

# Playing to a tough audience: Seizing a principal's assets without obtaining a judgment

by ERA Legal Counsels

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*"Money is not the most important thing in the world. Love is. Fortunately, I love money."*

— Jackie Mason

For the prolific sales rep victimized by the withholding of commissions due, few moves will command greater attention from the principal than exercising the lawful self-help remedy of grabbing those unpaid commission dollars, then pursuing litigation.

"Lawfully?" you ask. "Commissions are unpaid or underpaid every day," you blurt out. "That's the life of a rep. Since when does that mean we can seize first and ask questions later?"

You are going to prove tough to convince.

Consider the sales rep firm Forefront Machining Technologies Inc. out of Dayton, Ohio. Forefront entered into an oral contract with Sarix, SA, a Swiss manufacturer of 3D micro EDM machines and its New York-based distributor, Alouette Tool Company Ltd. (collectively, "Alouette"), for a 10 percent commission on sales it generated. Forefront alleges it delivered Silfex Inc. as a customer for Alouette and was responsible for the sales of 23 machines to Silfex. In response to such success, Alouette failed to fully commission Forefront. Sound familiar? And you know what happened next, right?

Termination.

Fortunately for Forefront, the termination notice received from Alouette acknowledged both the parties' agreement and that Forefront would get paid at least some commissions on certain additional machine sales to Silfex.

Inexplicably, it took Forefront over two and a half years to take action, but eventually its counsel sent a demand letter to Alouette seeking to get caught up on commissions owed. When Alouette failed to meet the demand, Forefront filed a six-count complaint in the Ohio state court, including for treble (3x) damages under the Ohio sales rep statute.

This is a relatively ordinary tale so far, and perhaps not worth writing about, especially to such a skeptical audience. It's what happened next that proves noteworthy.

Together with the complaint, Forefront filed a motion for "pre-judgment attachment" of Alouette's assets, a motion that was granted the very same day. Alouette received no notice that this motion was filed, and no opportunity to appear at the hearing where the Ohio judge ordered the levying officials to "attach" or seize certain of its assets, namely four machines sold to Silfex, and deliver them to the court to be held in escrow.

Let that sink in for a minute. With no opportunity to defend itself against charges just filed by its former sales rep, four Alouette machines were seized under court order from one of its customers.

All of a sudden you sound like a lawyer saying, “that sounds a lot like an unconstitutional deprivation of property without due process.” It’s a valid concern you raise, and well put.

In what must have felt like adding insult to injury, the court further ordered that Alouette could only recover its machines by posting a bond equal to their value. This was to protect the rights of the plaintiff, Forefront, whose not yet contested papers showed probable cause to support its motion. The attachment order did not specify a particular dollar amount claimed by Forefront; it simply identified the property of Alouette subject to seizure.

Two days later, a notice of these proceedings was provided to Alouette for the first time, together with a copy of the attachment order already entered and a notice that it had the right to request a hearing on the matter. This is the process intended to protect a defendant’s due process rights.

Shortly thereafter, Alouette took advantage, filing a motion for such a hearing, in which it sought to modify or discharge the attachment order. It then exercised its right to move the case to the Dayton federal court.

A federal forum meant a different judge would take over the proceedings, and that judge would now hear Alouette’s motion attacking the attachment order. Among the requirements for a pre-judgment attachment of a defendant’s property in Ohio is the filing of an affidavit showing: 1) the defendant is a foreign corporation and/or not a resident of Ohio; 2) the nature and amount of the claim; 3) a description of the property sought to be attached, including its approximate value; and 4) a showing of probable cause to support the attachment.

The Ohio pre-judgment attachment statute defines the “probable cause” requirement to mean that “it is likely” a plaintiff seeking attachment “will obtain judgment against the defendant ... that entitles the plaintiff to a money judgment that can be satisfied out of the property that is the subject of the motion.” In other words, the judge must ascertain from the outset that a plaintiff seeking to recover money will most probably prevail and that the proposed attachment will make the plaintiff whole.

Alouette’s motion broadly disputed virtually all of Forefront’s allegations, including the existence of a deal to pay 10 percent commissions, and that Forefront was likely to prevail. However, after holding an evidentiary hearing and applying the Ohio standards, the federal court, citing the termination notice, agreed this past February that Forefront had satisfied the statutory burden to obtain an order of attachment, including the probable cause requirement.

Then the case grew more interesting.

For attachment purposes, the court found Forefront had met its burden with respect to the value of the machines, tooling, and subcontracting work contracted for pre-termination in the total amount of \$271,000. But the Court also ruled that Forefront had not shown it was entitled to a judgment of equal value to the four machines it sought to attach.

Based simply on the initial affidavit submitted and the early evidentiary hearing it had conducted — before the parties engaged in the full discovery process — the court decided that Forefront had not yet demonstrated that its claims, which included four commissions on several machines sold post-termination and not yet shown to be due, were worth the value of the attached machines of over \$2.4 million.

In addition, the treble damages claimed by Forefront under the Ohio sales rep act, which requires meeting the high bar of showing that Alouette engaged in “willful, wanton, or reckless conduct” or “bad faith,” was likewise not yet met.

As a result, Alouette's motion to discharge was granted in part and denied in part. The federal judge modified the state court's attachment order to authorize Forefront to attach only \$271,000 of Alouette's property.

You're not sure what to make of this split-decision? You demand to know, "Where does that leave the underpaid rep?" It's an astute question you pose.

The fact that Forefront successfully grabbed \$271,000 of Alouette's property before it obtained any judgment is remarkable. Two different judges recognizing that a sales rep was likely to prove its claim for breach of the contractual duty to pay commissions without a trial and agreeing to deprive its principal of property in such an amount, is a highly unusual occurrence.

Nothing grabs the attention of a business, virtually any business, faster than seizing its currency, and nothing makes that business treat a claimant with greater seriousness. In this instance, of course, icing Alouette's \$271,000 was just the start. While the federal court's order limited the attachment to "only" this amount, it recognized the potential for other evidence to be introduced at trial that could increase this amount.

"Additionally, this Order does not place a ceiling or floor on the amount of a judgment that Forefront may be awarded," the Court concluded, and "it does not prevent Forefront from seeking to collect any judgment for amounts more than the amount in this Order, and it does not limit the ways in which Forefront may seek to collect a judgment."

You're nodding in agreement at last. You seem comfortable with the notion that Forefront can lock up the low-hanging pre-termination commission dollars at the start of the case, and then work to prove up the more difficult post-termination claims and the potential treble damages.

Through your healthy skepticism, you scratch your chin and wryly ask, "Didn't the rep's chances of reaching a settlement just increase by at least 271,000 times?"

The extraordinary remedy of attaching a defendant's assets pre-judgment is available in many, but not all, states, and each state's statute varies. Illinois, for example, requires a plaintiff to post a bond in twice the amount of the property to be attached, while Ohio requires no bond if the assets are located out-of-state.

Through the many different statutes, one consistent theme emerges: to take advantage of this remarkable remedy, they must each be carefully navigated. You seem to be in full agreement, for once, and you've telegraphed your next question, but you ask it anyhow: "Hmmm, does my state have one of those?"