

## Memorandum in Opposition

### COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #5-A

June 19, 2007

S. 3166-D

By: Senator Volker

A. 8647-A

By: M. of A. Weinstein

Senate Committee: Codes

Assembly Committee: Judiciary

Effective Date: Immediately

**AN ACT** to amend the civil practice law and rules, in relation to situs of property and restraining notices

**LAW AND SECTION REFERRED TO:** CPLR §§ 5201(d), 5222(h), 5225(c), 5229, 5234(b) and 6226

### **THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES** **OPPOSES THIS LEGISLATION**

The bill would add a new subsection (h) to CPLR 5222, governing restraining notices, providing that “[a] restraining notice issued pursuant to this section which has been made an order by endorsement of the court with jurisdiction to enforce the underlying judgment will be a restraining order and, upon delivery to the sheriff or other enforcement officer, will be entitled to priority as set forth in sections [5234 and 6226] as though it were an execution or order of attachment. A court shall issue such a restraining order upon a showing by the judgment creditor that a reasonable basis exists for delaying the issuance of execution with respect to specific identifiable property of, or debt owed to the judgment debtor.” In order for such priority to be retained, the sheriff would have to serve such restraining order within 30 days of its delivery to him, and the judgment creditor would have to bring a turnover proceeding within 180 days of service of the restraining order.

The bill would also amend CPLR 5229 (enforcement before judgment entered) to allow for service of a pre-judgment, but post-verdict or post-decision restraining order of the same type contemplated by the new CPLR 5222(h), and entitled to the same priority. Finally, the bill would add “restraining orders” to “executions” and “orders of attachment” in CPLR 5234(b) (priority among execution creditors) and CPLR 6226 (disposition of attached property after execution issued) and would accord such “restraining orders” the same priority as executions or orders of attachment.

The present bill is an amendment to an earlier bill (S 3166-C/A8547) which in addition to the above changes would have added a new subsection (d) to CPLR 5201 (governing debt or property subject to enforcement of judgments) to the effect that “Except as otherwise provided in article 8 of the uniform commercial code, the situs of property or debt under this section will be New York when the garnishee for such property or debt is subject to the jurisdiction of the courts of this state.” (A similar subsection (c) would have been added to CPLR 5225, governing payment or delivery of property of judgment debtor.) This Committee opposed the earlier bill, doubting the constitutionality of the proposed CPLR 5201(d), and also finding the proposed CPLR 5222(h) to be confusing and unnecessary. The new bill omits the situs-of-debt provision but still would add the new CPLR 5222(h) and related provisions, creating a restraining order conferring priority of execution.

The Sponsor's Memorandum is the same in relation to restraining orders as the Sponsor's Memorandum on the previous bill, and the Committee still fails to see the need for this amendment. According to the Sponsor's Memorandum, due to the restriction on execution on the property of a foreign sovereign pursuant to 28 U.S.C. §1610(c), "[a]t most, courts are only willing to issue to judgment creditors restraining orders against the removal of such property by the sovereign or the garnishee holding the property while the underlying commercial activity question is litigated through the court system. Because restraining notices or orders do not presently afford the diligent judgment creditor priority under the CPLR, the judgment creditor ... may lose priority to another creditor ...."

The scenario of the judgment creditor who is attempting to execute on sovereign property pursuant to the Foreign Sovereign Immunities Act but who is unfairly beaten out by another judgment creditor, is unconvincing because: a.) such judgment creditor would be entitled to an order of attachment under present law, CPLR 6201(1) & (5), FRCP 64, and would have priority as a result of such order under existing CPLR 6226 and 5234 and b.) the posited competing judgment creditor would be trying to enforce his judgment against the same sovereign property and would be subject to the same limitations on execution and attachment, 28 U.S.C. §28 U.S.C. §1610(c), meaning that neither such creditor would have any advantage over the other. For the same reasons, the showing required for the issuance of such a restraining order – "a reasonable basis exists for delaying the issuance of execution with respect to specific identifiable property of, or debt owed to the judgment debtor" – seems unlikely to arise in real life.

Moreover, in equating the new restraining order with an execution, the amendment incorrectly assumes that a CPLR 5222 restraining notice itself causes the seizure and sale of the property of the judgment debtor, which of course it does not. For instance, the amended CPLR 6226 would provide that "Where an execution *or restraining order* is issued upon a judgment entered against the defendant, the sheriff's duty with respect to custody and disposition of property or debt levied upon pursuant to an order of attachment is the same as if he had levied upon it pursuant to the execution." (New language in italics.) The apparent intention of the amendment is to require an execution sale of previously-attached property based only upon the issuance of a restraining order – contrary to the provision of the new CPLR 5222(h) that would require the judgment creditor to bring a turnover proceeding within 180 days of service of the restraining order in order for priority to be retained.

The proposed new "restraining order," joining executions and attachments on the short list of process entitling a judgment creditor to priority, is at best a remedy in search of a wrong. If there is a real-world problem this amendment would cure, it is not described in the Sponsor's Memorandum. But the amendment would add gratuitous uncertainty and complication to a smoothly-functioning and well-understood legal procedure. The existing statutory scheme is not broken, and it should not be fixed.

For the above reasons, the Committee on Civil Practice Law and Rules **OPPOSES** this legislation.

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