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## H.B. 254: Changes in Ohio's Attachment, Replevin and Garnishment Statutes

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# LEGISLATION NOTES

## H.B. 254: CHANGES IN OHIO'S ATTACHMENT, REPLEVIN AND GARNISHMENT STATUTES

### I. INTRODUCTION

Since the early 1970's, the status of traditional provisional<sup>1</sup> and enforcement<sup>2</sup> remedies has been uncertain due to fatal constitutional infirmities found in such procedures by the United States Supreme Court.<sup>3</sup> As a result, many states, including Ohio, have been without procedures to assist creditors and protect debtors in the collection of debts.

In 1973, a federal district court declared Ohio's prejudgment replevin<sup>4</sup> statute unconstitutional because it did not provide notice and an opportunity to be heard before the taking of property.<sup>5</sup> Similarly, in 1980, the Ohio Supreme Court ruled that the state's prejudgment attachment<sup>6</sup> statute failed to satisfy due process concerns and was therefore unconstitutional.<sup>7</sup> Ohio's garnishment<sup>8</sup> procedures were subjected to constitutional attack and were finally declared unconstitutional in

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1. A provisional remedy is a prejudgment device available to a plaintiff in a civil action to assure that the defendant does not dissipate his property while the action is pending thereby thwarting later enforcement of a judgment. In Ohio, provisional remedies include arrest and bail, replevin, attachment, injunction, garnishment and receivership. See Ohio Legal Center Inst., Reference Manual for Continuing Legal Education Program, Provisional Remedies (Pub. No. 131) [hereinafter cited as Provisional Remedies] (copy on file with University of Dayton Law Review).

2. An enforcement remedy is used to satisfy a judgment for a plaintiff. In Ohio, enforcement remedies include post-judgment garnishment of wages and post-judgment attachment or garnishment of property. See OHIO REV. CODE ANN. § 1911.26 (Page 1983).

3. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); See *infra* note 30 and accompanying text.

4. Replevin is an action taken by one owning or having an interest in specific property to recover that property from one who has wrongfully taken or retained it. Note, *Creditors' Prejudgment Remedies Under Attack in Ohio*, 10 CAP. U.L. REV. 397, 400-01 (1980) [hereinafter cited as Note, *Remedies Under Attack*].

5. Turner v. Block, 12 Ohio Op. 3d 373 (1973).

6. Prejudgment attachment is a procedure used by a creditor to place a debtor's property in the court's custody to ensure payment of the creditor's claim if a judgment is given in plaintiff's favor. See Note, *Remedies Under Attack*, *supra* note 4, at 400.

7. Peebles v. Clement, 63 Ohio St. 2d 314, 408 N.E.2d 689 (1980).

8. Garnishment is a procedure applying a debtor's property or money which is in a third party's possession or control to satisfaction of a creditor's claim. See BLACK'S LAW DICTIONARY 612 (5th ed. 1979).

1982 while a new state law on the subject was being drafted.<sup>9</sup>

House Bill 254 is the result of three years of legislative effort designed to correct constitutional infirmities and achieve uniformity in the application of Ohio's provisional and enforcement remedies.<sup>10</sup> The bill revises prejudgment attachment and replevin procedures,<sup>11</sup> establishes specific provisions for garnishment of property<sup>12</sup> and updates and revises the procedures for wage garnishment.<sup>13</sup> The bill sets forth in great detail the exact procedures to be followed in recovering property and satisfying debts and, most importantly, attempts to afford meaningful protection to creditors, debtors and garnishees.<sup>14</sup>

As a guideline for drafting the bill, legislators looked to minimum due process requirements outlined by both the United States Supreme Court and Ohio courts.<sup>15</sup> Compared with the old law, the new procedures require more judicial supervision, provide greater opportunities for the debtor to be heard and require more specificity in supplying notice to the debtor.<sup>16</sup>

The focus of this note will be on the provisions of H.B. 254 which most directly relate to due process with an analysis of their effectiveness in conforming with constitutional standards set out by both the United States Supreme Court and Ohio courts.

## II. IMPORTANCE OF PROVISIONAL AND ENFORCEMENT REMEDIES

Absent provisional (prejudgment) remedies, a plaintiff in a civil action is unable to prevent a defendant from assigning his property to a friend or relative, effectively placing it beyond the court's reach if a judgment is rendered against him. House Bill 254 makes three provisional remedies available to a plaintiff to prevent such an occurrence. These remedies are attachment, replevin and property garnishment.

Attachment places the defendant's property within the court's cus-

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9. *Simler v. Jennings*, 23 Ohio Op. 3d 554 (1982).

10. Memorandum from William K. Weisenberg, Director of Govt. Affairs of Ohio Bar Association to members of Ohio House of Representatives (Apr. 27, 1982) [hereinafter cited as Memorandum].

11. House Bill 254 amends OHIO REV. CODE ANN. § 2715 (Page 1981) to remedy the defects of prejudgment attachment; it also repeals the entire § 2737 as it previously existed and replaces it with a new procedure for replevin.

12. Statutory property garnishment procedures are now codified in OHIO REV. CODE ANN. § 2715 (Page Supp. 1983).

13. Statutory wage garnishment procedures are now codified in OHIO REV. CODE ANN. § 2716 (Page Supp. 1983). See *Provisional Remedies*, *supra* note 1, at 5.

14. Memorandum, *supra* note 10, at 2.

15. Telephone interview with William K. Weisenberg, Director of Govt. Affairs of the Ohio Bar Association (Nov. 29, 1982) [hereinafter cited as Telephone Interview] (Notes on file with University of Dayton Law Review).

16. Memorandum, *supra* note 10, at 2.

tody to ensure later payment of the plaintiff's judgment.<sup>17</sup> Replevin temporarily returns specific property to its original owner (the plaintiff) during the pendency of an action in which it is alleged that the defendant has wrongfully taken or retained the plaintiff's property.<sup>18</sup> Garnishment is an attachment of the defendant's property which is possessed or controlled by a third party.<sup>19</sup> The purpose of provisional remedies is to protect creditor-plaintiffs in civil actions against irreparable injury or dissipation of the defendant's property while an action is pending.<sup>20</sup> Therefore, attachment and garnishment are available only if there is probable cause<sup>21</sup> to support a plaintiff's motion for protection and there exists the possibility that the defendant intends to transfer, conceal or convert the property so that creditors cannot reach it.<sup>22</sup>

Likewise, replevin is available only if it is likely that the plaintiff will obtain a judgment against the defendant which will entitle the plaintiff to permanent possession of the specific personal property which is the subject of the action.<sup>23</sup>

Absent enforcement remedies, plaintiffs would have difficulty enforcing judgments and receiving that to which they are legally entitled. House Bill 254 revises the procedures for post-judgment garnishment of property and wages. The bill attempts to balance the rights of the creditor and debtor.<sup>24</sup> The new law provides procedures by which a creditor's claim can be satisfied out of the debtor's property. However, the law protects the debtor by recognizing that the debtor's property

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17. BLACK'S LAW DICTIONARY 115 (5th ed. 1979).

18. See *supra* note 4.

19. See *supra* note 8.

20. BLACK'S LAW DICTIONARY 1102 (5th ed. 1979).

21. "Probable cause" means that it is likely that the plaintiff will obtain a money judgment against the defendant which can be satisfied out of the defendant's property which is the subject of the motion. See OHIO REV. CODE ANN. § 2715.011 (Page Supp. 1983).

22. S. MORGANSTERN, LEGAL PROTECTION IN GARNISHMENT AND ATTACHMENT 92-93 (1971). OHIO REV. CODE ANN. § 2715.01 sets forth the specific circumstances under which attachment or garnishment is available. One of the following grounds must exist: defendant is a foreign corporation not exempted from attachment; defendant is not a resident of Ohio; defendant has absconded with the intent to defraud creditors; defendant has left his county of residence to avoid service of summons; defendant conceals himself to avoid summons; defendant is about to remove his property out of the court's jurisdiction with the intent to defraud creditors; defendant is about to convert his property into money for the purpose of placing it beyond reach of his creditors; defendant has property or rights in action which he conceals; defendant has assigned, removed or is about to dispose of his property; defendant has fraudulently or criminally contracted the debt or incurred the obligations for which the suit is brought; the claim is for work or labor; defendant has not complied with the provision of the code relating to bulk transfers. OHIO REV. CODE ANN. § 2715.01 (1)-(12) (Page Supp. 1983).

23. See OHIO REV. CODE ANN. § 2737.01(C) (Page Supp. 1983).

24. In *Simler v. Jennings*, 23 Ohio Op. 3d 554 (1982), it was noted that a debtor must be protected even though a judgment has been entered against him.

may be exempt<sup>25</sup> from attachment or garnishment. For example, certain amounts of clothing and household furnishings cannot be taken to satisfy a judgment. Also, state retirement plans and social security benefits are beyond the reach of creditors.<sup>26</sup>

### III. DUE PROCESS CONSIDERATIONS—THE OLD LAW COMES UNDER JUDICIAL ATTACK

Under the fourteenth amendment to the United States Constitution, property cannot be taken from any person without due process of law.<sup>27</sup> Due process considerations are of importance when a creditor resorts to the use of provisional or enforcement remedies since they result in either a temporary or permanent deprivation of property.<sup>28</sup>

In reviewing the constitutionality of provisional and enforcement remedies, the United States Supreme Court has observed that the purpose of due process "is to protect . . . use and possession of property from arbitrary encroachment [and] to minimize [the chances of] substantively unfair or mistaken deprivation of property. . . ."<sup>29</sup> The Court has found the crux of this protection in adequate notice, prompt opportunity to be heard and judicial supervision over such procedures.<sup>30</sup>

25. State and federal statutes exempt certain types of property, leaving them free from any claims of creditors. See S. MORGANSTERN, *supra* note 22, at 5; Ohio exemptions have not been altered by H.B. 254. All exemptions are collected in OHIO REV. CODE ANN. § 2329.66 (Page Supp. 1983).

26. Exemption statutes are designed to leave the debtor with a portion of his wages or property, sufficient, in theory, to sustain himself and his family without reliance on public assistance. See S. MORGANSTERN, *supra* note 22, at 5.

27. U.S. CONST. amend. XIV, § 1.

28. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863)). Whatever its form, opportunity to be heard must be provided before the taking of the property. *Fuentes*, 407 U.S. at 82. Notice must be of such nature as to reasonably convey the required information. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Identification of specific dictates of due process requires consideration of four factors: private interest which will be affected; risk of erroneous deprivation of such interests; the value of additional safeguards; and the government's interest. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

29. *Fuentes*, 407 U.S. at 81.

30. In *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), the United States Supreme Court held that Wisconsin's *prejudgment wage garnishment* statute violated the fourteenth amendment because it failed to provide for notice and a hearing before an obvious taking of property. The procedure involved a *summary procedure* whereby the clerk of the court issued the order at the request of the creditor's attorney. The Court found that such a procedure did not meet due process requirements.

In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Supreme Court invalidated Florida's and Pennsylvania's *replevin* statutes because they failed to provide notice and an opportunity for a *prior hearing* to a debtor who was deprived of continued use and possession of his property. Both statutes relied on summary procedures which had no requirement that the creditor make a convincing pre-seizure showing that the goods were wrongfully detained.

The above considerations were also important to the Ohio courts when they previously ruled on the constitutionality of Ohio's provisional and enforcement remedy statutes. In 1973, a federal district court declared Ohio's prejudgment replevin statute unconstitutional in *Turner v. Block*.<sup>31</sup> The court held that the statute permitted a taking of property without notice and an opportunity to be heard.<sup>32</sup> However, the court also declared that, despite the faulty statutory requirements, a replevin order could be issued if it was issued by a judge and the debtor was given an opportunity to be heard.<sup>33</sup> Attempts by local courts to judicially cure the due process defects in Ohio's replevin statute, as suggested by the *Turner* court, were later declared improper in *Farmer's Saving & Trust Co. v. Ridenour*.<sup>34</sup> The court relied on *Mitchell v. W.T. Grant Co.*<sup>35</sup> and found Ohio's replevin statute unconstitutional on a number of grounds.<sup>36</sup> The court noted that the statute improperly authorized a clerk of courts, rather than a judge, to issue the order.<sup>37</sup> Further, there was no requirement that the affiant-plaintiff set forth specific facts concerning the basis of wrongful detention.<sup>38</sup> Finally, there was no provision for a speedy post-seizure hearing.<sup>39</sup> The court held that with these defects, the replevin procedures denied the debtor due process of law.<sup>40</sup>

Similarly, in 1980, the Ohio Supreme Court in *Peebles v. Clement*<sup>41</sup> struck down the state's prejudgment attachment statute, holding that it violated due process under the United States and Ohio Constitu-

In *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), the Supreme Court *upheld* a Louisiana statute which allowed a possessor of a vendor's lien to seize property subject to the lien. The Court distinguished the statute involved therein from those in *Snidach* and *Fuentes* on several grounds. Under the Louisiana statute, the order could not be issued until the nature of the claim, the amount involved and the grounds relied upon for the order were specifically verified in an affidavit and a *judge* passed on their sufficiency. The statute also included a provision for damages and attorney fees for wrongful issuance of a writ. The Court found that these provisions effectively minimized the risks of a wrongful taking.

In *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), the Supreme Court held that garnishment of a corporate bank account under a Georgia statute denied the debtor due process because the statute contained neither the safeguards of *Fuentes* (prior notice and hearing) nor the saving characteristics of *Mitchell* (an affidavit containing specific allegations, judicial supervision over the proceeding and damages provisions for wrongful taking).

31. 12 Ohio Op. 3d 373 (1973).

32. *Id.* The court did not expand on this rationale.

33. *Id.* at 373-74.

34. 12 Ohio Op. 3d 370 (1979).

35. 416 U.S. 600 (1974). *See supra* note 30.

36. 12 Ohio Op. 3d at 372.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. 63 Ohio St. 2d 314, 408 N.E.2d 689 (1980).

tions.<sup>42</sup> The attachment statute provided that a clerk of courts could issue an order on the basis of an affidavit which contained only conclusory allegations.<sup>43</sup> The defendant could discharge the attachment by either posting a bond or making a motion for a hearing.<sup>44</sup> Looking to the United States Supreme Court decisions in *Mitchell* and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,<sup>45</sup> and to other state cases dealing with the same issue, the court established minimum requirements for prejudgment attachment statutes.<sup>46</sup> The court held that such statutes must:

- (1) require the plaintiff to furnish an appropriate bond or other security to *compensate a defendant in the event of a wrongful seizure*; (2) require that an affidavit be filed alleging *personal knowledge of specific facts* forming a basis for prejudgment 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

42. *Id.* at 317, 408 N.E.2d at 694. The relevant portion of the Ohio Constitution states: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." OHIO CONST. art. I, § 16.

43. The affidavit only needed to contain the following: the nature of plaintiff's claim; that it was just; the amount which plaintiff sought to recover; and the existence of any one of the grounds for attachment. 63 Ohio St. 2d at 316, 408 N.E.2d at 691. *See* OHIO REV. CODE ANN. § 2715.03 (Page 1981).

44. 63 Ohio St. 2d at 317, 408 N.E.2d at 691. *See* OHIO REV. CODE ANN. § 2715.44 (Page 1981).

45. 419 U.S. 609 (1975). The Court looked to other state courts confronted with similar statutes and due process concerns. In *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123 (3d Cir. 1976), the United States court of appeals declared Pennsylvania's foreign attachment procedure unconstitutional. The court found that the statute provided no protection against frivolous claims because it required no supervision by a *judicial officer*; allowed the order to be issued without any *specific supporting facts*; provided no machinery to indemnify a defendant for damages due to wrongful attachment; provided no means for the *defendant to promptly contest the attachment*; and had no means for dissolution of attachment by the defendant.

*Hillhouse v. Kansas City*, 221 Kan. 369, 559 P.2d 1148 (1977), stated the minimum requirements for prejudgment attachment statutes in exactly the same fashion as the Ohio Supreme Court did in *Peebles v. Clement*. *See infra* note 47 and accompanying text.

*Unique Caterers, Inc. v. Rudy's Farm Co.*, 338 So. 2d 1067 (Fla. 1976) found that due process does not require notice and hearing *prior* to attachment, but does require that a *judge* issue a writ with a supporting affidavit containing more than conclusory allegations, and order an immediate post-seizure hearing.

*Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978) held New York's lien law unconstitutional insofar as it allowed a garageman with a lien to conduct an *ex parte* sale of a bailed automobile. The court observed that the statute had none of the saving characteristics of *Mitchell*—it allowed the sale to proceed 24 days after notice was served without ever going to court, without filing a bond or affidavit and without giving the owner an opportunity to be heard. This procedure was a *permanent* deprivation of property with no due process afforded the debtor.

46. 63 Ohio St. 2d at 321, 408 N.E.2d at 693.

in which plaintiff must prove that the seizure is warranted.<sup>47</sup>

The Ohio procedures for post-judgment garnishment of wages and property have suffered from the same constitutional infirmities as the attachment and replevin laws.<sup>48</sup> Prior to H.B. 254, an *ex parte* garnishment order could be issued upon the filing of an affidavit containing few details.<sup>49</sup> Notice only had to be given to the garnishee;<sup>50</sup> a hearing was not mandatory.<sup>51</sup> In 1982, while hearings were being conducted on H.B. 254, Ohio's post-judgment garnishment procedure was declared unconstitutional in *Simler v. Jennings*.<sup>52</sup> The court balanced the due process interests of the various parties as expressed by the United States Supreme Court in *Mathews v. Eldridge*<sup>53</sup> and found that Ohio's garnishment procedures "[fell] short of providing minimal protection from unlawful and potentially disastrous garnishments."<sup>54</sup> The court found that:

[A]t a minimum, such procedures should include prompt service of the notice of garnishment 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.<sup>55</sup>

The court also emphasized that the notice must be in "meaningful and understandable lay language."<sup>56</sup>

In summary, Supreme Court and lower court decisions establish that due process requires provisional and enforcement remedies, which involve either a permanent or temporary taking of property, to do more than serve the creditor-plaintiff's interests. Such procedures must provide substantial protection to the debtor-defendant against wrongful taking of his property. This protection lies in adequate notice, prompt hearings, judicial supervision and additional safeguards to suit the particular remedy.

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47. *Id.* (emphasis added).

48. The statute failed to provide adequate notice to the defendant and did not provide a prompt hearing.

49. Ohio Senate Judiciary Committee, Report on Sub. H.B. 254 [hereinafter cited as Judiciary Report] (copy on file with University of Dayton Law Review).

50. A garnishee is a person holding money, credits or property of the debtor. See Provisional Remedies, *supra* note 1, at 2.01.

51. See Judiciary Report, *supra* note 49, at 8.

52. 23 Ohio Op. 3d 554 (1982).

53. 424 U.S. 319 (1976).

54. 23 Ohio Op. 3d at 568.

55. *Id.* at 571.

56. *Id.*

## IV. CHANGES IN OHIO'S PROVISIONAL REMEDIES

A. *Replevin*

House Bill 254 replaces the prior replevin action with a new procedure for "recovery of specific property" which is available in any civil action requesting damages.<sup>57</sup>

Under the old law, a replevin action could be characterized as a summary proceeding. An *ex parte* order could be issued by the clerk of courts merely upon the filing of an affidavit by the plaintiff<sup>58</sup> containing simply a description of the property and a claim of wrongful detention.<sup>59</sup> Finally, to secure the order, the plaintiff had to post a bond equal to at least twice the value of the property.<sup>60</sup>

Changes made in the replevin statutes require far more judicial supervision over the procedure. The plaintiff must submit to the court a written motion with an attached affidavit and a judge must rule on the sufficiency of the affidavit.<sup>61</sup> In addition to the requirements under the old law, the affidavit must now contain: (1) the manner in which defendant came into possession of the property, the reason his possession is wrongful, and to the best of plaintiff's knowledge, any defenses the defendant may claim to keep the property; (2) the use to which defendant has put the property; (3) the extent to which plaintiff is or will be damaged by defendant's retention of the property; and (4) the location of the property.<sup>62</sup> These new affidavit requirements are designed to decrease the likelihood that a replevin order will be issued without just cause.<sup>63</sup>

Notice and hearing provisions are also important in the new bill. The plaintiff requesting a replevin order is now under a duty to instruct the clerk of courts to issue notice to the defendant.<sup>64</sup> Such notice must inform the defendant about the nature of the order requested, the defenses which may be available and the right of the debtor to a hearing.<sup>65</sup> The notice must be accompanied by a hearing request form which the defendant can simply complete and mail to the court if he wants a hearing to be held.<sup>66</sup>

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57. All provisions of former Chapters 2737 and 1919 have been repealed. Replevin actions are now governed by Chapter 2737 of the Ohio Revised Code, as amended by H.B. 254.

58. See Judiciary Report, *supra* note 49, at 2.

59. *Id.*

60. *Id.*

61. OHIO REV. CODE ANN. §§ 2737.03, .07(B) (Page Supp. 1983).

62. *Id.* § 2707.03.

63. Telephone Interview, *supra* note 15.

64. OHIO REV. CODE ANN. § 2737.05(A) (Page Supp. 1983).

65. *Id.*

66. *Id.* § 2737.05(B).

If the court, either with or without a hearing,<sup>67</sup> finds probable cause<sup>68</sup> to support the plaintiff's motion, and the plaintiff posts a bond similar to that under the old law, a replevin order will be issued.<sup>69</sup>

The defendant can avoid a replevin order in one of two ways; he can prove at a hearing that there is no probable cause to support the plaintiff's motion,<sup>70</sup> or he can post a bond equal to an amount approximately twice the value of the property.<sup>71</sup>

### *B. Prejudgment Attachment and Garnishment*

The old procedures for prejudgment attachment and garnishment of property were similar to the old replevin procedures. An *ex parte* order was required to be issued by the clerk of court after the plaintiff filed an affidavit.<sup>72</sup> The affidavit merely needed to contain a statement as to the nature of plaintiff's claim, an allegation that the claim was just, the amount plaintiff felt he should recover, a statement that the property sought was not exempt<sup>73</sup> from attachment or garnishment, and the existence of one of the statutory grounds<sup>74</sup> for attachment.<sup>75</sup>

The new procedures<sup>76</sup> emphasize the need for an affidavit that contains more than mere conclusory allegations. In addition to the items previously required, the affidavit must now contain: facts supporting the ground for seizure; a description and approximate value of the property sought; the location of the property; the use to which the defendant has put the property; and, for garnishment, the name of the third party who possesses the property.<sup>77</sup>

The plaintiff must still post a bond before the order is issued<sup>78</sup> and must direct the clerk of courts to give notice to the defendant.<sup>79</sup> The form of notice is similar to that given pursuant to the replevin provision in that it must describe the order against the defendant, educate him as

67. An order can be issued without a hearing if notice was given to the defendant and the defendant did not return the hearing request form or request a continuance. *Id.* § 2737.06.

68. *Id.* § 2737.01(C). See *supra* note 21.

69. OHIO REV. CODE ANN. §§ 2737.06(A), .07(B) (Page Supp. 1983).

70. *Id.* § 2737.07(B).

71. *Id.* § 2737.11 (the amount of the bond is equal to the amount of the plaintiff's bond and is usually twice the value of the property). See *Provisional Remedies, supra* note 1, at 3.11.

72. Judiciary Report, *supra* note 49, at 2.

73. See *supra* notes 25, 26 and accompanying text.

74. See *supra* note 22 listing the statutory grounds for attachment.

75. Judiciary Report, *supra* note 49, at 2-3.

76. Procedures for prejudgment attachment and garnishment now appear in Chapter 2715 of the Ohio Revised Code.

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

78. *Id.* § 2715.044. However, note that under the statute, if the plaintiff is indigent, the court may lower or waive the bond requirement.

to possible exemptions, notify him that he may request a hearing or retain the property by posting a bond, and include a hearing request form.<sup>80</sup>

A judge must rule on the sufficiency of the affidavit before an order may be issued.<sup>81</sup> If a hearing is requested, the judge must determine there is probable cause to support plaintiff's motion and that the defendant's property is not exempt from attachment.<sup>82</sup>

### C. Irreparable Injury

For all of the provisional remedies discussed above, the court may issue an order prior to notice and without a hearing under certain extraordinary circumstances.<sup>83</sup> Not only must the judge find probable cause to support the affidavit but she must also determine that the plaintiff will suffer irreparable injury if the order is delayed.<sup>84</sup> A finding of irreparable injury is appropriate if there is present danger that the property will be immediately disposed of or taken out of the jurisdiction or the value of the property will be substantially impaired if the order is delayed.<sup>85</sup>

In situations where the possibility of irreparable injury is found to exist, the statute provides for notice and an opportunity to be heard as quickly as possible. The plaintiff must immediately direct the clerk to give notice to the defendant who will be granted a hearing within three days of his request.<sup>86</sup> The defendant can then regain the property by either showing no probable cause exists to support the plaintiff's affidavit at the hearing or by posting a bond.<sup>87</sup>

### D. Additional Protection for the Defendant

If the plaintiff obtains an order for any of the provisional remedies but judgment in the civil action is rendered against him, he must return the seized property or pay its value to the defendant.<sup>88</sup> The plaintiff is also liable for any damages which the defendant suffered as a result of the taking and for any injury to the property while it was in his possession.<sup>89</sup> Finally, under certain circumstances, an action for malicious

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80. *Id.* § 2715.041(A), (B).

81. *Id.* § 2715.042(A)(4).

82. *Id.* § 2715.043.

83. Attachment and garnishment pursuant to § 2715.045(A); replevin pursuant to § 2737.19(A).

84. *Id.*

85. *Id.* §§ 2715.045(B), 2737.19(B).

86. *Id.* § 2715.045(C).

87. *Id.* §§ 2715.045(C)(1), 2737.19(C)(1).

88. *Id.* § 2715.044.

89. *Id.*

prosecution may be brought against the original plaintiff.<sup>90</sup>

## V. ANALYSIS OF THE CHANGES IN PROVISIONAL REMEDIES

House Bill 254 "meets the guidelines of the [United States Supreme Court and Ohio] courts and assures sound and prudent constitutional safeguards to all parties" involved in provisional proceedings.<sup>91</sup> The new procedures substantially minimize the chances of unfair or mistaken deprivation of property, a major concern voiced by the United States Supreme Court in *Fuentes v. Shevin*.<sup>92</sup> This minimization of risk is largely accomplished by proceedings which are supervised by judges rather than ministerially performed by clerks of court.<sup>93</sup> The new law makes it more difficult for a plaintiff to obtain an order of replevin, prejudgment garnishment or attachment since he must specifically allege reasons for the order in the affidavit and a judge must pass on the sufficiency of the allegations. In this way, it is less likely that a creditor-plaintiff with a frivolous claim will obtain an order to seize property to the detriment of the defendant-debtor.

The new notice provisions also aid in protecting the defendant-debtor when an order to take his property is sought. Not only must the defendant be told of the nature of the proceeding against him, but he must also be told of his right to a hearing to dispute the claim.<sup>94</sup> Further, the notice itself contains a hearing request form which allows the defendant to obtain a hearing in a simple and timely manner.<sup>95</sup>

Additionally, for orders of attachment or garnishment, a list of exemptions is included in the notice so that the defendant is aware that certain benefits and property cannot be taken.<sup>96</sup> If the property about to be attached or garnished is within these exemptions, the defendant asserts the exemption as a defense.<sup>97</sup>

The new provisions also require prompt hearings within a range of twelve to twenty days after the filing of the affidavit.<sup>98</sup> Such promptness protects the defendant from a wrongful taking as well as guarding the plaintiff from undue delays. Even if a defendant desires a hearing but does not send in the hearing request form within the allotted time,<sup>99</sup> he can request a continuance of the hearing at any time before

90. See *Provisional Remedies*, *supra* note 1, at 2.12-14.

91. See Memorandum, *supra* note 10, at 3.

92. 407 U.S. 67 (1972). See *supra* note 30 and accompanying text.

93. Telephone Interview, *supra* note 15.

94. See *supra* notes 65, 66, 80 and accompanying text.

95. See *supra* notes 66, 80 and accompanying text.

96. See *supra* notes 25, 26 and accompanying text.

97. *Id.*

98. OHIO REV. CODE ANN. §§ 2737.07, 2715.04 (Page Supp. 1983).

99. *Id.* §§ 2737.04, 2715.04. The defendant usually has five business days after receipt of

the original hearing date.<sup>100</sup> The new law ensures that any defendant who really wants to be heard has ample opportunity to be so.

House Bill 254 adequately addresses the main due process concerns expressed by the various courts (judicial supervision, notice and opportunity to be heard). The bill also incorporates the specific guidelines enunciated by the Ohio Supreme Court in *Peebles v. Clement*<sup>101</sup> for prejudgment attachment, and by the United States district court in *Simler v. Jennings*<sup>102</sup> for garnishment.

It is important to note that the new legislation goes beyond other states' statutes which have been upheld as constitutionally sufficient in protecting the debtor-defendant.<sup>103</sup> Legal justification for Ohio's special "irreparable injury" provisions can be found in both *Sniadach v. Family Finance Corp.*<sup>104</sup> and *Fuentes v. Shevin*.<sup>105</sup> If the situation is so extraordinary that special protection for the plaintiff is necessary, notice and opportunity to be heard may be delayed but not completely avoided.<sup>106</sup> However, the statute must be narrowly drawn to serve this

notice to request a hearing.

100. *Id.*

101. 63 Ohio St. 2d 314, 408 N.E.2d 689 (1980). *See supra* note 46 and accompanying text.

102. 23 Ohio Op. 3d 554 (1982). *See supra* note 52 and accompanying text.

103. The following cases illustrate the types of provisions which have been upheld as constitutional:

*Hutchinson v. Bank of N.C.*, 392 F. Supp. 888 (N.D.N.C. 1975). The court upheld North Carolina's attachment procedures which provided for issuance of the order by either a judge or clerk of courts. The court determined that if the clerk issued the order he was performing more than a ministerial function because he had the power to hear an adversary proceeding to determine whether the facts supported the affidavit. Other provisions required the plaintiff to post bond and assume responsibility for damages and all costs where the plaintiff failed to obtain a favorable judgment. The statute further provided that the defendant could discharge the attachment by posting a bond.

*Searles v. First Nat'l Bank of Ariz.*, 127 Ariz. 240, 619 P.2d 749 (1980). Arizona's prejudgment seizure procedures were upheld as constitutional. Those procedures required the plaintiff to post a bond; provided judicial supervision by requiring a judge to issue orders; required the plaintiff to establish sufficient facts supporting the claim in an affidavit; and allowed the defendant to quash the order through a hearing or by posting a bond payable to plaintiff.

*Bustell v. Bustell*, 170 Mont. 457, 555 P.2d 722 (1976), upheld Montana's prejudgment attachment statute because it provided the defendant with an early hearing to discharge the attachment.

*International State Bank v. Gamer*, 281 N.W.2d 855 (Minn. 1979), upheld Minnesota's attachment procedures as constitutional because they required the plaintiff to specify acts of the defendant which constituted sufficient cause for attachment rather than merely state conclusory allegations in an affidavit. Only a judge or county court commissioner could issue the order. The defendant was afforded the opportunity to immediately file a motion to vacate, thus imposing on the plaintiff the burden of proving the necessity of attachment. Plaintiff also had to post bond and the defendant could regain possession by posting bond.

104. 395 U.S. 337, 339 (1969).

105. 407 U.S. 67, 90-91 (1972).

106. *Id.* *See also* 395 U.S. at 339.

purpose.<sup>107</sup> Ohio's "irreparable injury" provisions are very specific as to how and when notice and a hearing may be delayed. Such a provision cannot be used unless the judge finds its use truly essential to protect the creditor.<sup>108</sup> Even then, notice and an opportunity to be heard are given to the debtor at the earliest possible time.<sup>109</sup> In this way the debtor is protected even under special circumstances warranting immediate action for the creditor.

In summary, Ohio's provisional remedy procedures do more than serve the creditor-plaintiff's interests; they protect the debtor-defendant from unjust deprivation of property.

## VI. CHANGES IN ENFORCEMENT REMEDIES

As with provisional remedies, a judge rather than a clerk of courts must issue an order of post-judgment wage or property garnishment.<sup>110</sup> Wage garnishment, because of its severity, is only available after a judgment has been obtained.<sup>111</sup>

In *Simler*, the court found that the prior garnishment statutes did not provide for notice and an opportunity to be heard at a time reasonably calculated to minimize the risk of unlawful or mistaken taking.<sup>112</sup>

Under the newly enacted procedures, before an order can be requested, a demand for satisfaction must be made upon the debtor.<sup>113</sup> This demand must be given at least fifteen days, and not more than forty days, before the order is sought.<sup>114</sup> The statute provides four ways in which the debtor may avoid wage garnishment. He may pay the amount due; pay a precalculated portion of the debt;<sup>115</sup> apply to a local court for appointment of trustees to receive non-exempt earnings; or contact a consumer credit counseling service for assistance.<sup>116</sup>

If the debtor fails to exercise any of the four options, the creditor, in order to secure a wage garnishment remedy, must file an affidavit with the court.<sup>117</sup> Notice, similar to that for prejudgment attachment

107. 407 U.S. at 91.

108. See *supra* notes 83-85 and accompanying text.

109. See *supra* note 86 and accompanying text.

110. OHIO REV. CODE ANN. §§ 2716.06(C), .13(C)(5) (Page Supp. 1983).

111. *Id.* § 2716.11. The procedures for wage garnishment are found exclusively in Ohio Revised Code Chapter 2716.

112. 23 Ohio Op. 3d at 568.

113. OHIO REV. CODE ANN. § 2716.02 (Page Supp. 1983).

114. *Id.*

115. The precalculated portion is the excess of 25% of disposable earnings over the amount defendant's earnings would have been at federal minimum hourly wages. Provisional Remedies, *supra* note 1, at 4.06.

116. OHIO REV. CODE ANN. § 2716.02 (Page Supp. 1983).

117. *Id.* § 2716.03(A).

and garnishment, must be given to the debtor.<sup>118</sup> Such notice explains the nature of the proceedings against the debtor, the possible exemptions and the opportunity for a hearing.<sup>119</sup>

Additional miscellaneous procedures designed to protect debtors have also been enacted. No action for a garnishment of wages can be brought against a debtor less than thirty days after the filing of a previous garnishment action.<sup>120</sup> Also, an employer cannot discharge an employee solely because the employee has his wages garnished so long as garnishment has not occurred more than once in a twelve-month period.<sup>121</sup>

Procedures for post-judgment garnishment of property are very similar to those for wage garnishment. After a judgment has been journalized for the plaintiff, he may file an affidavit with the court.<sup>122</sup> The affidavit must contain the name of the defendant; a statement that the plaintiff believes, with good reason, that a third party has non-exempt property of the defendant; and a description of the property.<sup>123</sup> Notice, similar to that used for other enforcement and provisional procedures, must be given to the defendant, and a hearing is available to the defendant by simply completing and returning a hearing request form.<sup>124</sup>

## VII. ANALYSIS OF THE NEW ENFORCEMENT REMEDIES

It may seem that due process considerations are not crucial in post-judgment remedies since a judgment has already been rendered in the plaintiff's favor. However, as the district court noted in *Simler*:

A judgment simply represents the adjudication of a debtor's liability on the underlying debt. It does not entitle the judgment-creditor to particular assets of the debtor out of which satisfaction can be made. The fact remains that the debtor might defeat the attachment or garnishment with any one of several available defenses, including a claim of exemption. These defenses have not been adjudicated in the main action and remain ripe for review by the court under its continuing jurisdiction.<sup>125</sup>

The interests of the parties involved in post-judgment actions must be balanced and due process must protect those interests.<sup>126</sup> The creditor is principally interested in obtaining satisfaction of a judgment without

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118. *Id.* §§ 2716.05-.06.

119. *Id.*

120. *Id.* § 2716.03(B).

121. *Id.* § 2716.05.

122. *Id.* § 2716.11.

123. *Id.*

124. *Id.* § 2716.13(B).

125. 23 Ohio Op. 3d at 566.

126. *Id.*

undue delay and expense.<sup>127</sup> The debtor has an interest in continued possession and use of his own assets.<sup>128</sup> It is in the light of these compelling interests that due process must be considered.<sup>129</sup>

Ohio's enforcement remedies procedures do minimize the risk of unlawful taking by providing notice and prompt hearings. Similar to the notice requirements under the provisional remedy procedures, notice of an enforcement action must explain to the defendant the procedure against him and his rights incident to such procedure. The availability of a hearing assures that if the defendant has a valid reason for keeping his property, either because the property is exempt or the judgment is not valid, he will have an opportunity to raise such defenses before his property is taken. The hearing provision also aids the plaintiff because the hearing is not mandatory and if the defendant has no reason to contest the proceeding, unnecessary court time and expense will be avoided.<sup>130</sup> The hearing provision, therefore, considers both the plaintiff's and the defendant's interests and adequately protects them both.

The criteria established by the district court in *Simler* has been met in H.B. 254's enforcement remedy procedures<sup>131</sup> because prompt service of notice is required and the notice must explain the defenses and rights of the defendant in understandable language.<sup>132</sup>

In addition, for wage garnishment, Ohio gives the debtor a specific amount of time within which he can attempt to satisfy part or all of the judgment. This provision may avoid unnecessary legal proceedings for both parties.

In summary, Ohio's new enforcement remedy provisions provide protection of the creditor's and debtor's interests in conformity with due process standards set out by the Ohio courts and the United States Supreme Court.

### VIII. CONCLUSION

Analyzing Ohio's new provisional and enforcement remedy procedures in light of the due process standards set out by the courts illustrates that the three years of legislative effort in drafting H.B. 254 were worthwhile. Ohio finally has implemented constitutional procedures by which creditor-plaintiffs can seek satisfaction of judgments or

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127. *Id.* at 567.

128. *Id.*

129. *See supra* note 28.

130. Telephone Interview, *supra* note 15.

131. *See supra* notes 53-56 and accompanying text.

132. For an example of a notice to the defendant in one of the provisional proceedings, see

protect property interests during the pendency of a civil action.

However, the new provisions do more than satisfy the creditor-plaintiff's interests; they minimize the risks of mistaken deprivation of the defendant-debtor's property. This is largely accomplished by judicial supervision over the proceedings. Since a judge must pass on the sufficiency of the grounds for which a plaintiff-creditor seeks a provisional or enforcement order, there is less chance that an order will be issued on a frivolous claim. Additionally, the opportunity for a hearing assures that if a defendant has any defense to the issuance of the order, he will have the opportunity to raise it in all but extraordinary cases before he is deprived of the use or possession of his property.

Notice is directed towards giving the defendant prompt knowledge of the requested order against his property, his rights during such a proceeding, and the means available to avoid the order. Therefore, the debtor's interest in continued use and possession of his property is protected.

Additionally, Ohio's procedures provide the defendant with redress in the event of wrongful or unjust seizure of his property. Besides regaining possession of the property, the defendant may be entitled to damages or may be able to commence an action for malicious prosecution.

In instances where a creditor's interest is jeopardized to the point where "irreparable injury" may result if an order is delayed, notice and hearing may be postponed. However, the debtor is protected because prompt notice and an opportunity for a hearing is given as early as possible under the circumstances.

In conclusion, Ohio's new provisional and enforcement remedies afford due process to a debtor before he is deprived of the use and possession of his property. The statutes are consistent with standards set out by the Ohio courts and by the United States Supreme Court and should easily withstand constitutional scrutiny.

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Code Sections Affected: To amend sections 115.46, 1907.012, 1911.27, 1911.28, 1911.56, 1925.16, 2329.70, 2715.01, 2715.02, 2715.03, 2715.05, 2715.06, 2715.07, 2715.08, 2715.09, 2715.10, 2715.11, 2715.111, 2715.112, 2715.12, 2715.13, 2715.17, 2715.18, 2715.19, 2715.20, 2715.21, 2715.24, 2715.25, 2715.26, 2715.29,

2715.30, 2715.31, 2715.32, 2715.35, 2715.37, 2715.38, 2715.39, 2715.40, 2715.43, 2715.44, 2715.46, 2715.51, and 3113.21, to amend for the purposes of adopting new section numbers as indicated in parentheses sections 2715.02 (2716.02), 2715.11 (2716.03), 2715.111 (2716.04), and 2715.112 (2716.05), to enact sections 2715.011, 2715.041 to 2715.045, 2715.091, 2715.431, 2716.01, 2716.06, 2716.11, 2716.12, 2716.13, and 2716.21, to enact new sections 1911.26, 1911.58, 2715.04, and 2737.01 to 2737.20, and to repeal sections 1911.21, 1911.22, 1911.23, 1911.24, 1911.25, 1911.26, 1911.29, 1911.30, 1911.31, 1911.32, 1911.33, 1911.331, 1911.332, 1911.34, 1911.35, 1911.37, 1911.40, 1911.42, 1911.43, 1911.44, 1911.45, 1911.46, 1911.47, 1911.48, 1911.49, 1911.50, 1911.51, 1911.52, 1911.53, 1911.54, 1911.55, 1911.58, 1911.59, 1911.60, 1911.61, 1911.62, 1911.63, 1911.64, 1919.01, 1919.02, 1919.03, 1919.04, 1919.05, 1919.06, 1919.07, 1919.08, 1919.09, 1919.10, 1919.11, 1919.12, 1919.13, 1919.14, 1919.15, 1919.16, 1919.17, 1919.18, 1919.19, 1919.20, 2715.04, 2715.53, 2715.54, 2715.55, 2715.56, 2737.01, 2737.02, 2737.03, 2737.04, 2737.05, 2737.06, 2737.07, 2737.08, 2737.09, 2737.10, 2737.11, 2737.12, 2737.13, 2737.14, 2737.15, 2737.16, 2737.17, 2737.18, 2737.19, 2737.20, 2737.21, 2737.22, 2737.23, and 2737.24.

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