Freezing cash before judgment— Narrow remedies and needed reform

By Kendall B. Coffey and William H. Benson

A familiar plea to many civil litigations is the client's demand to sue a debtor or other party to default and proceed immediately to "freeze" that defendant's bank accounts. For many businessmen, the availability of this remedy seems as obvious as it is necessary to preclude the easy removal of cash assets. Especially in dealing with out-of-state or foreign business interests, funds in a local bank may present not only the sole source of recovery, but also the most readily disposable of any asset by a fast departing debtor.

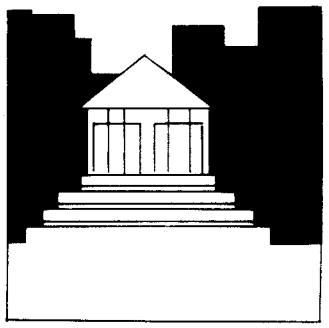
For Florida's courts, however, prejudgment relief against such assets is rarely available. Although allowing the creditor to seek a judgment, Florida law provides little assurance of eventual collectability if cash assets are the only security.

This article analyzes Florida law governing prejudgment relief against bank accounts and other cash assets. After reviewing the limited scope of relief provided by present statutes and caselaw, it concludes with a proposal for remedying current difficulties.

Prejudgment garnishment, replevin and attachment

Prior to 1977, the creditor's path to immediate freezing of his debtor's bank accounts was marked by Chapter 77 of the Florida Statutes.[1] The provisions for prejudgment garnishment set forth certain substantive criteria, a bond requirement and authorized *ex parte* issuance.

Like most of Florida's prejudgment remedies, though, this provision[2] fell under the sword of United States Supreme Court holdings that sustained due process challenges to provisional creditors' remedies, including *Sniadach v. Family Finance Corp. and Fuentes v. Shevin*.[3] In *Ray Lein Const., Inc. v. Wainwright*,[4] Florida's Supreme Court cited these cases when it declared unconstitutional those sections of the garnishment statute allowing prejudgment relief.



Comparing this state's law against the statutory safeguards validated by the United States Supreme Court in *Mitchell v. W. T. Grant Company*,[5] Florida's court found the law wanting because it (1) allowed garnishment upon unverified pleadings; (2) provided that writs be granted by a clerk rather than a judge; and (3) it merely permitted a post-seizure hearing rather than specifically providing for such a proceeding immediately following any prejudgment garnishment. Subsequent to its invalidation in Florida, the legislature has not reenacted prejudgment garnishment.

Although struck down near the time that prejudgment garnishment fell, Florida's statutes for prejudgment replevin and attachment have been legislatively reinstituted.[6] To date, only the replevin statute has been judicially approved[7] although the untested attachment statute should also pass constitutional muster in light of their analogous features. Although currently valid, both procedures are probably unavailable against bank accounts because of their limited scope.

Replevin lies only in favor of a creditor having the immediate right to possess specific personal property.[8] Absent a security interest creating such a right or else a claim of actual ownership to identifiable funds, it would be difficult to demonstrate the necessary possessory entitlement; moreover, except for rare instances in which specific, identifiable cash is located in a safe-deposit box or is otherwise physically insulated, cash assets ordinarily would not constitute personal property for replevin purposes.[9]

A similar definitional problem may preclude application of prejudgment attachment to bank accounts. Although Chapter 76 does not require a possessory interest in favor of an attaching creditor, its scope is confined to "goods and chattels, lands and tenements of the debtor."[10] Because attachment is a creature of statute, it can only be invoked against those assets which are expressly enumerated.[11] Several leading authorities conclude that a debtor's bank account would fall beyond the purview of attachment although no Florida court has directly spoken to the question.[12]

Such a conclusion seems correct because the interest of a bank customer in his account does not constitute a good or chattel.[13] Once a party deposits funds in a checking or savings account, he no longer actually owns the specific, identifiable funds. Rather, it is the bank that owns such monies while the customer gains a chose in action or debt due from the bank to the extent of his deposit.[14]

Thus, neither replevin nor attachment appears to be defined broadly enough to encompass a debtor's funds in a bank account.[15] With no prejudgment garnishment statute currently in force, litigants seeking immediate freezing of bank accounts must presently forego statutory provisional remedies and attempt to invoke the powers of equity.[16]

Injunction

As in other applications of equity, the critical test for permitting an injunction to freeze bank accounts hinges upon proof of irreparable harm which, in Florida, is generally

interchangeable with lack of adequate remedy at law.[17] If the test is applied to bar flatly injunctive relief for any injury theoretically compensable through a money judgment, bank accounts can almost never be frozen prior to judgment. After all, any harm from a debtor's disposal of cash assets would, by definition, be reparable at law since a judgment for damages could always, in theory, replace any loss resulting from disappearance of bank account funds.

In general, American courts do not stand upon so strict a definition of irreparable harm.[18] Although ordinarily disfavoring injunctions to freeze security while actions for damages are pending, most states as well as federal common law[19] recognize exceptions to this rule when recovery is sought against an insolvent or nonresident defendant.

In Florida, however, the effectiveness of legal remedy to produce dollars is currently deemed irrelevant to the adequacy of such remedy. Although earlier decisions seem to consider such factors as a defendant's solvency,[20] recent district court decisions prohibit prejudgment injunctions against cash assets irrespective of a debtor's circumstances. For example, in *Oxford International Bank v. Merrill Lynch, Pierce, Fenner & Smith*,[21] the trial court froze the local account of a nonresident, alien bank charged with conversion of $1.7 million in stolen securities. Quoting dictum from an earlier Florida Supreme Court decision, the Third District held, "The true test is, could a judgment be obtained in a proceeding at law, and not would a judgment produce compensation."[22] The court concluded that because plaintiff sued at law in conversion without claiming any title or lien in the proceeds, equity could not intervene prior to judgment even to prevent funds from leaving this jurisdiction.

A similar result obtained in another 1979 decision, *Digaetano v. Perotti*,[23] in which the trial court ordered a foreign defendant to deposit $33,500 in the court registry pending final determination of the merits. On appeal the Third District reversed ruling that, because plaintiff's conversion claim over a failure to return a loan commitment deposit could be processed into a money judgment, he was precluded from injunctive relief. In its opinion, the court cited its earlier holding in *Adjmi v. Pankonin*[24] for the proposition that so long as the suit's ultimate object was a money decree, injunctive relief is not obtainable.

With these holdings, the Third District has squarely rejected the more flexible approach of other states as to adequate legal remedy by concluding that it is invariably present whenever money judgment can, in theory, satisfy the claimant. Two other cases, however, suggest limited room for injunctive maneuvering.

In the 1961 decision of *Belks Dept. Store, Miami, Inc. v. Scherman*,[25] the Third District approved a prejudgment order directing the debtor's bank to pay over proceeds claimed by the plaintiff to a receiver in an action for an accounting, receivership and injunction. Correspondingly, in *ITT Community Development Corp. v. Barton*, [26] a Florida federal district court concluded in 1978 that the equitable character of plaintiff's claim for constructive trust warranted a prejudgment injunctive freeze upon bank accounts of its former chief engineer who allegedly accepted kickbacks from contractors.

Because these cases suggest that the distinction between legal and equitable actions may be determinative, they commend careful pleading to improve a party's chances for freezing a bank account through an injunction. Indeed, even though the plaintiff in *Belk's Dept. Store* apparently could have sued at law for breach of contract, the inclusion of claims for an accounting and receivership apparently made prejudgment injunction available. Conversely, had the party in *Digaetano* seeking return of its deposit from an offshore lender prayed for an accounting, restitution or constructive trust, arguably the injunctive order it obtained might have been affirmed. Particularly in light of procedural innovations minimizing the former separation of law and equity, the use of that differentiation to determine the availability of prejudgment relief may seem questionable.

Nevertheless, so long as cases hold that "the basic distinction between law and equity has been preserved," the creditor should attempt to plea his claim in equity.[27]

In addition to such theories as accounting,[28] restitution[29] and recision,[30] or claiming a title or lien against funds,[31] a theory of constructive trust presents an especially flexible vehicle for traveling in equity.[32] For example, in several Florida appellate cases, a broker's claim for commissions, normally a claim at law, was sustained as a constructive trust since a particular fund had been designated as the source of the broker's compensation.[33] Additionally, in a recent Third District decision, the court, on cryptically described facts, sustained an injunction because plaintiff amended to state a breach of fiduciary duty rather than a debtor-creditor relationship.[34]

While these holdings cannot be squared with cases flatly excluding equity when claims are susceptible to monetary recompense, they are consistent with a principle set forth in the 1947 ruling of *Ponce v. Demos.*[35] In that case, the Florida Supreme Court held that "in borderline cases" the trial judge has "broad discretion" to choose whether an action will be deemed equitable or legal and that, "if the remedy at law is not as sensitive to the prompt administration of justice as the remedy at equity, then the latter should be adopted."[36]

Thus, when an action sounds in equity but seeks relief ultimately to be transformed into money judgment, the trial judge is accorded "broad discretion" to determine whether equitable relief is available. In addition to considering usual standards for an injunction,[37] the court should consider factors referenced in Florida decisions specifically involving bank accounts including the definiteness of the amount claimed,[38] whether the subject fund was contemplated by the parties as a source of plaintiff's compensation[39] as well as any title or lien against the fund in favor of plaintiff.[40] Moreover, several factors previously given little emphasis in this state, such as insolvency and nonresidency, should be revisited.[41] Finally, a sensitivity to the needs of justice should govern any borderline case.[42]

Sequestration

In certain limited circumstances, a creditor may freeze bank accounts prior to judgment through F.S. §68.03.[43] This relatively little known provision allows the court to sequestrate or restrain funds or other property in the hands of a resident defendant which belong to a nonresident defendant who is located outside Florida at the time relief is sought. Although it clearly encompasses bank accounts,[44] the statute contains several preconditions similar to those limiting injunctive relief. The underlying action must sound in equity and the claim sued upon must be in a liquidated amount that is presently due.[45]

Notwithstanding these significant restrictions, the plaintiff whose case can be tailored to meet these criteria should include sequestration among his requests for prejudgment relief. Because this procedure is prescribed by statute for equitable claims, the mere fact that such a claim is compensable in money damages should not bar its application. To contend otherwise would render the statute almost completely superfluous since liquidated claims in equity will invariably be capable of reduction to

monetary judgments.

Therefore, while a dearth of authority exists on this provision,[46] it remains part of the Florida Statutes and should be utilized whenever permitted by the circumstances of the case.

Conclusion: Reenactment of prejudgment garnishment

Although uncertainty touches several facets of Florida law governing prejudgment relief against bank accounts, two conclusions are manifest: First, this state's lawmakers should pass a new prejudgment garnishment law. Second, they are constitutionally authorized to enact such a remedy.

The practical necessity for such relief is especially clear in a state such as Florida where out-of-state parties often undertake transactions fraught with potential liabilities while bringing no assets other than cash within the jurisdiction of our courts. Even for local parties, bank accounts are among the most readily transferred and easily secreted of any asset. Strong evidence of need for new legislation is exemplified in cases such as *Oxford Bank* in which an alleged victim of a stolen securities network could not keep what may have been the only source of possible recompense from leaving the country.

It is equally certain that the present status of law will authorize such a remedy so long as its procedural safeguards match the criteria enunciated in United States Supreme Court decisions. In *Ray Lien Construction, Inc., v. Wainwright*,[47] the Supreme Court acknowledged that a properly drawn provision could pass constitutional muster, even as the court struck down the prejudgment garnishment statute for failing to satisfy fully the safeguards endorsed in *Mitchell v. W. T. Grant Company*.[48]

Correspondingly, in *Gazil, Inc., v. Super Food Services, Inc.*,[49] the court gave passing grades to reenacted replevin based on conformance with *Mitchell* standards. Using those criteria as a checklist, the court proceeded to detail the essential components of a valid prejudgment creditor's remedy: (1) verified factual allegations showing a right to the requested relief, (2) determination of the application by a judicial officer rather than ministerial official, (3) allegations showing necessity for relief, including the fact that a debt is due or the imminence of waste or concealment, (4) the moving party must post a bond to secure the defendant, and (5) the debtor must be entitled to an immediate hearing on the issue of prejudgment seizure.[50]

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As a result, this state needs only to incorporate the specific *Mitchell* safeguards cited in *Gazil, Inc.*, to assure passage of a law that will probably satisfy present due process strictures. Although one can certainly argue that a prejudgment garnishment statute should pass constitutional muster in each of the *Mitchell* safeguards, to avoid creating undue constitutional uncertainty the most prudent course may commend passage in a form calculated to assure judicial approval.

Each of these remedies, however, is more limited in scope than prejudgment garnishment and some may turn, in part, on anachronistic distinctions between law and equity. None can fully replace that important remedy which the courts have removed and which the legislature should restore. □

[1] *See*, FLA. STAT. §§77.031, .04, .06 and .07 (1977).

[2] The statute authorized garnishment to enforce a "debt" when the movant believed that the defendant would not have sufficient assets within the county in which suit was filed to satisfy plaintiff's claim. FLA. STAT. §77.031(1) (1977).

[3] 395 U.S. 337 (1969) (invalidating Wisconsin's prejudgment wage garnishment). 407 U.S. 67 (1972) (invalidating Florida and Pennsylvania statutes for summary prejudgment replevin). *See also*, Mitchell v. Grant Co., 416 U.S. 601 (1975) and North Georgia Finishing, Inc., v. Di-Chem, Inc., 419 U.S. 60 (1975).

[4] 346 So.2d 1029, 1032 (Fla. 1977).

[5] 416 U.S. 600 (1974). In *Ray Lien Construction*, the Florida Supreme Court relied upon its previous analysis of *Mitchell* which prompted the invalidation of Florida's attachment law in Unique Caterers Inc., v. Rudy's Farm Co., 338 So.2d 1067 (1976). That latter decision was criticized by a student author for its rigid insistence that due process required the precise procedural safeguards endorsed by *Mitchell*. *See, Note*, 29 U.FLA.L.REV. 544, 564-565 (1977).

[6] *See* FLA. STAT. §§76.01 *et seq.* (1979) (Attachment), FLA. STAT. §§78.01 *et seq.* (1979) (Replevin).

[7] Gazil, Inc., v. Super Food Services, Inc., 356 So.2d 312 (Fla. 1978).

[8] FLA. STAT. §78.01 (1979). *See, e.g.*, Bringley v. C.I.T. Corp., 119 Fla. 529, 160 So. 680 (1935). *See also*, Halder v. Volusia County Bank & Trust Co., 96 Fla. 882, 116 So. 861 (1928) "(T)he primary object of a replevin action is the recovery of property in specie." *Rasukin*, 2 FLA. CREDITOR'S RIGHTS MANUAL, Ch. 3, at 32.

[9] Ordinarily, money on deposit in a bank account is not specifically identifiable for purpose of authorizing replevin. *See generally*, 66 AM.JUR. 2d, *Replevin* §13, at 844. Cash that is marked, labeled or otherwise sufficiently set aside for identification, however, can be replevied. 77 *C.J.S. Replevin* §12, at 19. Commissioner of Internal Revenue v. Wilcox, 327 U.S. 404 (1946).

[10] FLA. STAT. §78.01 (1979).

[11] Post v. Carpenter, 3 Fla. 1 (1850); First Nat. Bank v. Willingham, 36 Fla. 32, 18 So. 58 (1895). *See generally*, 16 AM.JUR. 2d, *Attachment & Garnishment*, §99, at 632.

[12] Williams, *Creditors' Prejudgment Remedies: Expanding Strictures on Traditional Rights*, 25 U.FLA.L.REV. 60, 65 (1972); 13 FLA.JUR. 2d, *Creditors Rights* §54, at 506.

[13] Grillo v. City Nat. Bank of Miami, 354 So.2d 959, 960 (Fla. 3d D.C.A. 1978).

[14] *E.g.*, City of Miami v. Shutts, 59 Fla. 462, 51 So. 929, 931 (1910). *Compare*, 7 *C.J.S. Attachment* §50 at 305. According to that authority, attachment reaches "bank accounts, . . . money, a sealed parcel or a locked safety deposit box belonging to defendant and wages." *Id. See also*, 6 AM.JUR. 2d, *Attachment & Garnishment*, §99, at 632.

[15] In distinguishing attachment from garnishment, one source observes ". . . an attachment involves only the rights of a creditor with