

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pinsky v. Duncan

Pinsky v. Duncan, 898 F.2d 852 (2d Cir. 1990) · Decided March 9, 1990

SUMMARY

The Second Circuit held that Connecticut's prejudgment attachment statute, Conn. Gen. Stat. § 52-278e(a)(1), violated due process because it permitted ex parte attachment of real property without prior notice or hearing absent extraordinary circumstances, and because it failed to require the plaintiff to post a bond or other security. The court found that a nonpossessory attachment of real estate deprives the owner of a significant property interest, and that the risk of wrongful attachment was high given the fact-intensive nature of the underlying claims. The lack of exigent circumstances and the absence of a bond requirement rendered the statute unconstitutional on its face.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	George C. Pratt
JURISDICTION	Federal
DECIDED	March 9, 1990
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from summary judgment in favor of defendant-appellee in federal action challenging constitutionality of state statute.
STANDARD OF REVIEW	De novo
PRECEDENTIAL VALUE	Published
PARTIES	Brian K. Doehr v. John F. Di Giovanni

TOPICS

- civil procedure
- constitutional law
- appellate procedure
- summary judgment

PRACTICE AREAS

- Civil Procedure

QUESTIONS PRESENTED

1. Whether Conn. Gen. Stat. § 52-278e(a)(1) violates due process by permitting ex parte prejudgment attachment of real estate without prior notice and opportunity for a hearing in the absence of exigent circumstances.
2. Whether the statute violates due process by failing to require the plaintiff to post a bond or other security before obtaining the attachment.

HOLDINGS

1. Yes, the statute violates due process because it allows the issuance of ex parte attachments in the absence of extraordinary circumstances, which is required by the Due Process Clause as interpreted in *Sniadach* and its progeny.
2. Yes, the lack of a bond or security provision is a constitutional defect. The state's vexatious litigation statute does not provide adequate protection because it requires separate litigation and may be unavailable if the underlying action settles.

KEY QUOTATIONS

“The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property.” (854)

“Because the risk of a wrongful attachment is considerable under these circumstances, we conclude that dispensing with notice and opportunity for a hearing until after the attachment, without a showing of extraordinary circumstances, violates the requirements of due process.” (856)

“A constitutionally valid statute must afford such protection, by bond or otherwise.” (857)

FACTUAL BACKGROUND

Di Giovanni sued Doebr for assault and battery in Connecticut state court. At the inception of the lawsuit, before any process was served on Doebr, Di Giovanni applied for and obtained an ex parte attachment on Doebr's home to the value of \$75,000. The attachment was issued based on Di Giovanni's affidavit stating that Doebr willfully and maliciously assaulted him, causing injuries. The affidavit was submitted without notice to Doebr, without a hearing, and without any bond or security. Doebr then filed a federal action challenging the constitutionality of the statute authorizing the attachment.

PROCEDURAL HISTORY

Di Giovanni sued Doebr in Connecticut state court for assault and battery and obtained an ex parte attachment on Doebr's home. Rather than moving to dissolve the attachment, Doebr filed a federal action alleging that the Connecticut attachment statute violated due process. The district court granted summary judgment for Di Giovanni, holding the statute constitutional. Doebr appealed.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The case is remanded for entry of judgment in favor of Doeher declaring Conn. Gen. Stat. § 52-278e(a)(l) unconstitutional.

CASES CITED

- Spielman-Fond, Inc. v. Hanson's, Inc., 379 F.Supp. 997 (D.Ariz. 1973), aff'd mem., 417 U.S. 901 (1974)
- Tulley v. Griffin, Inc., 429 U.S. 68 (1976)
- Fuentes v. Shevin, 407 U.S. 67 (1972)
- Shaumyan v. O'Neill, 716 F.Supp. 65 (D.Conn. 1989)
- MPI v. McCullough, 463 F.Supp. 887 (N.D.Miss. 1978)
- Terranova v. AVCO Financial Servs., 396 F.Supp. 1402 (D.Vt. 1975)
- Hutchison v. Bank of N.C., 392 F.Supp. 888 (M.D.N.C. 1975)
- Bay State Harness Horse Racing & Breeding Assn. v. PPG Indus., Inc., 365 F.Supp. 1299 (D.Mass. 1973)
- Gunter v. Merchants Warren Nat'l Bank, 360 F.Supp. 1085 (D.Me. 1973)
- Clement v. Four N. State St. Corp., 360 F.Supp. 933 (D.N.H. 1973)
- Boddie v. Connecticut, 401 U.S. 371 (1971)
- United States v. Premises & Real Property at 4492 S. Livonia Rd., 889 F.2d 1258 (2d Cir. 1989)
- Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)
- Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974)
- North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601 (1975)
- Mathews v. Eldridge, 424 U.S. 319 (1976)
- Goldberg v. Kelly, 397 U.S. 254 (1970)
- Watertown Equip. Co. v. Norwest Bank Watertown, 830 F.2d 1487 (8th Cir. 1987)
- Jones v. Preuit & Mauldin, 822 F.2d 998 (11th Cir. 1987)
- United States v. Vertol H21C, Reg. No. N8540, 545 F.2d 648 (9th Cir. 1976)
- Jonnet v. Dollar Savings Bank of City of New York, 530 F.2d 1123 (3d Cir. 1976)
- Fermont Div., Dynamics Corp. of America v. Smith, 178 Conn. 393, 423 A.2d 80 (1979)
- Blake v. Levy, 191 Conn. 257, 464 A.2d 52 (1983)
- Hiers v. Cohen, 31 Conn. Supp. 305, 329 A.2d 609 (Super.Ct. Hartford Co. 1973)
- Merrill v. Town of Addison, 763 F.2d 80 (2d Cir. 1985)

CITED IN

- Pinsky v. Duncan, Pinsky v. Duncan, 898 F.2d 852 (2d Cir. 1990)

OPINION

PRATT, J.

GEORGE C. PRATT, Circuit Judge: In this appeal we consider the constitutionality of a statute that authorizes prejudgment attachment of real estate without prior notice and opportunity for a hearing, and without requiring the person obtaining *853the attachment to post a bond. Conn.Gen. Stat. § 52-278e(a)(1). Brian K. Doehr, a Connecticut landowner whose property was attached under this statute, appeals from a summary judgment of the United States District Court for the District of Connecticut, Warren W. Eginton, Judge, reported at 716 F.Supp. 58.

Doehr claims that § 52-278e(a)(1) is unconstitutional on its face. For the reasons below, we agree. We therefore reverse and remand for entry of judgment in favor of Doehr. BACKGROUND Attachment is an extraordinary prejudgment remedy that enables a plaintiff to secure a contingent lien on defendant's property at the inception of a lawsuit. It has traditionally served the dual purposes of compelling the appearance of a defendant who cannot otherwise be haled into court, and providing security for any judgment that plaintiff might ultimately recover.

See 7 C.J.S. Attachment § 4 (1980). Under Connecticut law, a prejudgment attachment may sometimes be obtained after notice to defendant and a hearing, Conn.Gen.Stat. §§ 52-278c, 52-278d, or, in some cases, even without notice and a hearing. § 52-278e.

In neither case is the plaintiff required to post a bond or other security for the payment of damages the defendant may sustain either if the attachment is wrongfully issued or the plaintiff's claim ultimately proves to be meritless.

The portion of the statute governing the ex parte attachment of real estate provides in relevant part: The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52-278c and 52-278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for an attachment of real property * * *.

In March 1988, John F. Di Giovanni commenced an action for assault and battery against Doehr in Connecticut Superior Court. At the inception of this lawsuit, and before any process had been served on Doehr, Di Giovanni applied for an attachment on Doehr's property in Meriden, Connecticut.

As required by the statute, Di Giovanni submitted an affidavit in support of his application, in which he stated that "I was willfully, wantonly and maliciously assaulted by the defendant, Brian K. Doehr. * * * Said assault and battery broke my left wrist and further caused an ecchymosis to my right eye, as well as other injuries to my head, limbs and body. * * * In my opinion, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff." Based on these submissions, the state court authorized an attachment on Doehr's home to the value of \$75,000.

Rather than moving to dissolve the attachment, as he was entitled to do under the statute, § 52-278e(c), Doebr filed the present action in federal district court, alleging that Connecticut's ex parte attachment procedure violated his constitutional right to due process.

On Di Giovanni's motion for summary judgment, the district court held that § 52-278e is constitutional because "it requires the prejudgment remedy to be issued by a judge", " 'can be invoked only by a verified affidavit that contains factual, rather than merely eonclu-sory, supporting allegations' ", quoting *Fermont Div., Dynamics Corp. of America v. Smith*, 178 Conn.

393, 397, 423 A.2d 80 (1979), and provides for a "prompt post-seizure hearing" at which the property owner may challenge the attachment. 716 F.Supp. at 60. Doebr now appeals that ruling. Since the constitutionality of a state statute "affecting the public interest is drawn in question" by this lawsuit, the district court was required to "certify such fact to the attorney general of the State" for the purpose of allowing the state to intervene on the constitutional issue.

28 U.S.C. § 2403(b). Although the district court failed to follow this procedure, we invited the state to file an intervenor's brief in this appeal, consistent with our resolution of a similar problem in *Merrill v. Town of Ad*854dison*, 763 F.2d 80, 82-83 (2d Cir.1985).

The state elected to intervene, and we give careful consideration to its arguments in this decision. DISCUSSION A. Deprivation of a Protected Property Interest? As a threshold matter, we must determine whether the "seizure" at issue in this case — a nonpossessory attachment of real estate — deprives the owner of a significant property interest within the meaning of the fourteenth amendment.

Di Giovanni argues that our decision on this point is controlled by the Supreme Court's summary affirmance of *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F.Supp. 997 (D.Ariz.1973) (three-judge court) (per curiam), which held that "the filing of mechanic's and materialmen's lien does not amount to a taking of a significant property interest". *Id.* at 999, *aff'd mem.*, 417 U.S. 901, 94 S.Ct.

2596, 41 L.Ed.2d 208 (1974). However, notwithstanding the limited prece-dential value of a summary affirmance, see, e.g., *Tulley v. Griffin, Inc.*, 429 U.S. 68, 74, 97 S.Ct. 219, 223, 50 L.Ed.2d 227 (1976), we note that the mechanic's lien statute upheld in *Spielman-Fond* required the creditor to have a pre-existing right to the property, whereas Connecticut's attachment procedure is available in a variety of contexts, including the present case, to individuals having no preexisting interest in the property to be attached.

Moreover, although an attachment of real estate does not deprive the landowner of the use and possession of his property, and thus does not amount to a "seizure" in the literal sense, it nevertheless has a significant impact on the owner's ability to exercise the full scope of his property rights. An attachment not only impairs the marketability of the real estate, but also may

harm the owner's credit rating, and may prevent him from using the property as collateral for a loan.

Even if short-lived, these effects are certainly worthy of due process protection. See *Fuentes v. Shevin*, 407 U.S. 67, 86, 92 S.Ct. 1983, 1997, 32 L.Ed.2d 556 (1972) ("The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property"). Consequently, we hold that a nonpossessory attachment of real estate deprives the owner of a constitutionally protected property interest under the fourteenth amendment.

Accord *Shaumyan v. O'Neill*, 716 F.Supp. 65, 77-79 (D.Conn.1989); *MPI v. McCullough*, 463 F.Supp. 887, 901 (N.D.Miss.1978); *Terranova v. AVCO Financial Servs.*, 396 F.Supp. 1402, 1406-07 (D.Vt.1975) (three-judge court); *Hutchison v. Bank of N.C.*, 392 F.Supp. 888, 894 (M.D.N.C.1975) (three-judge court); *Bay State Harness Horse Racing & Breeding Assn. v. PPG Indus., Inc.*, 365 F.Supp. 1299, 1304-06 (D.Mass.1973) (three-judge court); *Gunter v. Merchants Warren Nat'l Bank*, 360 F.Supp. 1085, 1090 (D.Me.1973) (three-judge court); *Clement v. Four N. State St. Corp.*, 360 F.Supp. 933, 935 (D.N.H.1973) (three-judge court).

B. Ex Parte Attachment. Doebr argues that § 52-278e(a)(l) is invalid, first, because it dispenses with pri- or notice and opportunity for a hearing even in the absence of exigent circumstances. A "root requirement" of due process is the right to a hearing before being deprived of a significant property interest unless the state demonstrates "some valid governmental interest * * * that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct.

780, 786, 28 L.Ed.2d 113 (1971) (footnote omitted); see also *United States v. Premises & Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1263 (2d Cir.1989). Thus, in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339, 89 S.Ct. 1820, 1821, 23 L.Ed.2d 349 (1969), the Court emphasized that state garnishment procedures must ordinarily provide for a pre-deprivation hearing except in situations "requiring special protection to a state or creditor interest".

In *Fuentes* the Court made it clear that the type of "extraordinary circumstances" that warrant postponing the hearing "must be truly unusual", such as the need "to meet the needs of a *855national war effort, to protect against the economic disaster of a bank failure, [or] to protect the public from misbranded drugs and contaminated food." 407 U.S. at 90-92, 92 S.Ct. at 1999-2000 (citations omitted).

Although the Court later upheld a Louisiana sequestration statute that authorized the seizure of personal property without notice and opportunity for a hearing, see *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), the application of that statute was explicitly limited to unusual situations where "it is within the power of the defendant to conceal, dispose of,

or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action.” Id. at 605, 94 S.Ct. at 1899.

Because the creditor in Mitchell claimed a preexisting right to consumer goods held by the debtor, and because the creditor’s lien would expire under Louisiana law the moment the debtor transferred possession, any prior notice would enable the debtor to transfer the goods before the hearing and thereby defraud the creditor.

Thus there was a compelling reason to postpone notice and hearing until after the sequestration had initially taken effect. As the Court put it, “there is a real risk that the buyer, with possession and power over the goods, will conceal or transfer the merchandise to the damage of the seller. This is one of the considerations weighed in the balance by the Louisiana law in permitting initial sequestration of the property. * * * [N]otice itself may furnish a warning to the debtor acting in bad faith.” Id. at 609, 94 S.Ct. at 1901.

The rule to be derived from Sniadach and its progeny, therefore, is not that post-attachment hearings are generally acceptable provided that plaintiff files a factual affidavit and that a judicial officer supervises the process, but that a prior hearing may be postponed where exceptional circumstances justify such a delay, and where sufficient additional safeguards are present.

See Terranova, 396 F.Supp. at 1407 (“The Supreme Court decisions in [North Georgia Finishing, Mitchell, Fuentes, and Sniadach] dictate that except in extraordinary situations the prejudgment attachment of real estate belonging to an in-state resident may be effected only after notice to the owner and a hearing”) (emphasis added) (footnotes omitted).

The only decision in the Sniadach line of cases to find a post-deprivation hearing constitutionally acceptable, Mitchell, carefully limited the reach of its holding to the particular circumstances of the case: Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor.

The question is not whether a debtor’s property may be seized by his creditors, pendente lite, where they hold no present interest in the property sought to be seized. 416 U.S. at 604, 94 S.Ct. at 1898 (emphasis added); see also North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601, 609, 95 S.Ct. 719, 723, 42 L.Ed.2d 751 (1975) (Powell, J., concurring) (suggesting that Mitchell has been relegated “to its narrow factual setting”).

In sharp contrast to Mitchell, the case before us does present a situation where the attached property “is exclusively the property of the defendant”, and where the plaintiff “hold[s] no present interest in the property sought to be seized.” Di Giovanni sued Doebr because Doebr allegedly assaulted him, breaking his wrist, blackening his eye, and causing various other injuries.

Assuming the truth of these bare allegations, and without giving Doebr an opportunity to present his own version of the facts, the court issued an attachment on Doebr's home. There were no allegations that Doebr was about to fraudulently dispose of his home, nor was the attachment necessary to obtain personal jurisdiction over Doebr. Since exigent circumstances of this nature clearly formed the basis for permitting an ex parte seizure in Mitchell, we can hardly rely on Mitchell to uphold a procedure that makes such circumstances irrelevant to the inquiry.

The highly factual nature of the issues involved in the ex parte proceeding gives us further reason to doubt the adequacy of existing procedures. The dispositive issues *856 in the ex parte proceeding in Mitchell were simply whether the creditor possessed a lien on goods in the debtor's possession, and whether the debtor had defaulted on his payments.

The Court stressed that these were "uncomplicated matters that lend themselves to documentary proof" and that "[t]he nature of the issues at stake minimizes the risk that the writ will be wrongfully issued by a judge." 416 U.S. at 609-10, 94 S.Ct. at 1900-01. Distinguishing *Fuentes*, the Court observed: In Florida and Pennsylvania property was only to be replevied in accord with state policy if it had been "wrongfully detained." This broad "fault" standard is inherently subject to factual determination and adversarial input. * * * [I]n *Fuentes* this fault standard for replevin was thought ill-suited for preliminary ex parte determination.

In Louisiana, on the other hand, the facts relevant to obtaining a writ of sequestration are narrowly confined. As we have indicated, documentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default. There is thus far less danger here that the seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing which will be immediately available in any event.

Id. 416 U.S. at 617-18, 94 S.Ct. at 1905; see also *Mathews v. Eldridge*, 424 U.S. 319, 343-44, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976) (medical determination of disability is "sharply focused and easily documented", and thus "[t]he potential value of [a* pre-deprivation] evidentiary hearing * * * is substantially less in this context than in *Goldberg v. Kelley*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)]").

Unlike the procedures upheld in *Mitchell* and *Mathews*, Connecticut's ex parte proceeding involves the court in a host of difficult factual questions. To issue an attachment, the judge must determine whether "there is probable cause to sustain the validity of the plaintiff's claim". § 52-278e(a).

The statute is not limited to simple debtor-creditor disputes, where the likelihood of recovery often can be ascertained from documentary proof submitted by the creditor. Instead, the attachment procedure is available in all civil actions, including those arising from such fact-specific events as fist fights, as illustrated by the facts of the present action.

In such a case, how can the judge realistically determine the factual validity of the claim when presented with only the plaintiff's version of the altercation? Requiring the plaintiff to file a factual affidavit, though certainly helpful, is of little assistance when the affidavit merely recites facts that are certain to be sharply disputed by the other party.

Because the risk of a wrongful attachment is considerable under these circumstances, we conclude that dispensing with notice and opportunity for a hearing until after the attachment, without a showing of extraordinary circumstances, violates the requirements of due process. Despite the highly error-prone nature of Connecticut's pre-attachment procedure, Di Giovanni and the state insist that the private interest at stake is so minuscule that a prior hearing is not constitutionally required.

We are unpersuaded by this argument. An attachment can have a substantial impact on a landowner's ability to sell his property, secure a loan, or obtain credit. Given a particularly unlucky set of circumstances, even a temporary attachment can lead to foreclosure proceedings against the homeowner. See *Hiers v. Cohen*, 31 Conn. Supp. 305, 329 A.2d 609 (Super.Ct.

Hartford Co.1973). In any event, the individual's interest in a prior hearing certainly outweighs the state's interest in postponing the hearing until after attachment, which, in the absence of unusual circumstances, is practically nil. See *Shaumyan*, 716 F.Supp. at 81 (state's interest "seems minimal at best"). C. Attachment Bond. Doebr claims that § 52-278e(a)(1) is also defective because it does not require the plaintiff to post a bond or other security before obtaining an attachment.

Most state attachment statutes include at least some procedure for indemnifying the defendant for any loss caused by a wrongful attachment. See *Shaumyan*, 716 F.Supp. *857 at 81. In *Mitchell*, for example, the Louisiana sequestration statute required the plaintiff to file a bond "sufficient * * * to protect the [defendant] against all damages in the event the sequestration is shown to have been improvident." 416 U.S. at 606, 94 S.Ct. at 1899.

The statute further empowered the court to assess damages in favor of the defendant, including attorney's fees, "whether the writ is dissolved on motion or after trial on the merits." *Id.* at 617, 94 S.Ct. at 1905. These damages were not limited to actual out-of-pocket losses, but included "injury to social standing or reputation as well as humiliation and mortification." *Id.* at 606 n. 8, 94 S.Ct. at 1899 n. 8.

The *Mitchell* Court clearly found the bond requirement of the Louisiana statute to play an essential role in protecting the defendant from the effects of an erroneous seizure. See 416 U.S. at 610, 617, 94 S.Ct. at 1901, 1905. Justice Powell, in his concurring opinion in *North Georgia Finishing*, stated that "the provision of adequate security" is an indispensable procedural safeguard, 419 U.S. at 611, 95 S.Ct. at 725, and four circuit courts have expressed the view that the lack of a bond or damages provision would invalidate an attachment statute.

See *Watertown Equip. Co. v. Norwest Bank Watertown*, 830 F.2d 1487, 1493-94 (8th Cir.1987) (“Clearly, the centrality of an adequate bond for the protection of the debtor was well established by 1975.”), cert. denied, 486 U.S. 1001, 108 S.Ct. 1723, 100 L.Ed.2d 188 (1988); *Jones v. Preuit & Mauldin*, 822 F.2d 998, 1002 (11th Cir.1987) (debtor’s “financial interest must be protected in the event of a wrongful prejudgment attachment, either via the posting of a bond by the creditor who seeks the writ, or by allowing an action for damages suffered as a result of a wrongful attachment”), vacated on other grounds, 851 F.2d 1321 (11th Cir.1988) (in banc), vacated and remanded mem., — U.S. —, 109 S.Ct.

1105, 103 L.Ed.2d 170 (1989); *United States v. Vertol H21C*, Reg. No. N8540, 545 F.2d 648, 652 (9th Cir.1976); *Jonnet v. Dollar Savings Bank of City of New York*, 530 F.2d 1123, 1130 (3d Cir.1976) (“[T]he Pennsylvania attachment rules offer no machinery to indemnify a defendant for damages due to wrongful attachment * * *. A constitutionally valid statute must afford such protection, by bond or otherwise.”).

The state concedes that defendants must be protected against the wrongful attachment of their property, but insists that Connecticut’s vexatious litigation statute, Conn.Gen.Stat. § 52-568, provides adequate protection.

Under that statute, Any person who commences and prosecutes any civil action or complaint against another, in his own name, or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages.

The state argues that this remedy is all that due process requires, an assertion that, on the surface, appears to find support in the eleventh circuit’s dictum in *Jones* that a debtor’s interests can be adequately protected “either via the posting of a bond by the creditor who seeks the writ, or by allowing an action for damages suffered as a result of a wrongful attachment.” *Jones*, 822 F.2d at 1002 (emphasis added); see also *Shaumyan*, 716 F.Supp. at 80-81 (suggesting that *Jones* makes a separate action for damages “an option to the pre seizure posting of a creditor’s bond”).

The “action for damages” discussed in *Jones*, however, was made part of the attachment procedure itself, and the creditor was required to post a bond to cover any such damages. See *Jones*, 822 F.2d at 1003-04 (discussing Ala.Code §§ 35-11-111 and 6-6-148).

Thus in *Jones* the defendant could both challenge the propriety of the attachment and recover his damages in the same proceeding, held “before, during, or after the action in which the debtor appears as a defendant.” *Jones*, 822 F.2d at 1004 (citing *First National Bank v. Cheney*, 120 Ala. 117, 23 So. 733 (1897)). *858It is entirely different to require the defendant, as Connecticut does,

to wait for judgment in the underlying action, and only then prosecute a claim for vexatious litigation.

This subjects the defendant not only to the delay and expense of additional litigation, but deprives him of any remedy whatsoever if the underlying action is settled. *Blake v. Levy*, 191 Conn. 257, 464 A.2d 52 (1983) (“When a lawsuit ends in a negotiated settlement or compromise, it does not terminate in the plaintiff’s favor and therefore will not support a subsequent lawsuit for vexatious litigation.”).

This is particularly troubling in view of the fact that the mere existence of the attachment may weigh heavily in the defendant’s decision to reach a settlement. See Note, *The Constitutionality of Real Estate Attachments*, 37 Wash. & Lee L.Rev. 701 n. 1 (1980) (“Today attachment, if available, is often used as a tactical maneuver to put pressure on a defendant to reach an expeditious settlement of a legal dispute.”) (citing New York Judicial Council, *Seventh Annual Report* 391-93 (1941)); Kheel, *New York’s Amended Attachment Statute: A Prejudgment Remedy in Need of Further Revision*, 44 Brooklyn L.Rev.

199, 201 (1978) (attachment “can lead a defendant to settle a dispute promptly although he may think it likely that he would ultimately prevail against plaintiff’s claim”). For these reasons, we believe that Connecticut’s vexatious litigation statute offers inadequate protection against wrongful attachment, and we conclude that the lack of a bond or security provision in the attachment procedure itself is a flaw of constitutional magnitude.

CONCLUSION We hold that Conn.Gen.Stat. § 52-278e(a)(1) violates the requirements of due process because (1) it permits the issuance of ex parte attachments in the absence of extraordinary circumstances, and (2) it fails to require the plaintiff to post a bond or other security before obtaining the attachment.

The judgment of the district court is reversed and the case is remanded for entry of judgment in favor of Doeher declaring § 52-278e(a)(1) unconstitutional.