



Your Counterparty Breaches: Can the Court Force Them to Pay Before Judgment?

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Businesses often request legal assistance with breach of contract disputes. They say that there can be no doubt that their counterparty breached their contract, and they know that they are entitled to damages for the breach. But some are concerned that their counterparty will dispose of cash or other assets before a court can issue a judgment in their favor. So they ask their counsel what can be done to freeze or take possession of their counterparty's assets, or force their counterparty to deposit money with the court, as soon a Complaint is filed.

Kentucky courts recognize the longstanding principle that they generally do not have the authority to require one party to pay money allegedly owed to another party before that party has its proverbial "day in court." One exception to this general rule is called prejudgment attachment. This remedy allows a requesting party to ask the court to attach property of another party before a judgment is entered. However, appropriate circumstances must apply, such as when it appears that a person has left the state with the intent to defraud creditors or that the person is removing property from the state. In addition, the party seeking a prejudgment attachment must post a bond that has double the value of the property that is attached. In *PremierTox 2.0 v. Miniard*, the Kentucky Supreme Court explained the limited nature of this remedy.

PremierTox, a medical services testing company, contracted with Kentucky Spirit, who agreed to manage PremierTox's Medicaid payments. Kentucky Spirit allegedly breached the agreement, and PremierTox filed a lawsuit to recover allegedly unpaid funds from Kentucky Spirit. At the beginning of the case, PremierTox asked the trial court to order Kentucky Spirit to either immediately pay PremierTox the \$1.8 million in dispute, or place the funds in escrow until the lawsuit was resolved. Because the money in Kentucky Spirit's possession came from public funds and due to the potential harm to Kentucky citizens relying on Medicaid services, the lower court ordered Kentucky Spirit to escrow over \$1.8 million at the outset of the lawsuit. The trial court did not require PremierTox to post the bond generally required with attachment requests.

The case proceeded up to the Kentucky Supreme Court, which confirmed that a trial court generally cannot require a party to pay a judgment before it is proven that the party actually owes the amount in dispute. The Court recognized that a court rule exists which allows a trial court to order that certain money or property be seized and deposited with the trial court or even delivered to another party. However, the Court explained that this rule only applies when a party holding disputed money or property either voluntarily deposits it with the trial court or admits that it may not be theirs. In *PremierTox*, Kentucky Spirit vehemently disputed that it owed any money to PremierTox. As a result, the Court differentiated between the court rule and traditional prejudgment attachment rules, and explained that the court rule cannot be used as an alternative path to obtain a prejudgment attachment without following the required procedures. The party who wants money or property to be set aside before a final judgment is awarded must post a bond. It also must demonstrate to the trial court that appropriate grounds exist that warrant having the trial court depart from the general principle that every party is entitled to due process before its property is taken.

The Court's decision in *PremierTox* does not prevent a party from seeking immediate relief from the trial court to secure money or property, but it does confirm that a party seeking this relief has to jump through the hoops set out in the prejudgment attachment statutes, including posting an adequate bond. In addition, the case makes clear that companies involved in a dispute over money or property must be careful in responding to these disputes. In *PremierTox*, it was important that Kentucky Spirit did not admit liability. Had Kentucky Spirit admitted to owing any money to PremierTox, the result may have been different.

Companies involved in disputes of this nature, who believe that they need and deserve immediate relief, should consult with their counsel about whether it is possible to obtain a prejudgment attachment of money or property, or whether they can seek relief under the court rule if their counterparty does admit liability. As shown in *PremierTox*, the right to this relief before a judgment is entered is unusual, but circumstances do exist where it is appropriate. On the other hand, parties who are defending cases of this sort should be mindful that, if they admit to owing any property or funds at issue in the lawsuit, a court rule exists that could be used to force them to deliver that property or those funds to the trial court before the court issues its final decision.