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“RULE B” ATTACHMENTS UNDER THE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS—A POWERFUL, *EX PARTE*, REMEDY.

By: George M. Chalos, Esq.

Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims (hereinafter “Rule B”) permits a claimant having an in personam claim against a defendant that is cognizable in admiralty to attach the goods or chattels of the defendant, or the latter's credits or effects in the hands of garnishees, within the district, when the defendant cannot be found in the district. A Rule B attachment permits the assertion of jurisdiction over a defendant's property located within the district even though the court has no in personam jurisdiction over the defendant. Attachment is not necessarily dependent on the existence of a maritime lien or preferred mortgage lien, but necessitates merely an in personam claim against the defendant that falls within U.S. admiralty jurisdiction..

The attachment is not restricted to maritime property (ships, cargo, freight, bunkers), but may be taken against any goods or chattels of the defendant located within the jurisdiction of the federal district court seized of the claim, as well as the credits or effects of the defendant in the hands of third parties. Hence, it is used to seize both tangible and intangible assets, including, notably, bank accounts.

Because Rule B jurisdiction is in personam, if the defendant makes a general appearance in the action and the plaintiff's claim is allowed, the judgment is enforceable against all of the defendant's property, and not only against the property seized as in the action in rem. If the defendant fails to appear, however, the plaintiff's judgment is enforceable only against the value of the property attached. In addition, the defendant can choose to make a “special” or “limited” appearance, and merely appear for the purpose of seeking to vacate the attachment. By making a special or limited appearance, the defendant does not subject all of its assets to the jurisdiction of the court.

For maritime actions involving a writ of attachment pursuant to Rule B of the Supplemental Rules of Maritime Attachment, the procedure begins with the filing of a verified complaint. This sort of action is entitled to priority, in recognition of the fact that there is often

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the need to act quickly, before the moveable assets which are the subject of the seizure request can be removed from the jurisdiction of the court. In fact, the Rules also reflect that "exigent circumstances" may exist which require expedited consideration and handling of the initial application to the court.

Once the verified complaint is filed, the procedure routinely provides for ex parte issuance of the requested writ of attachment pursuant to Rule B. Although ex parte, these procedures pass constitutional muster because of the safeguard in Rule E enabling the defendant or any person claiming an interest in the property to seek a hearing immediate after the property is seized. At the Rule E hearing, the plaintiff is the party who has called for the seizure of the property in question and thus has the burden to show why the attachment should not be vacated. That the plaintiff has carried the burden has been defined as a preliminary determination, and the form of evidence that may be considered is within the discretion of the court.

While Rule B requires the presence of property within the jurisdiction of the court, the Rule also requires that the "defendant cannot be found within the district." The defendant may be considered "found" in the district, by conducting regular business and maintaining offices, but may not defeat a Rule B attachment by designating, after suit has been filed, an agent in the district for service of process. Once an appearance has been filed by the claimant of the property subject to Rule B attachment, additional Rule B writs may be disallowed in the same action, since the purpose of Rule B, that is, to secure that appearance, is no longer served. The more traditional view, however, is that the relevant period for determining if the defendant is "found within the district" by its presence and activities is at the time of the attachment. The authorities are split as to whether the presence of a vessel husbanding agent, prior to the attachment, is alone sufficient to defeat Rule B process. Mere presence of an agent for service of process in the district, in the absence of ongoing business activities of the defendant, is not sufficient to defeat a Rule B attachment.

If the attachment is upheld following a hearing pursuant to Rule E, the amount of security may be resolved by agreement of the parties or by the court. In the absence of agreement, the Rules require the court to fix the principal of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim "fairly stated with accrued interest and costs. . . ." The Rule provides for a maximum of "twice the amount of the plaintiff's claim or the value of the property on due appraisal, whichever is smaller." Despite the plain "whichever is smaller" language of the Rule, some courts explicitly "err on the high side" in setting the bond. The court has latitude in setting the amount of the bond, which properly includes accrued interest and costs. A plaintiff may attempt to re-arrest or re-attach property, after accepting security, only on a showing of fraud or misrepresentation, or mistake by the court in setting initially the amount of security.

The experienced litigant frequently accepts a P & I club letter of undertaking as security standing in place of a vessel or other property, and enabling its release, or in lieu of arrest in the first place; but the courts will not force a plaintiff to accept a letter of undertaking in lieu of a bond. Club letters may reserve the right to challenge the propriety of the arrest, or the amount of the security, after the property is released. A number of courts will not revisit the fact or amount of security until trial, if it has been provided by agreement, and without the involvement of the court in setting its amount. Where the court has determined the amount of security, on the other

hand, the Rule expressly provides for a reduction in the amount of security "for good cause shown.

If the court requires security for the benefit of a plaintiff, it is often met with a request for counter security by the opposing party. The Rules specifically provide, in limited circumstances, that a person who has provided security for attachment in the initial action, may file a counterclaim and seek security on the counterclaim. In practice, the requirement of counter security is conservatively applied, and any request for counter security must be based on something more than a claim for wrongful attachment, for which courts routinely deny the request. In ruling on motions for counter security, courts often invoke general equitable principles and the policy against imposition of burdensome costs on a plaintiff that might, otherwise, prevent it from bringing suit.

In conclusion, while we trust the foregoing is self-explanatory, we stand ready to respond to any and all inquiries you, your colleagues and/or your clients may have. Of course, any specific substantive liability analysis will necessarily depend on the facts and circumstances of the underlying incident. We are available to assist in any way we can, and for your convenience, George M. Chalos, Esq. can be contacted either at the above details, or on a 24/7 basis on his mobile telephone (+516-721-4076). Additionally, if more convenient, Mr. Chalos can be contacted via Email at gmc@codus-law.com.