New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 238—NO. 124 FRIDAY, DECEMBER 28, 2007 ALM

OUTSIDE COUNSEL

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N.Y. vs. Federal Provisional Remedies for Choice of Forum

Forum selection may be the most important decision made by litigation counsel in a matter where diversity jurisdiction is supportable or a nonexclusive federal claim may be asserted. The import of this decision is often most immediate when the action to be commenced will seek extraordinary pretrial relief, i.e., a temporary restraining order, preliminary injunction, attachment, receivership, or notice of pendency.

Such forum choice should not be informed by instinct alone.

Some states have sought to reduce or eliminate procedural variations between state and federal practice by adopting, in whole or in part, rules identical to, or substantively the same as, the Federal Rules of Civil Procedure. New York has repeatedly considered, but never adopted, that approach, and substantial differences exist in state and federal procedure in New York.

The forum differences in New York affecting commencement and pleading were reviewed in an earlier article by the authors.[1] Procedural differences affecting motion practice, discovery, trial and evidence, and appeal must also be considered, but are not addressed in this article. The topic considered here is procedural variations between New York state and federal practice concerning provisional remedies. The emphasis here will be upon the practical differences concerning provisional remedies likely to influence the choice of forum, rather than an exhaustive catalog of all differences.

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Provisional Devices Generally

The provisional remedies available in federal court actions are addressed in Federal Rule 64 (significantly, including attachment), Rule 65 (temporary restraining orders and preliminary injunctions), Rule 66 (receivers), and 28 U.S.C. §1964 (lis pendens).

Rule 64 provides that the state law remedies for the seizure of property, specifically including attachment, are available in federal court. The law of the state in which the district court sits governs "the circumstances and…manner" of the remedy sought. The state-law counterpart in New York, Article 62 of the CPLR, sets out in detail the procedure applicable to an attachment. Thus, the same rules apply to attachment in federal and state courts in New York, and any variations that exist will arise from case law.

In contrast, Rule 65 sets forth an independent federal rule for temporary restraining orders and preliminary injunctions. Article 63 of the CPLR sets forth in detail the procedure for such restraints in state court.

Rule 66 simply confirms the pre-existing power of the federal courts to appoint federal equity receivers. The appointment and powers of a state court receiver are set forth in Article 64 of the CPLR.

The procedure concerning lis pendens is the same whether an action is filed in state or federal court.

Attachment

Federal courts have no independent "federal" attachment device or procedure. Rather, the same attachment mechanisms available under state law are applied whether an action is commenced in state or federal court located in a given state. Attachment jurisdiction is generally "based on the theory that a state has comprehensive authority over all property within its territorial limits and may seize such property for payment of claims asserted in actions in its courts."[2] Thus, attachment jurisdiction is different in important respects from in personam jurisdiction. Although jurisdiction based on property is usually subject to the same minimum contacts test that is applied to in personam actions, this is not the case where quasi in rem jurisdiction is used to attach property to collect a debt.[3]

The New York attachment statutes and rules permit the issuance of an order of attachment without notice, but require the plaintiff promptly to move on notice for an order confirming the attachment. These procedures were enacted to comply with procedural due process guidelines set down in a series of U.S. Supreme Court cases following *Fuentes v. Shevin*, 407 U.S. 67 (1972).

Among other things, CPLR §6201 affords quasi in rem jurisdiction over, and provides security for a potential judgment against, a nonresident.[4] Subsection 6201(1) enables a plaintiff to obtain quasi in rem jurisdiction over defendants not subject to service within New York State. However, on its face, subsection 6201(1) is not limited to this jurisdictional purpose and authorizes an attachment against any "non-domiciliary residing without the state or…a foreign

corporation not qualified to do business in the state," without reference to amenability to service.[5] Arguably, so broad an interpretation would be unconstitutional.[6] The federal courts have consistently declined to grant nonresident attachments for security under 6202(1) in the absence of a strong showing of need (such as is required under the other grounds for attachment).[7] Thus, as discussed below, the practitioner seeking a 6201(1) attachment for security against an out-of-state defendant may consider filing a state court action. Any such attachment remains in effect after removal, if any, to federal court, just as it would in state court.[8]

State courts may be more likely to accept the argument that the statute should be enforced as written, i.e., that the proponent's burden is merely to show "that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in §6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff."[9] Since the express language of 6201(1) requires only that the defendant is a nonresident nondomiciliary or an unqualified foreign corporation, it may be argued that no further equitable showing of need is required.

In any event, an attachment under CPLR §6201 must be ancillary to an underlying action seeking a money judgment. It is an unresolved issue under New York law (state and federal) whether the pending action that is the sine qua non of every attachment must be a New York action. It is possible (but as yet undetermined) that a federal court would be more amenable to an action filed to seek an attachment in connection with an unresolved action pending outside the state.

A further point the practitioner should consider in deciding upon a forum in a case where an attachment will be sought, is appellate review. In state court, the grant, denial, continuation or modification of any provisional remedy is appealable as of right, while in federal court, no such appeal lies from an attachment.[10]

Preliminary Injunctions

• ***And Temporary Restraining Orders.*** In contrast to the attachment remedy, temporary restraining orders (TROs) and preliminary injunctions are subject to distinct procedural provisions in state and federal courts in New York. Nonetheless, case law defines the familiar elements for such relief in both forums: the lack of an adequate remedy at law, the threat of irreparable injury, a likelihood of success on the merits and a balance of hardships.

Until recently, a significant distinction between federal and New York State practice was the question of whether an applicant must seek to notify other parties before applying for a TRO. (In both court systems, notice to all parties is required for issuance of a preliminary injunction.) While an ex parte TRO is permissible in either court, Fed.R.Civ.P.65(b) requires an affidavit explaining why notice cannot be given and what efforts, if any, have been made to serve such notice. The CPLR does not contain such a requirement but the Rules of the Commercial Division of the Supreme Court, effective Jan. 17, 2006, now provide that absent "significant prejudice by reason of giving notice, [an ex parte] temporary restraining order will not be issued." Similarly, The Uniform Rules for the Trial Courts were amended effective Oct. 1, 2006 to require as a prerequisite to ex parte relief an "affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by giving the notice."[11] Thus, New York State practice now approximates that in federal court on this issue.

One point of common ground is that both state and federal courts in New York preclude the use of a preliminary injunction as an attachment for an unsecured debt.

There is a common perception that an ex parte TRO is easier to obtain in New York State Supreme Court as distinguished from federal court. It remains to be seen whether the referenced changes to Commercial Division and Trial Court rules will moderate that view.

Perhaps because of this perception, removable actions (actions where the parties are statutorily diverse or a non-exclusive federal claim is alleged) have often been filed in state court. Where a TRO issued before removal is effected by the defendant, another distinction between federal and state court practice becomes significant. By federal statute, 28 U.S.C. §1450, all injunctions and other orders entered in state court prior to removal remain in effect following removal. However, a federal TRO cannot remain in effect more than 10 days absent court order or stipulation, whereas the CPLR merely requires that the "Court shall set the hearing for the preliminary injunction at the earliest possible time."[12]

Upon removal, the state court TRO effectively becomes a federal court TRO, and the 10-day period begins to run. The Supreme Court has announced the following rule: "an ex parte temporary restraining order issued by a state court prior to removal remains in force after removal no longer than it would have remained in effect under state law, but in no event does the order remain in force longer than the time limitations imposed by Rule 65(b), measured from the date of removal."[13] Under New York law, a TRO that does not otherwise specify a time limitation remains in force until the preliminary injunction hearing.[14]

In practice, the New York State Supreme Court TRO often continues by its terms until the date of the preliminary injunction hearing. Thus, removal to federal court will often mean that a state TRO will expire 10 days after removal, absent extension by federal court order. In any event, following removal, an early conference with the federal court is in order to clarify the duration of a TRO entered in state court, as well as to set the preliminary injunction schedule.

No appeal lies in federal court from a TRO, but federal practice does permit review of preliminary injunctions, which is one of the few exceptions to the general bar against interlocutory appeals.[15] An order continuing the TRO beyond the period of statutory authorization, having, as it does, the same practical effect as the issuance of a preliminary injunction, is also appealable.[16] Under state court practice, CPLR §5701(a)(2)(i), an appeal of right from the lower court to the appellate division exists from any order granting, refusing, continuing or modifying any provisional remedy.

One point of common ground is that both state and federal courts in New York preclude the use of a preliminary injunction as an attachment for an unsecured debt.[17] In *Grupo Mexicano,* the U.S. Supreme Court

has held that federal courts do not have the power, as an alternative to a state-law attachment, to issue preliminary injunctions to prevent a defendant from transferring assets in which no interest or lien is claimed. The Court noted that such an all-purpose power would have rendered Rule 64, incorporating state law attachment remedies, virtually without effect. The New York Court Appeals in the *Credit Agricole* case similarly held that state courts do not have such an all-purpose power to secure future judgments, and thus "an unsecured creditor suing to collect a debt [is] not entitled to preliminary injunctive relief to prevent the debtor's dissipation of assets prior to judgment."

Receivership

The appointment of federal equity receivers is the subject of Federal Rule 66. However, the rule does not purport to exhaust the subject. Rather the rule incorporates "the practice heretofore followed in the courts of the United States."[18] The district courts have broad equitable powers in connection with the appointment of a receiver and the exercise of such equitable powers are reviewed under the abuse of discretion standard. Receivers may be sought and appointed in federal court on the motion of creditors, stockholders, or the government, importantly including the SEC and the CFTC. Federal courts may grant a receiver powers that include the management of a business entity, such as the authority to sell assets, sue, and file for protection of the bankruptcy laws.[19]

State equity receivership is, generally, a more circumscribed remedy. CPLR §6401(a) provides for the appointment of a receiver to take control of specified property during the pendency of an action. Under that section, only "a person having an apparent interest in property which is the subject of an action" has standing to seek appointment of a receiver. And, the motion is only to be granted "where there is a danger that the property will be removed from the state, or lost, materially injured, or destroyed." In practice, the most common use of receiverships in New York State courts is in single asset real estate cases.

Although bankruptcy courts are expressly prohibited from appointing receivers, they can continue a prepetition receiver's appointment.[20] When a state or federal court (nonbankruptcy) receiver is appointed, and a bankruptcy petition is subsequently filed, absent a court order to the contrary, the receiver must deliver to the trustee (or debtor in possession) any of the debtor's property that he holds. However, in single asset real estate cases, the bankruptcy courts have allowed receivers to remain in place in some cases, particularly where the receiver is well-established and there is little chance of a successful reorganization.[21] The receiver left in possession by the bankruptcy court has no role in the bankruptcy case other than to manage and preserve the property in his or her charge in accordance with the appropriate appointing orders.

As an alternative to receivership, both state and federal courts have the less commonly exercised power to replace the management of a corporation or other legal entity by order.[22]

Lis Pendens

By federal statute, where state law authorizes a lis pendens to be filed at the state level concerning a federal claim, the state procedure is made effective for federal actions.[23] The CPLR expressly allows a notice of pendency to be filed with the clerk of the county where the property is located "in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding to recover possession of real property."[24] This makes sense, of course, from the perspective of a mortgage purchaser, or title insurer, who thus needs to check the block and lot with one county clerk, and not also with the district court. Where a federal action concerning real estate property results in a lis pendens, any motion practice concerning the lis pendens nonetheless remains in federal court.[25]

Conclusion

Litigators who enjoy the luxury of a choice of New York forums should consider variations in state and federal procedure. We have explored here procedural variations concerning provisional remedies, but the practitioner should also consider differences concerning the commencement and pleading stage, motion practice, discovery, trial and evidence, and appeal.

1. NYLJ April 3, 2006 S4, (col. 1). The trend is arguably away from state/federal conformity. See John B. Oakley, "A Fresh Look at the Federal Rules in State Courts," 3 NEV. L.J. 354 (Winter 2003/2004).

2. Restatement (Second) of Judgments §8 Cmt. a (1982). See Fed. R. Civ. P. 64 ("all remedies providing for seizures of person or property for the purposes of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held.").

3. *CME Media. Enterprises B.V. v. Zelezny,* 2001 WL 1035138 at *3 (SDNY 9/10/01).

4. *Cargill, Inc. v. Sabine Trading and Shipping Co.,* 756 F.2d 224, 227 (2d Cir. 1985).

5. CPLR 6201(1). See e.g. *United Pac. Ins. Co. v. Ackerman*, 1980 U.S. Dist. LEXIS 9814 (S.D.N.Y. Jan. 15, 1980).

6. Cf. *Elton Leather Corp. v. First General Resources Co.,* 138 A.D.2d 132, 529 N.Y.S.2d 769 (1st Dept. 1988) (upholding attachment and suggesting that provision strikes balance between due process and utility of attachment). See *Burrell Color, LLC v. Burrell,* 9 Misc. 3d 1129(A), 2005 WL 3076323, 2005 N.Y. Slip Op. 51848(U), at *4 (N.Y. Sup. Feb. 25, 2005) (finding equal protection problem with broad interpretation); *Vath v. Israel,* 80 Misc. 2d 759, 760-61, 364 N.Y.S.2d 97, 99 (Queens County 1975) (finding provision violated Fourteenth Amendment Due Process).

7. *United Pac. Ins. Co. v. Ackerman,* 1980 U.S. Dist. LEXIS 9814 (S.D.N.Y. Jan. 15, 1980) (collecting cases). Compare, *Mindlin v. Gehrlein's Marina Inc.,* 58 Misc. 2d 153, 295 N.Y.S. 2d 172, 174 (1968)

8. 28 U.S.C. §1450.

9. CPLR 6212(a). See *Elton Leather Corp. v. First General Resources Co.,* 138 A.D.2d 132, 529 N.Y.S.2d 769 (1st Dep't 1988).

10. Compare CPLR §5701(a)(2)(i) with *Kensington Int'l, Ltd. v. Republic of Congo,* 461 F.3d 238, 241 (2d Cir. 2006).

11. 22 NYCRR §202.7(f).

12. Fed. R. Civ. P. 65(b); CPLR 6313(a).

13. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters,* 415 U.S. 423, 94 S. Ct. 1113, 39 L.3d 2d 435 (1974)

14. See *People v. Asiatic Petroleum Corp.,* 45 A.D.2d 835, 836, 357 N.Y.S.2d 542, 544 (1st Dep't 1974) (holding that a TRO is vacated "upon the disposition of the motion for the preliminary injunction.")

15. *Penn. Motor Truck Assoc. v. Port of Phila. Marine Term. Assoc.,* 276 F.2d 931 (3d Cir. 1960); 28 U.S.C. §1292(a)(1).

16. *In re Pan American World Airways, Inc.,* 306 F.2d 840, 843 (2d Cir. 1962).

17. *Grupo Mexicano de Desarrollo v. Alliance Bond Fund Inc.,* 527 U.S. 308 (1999); *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 729 N.E.2d 683 (March 30, 2000).

18. Fed.R.Civ.P. 66. See also 28 U.S.C. §959.

19. See, e.g., *S.E.C. v. Credit Bancorp, Ltd.,* 297 F.3d 127, 130 (2d Cir. 2002).

20. See 11 U.S.C. §105(b); 11 U.S.C. §543(d)(1).

21. See *In re 400 Madison Ave., LP,* 213 B.R. 888 (Bankr. S.D.N.Y. 1997) (state court receiver left in possession following Chapter 11 filing in a single asset real estate case).

22. *Malhas v. Shinn,* 597 F.2d 28, 31 (2d Cir. 1979) (affirming where the district court had "undertaken the unusual task of providing proper management" for an entity where existing management was removed for fraud and an interim board of directors was installed by the court at the request of the SEC).

23. 28 U.S.C. §1964.

24. CPLR §6501; CPLR 6511(a). See also RPAPL §1331 (filing mandatory in mortgage foreclosure actions).

25. See *In re Harry C. Partridge, Jr. & Sons, Inc.,* 121 B.R. 2, 4 (Bankr. S.D.N.Y. 1990); *Cayuga Indian Nation of N.Y. v. Fox,* 544 F.Supp. 542 (N.D.N.Y. 1982).