

BILL ANALYSIS

Senate Research Center
80R13870 DAK-F

H.B. 3293
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Jurisprudence
5/15/2007
Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Large default judgments obtained under federal copyright law against judgment-proof individuals have become legal financial obligations for counties, individual constables, and sureties due to the recent finding of a legal loophole. This loophole provides for the judgment against the original defendant to be translated into a judgment against one or more of the aforementioned parties through a motion filed in the underlying suit, asserting a variety of failures on the constables charged with execution of the writ, without regard to the practical difficulties of collection in a given circumstance.

H.B. 3293 provides explicit details relating to a constable's duties in executing a writ, and provides that damages are limited to actual damages.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 7.001, Civil Practice and Remedies Code, as follows:

Sec. 7.001. LIABILITY FOR REFUSAL OR NEGLIGENCE IN PERFORMANCE OF OFFICIAL DUTIES. (a) Provides that a clerk, sheriff, or other officer (officer) who neglects or refuses to perform a duty required under the Texas Rules of Civil Procedure, rather than Title 42, Revised Statutes, or under a provision of the Civil Practice and Remedies Code that is derived from those rules, is liable for actual damages only in a suit brought by a person injured by the officer's neglect or refusal. Makes a conforming change.

(b) Authorizes the officer to be punished for contempt of court for neglect or refusal in the performance of the officer's duties. Requires the court to set the fine at not less than \$10 or more than \$100, with costs. Requires that the officer be given 10 days' notice of the motion.

(c) Provides that this section does not create a cause of action for an action that can otherwise be brought under Chapter 34 (Execution on Judgments), Civil Practice and Remedies Code. Authorizes a party to seek actual damages under this section or Chapter 34, or to seek contempt sanctions, but not to seek both damages and contempt.

(d) Requires an action or motion brought under this section to comply with and to be subject to the provisions in Sections 34.068, 34.069, 34.070, and 34.074, Civil Practice and Remedies Code, as added by this Act, except that a motion brought under Subsection (b) need not comply with Section 34.068(b).

SECTION 2. Amends Section 7.003, Civil Practice and Remedies Code, by amending Subsection (a) and adding Subsection (c), as follows:

(a) Provides that an officer who, in good faith, executes or attempts to execute a writ issued by a court of this state is not liable for damages resulting from the execution of

that writ, except as provided by Section 34.061, Civil Practice and Remedies Code. Deletes existing text requiring the use of reasonable diligence in performing official duties.

(c) Provides that an officer who shows that a reasonably prudent officer, under the same or similar circumstances, could have believed that the officer's conduct was justified based on the information possessed by the officer when the conduct occurred, shows that the officer acted in good faith.

SECTION 3. Amends Section 34.061, Civil Practice and Remedies Code, by amending Subsection (b) and adding Subsection (c), as follows:

(b) Includes the value of a party's damaged property as a result of the negligence of the officer as an item for which the officer and the officer's sureties (officer) are liable. Deletes existing text providing that the amount of the party's injury, plus 10 percent of that amount, is an item for which the officer is liable. Deletes existing text setting forth the process by which the injured party can recover the total amount of the injury and the amount of the lost property.

(c) Provides that the injured party has the burden to prove that the officer took actual possession of the injured party's property and the actual value of any property lost or damaged.

SECTION 4. Amends Sections 34.063, 34.064, 34.065, 34.066, and 34.067, Civil Practice and Remedies Code, as follows:

Sec. 34.063. IMPROPER ENDORSEMENT OF WRIT. (a) Creates this subsection from existing text. Deletes existing text providing that an additional 20 percent of the amount of the execution, along with the actual damages suffered by the plaintiff, as an item for which the officer who failed to number writs of execution on receipt or who falsely endorsed a writ of execution is liable. Makes conforming changes.

(b) Sets forth certain claims relating to the improper endorsement of a writ that the plaintiff in execution has the burden to prove.

Sec. 34.064. IMPROPER RETURN OF WRIT. (a) Authorizes an officer to file an amended or corrected return after the officer has returned a writ to a court.

(b) Requires the officer to amend or file the return not later than the 30th day after the date that the actual notice of an error on a return or of failure to file a return is received by the officer.

(c) Provides that an officer who fails or refuses to amend or file the return may be subject to contempt under Section 7.001(b). Deletes existing text providing that an officer who neglects or refuses to return a writ of execution, or who makes a false return, liable to the person entitled to receive the money collected on the execution for the full amount of the debt, plus interest and costs. Makes conforming and nonsubstantive changes.

Sec. 34.065. FAILURE TO LEVY OR SELL. (a) Creates this subsection from existing text. Provides that the officer and the officer's sureties are only liable for actual damages suffered for the failure or refusal to levy on or sell property subject to execution when the levy or sale could have taken place. Makes a conforming change.

(b) Sets forth certain claims relating to the failure to levy or sell property subject to execution that the judgment creditor (creditor) seeking relief under this section has the burden to prove.

(c) Provides that property to be levied on is subject to execution for purposes of this section if the creditor proves certain claims regarding the property in question.

(d) Requires the court, before finding that an officer failed or refused to levy under the writ for purposes of this section, to find that the creditor specifically informed the officer that the property was owned by the judgment debtor (debtor) and was subject to execution and directed the officer to levy on the property. Deletes existing text including the full amount of the debt, plus interest and costs, within the direction from the creditor to the officer in levying on the property. Makes a conforming change.

(e) Defines "actual damages."

Sec. 34.066. IMPROPER SALE. (a) Creates this subsection from existing text. Requires that an officer only be liable for actual damages sustained by the injured party as a result of the officer selling property without giving notice as required by the Texas Rules of Civil Procedure or selling property in a manner other than that prescribed by this chapter and the Texas Rules of Civil Procedure. Deletes existing text providing that the officer forfeits the property in question, and that the officer is to pay the injured part an amount between \$10 and \$200, in addition to any other damages sustained by the party. Makes a conforming change.

(b) Provides that the injured party has the burden to prove that the sale was improper and any actual damages suffered.

Sec. 34.067. FAILURE TO DELIVER MONEY COLLECTED. Provides that the officer is liable for the amount collected that the officer failed or refused to deliver under an execution, if proven by the injured party, and for damages at a rate of one, rather than five, percent a month on that amount. Deletes existing text including interest and costs with the amount to be collected by the injured party. Makes conforming and nonsubstantive changes.

SECTION 5. Amends Subchapter D, Chapter 34, Civil Practice and Remedies Code, by adding Sections 34.068 through 34.076, as follows:

Sec. 34.068. RULES GOVERNING ACTIONS UNDER THIS CHAPTER. (a) Provides that this section applies to any claim for damages brought under Sections 7.001, 34.061, 34.063, 34.065, 34.066, or 34.067, Civil Practice and Remedies Code, or under Section 86.023 (Failure to Execute Process), Local Government Code (certain rules governing actions under this chapter).

(b) Requires suit to be brought in the form of a lawsuit filed against the officer in the county in which the officer holds office.

(c) Requires all suits to be filed not later than the first anniversary of the date on which the injury accrues.

(d) Authorizes an officer or a surety to defend the action by stating and proving any defenses provided by law, including any defense that would mitigate damages.

Sec. 34.069. PAYMENT OF DAMAGES. Authorizes a county, at the discretion of the commissioners court, to pay any judgment taken against an officer under certain rules governing actions under this chapter, provided that this section does not apply if the officer is finally convicted under Sections 39.02 or 39.03, Penal Code.

Sec. 34.070. RIGHT OF SUBROGATION. Provides that an officer against whom a judgment has been taken under certain rules governing actions under this chapter, including Section 34.064 and Section 7.002 (Liability for Deposits Pending Suit), Civil Practice and Remedies Code, has a right of subrogation against the debtor or person against whom the writ was issued.

Sec. 34.071. DUTIES OF EXECUTING OFFICER. Sets forth certain duties that are not required of an officer receiving a writ of execution.

Sec. 34.072. TIMING OF EXECUTION AND RETURN. (a) Authorizes an officer to return a writ of execution after the first levy or first attempted levy if the creditor cannot designate any more executable property currently owned by the debtor at the time of the first levy or first attempted levy.

(b) Authorizes an attempt to levy on property to begin any time during the life of the writ, provided that the officer is required to allow enough time for completing the sale of the property, notwithstanding Rule 637 (Levy of Execution), Texas Rules of Civil Procedure.

Sec. 34.073. TRANSFER OF WRIT; NO DUTY TO LEVY OUTSIDE OF COUNTY.

(a) Authorizes an officer receiving a writ to transfer the writ to another officer in another precinct, or to another law enforcement agency authorized to perform executions, within the county of the first officer who received the writ.

(b) Provides that an officer does not have a duty to levy on or sell property not within the officer's county, unless it is real property that is partially in the officer's county and partially within a contiguous county.

Sec. 34.074. OFFICER'S SURETY. (a) Authorizes an officer's surety to only be liable for the penal sum of the surety bond minus any amounts already paid out under the bond. Prohibits an officer's surety from being liable for more than the penal sum of the bond.

(b) Authorizes the surety, in the event that the officer and the officer's surety are both defendants in an action brought under this chapter, to deposit in the court's registry the amount unpaid under the surety bond. Requires the court to determine the proper disposition of this sum or to order the return of the deposit to the surety in the court's final judgment.

(c) Provides that a surety is not a necessary party to an action brought under this chapter or under Section 7.001, Civil Procedures and Remedies Code. Authorizes a prevailing party under these provisions to instead bring a separate action against a surety failing to pay the amount remaining under the bond on a final judgment. Requires this action to be brought on or before 180 days after the date all appeals are exhausted in the underlying action.

Sec. 34.075. WRONGFUL LEVY. Provides that the only remedy against a sheriff or constable for wrongful levy, occurring due to a certain writ being levied upon personal property or any part of personal property claimed by any claimant who is not a party to the writ, is by trial of right of property in Section 9 (Trial by Right of Property), Part VI, Texas Rules of Civil Procedure.

Sec. 34.076. EXCLUSIVE REMEDY. Provides that this subchapter is the exclusive remedy for violations of an officer's duties with regard to the execution and return of writs without regard to the source of the duty prescribed by law.

SECTION 6. Amends Section 86.024(a), Local Government Code, to provide that this section does not apply to actions brought under Chapter 34, Civil Practice and Remedies Code.

SECTION 7. Amends Section 604.005, Government Code, by adding Subsection (c), to provide that the surety is not liable for more than the penal sum of the surety bond minus any amounts already paid out under the bond.

SECTION 8. Makes application of this Act prospective.

SECTION 9. Effective date: September 1, 2007.