

## Memorandum in Opposition

### COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #8

October 29, 2007

S. 3166-E

By: Senator Volker  
Senate Committee: Rules  
Effective Date: Immediately

**AN ACT** to amend the civil practice law and rules, in relation to orders of attachment.

**LAW AND SECTIONS REFERRED TO:** CPLR § 6201

**REPORT PREPARED BY:** Committee on Civil Practice Law and Rules

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

The bill would add a new subsection (b) to CPLR 6201, governing attachments, entitled “post-judgment attachment.” The new subsection would provide that “A post-judgment order of attachment may be granted upon a showing by the judgment creditor that a reasonable basis exists for delaying the issuance of an execution with respect to specific identifiable property of, or debt owed to, the judgment debtor. Such attachment will remain in place subject to further order of the court or issuance of an execution.” The bill would also renumber the existing CPLR 6201 as 6201(a), would rename such subsection (a) “pre-judgment attachment,” and would refer to a “pre-judgment order of attachment” rather than to an “order of attachment” as under the existing statute.

The bill would thus make the existing pre-judgment remedy of attachment available to New York judgment creditors as an alternative to execution, after entry of judgment. Attachment is already available pursuant to CPLR 6201(5) to judgment creditors who are seeking money judgments in New York based upon federal, sister-state or foreign judgments.

There have been earlier versions of this bill. S 3166-C 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.” This amendment would have permitted attachment or execution in New York of property or debts located anywhere in the world, as long as the garnishee was subject to suit in New York. The first bill would also have added a new CPLR 5222(h) and related provisions,

creating a new kind of restraining order conferring priority of execution. The “D” print of the bill omitted the situs-of-debt provision but still would have enacted the new CPLR 5222(h). This Committee opposed both bills, doubting the constitutionality of the situs-of-debt provision and finding the new CPLR 5222(h) to be confusing and unnecessary.

The purpose of the latest version of the bill, according to the Sponsor’s Memorandum, is to “to provide judgment creditors who demonstrate to the court 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, with a post-judgment order of attachment that has the same priority rights afforded to pre-judgment orders of attachment and executions.” The Sponsor’s Memorandum explains that “Pursuant to Section 1610(c) of the F[oreign] S[overeign] I[mmunities] A[ct], a judgment creditor may not issue an execution against the foreign sovereign judgment debtor ‘until the court has ordered such ...execution after having determined that a reasonable period of time has elapsed following the entry of judgment ...’ Even when the court has determined that ‘a reasonable period of time has elapsed following the entry of judgment,’ execution may only issue against property of a foreign sovereign ‘used for a commercial activity in the United States.’” According to the Sponsor’s Memorandum, a judgment creditor who is attempting to satisfy these requirements and to locate property amenable to execution may lose priority to “another creditor who learns through monitoring foreign sovereign debt litigation of the existence of such property, and secures a pre-judgment attachment against it before the judgment creditor can get an order authorizing it to execute against the property.” The Sponsor’s Memorandum concludes that the amendment “would remedy this unfair situation and secure priority for the judgment creditor whose time, efforts and expenditures have located the property in question by authorizing the court to issue post-judgment attachments.”

The premise of this bill, that a judgment creditor can obtain an attachment under the Foreign Sovereign Immunities Act more easily than an execution, is incorrect. The cited FSIA provision, 28 U.S.C § 1610(c), provides that “No *attachment or* execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such *attachment and* execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.” (Emphasis added.) The Sponsor’s Memorandum inexplicably omits the words “attachment or” in its quote of this provision. In fact, the same showing is required for both attachment and execution. It is hard to see why a judgment creditor would choose attachment (which merely freezes the property pending further order of the court) over execution (which commands its delivery to the sheriff for sale) when the same requirements must be satisfied for either remedy.

Moreover the new CPLR 6201(b), unlike the existing statute, would not be limited to money judgments, or to actions in which a money judgment is sought. The bill would thus appear to allow for orders of attachment to be sought in support of judgments granting equitable relief, a dramatic change from existing law.

Present CPLR 6201(5) already provides for an order of attachment where the plaintiff has requested a money judgment and “the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53.” It might seem illogical to deny the right of attachment to New York judgment creditors when the same right is already granted to federal, sister-state and foreign country judgment creditors. (In fact a New York federal judgment creditor is arguably entitled to an order of attachment under existing CPLR 6201(5) and FRCP 64.) But a New York judgment creditor (and a federal judgment creditor) can already proceed directly to execution, unlike the other judgment creditors under CPLR 6201(5), who are by definition still in the process of domesticating their judgments in New York and are thus relegated to the pre-judgment remedy of attachment.

The Sponsor’s Memorandum fails to show any situation, under the Foreign Sovereign Immunities Act or otherwise, where a judgment creditor would be entitled to an order of attachment but not to an execution. As noted above the supposedly problematic FSIA provision, 28 U.S.C §1610(c), applies equally to attachments and executions. This bill thus remains a cure in search of a disease, and the Committee must respectfully oppose it.

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

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