A plaintiff may file an application for a prejudgment remedy in either state or federal court to obtain security for a claim pursued either in court or private arbitration. The financial security typically is granted in the form of an attachment, garnishment or replevin if the court finds "probable cause" that the prejudgment remedy could well equal the amount of the eventual final judgment "taking into [account](#) any defenses, counterclaims or setoffs."

In simple terms, the courts need to see that the plaintiff's claim is plausible — although plaintiffs do not have to prove "likelihood of success."

In addition to the lenient legal threshold, it usually is a revelation to potential plaintiffs (and out-of-state lawyers) that a defendant's financial condition is not relevant to relief under the statute, nor is it necessary to demonstrate some kind of exigent circumstances.

Prior to 1991, a PJR could be granted, *ex parte*, without a hearing based on a sworn statement of facts by the plaintiff. That process was rejected as unconstitutional by the U.S. Supreme Court, thus requiring that a prescribed notice and evidentiary hearing be afforded the defendant before a PJR can be granted, with limited exceptions. Those exceptions include when there is reason to believe the defendant is about to remove himself or his property from the state and/or is engaged in efforts to fraudulently dispose of or hide property.

The reach of the PJR statute is generally limited to property located within Connecticut. However, courts have permitted orders directing a defendant to bring stock certificates located in another state back into Connecticut. When a defendant holds assets in a bank with one or more locations in Connecticut, those assets may be attached regardless of whether the banking relationship was first established at an out-of-state location.

PJR applications commonly are accompanied by a Motion for Disclosure of Assets, which permits a plaintiff to discover a defendant's assets for purposes of

attaching them. In appropriate cases, courts will permit defendants to post a bond in the amount of the PJR order in lieu of such discovery or an actual attachment. Sometimes, proof of insurance without any reservation of rights may suffice.

While PJR rulings are not on the merits, and are not dispositive of issues to be decided at trial, as a practical matter, if a party is unable to prevail under the lower probable cause standard, this may cause the party to reassess the viability of the claim. The same can be said if it is determined that the defendant does not have the means to cover an eventual judgment. In some cases, the mere prospect of being subject to attachment will cause a defendant to seek an early resolution of the case. At the very least, plaintiffs will gain some evidence from the defendant that may enlighten the merits before any formal discovery commences in an action.

Properly used, the PJR statute provides businesses with a useful tool for an early assessment of both the economics and merits of the case, and ample security for an eventual recovery.

Although Connecticut's PJR statute stands alone among the preliminary remedies available to litigants around the country, it should not be overlooked. Businesses should strategically consider its utility when assessing the value of, and pursuing, their business claims.

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