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CREDITOR'S RIGHTS IN OHIO: AN EXTENSIVE REVISION

INTRODUCTION

by

JOHN P. FINAN*

HOUSE BILL NO. 254, effective August 26, 1982, involves a balancing of competing interests as well as an attempt to bring Ohio law into compliance with the procedural requirements mandated, on Constitutional grounds, by various U.S. Supreme Court cases. It involves a cost-benefit analysis because, in making decisions in this area, one must balance the costs associated with procedural requirements against the benefits afforded to consumers. The costs involved are costs to consumers, as there is little doubt that any costs associated with the procedural requirements in effect since August 26, 1982, will be borne by consumers. To be sure, financial institutions are subject to financial and regulatory constraints. However, given any reasonable assumptions about elasticity of demand, the financial institutions have the economic power to pass increased costs on. Of course, we are talking about primary demand, not selective demand; selective demand is not an issue since all financial institutions will be subject to procedural requirement of H.B. 254. As for regulation, this author is not aware of any regulations that would prevent financial institutions from passing the procedural cost on to consumers.

The cost-benefit analysis requires quantification. There is little question that the cost associated with the new procedures can be quantified. It is more difficult to quantify the cost associated with the failure to afford certain procedural protections. To the extent that these protections are mandated by the Constitution, no cost-benefit analysis need be made by the Ohio Legislature. However, it is likely that, at least in some respects, H.B. 254 enacts procedures that are not, at least as yet, required by the decisions of the United States Supreme Court. In evaluating these procedural protections (those not mandated by the United States Supreme Court) one must examine the benefit to the consumer or to put it another way, the cost to the consumer of a failure to enact these procedural safeguards. This is extremely difficult because not all of the protection afforded a consumer are capable of quantification. If one's resources are attached by legal process and one is deprived on them, even temporarily, one may be severely injured. For example, the money of which a consumer is temporarily deprived may be money needed to pay for food or heat or other life-sustaining benefits. The marginal utility of money must be considered which is difficult to quantify.

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In making the cost-benefit analysis, one cannot be unmindful that only a minuscule percentage of consumers take advantage of the procedural safeguards afforded in those instances where safeguards are required. There is no way to tell whether consumers will begin to take advantage of such safeguards but at least if history is a guide, it seems that some consumers themselves have spoken eloquently of the lack of benefit associated with the procedural protections enacted in such statutes as H.B. 254. It may be that the benefits afforded to those who assert their procedural rights justify the costs associated with the procedural safeguards. Clearly, empirical data will have to be gathered and evaluated, and it may well be that the legislature's assessment of the cost-benefit equation will shift as new data is provided.

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1.00 The Legislative History and Case Law Background of H.B. 254

Amended Substitute House Bill No. 254, hereinafter referred to as H.B. 254, became law on August 26, 1982, "culminat[ing] three years of concentrated work on the subject matter"¹ by the Banking and Commercial Law Committee of the Ohio State Bar Association, as well as the Ohio General Assembly. H.B. 254 is an effort to bring to this area of the law a "certainty of creditor-debtor rights and remedies"² that has not existed in Ohio for nearly thirteen years.³ While H.B. 254 is mostly a codification of substantive changes in the creditor's rights area,⁴ it also contains provisions that integrate what would otherwise be overlapping sections of the Ohio Revised Code.⁵

1.01 Legislative History Specifics

According to one of the drafters of H.B. 254,⁶ the bill had its origin in two bills proposed before the 114th Ohio General Assembly. The original House Bill No. 254 (as opposed to Amended Substitute House Bill No. 254) approved by the House was confined to revisions of Ohio's garnishment procedure. Senate Bill No. 244 was limited to amendments to two of Ohio's provisional remedies: prejudgment attachment and replevin. A conference between the House and

¹55 Ohio Bar 1103 (July 1982).

²Newton, *Procedural Due Process and Pre-Judgment Creditor Remedies: A Proposal for Reform of the Balancing Test*, 34 WASH. & LEE L. REV. 65 (1977) (citing Anderson and Guidry, *Mitchell v. W. T. Grant Co.: Recognition of Creditor's Rights*, 80 COM. L.J. 63 (1975)).

³This period of uncertainty began with *Sinadach v. Family Finance Corp.* 395 U.S. 337 (1969); *see infra*, § 1.01-1.02.

⁴There are five major creditor's remedies, both provisional and post-judgment, that are codified in H.B. 254:

- 1) Pre-judgment attachment — 2715.01 *et seq* (except for 2715.091-2715.13).
- 2) Pre-judgment garnishment of property other than wages — 2715.091-2715.13.
- 3) Post-judgment garnishment of wages — 2716.01 *et seq* (except for 2716.11-2716.13).
- 4) Post-judgment garnishment of property other than wages — 2716.11-2716.13.
- 5) Pre-judgment replevin — 2713.01 *et seq*.

⁵OHIO REV. CODE ANN. §§ 1911.26, 1911.27, 1911.28, 1911.56, and 1911.58 effectively integrate county court procedure with that followed in common pleas courts, thereby doing away with the system of dual procedure that previously existed. Similarly, new § 2715.51 incorporates by reference the procedures spelled out in § 2715.01-2715.49.

⁶Dennis Papp, of the Ohio Legislative Services Commission, in a conversation on November 15, 1982 related this legislative scenario. William K. Weisenberg, Director of Government Affairs for the Ohio State Bar Association, confirmed this in a conversation on November 19, 1982.

Senate legislators who had prepared the respective bills⁷ resulted in the synthesis piece of legislation that is now law in Ohio, H.B. 254.

1.02 The Case Law Background: Federal Level

1.02(A) The *Sniadach* Line of Cases

On four occasions since 1969, the Supreme Court of the United States has decided cases involving 'due process' questions associated with provisional creditor's remedies. Those landmark cases were *Sniadach v. Family Finance Corp.*,⁸ *Fuentes v. Shevin*,⁹ *Mitchell v. W. T. Grant Co.*,¹⁰ and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*¹¹ The cases involved, respectively, Wisconsin's wage garnishment statute, Florida's pre-judgment replevin statute, the rights of a possessor of a vendor's lien under Louisiana law, and Georgia's garnishment statute as it related to bank accounts. In all but the *Mitchell* case, procedural defects found in the various state statutes, resulted in the procedures delineated in those statutes being declared unconstitutional.¹² The problems experienced by the courts in applying the shifting procedural due process standard of the Supreme Court has been noted in both case law and legal journals.¹³ It would not be unreasonable to assume that the Ohio General Assembly has given the citizens of this state a law that goes well beyond the explicit due process requirements of the *Sniadach* line of cases¹⁴ in order to insure that the law will remain within whatever minimum standards the United States Supreme Court may promulgate in the future.¹⁵

⁷Senators Michael Schwarzwalder, Michael DeWine, Paul Pfeifer, Richard Finan, and Representative Thomas Pottenger.

⁸395 U.S. 337 (1969).

⁹407 U.S. 67 (1972).

¹⁰416 U.S. 600 (1974).

¹¹419 U.S. 601 (1975).

¹²For excellent analysis of the *Sniadach* line of Supreme Court cases and the doctrines that they espouse, see Catz and Robinson, *Due Process and Creditor's Remedies: From Sniadach and Fuentes to Mitchell, North Carolina and Beyond*, 28 RUTGERS L. REV. 541 (1975); Scott *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975); Chief Justice Celebrezze's majority opinion in *Peebles v. Clement*, 63 Ohio St. 2d 314, 317, 408 N.E.2d 689, 691 (1980).

¹³See, e.g., *Farmers Savings & Trust Co. v. Ridenour*, 12 O.O. 3d 370, 371 n.1, (Crawford Cty. Muni. Ct. 1979); Comment, *Replevin in Ohio: It's Nature, Development and Constitutionality*, 7 U. TOLEDO L. REV. 517, 547-87 (1977); Tabac, *Repossession of Goods in Ohio: Remedies in Search of a Rule*, 44 U. CIN. L. REV. 241 (1975), on whether or not Ohio's replevin statute was definitely unconstitutional. For an analysis of the problem in another jurisdiction, see McLaughlin, *Essay-Prejudgment Attachments and the Concept of the Neutral Magistrate: A Tale of Two Cases*, 83 W. VA. L. REV. 203 (1980).

¹⁴Whether or not the new law exceeds the minimum requirements set forth in *Sniadach* and its progeny is certainly open for debate. The place to begin such a discussion is with the majority opinion in *Peebles v. Clement*, and its analysis of *Sniadach* since that analysis of what the Supreme Court requires in the way of due process for debtors has been adopted, practically verbatim, by the Ohio General Assembly in H.B. 254. See *infra*, at § 1.03. It can be said that the new law does, in fact, greatly exceed the Supreme Court's expectations. Lawrence Walsh, Clerk of Court for Akron Municipal Court expressed such sentiments in a conversation on November 3, 1982. Yet, it can also be said that the new law doesn't go far enough (see *infra*, § 1.03, § 1.04, and note 15).

¹⁵There is the suggestion in Justice Black's dissent in *Goldberg v. Kelly*, 397 U.S. 254, 278 (1970), that <https://ideaexchange.uakron.edu/akronlawreview/vol16/iss3/5>

It has been suggested¹⁶ that the case of *Mathews v. Eldridge*¹⁷ provides guidance into the procedural benchmarks with which the court is most concerned. Specifically, the competing interests of the creditor and debtor are to be subjectively weighed by the court through the balancing of three factors:

First, the private interest that will be affected by the official action; Second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁸

The weighing of these factors in *Fuentes*, for example, produced the result that "even a temporary taking of property was a deprivation under the Due Process Clause, and that a defendant debtor . . . was entitled to 'due process' protection."¹⁹ The *Fuentes* Court found that the private interest of the debtor in maintaining possession and the possible erroneous deprivation of that interest by the granting of a writ of replevin clearly outweighed the private interest of the creditor in receiving either money or goods for the debt owed.

The Court reached a different result in *Mitchell* after weighing the same factors as applied to the specific facts of the case. The interest of a person that could prove that they were a lienholder under Louisiana law was taken to be greater than the interest of a person who possessed the property in which the lienholder claimed a security interest. As suggested elsewhere, this result may have been reached because "the rights of the lienholder were dissolved if the debtor transferred the property"²⁰ to a third party.

1.02(B) Exemptions of Certain Federal Benefits and Other "Special Property"²¹

The last several decades have seen the rise of a large number of benefits and programs sponsored by the Federal government that have been deemed by both judges and laypeople as deserving of special protection and recognition by the law.²² Social Security benefits²³ and ERISA-protected pension plan

the logical extension of procedural due process by the Court will eventually lead to a requirement that all possible avenues of appeal and attempts to do justice be exhausted before a taking of property may take place. See also, the possible constitutional attacks on Kentucky's provisional creditor's remedies statutes suggested in Mapother, *The Constitutionality of Kentucky's Prejudgment Seizure Law*, 68 KY. L.J. 557, 559 (1980). Kentucky's codification of these remedies is fairly similar to that contained in H.B. 254. See the 1978 amendments to KY. REV. STAT. 425; see, e.g., 425.301.

¹⁶Comment, *Post-judgment Garnishment Procedures in Connecticut: A Due Process Analysis and Practical Guide* 14 CONN. L. REV. 883, 890 (1982).

¹⁷424 U.S. 319 (1976).

¹⁸*Id.* at 334-35.

¹⁹*Peebles v. Clement*, 63 Ohio St. 2d at 318, 408 N.E. 2d at 692.

²⁰*Id.* at 319, 408 N.E. 2d at 692.

²¹This concept was first introduced in Reich, *The New Property*, 73 YALE L.J. 733 (1964).

²²See the majority opinion in *Goldberg v. Kelly*, 397 U.S. 254 (1970).

²³*Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980); See Note, *Due Process Requires Notice of Exemptions*

pay-outs²⁴ have received explicit judicial protection from the claims of creditors in recent years. In Ohio, the standards promulgated by the Consumer Credit Protection Act²⁵ effectively preempted portions of Ohio's garnishment laws in the early 1970's.²⁶ In each of these cases, there existed a conflict between the protection afforded by law to certain kinds of "special property" belonging to debtors and the desire of creditors to gain possession of that "special property."

The above-referenced cases as well as other sources²⁷ indicate that the burden of asserting such exemptions in a pre-judgment proceeding brought by a creditor is almost exclusively upon the debtor. If the primary purpose for granting a hearing to a debtor before a writ of attachment, garnishment, or replevin is rendered by the court, is to fulfill due process requirements, then it would seem to follow that a hearing where the debtor is present should be required by law. This is necessary to give the debtor the opportunity to assert such exemptions if they exist or to dispel any possibility that the property in question is so exempted. Such is not the case with the new Ohio law²⁸ and it has been suggested that the constitutionality of that law is suspect.²⁹

The Ohio law pertaining to debtors' property³⁰ that is exempted from the reach of creditors is inextricably bound up with the federal law of exemptions in the bankruptcy area.³¹ In passing the Bankruptcy Reform Act of 1978, Congress permitted the individual states to opt out of the federal exemptions by enacting their own law in this area. The 113th Ohio General Assembly exercised this option in 1979 and enacted H.B. 674.³² House Bill 674 "provides exemp-

and a Prompt Postseizure Hearing for Postjudgment Garnishment 46 MO. L. REV. 857 (1981); Note, *Fingberg v. Sullivan: Protecting Exempt Funds From Postjudgment Seizure*, 3 CARDOZO L. REV. 171 (1981), Note, *Due Process Considerations and Arizona's Post-judgment Garnishment Provisions*, 1981 ARIZ. ST. L.J. 1085; Note, *Pennsylvania's Postjudgment Garnishment Procedures Violate the Due Process and Supremacy Clauses* 26 VILL. L. REV. (1981).

²⁴*General Motors Corporation v. Buha*, 623 F.2d 455 (6th Cir. 1980), noted at 7 OHIO N.U.L. REV. 729-730 (1980).

²⁵15 U.S.C. § 1673(a)(1) & (2) (1982).

²⁶*Hodgson v. Cleveland Municipal Court*, 326 F. Supp. 419 (N.D. Ohio 1971); noted at 41 U. CIN. L. REV. 258 (1972); 32 OHIO ST. L.J. 856, 858 (1972).

²⁷This observation was concurred in by both Mark A. Vander Laan, author of part V, *Exemptions and their Assertions*, found in Ohio Legal Center Institute, *Provisional Remedies* (1982), at 5.09, and Terry Sanford, an assistant vice-president at Centran Bank of Akron, in a conversation on October 25, 1982.

²⁸*See infra*, § 2.06-2.08, for analysis of the hearing request forms, and a discussion of new sections 2715.041, 2716.06, 2716.13, and 2737.05. These sections make clear that a hearing is required only in those circumstances where a debtor actually asserts his statutory right to one. Such a statutory scheme assumes that debtors are able to both understand their rights and to freely exercise them.

²⁹*See supra* note 15.

³⁰*See* OHIO REV. CODE ANN. § 2329.66(A). *See also* the Ohio cases collected in Simler & Jackson v. Jennings, 23 Ohio Op. 3d 571 n.25, (S.D. Ohio 1982) for the judicial application of these exemptions in specific cases.

³¹11 U.S.C. 101-109 (1979).

³²*See Note, H.B. 674: Ohio Opt's Out of the Federal Bankruptcy Exemptions and Revises Its Exemption Laws*, 5 U. DAYTON L. REV. 461, 462 n.14, (1980) for the explanation as to how this was legislatively and constitutionally executed. *See generally*, Fisher, *The Federal Exemption Scheme: Delayed Until 1983 for Ohio Bankrupts*, 49 U. CIN. L. REV. 791 (1980).

tions for Ohio debtors in U.S. bankruptcy court as well as in state court. . . .”³³ Those exemptions pertaining to post-judgment garnishment of personal earnings³⁴ are especially important since the vast majority of creditor-instigated actions to collect on the debts is via the post-judgment garnishment of personal earnings procedure.³⁵

1.03 The Case Law Background: State Level

The creators of H.B. 254 were responding to three cases at the state level when they drafted the bill. Those cases were *Farmers Savings & Trust Co. v. Ridenour*,³⁶ *Simler and Jackson v. Jennings*,³⁷ and *Peebles v. Clement*.³⁸ The cases dealt with, respectively, the constitutionality of Ohio’s pre-judgment replevin statute, post-judgment garnishment law, and its pre-judgment attachment statute. In responding to the *Ridenour* holding, the legislature was, indirectly, also coming to grips with the decision rendered in *Turner v. Block*,³⁹ a federal district court opinion that had gone unreported and largely unnoticed⁴⁰ for over six years.

The *Ridenour* holding focused upon three major defects that were found in the then-existing section of the Ohio Revised Code that dealt with pre-judgment replevin (Chapter 2737). Those defects were:

- (1) the lack of any requirement for the party seeking the writ of replevin to set forth specific facts concerning the wrongful detention of its property by the debtor;
- (2) The fact that a non-judicial officer (the clerk of courts) was empowered to issue the writ;
- (3) The fact that there was no requirement for a speedy post-seizure hearing in order to explore the validity of the issuance of the writ and to ascertain if the debtor had been harmed in any way by the taking of the property.⁴¹

Despite the holdings of the *Ridenour* and *Turner* courts, Chapter 2737 remained unchanged until H.B. 254 became law. The law continued to exist in its unconstitutional form until the new legislation became effective because of the

³³See Note, *supra* note 32, at 462.

³⁴OHIO REV. CODE ANN. § 2329.66(A)(13)(a) and (b) (Page 1981).

³⁵Terry Sanford and Lawrence Walsh, in separate conversations, concurred that the garnishment of wages was the remedy that creditors employed most often to obtain the money owed to them.

³⁶59 Ohio Misc. 128, 12 Ohio Op. 3d 370, 394 N.E.2d 1039 (Crawford City. Mun. Ct. 1979).

³⁷23 Ohio Op. 3d 554 (S.D. Ohio 1982).

³⁸63 Ohio St. 2d 314, 408 N.E.2d 689 (1980); see Note *Peebles v. Clement: Creditor’s v. Remedies Under Attack in Ohio*, 10 CAP. U.L. REV. 397 (1980) and, Note, *Prejudgment & Attachment . . . Due Process*, 86 COM. L.J. 58 (1981).

³⁹12 Ohio Op. 3d 373 (N.D. Ohio 1973).

⁴⁰The *Turner* opinion was finally reprinted in 1979 only because of the reliance the *Ridenour* court placed on it. 12 Ohio Op. 3d 370, 371 n.1, 394 N.E.2d at 1041 n.1.

⁴¹Ohio Op. 3d at 372, 394 N.E.2d at 1041. The *Turner* holding emphasized the second factor mentioned. 12 Ohio Op. 3d at 374.

common practice of “amending” those unconstitutional procedures contained in the statute via local rules of court.⁴²

The *Peebles* opinion, as previously noted,⁴³ presented the first opportunity for the Ohio Supreme Court to expound upon the *Sniadach* line of United States Supreme Court cases. The court reached the conclusion that those cases demanded the fulfillment of five separate criteria before sufficient due process has been afforded by the courts to a debtor in a pre-judgment attachment proceeding.⁴⁴ The *Peebles* court focused on only one of those criteria in reaching its decision: the need for judicial supervision from the very beginning of the attachment proceeding.⁴⁵ Since the then-existing pre-judgment replevin and garnishment (of property other than personal earnings) statutes were virtually identical in this regard,⁴⁶ the Ohio Supreme Court had, by inference, effectively declared all of the major provisional creditors’ remedies in Ohio at least partially unconstitutional.

Ohio’s scheme for post-judgment garnishment of personal wages was closely scrutinized in *Simler and Jackson v. Jennings*⁴⁷ and was found to be lacking in several important respects. This recent federal district court case convincingly demonstrated the increasingly intensified conflict between the creditor’s demands for payment and the rights of debtors to continue in possession of any exempted property they may own.⁴⁸

The *Simler* court touched upon a number of procedural aspects of the post-judgment garnishment of wages procedure that, cumulatively, permitted the possibility of a debtor’s property being wrongfully taken, even if only temporarily.⁴⁹ The court, applying the balancing test in *Mathews v. Eldridge*,⁵⁰ formulated a set of criteria⁵¹ that, “at a minimum,” had to be met before the

⁴²The *Ridenour* court did not look kindly upon this acknowledged mechanism of salvaging what would otherwise be bad law. The effect of its holding in this regard was, due to its limited jurisdiction, minimized.

⁴³See *supra* note 12.

⁴⁴See *infra*, § 2.03 where the five criteria are set out in full.

⁴⁵63 Ohio St. 2d at 322, 408 N.E.2d at 694.

⁴⁶OHIO REV. CODE ANN. § 2715.11, 2737.02 (Page 1981).

⁴⁷23 Ohio Op. 3d 554 (S.D. Ohio 1982).

⁴⁸One of the plaintiffs in the *Simler* case, Ralph S. Drummond, was an 85-year old retiree whose Social Security and Veteran’s Administration benefits, having been automatically deposited in his bank account and being exempt from execution under Federal law, were the subject of an order of garnishment. The other plaintiff, Veronica Jackson, was a mother of three minor children whose disposable income was \$50 per week. As the head of a household, this income was exempted from garnishment under § 2329.66(A)(13), yet some of her wages were garnished by a creditor in one of the proceedings that caused the *Simler* court to review Ohio’s garnishment statute. *Simler*, 23 Ohio Op. 3d at 555-56.

⁴⁹Those aspects included: (a) certainty of notice to the debtor (at 293, 296, 307); (b) the ability of the debtor to effectively pursue an appeal through the state court system (at 300); (c) the adequacy of the communicative content of the notice (at 307); (d) notice of the possibility of exemptions and other defenses to the creditor’s action (at 308); and (e) affording a debtor the right to a prompt post-seizure hearing (at 308).

⁵⁰See *supra* § 1.02(a) for discussion of the relevance of this case. As the *Simler* court put it: “The final factor to consider in weighing the various interests of the parties is the administrative and fiscal burden additional or substitute procedures would entail.” 23 Ohio Op. 3d at 571.

⁵¹ Thus, at a minimum, such procedures should include prompt service of the notice of garnishment

Ohio post-judgment garnishment of wages statute could be said to afford the amount of due process required by the United States Constitution. It seems relatively clear that the individuals responsible for H.B. 254 had the due process criteria in mind when drafting the legislation.⁵² Whether they have gone unnecessarily far beyond those requirements in their reformulation of Chapters 2715, 2716, and 2737 of the Ohio Revised Code is a conclusion that will be drawn over the coming months and years by courts, attorneys, creditors, and debtors.

1.04 The Mechanics of Legislative Drafting — Some Semantic Ambiguities in H.B. 254

Because H.B. 254 was produced with the input of “interest groups from different sides of the spectrum”⁵³ it contains a certain amount of semantic ambiguity within its provisions that will provide hurdles to its effective implementation. The two ambiguities that are particularly worth noting involve (1) timing of the service upon the defendant, and how it relates to the defendant’s ability to request a post-seizure hearing, and (2) the definition of the term “indigent” and how it relates to the necessity of posting bond in a pre-judgment proceeding.⁵⁴

The defendant’s ability to maintain possession of the property being subjected to the pre-judgment proceeding until such time as the creditor’s suit proceeds to a trial on the merits is directly related to his ability to either claim that the property is exempt or to post a bond equivalent to the one posted by the creditor pursuant to Ohio Revised Code Section 2715.10. Whether a defendant can avoid the bond requirement by being deemed “indigent” is a crucial conclusion to be reached by the court, especially if the property in question is an integral part of the defendant’s existence. Yet H.B. 254 sets forth no criteria by which courts will be able to ascertain whether a particular defendant is “indigent.” While any such criteria would have to be flexible in order to accommodate the varying standards of living in communities around Ohio,⁵⁵ they could be linked to the existing standards in each community for qualifying for welfare.

upon the judgment debtor; a notice explaining that defenses, including exemptions, may be available which would nullify the garnishment and restore the assets, with a description of a simple procedure for requesting a hearing; and a prompt hearing and decision on the claimed defense. . . . [these procedures] do balance the various competing interests by giving appropriate weight to the rights of debtors to keep their exempt property available to meet and pay for life’s necessities.

23 Ohio Op. 3d at 571.

⁵²See *supra* note 6, William Weisenberg. A close examination of various parts of H.B. 254 reveals that there are several places where the specific language of those two holdings was incorporated into the new law. See *supra* note 14; see *infra* note 170, 179.

⁵³See *supra* note 6. Conversation with Dennis Papp.

⁵⁴See, with respect to the first mentioned ambiguity, § 2715.044 (last paragraph); and § 2715.10 (last paragraph). With respect to the second mentioned ambiguity, various provisions of § 2716.13 are pertinent.

⁵⁵See Bureau of Research and Analysis/Department of Economic and Community Development, *Poverty in Ohio* (1974), Tables 1-2, at 7 which shows that the number of people living at or below the poverty level in Ohio communities ranges, on a percentage basis, from a low of 7.5% to a high of 20.2%.

Sections 2716.13(A), (C)(1), (C)(1)(b), and (D), and analogous provisions,⁵⁶ provide an interesting example of what may happen if notice of any action brought under chapters 2715, 2716, and 2737 is not immediately served. Under 2716.13(A), upon the filing of "an action in garnishment" of property other than wages, the clerk of courts shall set a hearing on the matter "within twelve days." Under 2716.13(C)(1), notice and a "hearing request form"⁵⁷ shall be served upon the defendant no later than seven days prior to the day on which the hearing has been scheduled. The type of service to be utilized is set forth in 2716.13(D) as being "ordinary or regular mail," unless the plaintiff requests otherwise. Within the statutorily mandated "hearing request form," the defendant is notified that he has five business days upon receipt of the notice to request the post-seizure hearing defined in 2716.13(A). If he does not do so, then, under 2716.13(C)(2), that hearing is automatically cancelled.⁵⁸

Difficulties may occur in attempting to accommodate, within a twelve-day time frame, both service upon the defendant at least seven days before the hearing date and the defendant's statutory right to request a hearing within five days after receiving the notice and hearing request form. Under the Ohio Rules of Civil Procedure,⁵⁹ twelve days is not twelve "business" days. It is twelve consecutive days, including holidays and weekends. If a garnishment proceeding is filed on Friday, November 19, 1982, service would have to be made on the defendant by Wednesday, November 24, since the hearing on that action would be scheduled for December 1. It seems safe to predict that there will be many situations where debtors will not be served within the specified number of days.

Even if the defendant is not served within the allotted time span, it is likely that it will not matter. If the experience of one municipal court under the new law is representative, approximately 1.5% of all such defendants actually request a hearing in one form or another.⁶⁰ Yet, one can postulate the case where a defendant is served less than five days before the hearing, desires that hearing and has legitimate reasons for challenging the creditor's garnishment of his property. Under the statutory scheme set for in H.B. 254, such a defendant would be denied the hearing unless he promptly requested it; the order of garnishment would be issued by the court.⁶¹ While provision is made for a court-granted continuance of the scheduled hearing date,⁶² the defendant, in most

⁵⁶See *infra* § 2.09-2.12, 3.05, discussing, respectively, § 2715.04-2715.041, 2716.05-2716.06.

⁵⁷See *infra* § 2.07.

⁵⁸See *infra* § 3.05.

⁵⁹OHIO R. CIV. P. 6(A). This is suggested by the analysis in the reprint of *Special Session: Attachments, Garnishments, and Replevins* (Am. Sub. H.B. 254), published by the Ohio Judicial College, at 32.

⁶⁰The approximate figures from the Akron Municipal Court were three requests for a post-seizure hearing out of 150 debtors served for the period from August 16, 1982-November 3, 1982. Conversation with Larry Walsh, *supra* note 14.

⁶¹OHIO REV. CODE ANN. § 2716.13(C)(2) and (C)(5) (Page Supp. 1983).

⁶²OHIO REV. CODE ANN. § 2716.13(C)(3).

cases, will be ignorant of this provision and not avail himself of it. In this situation, a deserving defendant will not have been given notice of the garnishment and the opportunity for a hearing before a taking of his property, as is required by the *Sniadach* line of cases.

The small chance of this chain of events actually occurring makes it unlikely that H.B. 254 will be declared unconstitutional for this reason.⁶³ If, however, amendments to H.B. 254 are contemplated, the Ohio General Assembly should seriously consider amending the service and timing provisions.⁶⁴

2.00 Pre-judgment Attachment Procedures

2.01 Grounds for Pre-judgment Attachment — R.C. § 2715.01

This section sets forth the circumstances under which an attachment of personal property may be obtained and the grounds upon which a pre-judgment attachment will be effected. These twelve grounds remain virtually unchanged by the 1982 act.⁶⁵ The only substantive change is found in subsection (11) which has eliminated as a ground for pre-judgment attachment the fact that plaintiff's claim is for necessities.

Despite the use of permissive language throughout the new act, the addition of subsection (D) makes it clear that pre-judgment attachment may be obtained only pursuant to this section.⁶⁶ This specifically eliminates the use of any other possible statutory or common law concept upon which the creditor may base a claim to obtain possession of an item.

2.02 Definitions — R.C. § 2715.011

This section has been added in its entirety by the new act. The terms which are defined: probable cause to support the motion, levying officer, and occupied dwelling unit are also new.

"Probable cause to support the motion" is defined as support which demonstrates that it is likely that the plaintiff will obtain a judgment against the defendant.⁶⁷ Although the statute does not delineate the degree of likelihood which is actually required, the indications are that the creditor must demonstrate

⁶³Once again, the third factor contained within the balancing test of the *Mathews v. Eldridge* case should be examined: ". . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Such language would seem to militate against a potential finding of unconstitutionality.

⁶⁴At this time, no such amendments have been formally proposed, but, according to William Weisenberg, the possibility of such amendments is being considered by the Ohio Clerk of Courts Association and a sub-committee of the Ohio State Bar Association. See *supra* note 6.

⁶⁵OHIO REV. CODE ANN. § 2715.01 (Page Supp. 1983).

⁶⁶OHIO REV. CODE ANN. § 2715.01 (Page 1982). An attachment against the property, other than personal earnings, of a defendant may be accomplished prior to the entry of judgment only pursuant to an attachment proceeding under this chapter.

⁶⁷OHIO REV. CODE ANN. § 2715.011 (Page Supp. 1983). "Probable cause to support the motion" means that it is likely that a plaintiff who files a motion for attachment pursuant to section 2715.03 of the Revised Code will obtain judgment against the defendant against whom the motion was filed that entitles the plaintiff to a money judgment that can be satisfied out of the property that is the subject of the motion.

that it is more likely than not that he will prevail in the case using a generally accepted standard.

Unlike the prior act, officers other than a sheriff are given the authority to levy an order of attachment against property. The levying officer is any person who is authorized and directed by the order of attachment to levy on the property.⁶⁸ This definition may be used to expand the number of people who may be involved in the levying process.

An occupied dwelling is defined as any structure which is used as a household or residence by one or more persons.⁶⁹ A structure is not an occupied dwelling if reasonable efforts to contact a person of the household have failed and the levying officer or the person making the efforts to contact the occupant reasonably believes that no person is in the structure at that time.

2.03 Contents of Affidavit — R.C. § 2715.03

The previous version of section 2715.03 provided that the creditor, his attorney or agent could submit an affidavit for cause to the clerk of court who could then issue the order of attachment.⁷⁰ This section was found unconstitutional by the Ohio Supreme Court in *Peebles v. Clement*.⁷¹ The court was faced with a line of decisions which have been handed down by the United States Supreme Court beginning with *Snidach v. Family Finance Corp.*,⁷² in which the Supreme Court has attempted to define the scope of pre-judgment and garnishment statutes.

Based primarily upon the later Supreme Court cases of *Mitchell v. W. T. Grant*⁷³ and *North Georgia Finishing v. Di-Chem Inc.*,⁷⁴ the Ohio Supreme Court determined:

[a] statute providing for pre-judgment attachment must at a minimum:

⁶⁸*Id.* "Levying Officer" means the sheriff or other authorized law enforcement officer who is ordered by the court to take possession of property under an order of attachment.

⁶⁹*Id.* "Occupied dwelling unit" means a structure that is used in whole or in part as a home, residence, or sleeping place by one person who maintains a household or by two or more persons who maintain a common household and the facilities and appurtenances in it and in which any person is present or is likely to be present, except that such a structure is not an occupied dwelling unit at any time if after reasonable efforts to personally contact any person who may be present in the structure at that time, the person who made the efforts reasonably believes that no person is present in the structure at that time.

⁷⁰OHIO REV. CODE ANN. § 2715.03 (Page 1981). An order of attachment shall be made by the clerk of court in which the action is brought in any case mentioned in section 2615.01 of the Revised Code, when there is filed in his office an affidavit of the plaintiff, his agent, or attorney, showing:

(A) The nature of the plaintiff's claim;

(B) That it is just;

(C) The amount which the affiant believes the plaintiff ought to recover;

(D) The existence of any one of the grounds for an attachment enumerated in such section.

Such affidavit may be made before any person authorized to administer oaths whether an attorney in the case or not.

⁷¹63 Ohio St. 2d 314, 408 N.E.2d 689 (1980).

⁷²395 U.S. 337 (1969).

⁷³416 U.S. 600 (1974).

⁷⁴419 U.S. 601 (1974).

(1) require plaintiff to furnish an appropriate bond or other security to compensate a defendant in the event of wrongful seizure; (2) require that an affidavit be filed alleging personal knowledge of specific facts forming the basis for pre-judgment seizure; (3) require that a judicial officer pass upon the sufficiency of the facts alleged in the affidavit; (4) provide for dissolution of the seizure upon the posting of a bond by defendant; and (5) provide an immediate right of hearing to the defendant in which plaintiff must prove that the seizure is warranted.⁷⁵

The new pre-judgment attachment statute must not only conform with the specific mandates of *Peebles*, but it must also pass constitutional muster in its application. There is an indication that the Ohio Supreme Court's reliance upon *Mitchell* and *Di-Chem* was misplaced⁷⁶ and that the court should have applied the standard as set for in *Fuentes v. Shevin*⁷⁷ or a more effective combination of the United States Supreme Court's recent decisions.

In light of the Ohio Supreme Court mandates, section 2715.03 has been reconstructed.⁷⁸ The plaintiff's affidavit must now specifically state the facts upon which his claim is based. The affidavit must include the amount of plaintiff's claim and a copy of any written instrument upon which the claim is based. The requirement of the production of the written instrument if the claim is based upon an instrument is consistent with the requirements of Ohio Rule of Civil Procedure 10(D).⁷⁹

The plaintiff is also required to state facts which support at least one of the grounds of attachment enumerated in section 2715.01.⁸⁰ Although the section does not specifically state a requirement for specific delineation, it is reasonable to believe that any grounds which are used as a basis for attachment must be specified as falling within section 2715.01. The affidavit may contain several alternative, non-exclusive grounds for attachment but each ground should be accompanied and supported by its own set of facts. This is not to say that the same set of facts or a segment thereof could not be used to support two or more separate grounds for attachment. Subsection (B) is more restrictive and is designed to elicit more specific, exacting information as to the plaintiff's particular claim for attachment.

Subsection (C) now requires the plaintiff to present a description of the property.⁸¹ The plaintiff must also state the approximate value of the property

⁷⁵63 Ohio St. 2d 314, 321, 408 N.E.2d 589, 693 (1980).

⁷⁶Note, *Peebles v. Clement: Creditors' Prejudgment Remedies Under Attack in Ohio*, 10 CAP. U.L. REV. 397, 413 (1980).

⁷⁷407 U.S. 67 (1972).

⁷⁸See OHIO REV. CODE ANN. § 2715.03 (Page Supp. 1983).

⁷⁹OHIO R. CIV. P. 10. When any claim or defense is founded on an account or other written instrument, a copy thereof must be attached to the pleadings. If not so attached, the reason for the omission must be stated in the pleading.

⁸⁰OHIO REV. CODE ANN. § 2715.03(B) (Page Supp. 1983).

⁸¹OHIO REV. CODE ANN. § 2715.03(C) (Page Supp. 1983).

sought. It should be noted that this may be different from the prior section which required the plaintiff to state the amount which he believed he was entitled to recover. There are several conceivable situations in which the two amounts would not be the same.⁸²

Subsection (D) requires the plaintiff to specify the location where the property may be found.⁸³ Although this may appear to be an intrinsic part of the attachment proceeding with regard to efficiency, it is also important as an element of sufficiency of the affidavit. Throughout the series of pre-judgment attachment cases the Supreme Court's main focus has been on the prevention of mistaken seizure of goods.⁸⁴ Increased specificity in the initial affidavit is one method by which the courts and legislatures have sought to accomplish this objective.

Subsection (E) is an original provision which again requires that the information be based upon the plaintiff's own knowledge. Since the affidavit may be made by the plaintiff, his attorney or his agent, the wording of this subsection may present more conceptual problems rather than actual complications. A literal reading of the section requires an attorney to attest to facts which were personally known by the plaintiff. The conceptual complications lie in the fact that an affiant must swear to the actual belief and knowledge of a third person in some circumstances.

This provision is also designed to protect the debtor from unfounded or mistaken pre-judgment attachments in the sense that the property is exempt from attachment proceedings. The exemptions recognized by law serve to take property held by the debtor outside the immediate reach of a prejudgment attachment action.

The new pre-judgment attachment portion of the statute places the burden upon the plaintiff to show that the property sought is not exempt from attachment proceedings.⁸⁵ This is contrasted with any possible burden which could have been placed upon the debtor in claiming the exemption. The exemptions to which the defendant is entitled are set forth in section 2329.66 of the Revised Code and have not been substantively changed by the new act.⁸⁶

⁸²Although this section does not define "value," it is reasonable to believe that "value" pertains to the fair market value of the item at the time of the filing. If an item depreciates at a rate which is more rapid than the value covered by the accumulated payments, the amount to which plaintiff is entitled to recover would be in excess of the actual value of the property. The more likely circumstance, however, is the situation where the fair market value of the property exceeds the amount to which plaintiff is entitled to recover.

⁸³OHIO REV. CODE ANN. § 2715.03(D) (Page Supp. 1983).

⁸⁴Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972). In this case the Court stated:

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment — to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party.

⁸⁵OHIO REV. CODE ANN. § 2715.03(E) (Page Supp. 1983).

⁸⁶OHIO REV. CODE ANN. § 2329.66 (Page Supp. 1983).

Because of the different requirements which may be made with respect to property in the debtor's possession and property in the possession of a third party,⁸⁷ subsection (F) requires that the affiant specifically state the name of any third party in possession of the property.⁸⁸ The provision does not require that the belief come from the plaintiff's personal knowledge, but it appears that the statement may be based on information related to the affiant by another, even disinterested party.

The provision which permitted the affidavit to be made before any person authorized to administer oaths has been deleted. The change is the result of the requirement and new inclusion that the affidavit and application for attachment must be made before the court. These modifications are an attempt to place the pre-judgment attachment procedure within the full control of the court from the inception. Control of the proceeding by the clerk has been specifically found not to afford adequate due process protection.⁸⁹

2.04 Notice Requirements to Defendants — R.C. § 2715.04

Section 2715.04 now incorporates the due process requirement of prior notice and an opportunity for a hearing.⁹⁰ In order to receive a hearing on the motion for attachment, the defendant must make a written request to the court within five business days after receipt of the attachment.⁹¹ If the notice is received by the defendant on a Friday, he has until the following Friday to provide the court with the written notice for a hearing.

This request permits the defendant to state his reasons for disputing the attachment but does not require the defendant to do so. The statements made in the defendant's request for a hearing will not prevent him from raising additional defenses during the hearing or trial. The failure of the defendant to include a statement of reasons for dispute with the request for a hearing does not constitute a waiver of his right to present additional defenses nor a waiver of the defendant's right to pursue the actual pre-attachment hearing.⁹² A defendant may decline to state any reasons for his disputing the attachment in his initial request for a hearing. The presence or absence of stated reasons apparently has no persuasive effect on the outcome of the hearing on the motion for attachment.

⁸⁷See, e.g., OHIO REV. CODE ANN. § 2715.091 (Page Supp. 1983).

⁸⁸OHIO REV. CODE ANN. § 2715.03(F) (Page Supp. 1983).

⁸⁹*Snidach v. Family Finance Corp.*, 395 U.S. 337 (1969); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

⁹⁰OHIO REV. CODE ANN. § 2715.04 (Page Supp. 1983).

⁹¹*Id.*

⁹²In *Computer Leasing Co. v. Computing & Software, Inc.*, 37 Ohio Misc. 19,21, 306 N.E.2d 191,193 (1973), the Franklin County Court of Common Pleas found:

if the pre-seizure hearing is to be fair (in the sense of allowing both sides an opportunity to present their available, good-faith legal arguments) and to provide a real test (in the sense of allowing the court to consider *all* relevant factual and legal matters before making a decision), such a hearing must include the right to raise affirmative defenses.

A defendant is given notice of the time and place of the hearing at the time he receives the notice of a motion for attachment.⁹³ If the defendant's written request for a hearing is not made within the allotted time, the hearing is cancelled, and the motion for attachment shall provide the basis for a determination of sufficiency.⁹⁴ Even if the request for a hearing is not presented to the court by the defendant within the five business days, the court is given the discretion to grant a continuance as provided within section 2715.042(B).⁹⁵ The failure of the defendant to respond will actually result in an *ex parte* proceeding, but the defendant is at least given the initial opportunity to participate in the attachment proceeding. The United States Supreme Court has interpreted due process as only requiring the defendant prior notice and an opportunity for a hearing.⁹⁶

2.05 Examples of Sufficient Notice to Defendants — R.C. § 2714.041

Section 2715.041 is new in its entirety. When the plaintiff files the affidavit and motion, he or she must also file a praecipe instructing the clerk of court to notify the defendant of the motion which has been filed.⁹⁷ It should be noted that the clerk now becomes involved only after the court has approved the motion and accepted the affidavit. Even at this stage the clerk is not given any discretion in the course of action which he may take. This notice to the defendant is the instrument which upon its receipt by the defendant begins the time period within which the defendant must file the request for a hearing under section 2715.04.⁹⁸

The notice requirements are stated in example form in this subsection. Although the provision states that a notice must only substantially comply with the given example, there is an indication that a deviation of any degree from the stated form would be insufficient. A prudent plaintiff would be wise to adhere closely to the requirements and the form as set forth in this section. If the form of the plaintiff's notice is different from that which is actually provided in section 2715.041, it must provide the same type of notice and incorporate the elements of adequate notice as defined in sections 2715.04 and 2715.041.

The notice apparently must contain a condensed list of exemptions to which the defendant may be entitled.⁹⁹ The actual listing of these exemptions provides the unwary debtor with information upon which he may base any dispute or initial defense to the motion for attachment. The notice also must specifically state that a debtor's wages may not be attached before a judgment has been

⁹³OHIO REV. CODE ANN. § 2715.04 (Page Supp. 1983).

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶Fuentes v. Shevin, 407 U.S. 67 (1972).

⁹⁷OHIO REV. CODE ANN. § 2715.041 (Page Supp. 1983).

⁹⁸OHIO REV. CODE ANN. § 2715.041(A) (Page Supp. 1983).

⁹⁹*Id.*

entered against him. This provision eliminates any doubt that wage garnishments will not be enforced absent a final judgment. This requirement is consistent with the United States Supreme Court mandates in *Snidach v. Family Finance Corp.*¹⁰⁰

The list of exempted property and benefits provided to the defendant in the notice required by section 2715.041 is not exhaustive.¹⁰¹ The apparent necessity of a benefit or item to the defendant may also bear on the defendant's ability to dispute the plaintiff's claim. It should be noted, however, that showing that the item is a necessity has been specifically deleted in section 2715.01.

The notice must also state that the defendant has the right to a hearing on the motion.¹⁰² The notice reiterates the requirements for adequacy as provided in section 2715.04.¹⁰³ The notice also provides that a defendant may retain possession of the property pending final judgment upon the posting of a surety.¹⁰⁴

If the defendant fails to post the bond or request a hearing, he is advised that the property in his possession may be attached without further notice. This notice gives the defendant two separate alternatives which will allow him to retain possession of the property pending a hearing on the motion for attachment. Absent the defendant requesting a hearing or posting a bond, the order of attachment may be granted in a non-adversarial setting.

Subsection (B) provides the form which may be used as a hearing request. Although the actual language of the request for hearing form may differ from that provided, it must be in substantial compliance with the basic requirements of the request for hearing as set forth in section 2715.041. The clerk is instructed to include the request in the notice of the motion. From the structure included in section 2715.041 it appears that the request for hearing may be attached as a part of the actual notice either as a part of the same page or an additional page in the series of documents served upon the defendant. It should be specifically and emphatically stated that the request for a hearing must be

¹⁰⁰395 U.S. 337 (1969).

¹⁰¹See OHIO REV. CODE ANN. § 2329.66 (Page Supp. 1983) for the complete list of exemptions available to the defendant.

¹⁰²OHIO REV. CODE ANN. § 2715.041 (Page Supp. 1983).

¹⁰³*Id.* The "notice" includes the following paragraphs:

If you dispute the plaintiff's claim and believe that you are entitled to retain possession of the property because it is exempt or for any other reason, you may request a hearing before this court by disputing the claim in the request for hearing form appearing below, or in a substantially similar form, and delivering the request for the hearing to this court, at the office of (Title of court official), not later than the end of the fifth business day after you receive this notice. You may state your reasons for disputing the claim in the space provided on the form, but you are not required to do so. If you do state your reasons for disputing the claim in the space provided on the form, you are not prohibited from stating any other reasons at the hearing, and if you do not state your reasons, it will not be held against you by the court and you can state your reasons at the hearing.

¹⁰⁴*Id.*

returned to the court within five days after receipt. The notice must also state that failure to return the request within the specified time constitutes waiver of the defendant's right to a hearing and to retain the possession of the property.¹⁰⁵

Subsection (C) requires that notice of the motion for attachment be served on the defendant at least seven days prior to the date of the hearing.¹⁰⁶ The notice of a hearing must be accompanied by the complaint and summons in accordance with the Rules of Civil Procedure.¹⁰⁷ Service may also be made by publication and the number of weeks required by the civil rules may be diminished by the court as it deems appropriate.¹⁰⁸

Section 2715.041 provides the framework which allows the defendant an ample opportunity to be heard and provides the defendant with sufficient notice of the motion for attachment which has been filed. The section may actually provide the defendant with more notice and pre-judgment protection than he is constitutionally entitled to, but the Ohio legislature has apparently decided to afford the defendant with a fuller amount of pre-judgment protection.

2.06 Granting the Order of Attachment Without a Hearing — R.C. § 2715.042

The court is still empowered under section 2715.042 to issue an order of attachment without affording the defendant a prior hearing. The circumstances under which this may take place are outlined in this new section.

Subsection (A) provides that the court may issue the order in the event that the defendant does not respond to the section 2715.041 notice.¹⁰⁹ The court may grant a continuance under subsection (B) if it finds a reasonable justification for the delay.

2.07 Defendant's Hearing on the Motion — R.C. § 2715.043

Section 2715.043 requires the hearing on a motion for attachment be held within twenty days after the motion has been filed.¹¹⁰ The notice under section 2715.041 must be served on the defendant within thirteen days after the motion was filed. Because of the nature of the proceedings, the plaintiff will want to work within the minimum time limits as much as possible to protect his pro-

¹⁰⁵*Id.*

¹⁰⁶This section provides:

The notice required by division (A) of this section shall be served on the defendant in duplicate not less than seven business days prior to the date on which the hearing is scheduled, together with a copy of the complaint and summons, if not previously served, and a copy of the motion for the attachment of property and the affidavit attached to the motion, in the same manner as provided in the Rules of Civil Procedure for the service of process.

¹⁰⁷*Id.*

¹⁰⁸OHIO R. CIV. P. 4.

¹⁰⁹See generally OHIO REV. CODE ANN. § 2715.042 (Page Supp. 1983).

¹¹⁰OHIO REV. CODE ANN. § 2715.043 (Page Supp. 1983).

erty. The minimum time limits work to the advantage of the defendant in that the property will ordinarily be taken from him immediately upon filing the affidavit and motion.

This section also provides that the defendant shall receive notice of the date, time and place of the hearing and that any failure on the part of the defendant to avail himself of the hearing shall not constitute a waiver of his right to present evidence in his defense at the trial.¹¹¹ These requirements are incorporated and manifested in the notice and request for hearing example forms included in section 2715.041.

2.08 Bond Requirements — R.C. § 2715.044

Section 2715.044 outlines the uses to which the bond will be put upon final judgment.¹¹² The posting of bond is an absolute mandate for the plaintiff. Until the plaintiff posts bond, the order of attachment will not be effective.

Before the court will grant the order for attachment, the plaintiff must post bond in an amount twice the value of the property sought.¹¹³ This bond must be presented whether the hearing on the motion is held or attachment is granted by default.

If judgment is ultimately rendered in favor of the defendant, the plaintiff is required to return the property or, at the defendant's election, pay an amount which is equal to the value of the property in dispute.¹¹⁴ In addition, the plaintiff must pay any damages which the defendant suffered as a result of the mistaken detention or were caused by the plaintiff with respect to the defendant's property.¹¹⁵

If the plaintiff does not know the value of the property sought, a bond double the amount stated in the affidavit as the plaintiff's claim must be posted.¹¹⁶ The value stated in the plaintiff's claim will also serve as the basis for the amount of the bond if the plaintiff does know the identify of the property sought.¹¹⁷

The plaintiff may avoid the bond requirement upon a showing of

¹¹¹*Id.*

¹¹²OHIO REV. CODE ANN. § 2715.044 (Page Supp. 1983) states:

An order of attachment issued by a court shall not be effective until the plaintiff that filed the motion for attachment files with the court a bond to the defendant against whom the motion was filed, executed by the plaintiff's surety, in an amount twice the approximate value of the property to be attached under the order, to the effect that, should judgment be issued against the plaintiff, the plaintiff will return the property taken or pay the value so assessed, at the election of the defendant, and also pay the damages suffered by the defendant as a result of the taking and detention of, and any injury to, the property and the costs of the action.

¹¹³*Id.*

¹¹⁴*Id.*

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷*Id.*

indigency.¹¹⁸ The indigency exception may be recognized by the court on its own motion or through a motion by the plaintiff.¹¹⁹ The result may be a complete waiver of the bond requirement or a reduction in the amount which is required.¹²⁰

2.09 Summary Attachment Proceedings — R.C. § 2715.045

Because of the competing interests in the property sought, there will be occasions when the plaintiff's need for immediate possession of the property outweighs the defendant's right to retain the property. The United States Supreme Court has specifically recognized that the plaintiff may have a substantial property interest which must also be protected during the course of the proceedings.¹²¹

Although the plaintiff must generally file his motion and affidavit and give notice to the defendant prior to obtaining an order for attachment, the legislature through section 2715.045 has recognized that there may be circumstances in which this procedure will not afford the plaintiff adequate protection for the property.¹²² The United States Supreme Court, in *Fuentes*, has also recognized these unusual situations and has granted exceptions for them.¹²³

The Ohio legislature has stated that a plaintiff must show one of two possible contingencies in order to receive summary attachment treatment.¹²⁴ The plaintiff must demonstrate irreparable injury in that there is a present danger of concealment or disposition of the property.¹²⁵ In the alternative, the plaintiff may be able to demonstrate that the value of the property will be substantially impaired if an order for attachment is not immediately issued.¹²⁶

If the court finds the existence of either of these circumstances it may issue the order for attachment before a hearing is set.¹²⁷ In granting the order the court must direct the clerk to immediately serve upon the defendant a copy of the complaint and summons, the motion, and a copy of the order for attachment.¹²⁸

¹¹⁸*Id.* "If the plaintiff is indigent, the court may, on motion of the plaintiff or on its own motion, waive the bond required by this section or may set the bond in a lower amount, as fairness requires."

¹¹⁹*Id.*

¹²⁰*Id.*

¹²¹See *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974).

¹²²OHIO REV. CODE ANN. § 2715.045 (Page Supp. 1983) provides:

Upon the filing of a motion for attachment, the court may issue an order of attachment without issuing notice to the defendant against whom the motion was filed and without conducting a hearing if the court finds that there is probable cause to support the motion and that the plaintiff that filed the motion for attachment will suffer irreparable injury if the order is delayed until the defendant against whom the motion has been filed has been given the opportunity for a hearing. The court's finding shall be based upon the motion and affidavit filed pursuant to section 2715.03 of the Revised Code and any other relevant evidence that it may wish to consider.

¹²³407 U.S. 67, 81 (1972).

¹²⁴See generally OHIO REV. CODE ANN. § 2715.045 (Page Supp. 1983).

¹²⁵*Id.*

¹²⁶*Id.*

¹²⁷*Id.*

¹²⁸See OHIO REV. CODE ANN. § 2715.045(C)(1), <https://ideaexchange.uakron.edu/akronlawreview/vol16/iss3/5>

The example of a notice as set forth in subsection (C)(1) is substantively the same as the notice provided in section 2715.041.¹²⁹ Even though the defendant's property has been summarily attached he will be given ample opportunity to present his defenses in a prompt manner.¹³⁰ Upon receipt of the request for a hearing on the order for attachment the court shall set the hearing within three days.¹³¹ If the defendant does not request a hearing, he has waived his rights to object to the attachment until the trial.¹³²

Subsection (E) permits the defendant to recover the attached property upon a finding that there is not probable cause to support the plaintiff's motion. During the hearing the burden is upon the defendant to demonstrate the lack of probable cause.¹³³

2.10 Issuance of the Order for Attachment — R.C. § 2715.05

Section 2715.05 has been amended to specifically require the court to issue the order for attachment.¹³⁴ This change erases any possibility that the order may be issued by a clerk of the court.

The court now has the authority to direct an officer in any county within the state to attach property found within that county.¹³⁵ This provision greatly expands the reach of the court in attaching property in the possession of the defendant.

The 1982 version of section 2715.05 contains a new subsection (B) which requires the order for attachment list the names of the parties and a statement that a bond for the property has been filed pursuant to section 2715.10 or 2715.26.¹³⁶ This requirement further protects the defendant against any mistaken attachments or frivolous and malicious proceedings.

Any subsequent attachments must be served upon the defendant pursuant to the Ohio Rules of Civil Procedure regarding service of papers subsequent

¹²⁹See *supra* note 109.

¹³⁰OHIO REV. CODE ANN. § 2715.045(D) (Page Supp. 1983).

¹³¹OHIO REV. CODE ANN. § 2715.045(C)(1). The example notice states, "If you request a hearing, it will be held within three business days after delivery of your request for hearing and notice of the date, time, and place of the hearing will be sent to you."

¹³²*Id.* The notice sent to the defendant states:

If you do not request a hearing or file a bond before the end of the fifth business day after you receive this notice, possession of the property will be withheld from you during the pendency of the action. Notice of the dates, times, places, and purposes of any subsequent hearings and of the date, time, and place of the trial of the action will be sent to you.

¹³³OHIO REV. CODE ANN. § 2715.045(E) states: "If, after hearing, the court finds that there is not probable cause to support the motion, it shall order that the property be redelivered to the defendant without the condition of bond."

¹³⁴OHIO REV. CODE ANN. § 2715.05 (Page Supp. 1983).

¹³⁵*Id.*

¹³⁶OHIO REV. CODE ANN. § 2715.05(B) (Page Supp. 1983) provides:

An order of attachment shall contain the names of the parties and the court in which the action was brought and a statement that the property subject to the order of attachment can be retained or recovered by filing a bond pursuant to section 2715.10 or 2715.26 of the Revised Code.

to the service of the complaint.¹³⁷ This requirement still insures that the defendant will have adequate notice of all proceedings against him.

2.11 Execution of the Order for Attachment — R.C. § 2715.09

Section 2715.09 provides the outline for the manner in which the order for attachment must be executed.¹³⁸ In addition to leaving a copy of the order with the occupant of the dwelling in which the property sought is located, the officer must also leave a copy of the order with the defendant or at the place where the items were detained.¹³⁹ The officer is generally required to take physical possession of the property sought but will be permitted to execute the attachment by posting a notice if it would be an unreasonable expense to remove the item.¹⁴⁰

The requirement that the sheriff be accompanied by two witnesses has been eliminated. The levying officer may now proceed alone but must still make a true inventory of the items which were seized.

Subsection (B) is new to 2715.09 and now provides that the levying officer may use any lawful means to enter the building or enclosure, other than an occupied dwelling, in which the property sought may be located.¹⁴¹ The officer is first required to seek voluntary admittance into the structure; if he is unable to secure that consent, he may enter the structure provided that it is done in a lawful manner.¹⁴² If the officer is required to attach the property without voluntary admittance he is required to file an affidavit with the court on the next business day stating the reasons for the manner of attachment.¹⁴³ These requirements are designed to eliminate the use of force or violence in attachment proceedings.

2.12 Attachment of Property in the Possession of Third Parties — R.C. § 2715.091

Section 2715.091 is a new addition to the pre-judgment attachment statute.¹⁴⁴ This provision particularly addresses circumstances involving a reluctant third party who is in possession of the property. Section 2715.091 provides that when attempts to attach personal property have failed, the officer is directed to leave a copy of the notice of attachment with the garnishee.¹⁴⁵ The officer is also required to leave an order that he appear in court and answer the complaint.¹⁴⁶ This section enumerates the proper places for leaving notice

¹³⁷*Id.* See also, OHIO R. CIV. P. 4.

¹³⁸OHIO REV. CODE ANN. § 2715.09 (Page Supp. 1983).

¹³⁹OHIO REV. CODE ANN. § 2715.09(A) (Page Supp. 1983).

¹⁴⁰*Id.*

¹⁴¹See OHIO REV. CODE ANN. § 2715.09(B) (Page Supp. 1983).

¹⁴²*Id.*

¹⁴³*Id.*

¹⁴⁴See OHIO REV. CODE ANN. § 2715.091 (Page Supp. 1983).

¹⁴⁵See OHIO REV. CODE ANN. § 2715.09(A) (Page Supp. 1983).

when the garnishee is not an individual.¹⁴⁷

Subsection (B) specifically states that only property sought for an attachment is subject to the order.¹⁴⁸ Any attempts to garnish personal wages must be accompanied by a final judgment.

2.13 Defendant's Objectives to the Surety — R.C. § 2715.43

The defendant may challenge the sufficiency of the surety given by the plaintiff upon attachment.¹⁴⁹ The defendant must file a motion in objection to the surety within ten days after the surety's bond was filed. Once the objection has been filed, the officer shall still attach the property but must not take any further action until the sufficiency of the surety is determined.¹⁵⁰

The surety requirement is designed to afford the defendant full protection from improper attachments. The bond sufficiency requirement will insure that the defendant will recover the amount of the property which was sought if the defendant should prevail as well as any damages which are attributable to the wrongful attachment.

2.14 Recovery From Surety — R.C. § 2715.431

Section 2715.431 is a new addition in the 1982 act. This section specifically provides that a party may recover damages from the other party's surety upon filing a complaint against the surety.¹⁵¹ This provision permits the prevailing party another source from which to recover money damages upon the outcome of the proceedings.

2.15 Unaltered Sections in the 1982 Act.

Many of the parts of the prior pre-judgment attachment statute remain basically in tact. The following sections in this part underwent only minor, cosmetic changes: 2715.06; 2715.12; 2715.13; 2715.17; 2715.19; 2715.20; 2715.21; 2715.24; 2715.25; 2715.26; 2715.29; 2715.30; 2715.31; 2715.32; 2715.37; 2715.38; 2715.39; 2715.40; 2715.44; 2715.46; and 2715.51.

3.00 Post-Judgment Garnishment¹⁵²

¹⁴⁷*Id.*

¹⁴⁸See OHIO REV. CODE ANN. § 2715.091(B) (Page Supp. 1983).

¹⁴⁹OHIO REV. CODE ANN. § 2715.43 (Page Supp. 1983).

¹⁵⁰*Id.*

¹⁵¹OHIO REV. CODE ANN. § 2715.431 (Page Supp. 1983) states:

A party may seek recovery of damages awarded on final judgment and the costs of judgment execution against the other party's surety on a bond filed pursuant to section 2715.044, 2715.10, or 2715.26 of the Revised Code if execution of judgment issued in favor of that party is returned unsatisfied, by the filing of a complaint against the surety in the same action in which the bond was filed.

¹⁵²24 O. Jur. 3d, *Creditor's Rights* § 268 (1980) defines postjudgment garnishment as "[a]n action . . . by which a creditor seeks satisfaction of an indebtedness out of an obligation due the debtor from a third person, the garnishee."

3.01 2716.01 — An Introductory Provision

This chapter has been added by H.B. 254 in an effort to integrate the remedy of post-judgment garnishment within its own section of the Ohio Revised Code.¹⁵³ Previously, garnishment was one of the several remedies contained within chapter 2715 of the Ohio Revised Code.¹⁵⁴ Post-judgment garnishment is divided into two separate categories: (a) post-judgment garnishment of personal earnings is set out in R.C. § 2715.02-2715.10; and (b) post-judgment garnishment of property other than personal earnings, is found in R.C. § 2716.11-2716.13. The latter sections may overlap, or even supersede, another important remedy section contained within the Ohio Revised Code.¹⁵⁵

3.02 The 15-Day Demand — R.C. § 2716.02

This section contains the revised format for what is commonly called the “15-day demand.” The demand is made upon the debtor after judgment is obtained and at least fifteen, but not more than forty-five, days before the creditor would like to obtain the order of garnishment from the court.¹⁵⁶

As the new language indicates (“within 15 days of the date . . . OF ITS SERVICE BY THE COURT . . . we will go to court . . . UNLESS WE ARE OTHERWISE PRECLUDED BY LAW FROM DOING SO.” [New statutory language in caps.]) the objective of the statute is to give the debtor the fullest possible opportunity to be given notice of the creditor’s intended action and the fact that such action may be precluded by either the federal or state exemption schemes. The likelihood of the demand having as intimidating an effect upon debtors as it once did is diminished by the substitution of the word “could” for the word “can” in the sentence that refers to the effect that a garnishment demand may have upon the debtor’s continued employment by the garnishee/debtor’s employer.¹⁵⁷

To avoid immediate garnishment by the creditor, the debtor is put on notice by the fifteen-day demand that he must do one of three things in the fifteen day period immediately following his receipt of the notice. The last alternative involves the debtor doing one of two things: either applying for the appointment of a municipal court trustee to manage his earnings or entering into an agreement for debt scheduling with a consumer credit counseling service¹⁵⁸ (new

¹⁵³OHIO LEGAL CENTER INSTITUTE, PROVISIONAL REMEDIES 4.03 (1982) [hereinafter cited as OLCI].

¹⁵⁴See OHIO REV. CODE ANN. § 2715.11-2715.19 (Page 1981).

¹⁵⁵See OLCI, *supra* note 153 at 5 referring to the “proceedings in aid of execution” sections of the R.C. 2333.09-2333.27 (Page 1981).

¹⁵⁶The form of the current 15-day demand was contained in OHIO REV. CODE ANN. § 2715.02 (Page 1981), under the pre-judgment attachment remedy.

¹⁵⁷A creditor is precluded from using the 15-day demand merely as a means to intimidate a debtor into paying the debt owed. Either a suit must have been commenced or a judgment obtained before it can be sent. *Thomas v. Sun Furniture and Appliance Co.*, 61 Ohio App. 2d 78, 399 N.E.2d 567 (Hamilton Cty. Ct. of Appeals 1978).

¹⁵⁸The consumer credit counseling service (CCCS) is essentially the counterpart of the municipal court trustee in the private sector. A CCCS is a not-for-profit corporation organized under chapter 1702 of the Ohio Revised Code.

for this remedy in H.B. 254; hereinafter referred to as C.C.C.S.). As is apparent both from the language retained from previous law and that which is added here for the first time ("and notify us that you have applied for the appointment of a trustee"), the burden is squarely upon the debtor to either apply for a trustee's appointment or enter into an agreement with a C.C.C.S., and to promptly notify the creditor of his doing so.¹⁵⁹

3.03 The Creditor's Affidavit — R.C. § 2716.03

This part of H.B. 254, formerly § 2715.11, sets out the form of the affidavit which the creditor must file with the court in order to proceed with the garnishment threatened in the fifteen-day demand of § 2716.02. The substantive contents of such an affidavit remain essentially unchanged by the new law. Noticeable by its omission in either H.B. 254 or previous law is any explicit requirement in this section that a written motion to the court for the issuance of an order of garnishment be filed with the affidavit.¹⁶⁰ Subsection (C) directly tracks the language of the *Simler* holding when it requires that both the garnishee and defendant are to be timely notified of the creditor's action of filing the affidavit which requests the court to issue an order of garnishment.¹⁶¹

3.04 Order and Notice of Garnishment and Answer of Employer — R. C. § 2716.05

The form of the "Order and Notice of Garnishment and Answer of Employer" [hereinafter referred to as the "Order and Notice"] is set out in § 2716.05 as well as the procedure by which this form is served upon the garnishee¹⁶² and answered by him.¹⁶³ Three copies of the "Order and Notice," in the form required by the statute, are left with the garnishee. One is to be answered and returned to the court; another is to be kept by the garnishee for his records; the third is to be delivered to the defendant by the garnishee along with other documents that are required by Chapter 2716 to be left with the garnishee for delivery to the debtor.¹⁶⁴

Judicial gloss indicates that the garnishee does not have to personally appear before the clerk when making his answer to the "Order and Notice"¹⁶⁵ as would

¹⁵⁹This is similar to the assertion of statutory exemptions where the burden is also upon the debtor. See *supra* § 1.03(b).

¹⁶⁰Rule 7(b) of the OHIO RULES OF CIVIL PROCEDURE would seem to dictate this result.

¹⁶¹*Simler*, 23 Ohio Op. 3d at 569. The notice is given in accordance with the requirements of sections 2716.05 and 2716.06 (Page Supp. 1983)

¹⁶²For the potential effect upon the validity of the order of garnishment of having someone other than a court-appointed person serving the order upon the garnishee, see Annot. 75 A.L.R. 2d 1433, 1433 (1961).

¹⁶³The form of the garnishee's answer is incorporated form OHIO REV. CODE ANN. § 1911.332 (Page Supp. 1982). See OCLI, *supra* note 153, at 4.10.

¹⁶⁴See *infra* § 3.05 for discussion of section 2716.06, for the potential significance of this and a listing of the other forms that are required to be delivered to the debtor.

¹⁶⁵See OCLI, *supra* note 153, at 4.11, citing Peoples Bank & Savings Co, v. Katz, 146 Ohio St. 297, 65 N.E.2d 708 (1946). See pages 301-02 of the opinion, for a discussion of the garnishee's status as a party to the garnishment proceeding and how it relates to the garnishee's answer.

appear to be required by the language of 2716.05 (“the garnishee appear and answer”). The garnishee can be compelled to appear personally, though, if it appears that his answer to the “Order and Notice” was insufficient or misleading in any way.¹⁶⁶

That “[t]he order shall bind the personal earnings of the defendant due from the garnishee from the time of service” has been added by H.B. 254 is significant. All of a debtor’s earnings are frozen until such time as his employer pays over the amount calculated according to the formula set out in the “Order and Notice,” which incorporates statutory standards.¹⁶⁷

3.05 Notice to the Debtor — R.C. § 2716.06

The precise form that notice to the debtor should take is set forth in this section. This aspect of the garnishment process, which the *Simler* court emphasized in finding fault with the previous law, leaves the garnishee with the responsibility of rendering notice to the defendant. Whether it is sound, from a social-psychology point of view, for an employer to give that notice “at the time [he] would otherwise pay the earnings which he is instead paying to the courts” was apparently not a concern of those drafting H.B. 254.¹⁶⁸

The actual written notice delivered by the garnishee to his employer consists of three documents: (1) a copy of the “Order and Notice”; (2) a copy of the “Notice to the Defendant”; and (3) a postage-paid, self-addressed “Request for Hearing” form. The first is included so that the debtor will be put on notice as to precisely how his employer calculated the amount of wages that were, or are to be, sent to the court¹⁶⁹ in order that he can check those calculations for their accuracy. The second is the *Simler*-engendered notice¹⁷⁰ that makes the debtor aware, in very straightforward language, that he has the right to a hearing if he feels that either the order of garnishment is invalid or that the amount to be garnished should be reduced by some applicable

¹⁶⁶The obligations and rights of garnishees are set out in detail in OHIO REV. CODE ANN. § 2716.21 (Page Supp. 1983).

¹⁶⁷OHIO REV. CODE ANN. § 2329.66(A) (Page 1981).

¹⁶⁸The employer/garnishee’s duty to give that notice is stated in both § 2716.05 and 2716.06(A). As for the effect that garnishment has upon the employment relationship, see Kripke, *Consumer Credit* at pp. 289-95. The prohibition of 15 U.S.C. 1674(a) (1982), relating to the discharge of an employee due to a single garnishment of his wages was necessary because of the adverse impact garnishment has historically had upon the employment relationship. It has been suggested that this prohibition be expanded to include the situation where the debtor is garnished by more than one creditor. See *Consumer Research Foundation, CRITIQUE OF THE UNIFORM CONSUMER CREDIT CODE* 310 (1971).

¹⁶⁹It is never made entirely clear by § 2716.06 whether the debtor’s wages are to be paid to the court prior to the time that he receives notice of the garnishment or only after the debtor either (1) failed to request a hearing on the garnishment or (2) the hearing was had and the amount of wages to be garnished confirmed, and an order subsequent to (1) or (2) issued by the court directing the garnishee to pay the garnished wages into court. Compare “. . . some of your personal earnings, now in the possession of your employer. . . .” (2716.06(A)) with “The court shall issue an order to the garnishee to pay . . . the wages . . . into court, if they have not already been paid to the court.” (2716.06(C)).

¹⁷⁰The idea of including something similar to a “request for hearing” form with the notice of garnishment served upon the debtor can be traced to *Simler*, 23 Ohio Op. 3d at 310 which states “. . . a simple procedure for requesting a hearing . . .”

exemption(s). The third is similar to "Request for Hearing" forms mandated by other sections of H.B. 254.¹⁷¹

The 2716.06 "Request for Hearing" form includes a clause pertaining to "emergency" situations in which the debtor can speed up the hearing process if garnishment of his wages would leave him destitute. The "Request for Hearing" form set out in 2716.06 specifies that a hearing shall be had upon the debtor's request within twelve days after its receipt by the court; this is a smaller time frame than is contained in any of the pre-judgment remedies sections of H.B. 254 within which the debtor must be afforded his post-seizure hearing.¹⁷²

Noticeable by its absence in 2716.06, or any other section of Chapter 2716, is any provision for a court-ordered continuance of the time in which a debtor can request a post-seizure hearing. If he doesn't make the request within the stated five days after his receipt of the Notice to Defendant, his right to such a hearing is apparently completely extinguished¹⁷³ and an order for payment of the garnished funds over to the creditor will issue forthwith from the court.¹⁷⁴

The last sentence of 2716.06(B) defines the parameters within which a debtor's right to a hearing subsequent to the issuance of the order of garnishment must occur when that right is exercised. By its language, that sentence explicitly precludes a debtor from coming to the hearing and arguing the merits of the case. No exceptions to this rule are provided for in either 2716.06 or elsewhere in Chapter 2716. Whether such a total deprivation of any chance for a debtor to argue the merits of his case at one of these hearings is sound law or public policy is debatable:

[The debtor] is deemed to know that certain enforcement proceedings naturally will follow. The continuing validity of this assumption can be criticized because of the dubious nature of many judgments awarded without an actual hearing on the merits ever having taken place, and because many consumers lack a basic familiarity with the judicial process. . . . Default by a large number of consumer debtors given the opportunity to appear in court casts serious doubt on the assumption that the debtor has received a meaningful opportunity to be heard.¹⁷⁵

The inclusion of some form of judicial discretion to hear the merits of the case at the debtor's post-seizure hearing under certain circumstances could, perhaps, have been included in the statute to remedy at least those extreme cases of hardship that do occur from time to time.

¹⁷¹See *supra* § 2.12.

¹⁷²The court must look to a 20 day time frame for both attachment and replevin. OHIO REV. CODE ANN. § 2715.043(A), 2737.07(A).

¹⁷³There is no provision made in the garnishment of wages situation for a court-ordered extension of the time in which the debtor can request such a hearing. This must be compared with other sections of H.B. 254, where such provision is made; see *supra*, § 2.04; see also OHIO REV. CODE ANN. §

¹⁷⁴OHIO REV. CODE ANN. § 2716.06(C) (Page Supp. 1983).

¹⁷⁵Alderman, *Default Judgments and Postjudgment Remedies Meet the Constitution: Effectuating Sniadach and its Progeny*, 65 GEO. L.J. 1, 13 (1976).

3.06 Post-Judgment Garnishment of Property Other Than Wages — RC. § 2716.11-2716.13

The substantive provisions of §§ 2716.11-2716.13 are largely patterned after the garnishment of personal earnings sections of H.B. 254, with the structure of some of the attachment and replevin provisions being used for models as well.¹⁷⁶ The hybrid nature of this remedy can undoubtedly be attributed to the fact that while it is a post-judgment garnishment remedy, the property being subjected to that remedy is the same as that which is the object of the replevin and attachment remedies — personal property other than wages. For the purposes of this analysis, only those provisions of 2716.11-2716.13 which are sufficiently different from those sections of H.B. 254 upon which the bulk of 2716.11-2716.13 is based will be set out for explication.

The affidavit required as a condition precedent to the issuance of an order for post-judgment garnishment of property other than personal earnings, set out in 2716.11, is less detailed than any of its counterparts in H.B. 254. The contrast with the wage garnishment affidavit is especially revealing; no preliminary demand is necessary before the 2716.11 affidavit is filed with the court and the order of garnishment issued by the court according to the provisions of 2716.13. This difference can best be explained by the status wages have attained in the eyes of judges and lawmakers as a more valued form of property that is deserving of a concomitantly greater amount of protection by the law.¹⁷⁷

The maximum number of days allowed to elapse between the time an order of garnishment is issued and the time a debtor shall have the hearing designated as rightfully his by statute, if timely requested, is identical to the time span found in the wage garnishment provisions and different from the time allotted by the attachment and replevin sections of H.B. 254.¹⁷⁸ It should probably be inferred that the necessity for a quick post-seizure hearing is greater within the garnishment context because of the greater chance for error.¹⁷⁹

CONCLUSION

In response to United States Supreme Court decisions, the Ohio legislature has made sweeping changes in Ohio debtor-creditor law. These changes go well beyond the threshold requirements set down by the Supreme Court; the new Ohio law should withstand constitutional scrutiny.

¹⁷⁶The affidavit required by 2716.11 is similar in form to the affidavits required in 2715.03 (attachment) and 2737.03 (replevin). The notice to the defendant required by 2716.13(C)(1)(a) is analogous to the notice mandated by 2715.041(A). Finally, the "Order and Notice" of 2716.13(B) is like the "Order and Notice" of 2716.05.

¹⁷⁷See Kripke, *supra* note 168, in this regard. For people living at or near the poverty level, personal earnings will constitute their only means of support from one paycheck to the next.

¹⁷⁸See *supra* note 172.

¹⁷⁹One need only look to the facts surrounding the garnishment of the bank account owned by one of the plaintiffs in *Simler* to see the risks inherent in asking a third party to ascertain what property of the debtor's they have in their possession and to determine if any of it is exempt.

The Ohio Supreme Court struck down the former replevin statute in *Peebles v. Clement* in 1980. Since that time there has been no apparent guideline in the area of pre- or post-judgment remedies. The primary goal of the legislature in implementing House Bill 254 was to enact a sound scheme for effectuating these remedies.

The true effectiveness of the act, however, will not be demonstrated unless its provisions are actually employed. The major premise underlying the enactment of the statute is that the measure will be widely utilized. Only time and the test of case law interpretation will determine the true validity of this premise.

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