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COMMENTARY

THE CONNECTICUT LAW REVISION COMMISSION REPORT ON PREJUDGMENT DISCLOSURE AND THE ABOLITION OF BODY ATTACHMENT AND BODY EXECUTION

MICHAEL R. PARIZO*

In 1980, the Connecticut Law Revision Commission (the Commission),¹ recommended the enactment of a disclosure in aid of pre-judgment remedy device and the abolition of two antediluvian creditor remedies: Body execution and body attachment.² These proposals became law when the 1981 General Assembly passed, and the Governor signed, Public Act 81-410.³

I. ABOLITION OF BODY EXECUTION

Body execution permitted judgment creditors, in actions for fraud,⁴ breach of fiduciary duty,⁵ and tort,⁶ to imprison their judgment debtors until the judgment was paid. The remedy had been

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1. The Connecticut Law Revision Commission is a legislative agency charged with the statutory duty to "[r]ecommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions. . . ." CONN. GEN. STAT. § 2-87 (1981).

2. For the full text of the recommendation see CONN. LAW REVISION COMM'N, SIXTH ANNUAL REPORT OF THE CONNECTICUT LAW REVISION COMMISSION TO THE GENERAL ASSEMBLY, app. C, at 2-39 (1980) [hereinafter cited as SIXTH ANNUAL REPORT].

3. 1981 Conn. Pub. Acts.

4. CONN. GEN. STAT. § 52-562 (1981).

5. *Id.* § 52-355.

6. *Campbell v. Klahr*, 111 Conn. 225, 149 A. 770 (1930) (authorizing body execution in tort actions).

used to punish recalcitrant debtors, thereby compelling them to disclose their assets.⁷ Criminal sanctions, however, are available to punish those guilty of fraud and other torts,⁸ and disclosure of assets can be compelled under the examination of judgment debtor procedure.⁹ Consequently, the Commission concluded that body execution no longer was necessary¹⁰ and recommended its abolition.

II. ABOLITION OF BODY ATTACHMENT

The Commission also had a number of reasons for recommending the abolition of body attachment. Body attachment could be used by plaintiffs, in actions for fraud¹¹ and breach of fiduciary duty,¹² to imprison their debtors until sufficient assets were produced for attachment.¹³ The remedy was subject to attack on constitutional grounds. Section 52-369, which authorized body execution, was challenged in *Abbit v. Bernier*¹⁴ as a denial of equal protection in violation of the fourteenth amendment. Defendant debtor argued that section 52-369 was unconstitutional because the issue of his ability to pay the debt was not heard prior to levy of the execution.¹⁵ Consequently, a person could be imprisoned solely because of indigency.¹⁶ The United States District Court for the District of Connecticut ruled, *inter alia*, that debtors had to be given notice and an opportunity to be heard on their ability to pay a judgment debt prior to levy of a body execution.¹⁷ Body attachment was susceptible to

7. See 33, C.J.S. *Executions* § 407, at 763 (1942).

8. See, e.g., CONN. GEN. STAT. § 53a-119 (1981).

9. *Id.* § 52-397.

10. The Commission also argued that the remedy was archaic and rarely used, ineffective and costly, subject to abuse, unsound in principle, and constitutionally suspect. See *Abbit v. Bernier*, 387 F. Supp. 57 (D. Conn. 1974). These issues are discussed more extensively in SIXTH ANNUAL REPORT, note 2 *supra* at 7-14.

11. CONN. GEN. STAT. § 52-562 (1981).

12. *Id.* Section 52-279 authorizes body attachment in actions where body execution is authorized. CONN. GEN. STAT. § 52-355 authorizes body execution in actions for breach of fiduciary duty. Consequently, body attachment is authorized for breach of fiduciary duty.

13. CONN. GEN. STAT. § 52-279 (1981) (body attachment is not authorized in tort actions).

14. 387 F. Supp. 57, 59 (D. Conn. 1974).

15. *Id.* at 60.

16. *Id.* at 61 (quoting *Tate v. Short*, 401 U.S. 395 (1971)).

17. *Id.* at 62; *Cf. Palumbo v. Manson*, 35 Conn. Supp. 130, 400 A.2d 288 (Super. Ct. 1979). In *Palumbo*, the court held that CONN. GEN. STAT. § 52-369 (1981) was not facially unconstitutional as hearings normally are held prior to levy of a body execution. *Id.* It is not without some irony that the court conceded that a meaningful hearing had not been held in the case before it and, consequently, conducted one. *Id.* at 135, 400 A.2d at 291.

the same challenge because notice and a hearing on the issue of indigency were not statutorily required prior to levy of the body attachment.

Body attachment also was ineffective and costly. One commentator found body attachment "practically valueless" as a method of collecting debts and argued that the "experience of practicing attorneys will bear out the assertion that there are not five instances in a hundred in which the order of arrest results in the collection of a debt from a party who could not be otherwise compelled to pay."¹⁸ One reason body attachment was ineffective was its negligible value as a punishment device. Indeed, the value of body attachment as punishment has been described as "almost farcical."¹⁹ Charles Evans Hughes, before he became Chief Justice of the United States Supreme Court, explained that, while the "rascal who has been guilty of embezzlement or fraudulent practices may stand in fear of the criminal law, . . . the law of civil arrest, gives him little anxiety."²⁰ Hughes concluded that body attachment effected "a punishment . . . too mild to be a terror to evil doers. . . ."²¹ Body attachment also was ineffective because of the costs involved. The creditor had to pay the costs of maintaining an incarcerated debtor.²² While these costs could be added to the defendant's debt,²³ there was no guarantee that the creditor would prevail in his action and even less assurance that the creditor could compel the debtor to pay a sum larger than the one for which he was unwilling to give security in the first instance.²⁴

III. DISCLOSURE IN AID OF PREJUDGMENT REMEDY

Following its decision that body attachment was not a viable method for coercing the disclosure of hidden assets, the Commission next considered whether any coercive prejudgment disclosure device

18. Note, *Arrests in Civil Actions*, 5 ALBANY L.J. 243, 244 (1872). See also, Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 47-48 (1926); Sterling, *Study Relating to Civil Arrest in California*, reprinted in CAL. LAW REVISION COMM'N, RECOMMENDATION AND STUDY RELATING TO CIVIL ARREST, 27, 29-30 (July, 1972); Note, *Arrest and Imprisonment in Civil Actions in New York*, 26 N.Y.U. L. Rev. 172, 181, n.72 (1951).

19. Hughes, *Arrest and Imprisonment on Civil Process*, 28 REP. N.Y. ST. B.A. 151, 173 (1905).

20. *Id.* at 173.

21. *Id.* at 174.

22. CONN. GEN. STAT. § 18-59 (1981).

23. *Id.* § 18-60.

24. See, e.g., 2 E. STEPHENSON, CONNECTICUT CIVIL PROCEDURE § 217, at 929 (2d ed. 1970).

should be made available to creditors simply on allegations of debt or damages. Simply abolishing body attachment was one alternative. California took this approach when it abolished body attachment, forbade imprisonment on civil process prior to judgment,²⁵ and refused to extend other creditor disclosure devices.²⁶ Although less court time is spent hearing attachment matters under the California procedure and a defendant is free of any coercion until a judgment has been rendered against him, the plaintiff is unable to secure his claim unless he knows the location of the defendant's assets.²⁷

In contrast to California, New York enacted a broad disclosure remedy when it abolished body attachment.²⁸ Under New York procedure, a plaintiff can file a motion for an order directing a defendant to disclose information regarding property in which he has an interest.²⁹ If the defendant refuses to answer a proper question, the plaintiff can apply to the court for an order to compel disclosure.³⁰ If the defendant remains contumacious, the court can impose sanctions.³¹

The Commission recommended that Connecticut adopt a disclosure in aid of prejudgment remedy device similar to the New York procedure.³² The Commission believed that disclosure was a necessary supplement to the remedy of attachment.³³ This principle already was embodied in Connecticut law authorizing body attachment, body execution, examination of judgment debtors, and discovery against garnishees.³⁴ One flaw of body attachment was its ineffectiveness. Creditors, by virtue of the prejudgment remedies act, were given the right to attach the property of their debtors if they

25. CAL. CIV. PROC. CODE § 501 (Deering Supp. 1982).

26. *See id.* § 491.010 Law Revision Commission comment, (Deering Supp. 1982).

27. *Id.* §§ 481.010-493.010 (1982).

28. *See* N.Y. CIV. PRAC. LAW §§ 6001-7000 (publisher's explanation) (McKinney 1980).

29. *Id.* § 6220.

30. *See id.* § 6220 (practice commentary).

31. *Id.* § 3126 (McKinney Supp. 1980). These sanctions include "such orders with regard to the failure or refusal as are just, among them: . . . 3. an order . . . rendering judgment by default against the disobedient party." *Id.*

32. Under New York law, an order of attachment and consequent disclosure are available in a limited number of cases including fraud. *Id.* § 6201 (McKinney 1980). *Cf.* CONN. GEN. STAT. §§ 52-278a to 279 (1981) (permitting attachment in any case in which plaintiff can show probable cause for the validity of his claim). Consequently, disclosure will be available in a greater number of cases in Connecticut than in New York.

33. SIXTH ANNUAL REPORT, note 2 *supra*, app. C, at 15.

34. *See* notes 2, 4-6, 9, and 11-13 *supra* and accompanying text.

could show probable cause for the validity of their claims.³⁵ The exercise of that right, however, was subject to the defendant's ability to hide assets and limited by the plaintiff's ability to discover them. Attachment is an empty remedy when the creditor is without knowledge of any readily accessible assets. The problem, therefore, was to devise a remedy that could be used effectively by creditors and, at the same time, would protect debtors from abuse.

The legislature adopted the following language:

(a) The court may, on motion of a party, order an appearing defendant to disclose property in which he has an interest or debt owing to him sufficient to satisfy a prejudgment remedy. The existence, location and extent of the defendant's interest in such property or debts shall be subject to disclosure. The form and terms of the disclosure shall be determined by the court.

(b) A motion to disclose pursuant to this section may be made by attaching it to the application for a prejudgment remedy or may be made at any time after the filing of the application.

(c) The court may order disclosure at any time prior to final judgment after it has determined that the party filing the motion for disclosure has, pursuant to either section 52-278d, 52-278e or 52-278i of the general statutes, probable cause sufficient for the issuance of a prejudgment remedy.

(d) A defendant, in lieu of disclosing assets pursuant to subsection (a) of this section, may move the court for substitution either of a bond with surety substantially in compliance with sections 52-307 and 52-308 of the general statutes or of other sufficient security.

(e) Rules of court shall be enacted to carry out the foregoing provisions and may provide for reasonable sanctions to enforce orders issued pursuant to this section.³⁶

Use of the procedure is relatively straightforward. The plaintiff first must file a motion for disclosure.³⁷ The court hearing the motion then must find probable cause sufficient for the issuance of a prejudgment remedy (PJR), after which disclosure can be ordered against an appearing defendant.³⁸ The motion procedure was written to be as convenient as possible for courts and creditors. Subsection (b) provides that the plaintiff's motion may be "made by attaching it to the application for a prejudgment remedy or may be

35. CONN. GEN. STAT. §§ 52-278d, 52-278e & 52-278i (1981).

36. 1981 Conn. Pub. Acts 81-410.

37. *Id.* at 81-410(b).

38. *Id.* at 81-410(c).

made at any time after the filing of the application."³⁹ Plaintiffs are given the opportunity to make their motion for disclosure at the same time that they apply for a PJR because both the order of attachment and the order of disclosure require the same finding of probable cause.⁴⁰ Because a party may file his motion for disclosure at the same time he files his application for a PJR,⁴¹ the court can make a contemporaneous finding of probable cause as to the PJR and the motion to disclose. If probable cause is found and disclosure is ordered, the defendant either may make the ordered disclosure or may move the court for substitution of a bond or other sufficient security.⁴² Defendants who refuse to disclose are subject to court ordered sanctions.⁴³

Unlike body attachment, the new disclosure device is available in all cases in which attachment is warranted.⁴⁴ Because body attachment could be used to punish, it had been limited to cases in which the defendant, in some manner, was culpable: Fraud and breach of fiduciary duty are examples. Discovery, however, is a collection device only:⁴⁵ It should be available to creditors regardless of the honesty or dishonesty of their debtors. Further, the scope of discovery is broad. The defendant can be required to disclose the existence, location, and extent of his interest in property, factors crucial to any meaningful disclosure.

The statute also is intended to protect defendants from abuse. Discovery is permitted only against appearing defendants;⁴⁶ thus it protects unsophisticated debtors who fail to appear and insolvent debtors who plan to default from creditor threats of imprisonment for contempt.

Appearing defendants also are protected from frivolous and harassing orders of disclosure. In the first instance, defendants are

39. *Id.* at 81-410(b).

40. CONN. GEN. STAT. §§ 52-278d, 52-278e & 52-278i (1981) set forth the probable cause necessary for the issuance of an order of attachment. These sections are incorporated by reference in subsection (c) of the new section. 1981 Conn. Pub. Acts 81-410(c).

41. *Id.* at 81-410(b).

42. *Id.* 81-410(d).

43. *Id.* 81-410(e).

44. The writ of body attachment, at one time, was available in all actions for debt and damages. Creditor abuse, however, led to the prohibition of its use in actions founded on contract.

45. It can be argued that the new procedure can be used as a punishment device as court ordered sanctions are available against defendants refusing to disclose. The argument is specious as the punishment is levied, not because of the defendant's inability to pay a debt, but because of his refusal to obey an order of the court.

46. 1981 Conn. Pub. Acts 81-410(a).

protected because of the costs involved. They also are protected by the contingent finding of "probable cause sufficient for the issuance of a prejudgment remedy."⁴⁷ This requirement also ensures that defendants always will be presented with an opportunity to contest probable cause. Additional protection from unnecessary requests for disclosure is offered defendants by provisions in the new section providing for judicial discretion. Subsection (a) ensures that even if a finding of probable cause is made, the order of disclosure still will be within the discretion of the court.⁴⁸ The form and contents of disclosure also are matters of judicial discretion.⁴⁹ Finally, the defendant can be required to disclose only assets sufficient to satisfy the order of attachment.⁵⁰

A defendant can avoid disclosure, even after it has been ordered, by substituting sufficient security. In ordinary attachment cases, the defendant cannot substitute a bond until an attachment has been levied.⁵¹ As a result, the defendant's interest in his property may be disrupted. Under the new procedure, a defendant who has been ordered to disclose may substitute a bond or other sufficient security prior to the attachment being levied, thereby avoiding a disturbance of his interest.⁵² This procedure also benefits creditors because it allows them to become secured earlier.

IV. CONCLUSION

Public Act 81-410 not only abrogates two archaic remedies from Connecticut practice but also closes a gap in the current attachment procedure by establishing a disclosure in aid of prejudgment remedy device that allows plaintiffs to obtain information regarding attachable assets from appearing defendants.

47. *Id.* at 81-410(c).

48. *Id.* at 81-410(a).

49. *Id.*

50. *Id.*

51. *Id.*

52. 1981 Conn. Pub. Acts 81-410(d).