

Legislative History for Connecticut Act

HB 7329	PA 93-431	1993
Senate 5128-5130, 5171-5173		6
House 11,119-11,120, 11,218-11,250		35
Jud. 3684-3691, 3719-3721, 3735-3736, 3814-3830		30
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Transcripts from the Joint Standing Committee Public Hearing(s) and/or Senate  
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GEN. ASSEMBLY  
SENATE

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005128

WEDNESDAY  
June 9, 1993

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anybody else wish to remark on Senate Calendar 639?

Are there any further remarks on Senate Calendar 639?

If not, Senator Milner, would you like to make a motion to place this on the Consent Calendar?

SENATOR MILNER:

So moved, Madam President.

THE CHAIR:

Thank you very much. Is there any objection to placing Senate Calendar 639, Substitute for House Bill 6054, on the Consent Calendar? Is there any objection? Any objection? Hearing none, so ordered.

THE CLERK:

Calendar Page 5, Calendar No. 649, File No. 709, Substitute for House Bill 7329, AN ACT CONCERNING PREJUDGMENT REMEDIES. (As amended by House Amendment Schedules "A", "B", "C", "D" and "E").

Favorable Report of the Committee on Judiciary.

THE CHAIR:

The Chair would recognize Senator Jepsen.

SENATOR JEPSEN:

Thank you, Madam President. I move acceptance of the Joint Committee's Favorable Report and adoption of the bill in concurrence with the House.

THE CHAIR:

Thank you very much, Senator. Do you wish to

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remark further?

SENATOR JEPSEN:

Yes, I would. Thank you, Madam President. A recent Supreme Court decision made clear the certain aspects of Connecticut's prejudgment remedy law was constitutionally inadequate. This is an act which tightens up and restructures our prejudgment remedy laws in a way that doesn't make it terribly different from what was there before, but we believe makes it constitutionally acceptable.

Some of the main differences or the main things that it does is that it does allow a defendant who has been in an action when a plaintiff seeks a prejudgment to demand a bond adequate to cover any losses the defendant might sustain in the event that the plaintiff's action proves to be found wanting. It also sets forth the process by which the prejudgment remedy is applied for and it makes clear that the prejudgment remedy is limited to cases where the plaintiff can show that without the PJR there would not be adequate insurance or other properties available to cover the suit.

THE CHAIR:

Would anybody else wish to remark on Senate Calendar 649? Are there any further remarks on Senate

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Calendar 649? If not, Senator Jepsen, would you like to --?

SENATOR JEPSEN: --

I move this to Consent.

THE CHAIR:

Is there any objection to placing Senate Calendar 649, Substitute for House Bill 7329, on the Consent Calendar? Is there any objection? Hearing none, so ordered.

THE CLERK:

Calendar Page 10, Disagreeing Actions, Calendar No. 39, File No. 519, Substitute for Senate Bill 789, AN ACT CONCERNING DEADLINE EXTENSIONS AND MEMBERSHIP CHANGES TO CERTAIN TASK FORCES. (As amended by Senate Amendment Schedule "A" and House Amendment Schedules "A" and "C").

Favorable Report of the Committee on General Law.

The House rejected Senate Amendment Schedule "A" on June 8th.

THE CHAIR:

Thank you very much. Is Senator DiBella here?  
Senator Przybysz.

SENATOR PRZYBYSZ:

Thank you, Madam President. I move acceptance of the Joint Committee's Favorable Report and passage of

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vote on Consent Calendar No. 1 please. Make sure your car windows are closed.

THE CLERK:

An immediate roll call has been ordered in the Senate. Will all Senators please return to the Chamber. An immediate roll call has been ordered in the Senate. Will all Senators please return to the Chamber. The Senate is now voting on the Consent Calendar. Will all Senators please return to the Chamber.

THE CHAIR:

Thank you very much, Mr. Clerk. The issue before the Chamber is Consent Calendar No. 1 for today, Wednesday, June 9, 1993. Mr. Clerk, would you please read the items that have been placed on the Consent Calendar.

THE CLERK:

The first Consent Calendar begins on Calendar Page 3, Calendar No. 583, Substitute for House Bill 7087. Calendar No. 627, Substitute for House Bill 7151.

Calendar Page 4, Calendar No. 639, Substitute for House Bill 6054.

Calendar Page 5, Calendar No. 649, Substitute for House Bill 7329. Calendar 650, Substitute for House

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Bill 7161.

Calendar Page 10, Calendar No. 536, Substitute for House Bill 5885. Calendar 39, Substitute for Senate Bill 789.

Calendar Page 11, Calendar No. 296, Substitute for Senate Bill 984. Calendar 313, Substitute for Senate Bill 1062. Calendar 353, Substitute for Senate Bill 1046. Calendar 421, Substitute for Senate Bill 787.

Calendar Page 12, Calendar No. 428, Substitute for Senate Bill 805. Calendar 436, Substitute for House Bill 7244. Calendar 475, Substitute for Senate Bill 1082. Calendar 541, Substitute for House Bill 7100.

Calendar Page 14, Calendar No. 655, Senate Resolution 21. Calendar 656, Senate Resolution 22. Calendar 657, Senate Resolution No. 23.

Madam President, that completes the first Consent Calendar.

THE CHAIR:

Thank you very much, Mr. Clerk. You've heard the items that have been placed on the Consent Calendar No. 1 for today, Wednesday, June 9th. The machine is open. You may record your vote.

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Senator Milner, Senator Larson. Have all Senators voted and are your votes properly recorded? Have all Senators voted and are your votes properly recorded? The machine is closed.

The result of the vote:

36	Yea
0	Nay
0	Absent

Consent Calendar No. 1 has been adopted.

Senator Milner. I mean Senator DiBella.

SENATOR DIBELLA:

Thank you, Madam President. I know you get Senator Milner and I mixed up all the time.

THE CHAIR:

I know, well, you know.

SENATOR DIBELLA:

I would like to ask that we make some changes in the Calendar.

THE CHAIR:

Thank you.

SENATOR DIBELLA:

On Page 4, Calendar Item No. 632 has been changed from Pass Retained to a Go. Calendar Item No. 635 on the same page is a Go.

On Page 5, Calendar Item No. 648 is changed from

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House of Representatives

Friday, June 4, 1993

Members to the Chamber, please. Members to the Chamber please. The House is voting by roll.

DEPUTY SPEAKER PUDLIN:

If all the members have voted and if your votes are properly recorded the machine will be locked. The Clerk will take the tally. The Clerk will announce that tally.

CLERK:

Senate Bill 937 as amended by House Amendments "A", "B" and "C".

Total number voting	132
Necessary for passage	67
Those voting yea	129
Those voting nay	3
Those absent and not voting	19

DEPUTY SPEAKER PUDLIN:

The bill passes.

CLERK:

Page 5, Calendar 537, Substitute for House Bill 7329, AN ACT CONCERNING PREJUDGMENT REMEDIES.

Favorable Report of the Committee on Judiciary.

DEPUTY SPEAKER PUDLIN:

Representative Tulisano.

REP. TULISANO: (29th)

Mr. Speaker, I move for acceptance of the Joint

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House of Representatives

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Committee's Favorable Report and passage of the bill.

DEPUTY SPEAKER PUDLIN:

The question is on acceptance and passage. Will you remark?

REP. TULISANO: (29th)

Yes, Mr. Speaker. Mr. Speaker, this amendment, this bill establishes a way in which prejudgment remedies can be obtained.

DEPUTY SPEAKER PUDLIN:

Representative Ireland.

REP. IRELAND: (111th)

Mr. Speaker.

DEPUTY SPEAKER PUDLIN:

Proceed.

REP. IRELAND: (111th)

May this item be PTd very temporarily.

DEPUTY SPEAKER PUDLIN:

The motion is for a very temporary PT. Hearing no objection, so ordered.

CLERK:

Page 31 please, Calendar 491, top of the Page, House Bill 6357, AN ACT CONCERNING RECREATIONAL EQUESTRIAN ACTIVITIES, as amended by House "A" and Senate "A". Favorable Report of the Committee on Judiciary.

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House of Representatives

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House Bill 7146, as amended by House Amendments  
"A", "B", "C" and "F" and Senate "A", in concurrence.

Total number Voting	142
Necessary for Passage	72
Those voting Yea	142
Those voting Nay	0
Those absent and not Voting	9

SPEAKER RITTER:

Bill, as amended, passes.

Clerk, please return to the call of the Calendar.

CLERK:

Please turn to page 4, calendar 573. Excuse me,  
537. Calendar 537, substitute for House Bill 7329, AN  
ACT CONCERNING PREJUDGMENT REMEDIES. Favorable report  
of Judiciary.

SPEAKER RITTER:

Representative Tulisano.

REP. TULISANO: (29th)

Mr. Speaker.

SPEAKER RITTER:

Oh, I am sorry. Wait just one second, Sir.

We have to type it in today because of a  
malfunction with the machine. We will try our best to.  
Please proceed, Sir!

REP. TULISANO: (29th)

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Mr. Speaker, I move for acceptance of the Joint Committee's favorable report and passage of the bill.

SPEAKER RITTER:

Motion is on acceptance and passage. Please proceed, Sir.

REP. TULISANO: (29th)

Yes, Mr. Speaker. The bill before us deals with how one applies for prejudgment remedy. There have been a number of court cases, some of which raise some issues of how you might have a prejudgment remedy, that is like an attachment on somebody's property before a lawsuit commences.

And in order to comply with what is anticipated to be both federal and current state law, we have made some changes at the recommendation of the Law Revision Commission who worked on this in the interim.

Mr. Speaker, the Clerk has an amendment, LCO7648.

SPEAKER RITTER:

Clerk has amendment, LCO7648. If he may call and Representative Tulisano would like to summarize.

CLERK:

LCO7648, House "A" offered by Representative Tulisano.

SPEAKER RITTER: }

Representative Tulisano.

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REP. TULISANO: (29th)

Mr. Speaker, this amendment makes a number of technical changes that were picked up by LCO clarifying language.

The one important part of this is that it does set up in the file copy, the court may require a discretionary bond and it does set up a standard by which that bond may or may not be issued. I move its adoption.

SPEAKER RITTER:

The Gentleman moves adoption.

The question is on adoption. Will you remark further? Representative O'Neill.

REP. O'NEILL: (69th)

Through you, Mr. Speaker. Since I haven't seen the amendment itself, I was wondering if Representative Tulisano could tell us what some of those standards are that we are now going to be imposing?

SPEAKER RITTER:

Representative Tulisano.

REP. TULISANO: (29th)

Through you, Mr. Speaker. It indicates that the amount of the bond the court shall consider the nature of the property subject to the prejudgment remedy. The methods of retention or storage if it is something that

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has to be done. It exactly puts some conditions on whether or not there was a bond or whether or not a prejudgment. A bond should be required or otherwise.

It just sets some parameters on it.

SPEAKER RITTER:

Representative O'Neill.

REP. O'NEILL: (69th)

Thank you, Mr. Speaker.

SPEAKER RITTER:

Thank you, Sir. Anybody else care to comment on House Amendment "A"? Representative Radcliffe.

REP. RADCLIFFE: (123rd)

Mr. Speaker, a question through you to the proponent of the amendment.

SPEAKER RITTER:

Please proceed, Sir.

REP. RADCLIFFE: (123rd)

The portion of the amendment on line 60 that deals with insurance coverage or actually, it is the file copy and I think it is covered by the amount. Perhaps, I should wait for the file copy.

SPEAKER RITTER:

Thank you, Sir.

Anybody else want to comment on House Amendment "A"?

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If not, I will try your minds. All in favor,  
signify by saying Aye.

REPRESENTATIVES:

Aye.

SPEAKER RITTER:

Opposed, no. House "A" is adopted and ruled  
technical. Do you care to comment on this bill?  
Representative Tulisano.

REP. TULISANO: (29th)

Mr. Speaker, the Clerk has another amendment.  
LCO7659.

SPEAKER RITTER:

Clerk has amendment LCO7659, which will be  
designated House "B". If he would call and  
Representative Tulisano has permission to summarize.

REP. TULISANO: (29th)

Mr. Speaker, this amendment.

SPEAKER RITTER:

Wait, let's call it. Can you call it, please?

CLERK:

LCO7659, House "B" offered by Representative  
Tulisano.

SPEAKER RITTER:

Representative Tulisano.

REP. TULISANO: (29th)

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Mr. Speaker, this amendment just clarifies language in our current statute of how one makes service on corporations, any kind of service of process with a prejudgment remedy or otherwise by leaving a true and attested copy with the agent or for a natural person by leaving it at the agent's usual place of abode.

I move its adoption. This is on corporate service.

SPEAKER RITTER:

The question is on adoption. Will you remark further? Representative Radcliffe.

REP. RADCLIFFE: (123rd)

Mr. Speaker, a question through you to the proponent of the amendment.

If the agent for service of process is a corporation, such as the CT Corporation which is the agent for many corporations in the State of Connecticut, how would one leave that service at the usual place of abode of that agent? Through you, Mr. Speaker.

REP. TULISANO: (29th)

Through you, Mr. Speaker. The language indicates by leaving a true and attested copy with the agent or if it is only a natural person, that it may do it at the home.

REP. RADCLIFFE: (123rd)

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Through you, Mr. Speaker. Why would we want a corporate officer to be served at the home? Doesn't each corporation have a designated agent in place of business where they can be served at their usual place of business? Through you, Mr. Speaker.

SPEAKER RITTER:

Representative Tulisano.

REP. TULISANO: (29th)

Through you, Mr. Speaker. That is true, but at sometimes, as an example, through you, Mr. Speaker, I have been a statutory agent and people come to my home and give them to me. And I tell them okay, leave it there.

REP. RADCLIFFE: (123rd)

Through you, Mr. Speaker. Why wouldn't that be alright? That is personal service. If someone comes to your home and gives it to you and you are the agent, that would be personal service. But, are we now allowing abode service at the home of the statutory agent rather than simply personal service? Through you, Mr. Speaker.

REP. TULISANO: (29th)

Through you, Mr. Speaker. That is exactly what this would allow. As I indicated, sometimes I have said, I am not going to be there on the weekend. Just

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drop it at the house and there is no question if that happens and that is what this covers.

REP. RADCLIFFE: (123rd)

Thank you, I appreciate that answer, but I think we maybe opening up a situation of abuse here that is not intended.

Certainly if the agent for service of a corporation is a natural person, is the president, is the secretary, is an officer or a director, there is no reason why that person can't be served by personal service and the sheriff's return would reflect that the sheriff made personal service on this individual wherever.

If, however, there is a prescribed means for serving the corporation, serving the agent at the place of business, leaving it at a place of business, it would seem to me that the service of process is much more likely to come to the attention of corporate officers, corporate officials or corporate employees, it is left at the place of business. As I can see situations where someone may have moved, where a corporate officer may have moved or someone is still on as a secretary of a corporation and they leave it at the home and the corporation doesn't get knowledge of it, the return date goes by and assuming the

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corporation may in default in a law suit, all of which could have been avoided if the service of process had been left either based on personal service with the agent, or had been left at the normal place of business of that agent.

I think this is giving us an opportunity to get people into court, perhaps get a corporation into court, render a judgment against that corporation and not give them an adequate opportunity to defend itself against service which maybe proper in one year, but might not be proper in the next year because the person may have moved. The person may have moved out of state, may no longer be the agent of service of a corporation. Something may have been filed in the Office of the Secretary of State where that person is not any longer the agent.

But the sheriff's return is going to reflect that there was service at the usual place of abode of the authorized agent for service of a corporation which may be an attorney, maybe a secretary, maybe an employee who is designated purely as a scribner.

I think it should be easy to get service over corporations. It is, in many instances, through long armed jurisdiction, file with the Secretary of State, but this, I think, opens up some abuses in the system

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and I think I would have to oppose the amendment on that basis.

SPEAKER RITTER:

Representative Tulisano.

REP. TULISANO: (29th)

Mr. Speaker, certainly as Representative Radcliffe indicated, there is no intent to allow or authorize any kind of abuse. I think we are trying to facilitate the process here and I hope the amendment will pass. Thank you.

SPEAKER RITTER:

Representative Belden.

REP. BELDEN: (113th)

Thank you, Mr. Speaker. An inquiry to the gentleman, please through you.

SPEAKER RITTER:

Please proceed.

REP. BELDEN: (113th)

Representative Tulisano, has there been some problems, specific, significant problems that have developed that would mandate now that the service and I assume that service would be it says "leaving". I don't know if that is personal service or not, would have to be a the business agent's residence. Through you, Mr. Speaker.

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SPEAKER RITTER:

Representative Tulisano.

REP. TULISANO: (29th)

Mr. Speaker, I didn't quite, sorry, understand the question.

Leaving? Yeah, that is sort of leaving. That is not in hand service. That is abode service as Representative Radcliffe clearly identified. The problem that has arisen is a couple of attorneys came here today - not today - in the past week or two and indicated that there was a problem. People who have small corporations at home and they have to leave them at their homes. People are not there. That is the kind of problem they had indicated. Whether it is a great problem or not, I am not sure. A former member of the General Assembly brought it to our attention a couple of weeks ago.

SPEAKER RITTER: hunter starts

Representative Belden, you have the Floor, sir.

REP. BELDEN: (113th)

Thank you, Mr. Speaker. Did the gentleman indicate that this particular file is leaving at the abode or is it personal service? Through you, Mr. Speaker.

REP. TULISANO: (29th)

This amendment deals with abode service.

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REP. BELDEN: (113th)

Mr. Speaker.

SPEAKER RITTER:

Representative Belden.

REP. BELDEN: (113th)

Mr. Speaker, I thought that the file before us deals with serving, starts out with a corporation, etc etc. be served upon a corporation subject to provisions 32-296. What we're doing now is saying that you not only can serve the corporation, but you can serve the agent of the corporation at their abode. Is that an in hand service or is that, do you just leave it there?

SPEAKER RITTER:

Representative Tulisano.

REP. TULISANO: (29th)

It can be either way. In terms of this in lines, I think it's 24 through 27 and parallel language later on indicates you may leave it true and attest a copy with the agent or at their place of abode, so they can do it either way, in hand or abode service.

SPEAKER RITTER:

Representative Belden.

REP. BELDEN: (113th)

Mr. Speaker, I always thought that, and I'm not an

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expert here, but I always thought the corporation papers that are filed listed the address and where to be served and all those kinds of things at the Secretary of State's Office, and I'm not sure. Let me ask you a question. Could the president of Pfizer Chemical now be served at his residence in this case rather than the document being served at Pfizer in wherever they are Groton.

REP. TULISANO: (29th)

Through you, Mr. Speaker, Mr. Speaker, I stand to be corrected, but my understanding is that you could serve the president as well as the agent for service, and the president of the corporation, I guess you can go to his house and do it, and if that's Pfizer Corporation, the answer would be yes.

REP. BELDEN: (113th)

Through you, Mr. Speaker, can you do that now, or will the amendment allow that to happen.?

REP. TULISANO: (29th)

Through you, Mr. Speaker.

SPEAKER RITTER:

Representative Tulisano.

REP. TULISANO: (29th)

I believe you can do that now. This amendment deals with the agent for service of process.

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REP. BELDEN: (113th)

Through you, Mr. Speaker, one more question if I might.

SPEAKER RITTER:

Please proceed, sir.

REP. BELDEN: (113th)

Representative Tulisano, who is the agent?

SPEAKER RITTER:

Representative Tulisano.

REP. TULISANO: (29th)

Through you, Mr. Speaker, when you incorporate documents, you are allowed, as Representative Radcliffe indicated, it could be a corporation like they call CIT Corporate. There are people who set up to accept service, and then it could be often it's an attorney. Often when I incorporate small businesses or help people doing business at home as an alternative, I name myself as agent for service. I have the writ served on me, and then I let them know what's going on, but it's usually some other person other than one of the officers of the corporation.

REP. BELDEN: (113th)

Thank you, Mr. Speaker.

SPEAKER RITTER:

Thank you, Representative Belden. Will you remark

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further? Representative Cafero.

REP. CAFERO: (142nd)

Thank you, Mr. Speaker. Question to the proponent of the bill, through you.

SPEAKER RITTER:

Please frame your question.

REP. CAFERO: (142nd)

Representative Tulisano, I know the bill calls for a provision that has the plaintiff posting a bond to guard against potential damages by the defendant that he may sustain as a result of the. Excuse me this is on the bill proper. I'm sorry. I withdraw the question.

SPEAKER RITTER:

No problem, Representative Cafero. Will you remark further? Representative Belden.

REP. BELDEN: (113th)

Mr. Speaker, thank you. Representative Tulisano, I can be wrong here, but I think on line 25, 26, does it now mandate that if the agent is a natural person it must be served at the abode because the way it reads says or if such agent is a natural person, by leaving a true and attested copy with such agent or at the agent's abode, so it could be served at the agent's place of business or at his home.

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SPEAKER RITTER:

Representative Tulisano.

REP. TULISANO: (29th)

Through you, Mr. Speaker, my understanding is it is at either place. It is not exclusive.

REP. BELDEN: (113th)

Thank you.

SPEAKER RITTER:

Representative Belden. Representative Ward.

REP. WARD: (86th)

Mr. Speaker, I support the amendment. I think it does make sense to provide an additional manner of making service. My recollection as I reviewed the statutes that if you are trying to serve the agent for service for process, the only way to do that now is with in hand service. Certainly it's a common practice for the sheriff if it's a lawyer for example, to call their office, and ask if they'll accept it and people casually will say yes, leave it with my secretary or whatever, but technically in hand services require if you've got a lawyer that's not around too much because he's always in court or maybe hanging around the Legislature, the sheriff may have trouble giving in hand service. This would let the sheriff leave it at the individual's home so that the plaintiff's rights

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would be protected. They'd make service in a timely manner.

If you're going to allow yourself to be named the statutory agent, I'd point out the forms you file with the Secretary of State require that you list both your business address and your residence address, so that it seems to me you've indicated a willingness to at least be contacted at your home as an agent for service by filing that as a public document. It seems to me it makes it easier to make service. It's sensible to do. It's not an undue burden on the agent for service to process to pay attention to what gets served at his or her home. Thank you, Mr. Speaker.

DEPUTY SPEAKER COLEMAN:

Thank you, Representative Ward. Will you remark further? Will you remark further on House "B"? Representative Farr.

REP. FARR: (19th)

Yes, Mr. Speaker. I guess my major concern with this is that there's been no public hearing. It's a new concept that comes out in the closing days of the session. I can understand the arguments both ways. I'm not sure whether it's clear that this amendment was needed, but I'm also not sure that there's any reason why we have to do this at the last moment, and I guess

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I would just oppose doing it in this process, and urge rejection of the amendment.

DEPUTY SPEAKER COLEMAN:

Thank you, Representative Farr. Are there any further remarks? Are there any further remarks on House "B"? If not, I will try your minds. The question is adopted of House Amendment Schedule "B". All those in favor, please say aye.

REPRESENTATIVES:

Aye.

DEPUTY SPEAKER COLEMAN:

All those opposed, please say nay.

REPRESENTATIVES:

No.

DEPUTY SPEAKER COLEMAN:

The ayes have it. House "B" is adopted and ruled technical. Will you remark further on the bill as amended?

REP. TULISANO: (29th)

Mr. Speaker.

DEPUTY SPEAKER COLEMAN:

Representative Tulisano.

REP. TULISANO: (29th)

The Clerk has another amendment LCO6578.

DEPUTY SPEAKER COLEMAN:

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Would the Clerk please call LCO6578, designated House "C"?

CLERK:

LCO6578, House "C".

DEPUTY SPEAKER COLEMAN:

What is your pleasure, Representative Tulisano?

REP. TULISANO: (29th)

Mr. Speaker, permission to summarize.

DEPUTY SPEAKER COLEMAN:

Is there objection to summarization? Seeing none, please proceed, Representative Tulisano.

REP. TULISANO: (29th)

Mr. Speaker, this is another technical kind of amendment which picked up on service process on lines 67 and 68. 68 is the only new language. It adds any proper officer or indifferent person may serve a lis pendens. Sometimes you give it to a sheriff, and he signs it as a sheriff, and technically it's not allowed because he's going to serve the following writ with it, and it can cause some problems of whether or not it's properly done, and this is just to clarify that any proper officer or indifferent person could serve these notice of lis pendens. I move its adoption.

DEPUTY SPEAKER COLEMAN:

Thank you, Representative Tulisano. Question is

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adoption of House "C". Will you remark?

Representative Farr.

REP. FARR: (19th)

Mr. Speaker, I guess my concern here is that we seem to be launching into a Judiciary Committee meeting, and we have new concepts coming at us, amendment after amendment. I don't know if any of these have ever had anybody come before the Judiciary Committee and propose it. On the surface these look fine, but I also don't know if there's any reason why we have to do them.

I'm a little confused by the process. I guess people come in to see Representative Tulisano the last week of the session and suggest changes in our laws and he brings out amendments and we do it, and we could simplify a lot of our session by just getting rid of Judiciary Committee, and doing it that way, because we seem to make more changes in our laws to amendments in the last couple of days of the session than we do the rest of the session. Thank you.

DEPUTY SPEAKER COLEMAN:

Thank you, Representative Farr. Will you remark?  
Representative Tulisano.

REP. TULISANO: (29th)

Mr. Speaker, I don't mind getting beaten on as a

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normal course of events in the place, and I don't mind those kinds of statements, but the fact of the matter is it isn't unusual when somebody finds something that looks like technical and we make those kinds of changes in our law, and yes you can agree or disagree, but it's not unusual when you find something that there's no need to wait for year for it's not a substantive change in the law in terms of the rights and obligations of people that we do something like this. Thank you, Mr. Speaker.

DEPUTY SPEAKER COLEMAN:

Thank you very much, Representative Tulisano. Will you remark further? Representative Simmons.

REP. SIMMONS: (43rd)

Thank you, Mr. Speaker. I share the concerns of Representative Farr on this matter. I think it is unusual when we violate our process and begin to do what I call lone ranger the law in the last few days of the session. I had the distinct privilege of working for a number of months with Representative Mikutel on the other side with a bill on sexual predators, and we took that bill through every step of the process.

We circulated dear colleague letters. We had hearings in the appropriate committees. We talked to interested parties. We debated it on the Floor here

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earlier in this session. We went through every step of the process, and we allowed every member of this body to know what the heck we were doing with the thing, and I think that's important, and I think it's a travesty of the process when we stand up here on a Saturday in casual clothes, chattering away. God knows what's going on, and these three and four and five page pieces of paper come for us with one person's name on them, no hearings, nobody's looked at it. Nobody knows what it means, but it's okay. We have the assurances of the gentleman that it's fine.

I think when you violate the process, you don't know what the product is going to be, and the legislative process is important. It is important, and you don't violate except in very unusual circumstances, and it doesn't seem to me that the language of this amendment reflects a very unusual circumstance, so I would strongly disagree with what I've heard from the other side on this point. I think the process is important. I think we're violating it in this case. We don't violate it in the case of other legislation, and I don't see any reason why we should start doing that now. Thank you, Mr. Speaker.

DEPUTY SPEAKER COLEMAN:

Thank you very much, Representative Simmons. Are

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there any further remarks? Representative Ward.

REP. WARD: (86th)

Mr. Speaker, I think people in the last days are always wise to carefully read amendments and to be careful. I will indicate that the careful reading of this amendment strikes me that it is truly technical, and is fixing something that could potentially be a problem, and it does not harm by doing it. It think it's appropriate to look at all of these carefully. I believe these things were in at least in some files been around for some time, so there's an opportunity to review it, if it was making a substantive language, I agree, last minute amendments are a problem.

I don't think that's what's going on with this amendment, and I think it's a fair amendment that the Chairman of the Judiciary has offered.

DEPUTY SPEAKER COLEMAN:

Thank you much, Representative Ward.

Representative Radcliffe.

REP. RADCLIFFE: (123rd)

Thank you, Mr. Speaker. This does look like a technical amendment, and therefore I guess I have one purely technical question if I may to the proponent of the amendment. Representative Tulisano, on line 71 the word proper officer or indifferent person, are there

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any circumstances in which the proper officer would not be an indifferent person? Through you, Mr. Speaker.

DEPUTY SPEAKER COLEMAN:

To Representative Tulisano?

REP. RADCLIFFE: (123rd)

Yes, sir.

DEPUTY SPEAKER COLEMAN:

Representative Tulisano, do you care to respond.

REP. RADCLIFFE: (123rd)

Mr. Speaker, perhaps I should repeat the question.

DEPUTY SPEAKER COLEMAN:

Please proceed.

REP. RADCLIFFE: (123rd)

I think this is a purely technical question. You're adding the words proper officer or indifferent person. I'm just trying to think of any situation in which a proper officer wouldn't be an indifferent person. Through you, Mr. Speaker.

DEPUTY SPEAKER COLEMAN:

Representative Tulisano.

REP. TULISANO: (29th)

Through you, Mr. Speaker, I think that's probably true, and when it came to my attention, I said well, should you sign it as an indifferent person, and what

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happens however, because of the technicality and they're serving some other documents, say as a sheriff or a constable, they sign the whole thing, process it as a sheriff or constable, because they have the power. The indifferent person who doesn't have the power to do it. They just sign it two different ways and there are technical errors which possibly jeopardizes all of the possible, I don't think it's ever. It may have happened once and I've heard about it and someone has brought this to my attention as a possible potential thing that knocks out a whole lawsuit which you don't want to do.

DEPUTY SPEAKER COLEMAN:

Representative Radcliffe.

REP. RADCLIFFE: (123rd)

Thank you. Mr. Speaker, I appreciate that answer. Now I think I understand. This is a situation where someone is a constable of a city or a city sheriff or a county sheriff, makes services and signs that it could be subject to a motion to dismiss by someone claiming that although it was served by an indifferent person, since the language indifferent person is not used in the return of service, but another identification of the individual in question is used, that therefore it did not technically comply with the requirement that it

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be, although it was served by an indifferent person within the four corners of the world, it doesn't say indifferent person. If that's what we're trying to correct, that is purely technical, and I can't imagine too many judges who would grant a motion to dismiss on that particular basis, but if this is going to prevent one such incident, then I agree that it's a purely technical amendment, and it ought to pass.

DEPUTY SPEAKER COLEMAN:

Thank you, Representative Radcliffe.

Representative Ward.

REP. WARD: (86th)

Mr. Speaker, I just had very briefly one other additional reason to do this at least in speaking to sheriffs when they act as a sheriff, most or all of them have malpractice insurance of one form or another. If they act as an indifferent person, perhaps in a different county or even in their own county here if they have to sign it, and they do something wrong and they get sued, they may be outside of their insurance coverage, because they're only covered when they act in their official duties, and acts as a sheriff.

It seems to me that if a person's paying a premium to get coverage for something, you're asking him to carry out a duty, the individual who's having them

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carry out the duties would want them to be insured for those functions. If we're going to force them to say that he's an indifferent person, or she to say that she's an indifferent person and not a sheriff, you may have taken the coverage away, and so the individuals that would ultimately protect would no longer be protected, so I think it really is technical, but there may be a reason to correct the technical problem.

DEPUTY SPEAKER COLEMAN:

Thank you, Representative Ward. Are there any further remarks? Will you remark further?

REP. BELDEN: (113th)

Mr. Speaker.

DEPUTY SPEAKER COLEMAN:

Representative Belden.

REP. BELDEN: (113th)

Thank you, Mr. Speaker. Very briefly, I think in all of this debate nobody is questioning the gentleman from Rocky Hill's purpose. His purpose I'm sure is to where possible to improve our laws in whatever manner he can, and we certainly appreciate that. The other thing I would like to just mention at least on this particular file all these amendments whether they're technical or perhaps a little bit more, this file is not going into effect until January 1, 1994, so at

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least some people will understand that there's something coming at them whatever it is.

DEPUTY SPEAKER COLEMAN:

Will you remark further? Will you remark further? If there are no further remarks, I will try our minds. The question before the Chamber is adoption of House Amendment Schedule "C". All those in favor, please indicate by saying aye.

REPRESENTATIVES:

Aye.

DEPUTY SPEAKER COLEMAN:

All opposed, say nay. The ayes have it. House "C" is adopted and ruled technical. Will you remark further on the bill as amended? Representative Tulisano.

REP. TULISANO: (29th)

Mr. Speaker, the Clerk has an amendment LC05646.

DEPUTY SPEAKER COLEMAN:

Will the Clerk please call LC05646, designated House "D"?

REP. TULISANO: (29th)

Through you, Mr. Speaker, permission to summarize.

CLERK:

LC05646, House Amendment Schedule "D", as offered by Representative Krawiecki and Ward.

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DEPUTY SPEAKER COLEMAN:

I believe Representative Tulisano wishes permission to summarize the amendment. Is there objection? Without objection, please proceed, Representative Tulisano.

REP. TULISANO: (29th)

Yes, Mr. Speaker, this amendment takes out certain provisions requiring any person, when you give notice of the prejudgment remedy, that the person disclose any possible defenses that could result, that the defendant would have. I move for its adoption.

DEPUTY SPEAKER COLEMAN:

Question is adoption of House "D". Will you remark further? Will you remark concerning adoption of House "D"? If not, the Chair will try your minds. The question before the Chamber is adoption of House Amendment Schedule "D". All those in favor please say aye.

REPRESENTATIVES:

Aye.

DEPUTY SPEAKER COLEMAN:

All opposed, say nay. The ayes have it. House "E" ("D") is adopted and ruled technical. Will you remark further concerning the bill as amended?

REP. TULISANO: (29th)

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Mr. Speaker.

DEPUTY SPEAKER COLEMAN:

Representative Tulisano.

REP. TULISANO: (29th)

The Clerk has another amendment, LCO5650.

DEPUTY SPEAKER COLEMAN:

Will the Clerk please call LCO5650, designated House "E".

CLERK:

LCO5650, designated House "E", offered by  
Representative Krawiecki.

DEPUTY SPEAKER COLEMAN:

Is there objection to summarization? Without objection, please proceed, Representative Tulisano.

REP. TULISANO: (29th)

Mr. Speaker, this amendment takes out from the file copy some requirements that there be disclosure of insurance that is not normal and customary. I move its adoption.

DEPUTY SPEAKER COLEMAN:

Question is adoption of House Amendment Schedule "E". Will you remark further? Will you remark further? If not, I will try your minds. All those in favor, please indicate by saying aye.

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Aye.

DEPUTY SPEAKER COLEMAN:

All those opposed, indicate by saying nay. The ayes have it. House "E" is adopted and ruled technical. Will you remark further? Will you remark further on the bill as amended? Representative Cafero.

REP. CAFERO: (142nd)

Thank you, Mr. Speaker. Now seems to be the right time. Question to the proponent of the bill.

DEPUTY SPEAKER COLEMAN:

Please proceed.

REP. CAFERO: (142nd)

Yes, Representative Tulisano, with regard to the plaintiff's bond, what criteria is used other than that that's stated in the summary by a judge in determining the amount of the bond? What kind of damages do you foresee a defendant suffering that would determine the amount of the bond?

DEPUTY SPEAKER COLEMAN:

Representative Tulisano.

REP. TULISANO: (29th)

Through you, Mr. Speaker, I suppose if its property that could be wasted, that is deteriorate or something like that, and there's not, that could happen. There is some question in one of the court cases I gather

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than the mere fact of depuration of property that you don't have available, the property for to refinance to pay for your kids' educations an example, and that's just a mere unavailability of land for use or equity in anything could cause you damages, and one of the concerns of the bond and why it is in here is because there was some hint in the Supreme Court case that in fact that would be required in the future, and this is why it's an optional in this particular bill.

DEPUTY SPEAKER COLEMAN:

Thank you, Representative Tulisano. Representative Cafero.

REP. CAFERO: (142nd)

No further questions. Thank you.

DEPUTY SPEAKER COLEMAN:

Will you remark further? Will you remark further on the bill as amended? If not, would staff and guests please come to the Well of the House? Would members please be seated? The machine will be opened.

CLERK:

The House of Representatives is voting by roll.

Members, to the Chamber. The House is voting by roll.

DEPUTY SPEAKER COLEMAN:

Have all members voted? If all members have voted, the machine will be locked. The Clerk will take a

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tally.

The Clerk will announce the tally.

CLERK:

House Bill 7329, as amended by House Amendments  
"A", "B", "C", "D" and "E".

Total Number Voting	144
Necessary for Passage	73
Those Voting Yea	144
Those Voting Nay	0
Those absent and not Voting	7

DEPUTY SPEAKER COLEMAN:

The bill, as amended, is passed.

CLERK:

Page 23, Calendar 597, Substitute for House Bill  
6619, AN ACT CONCERNING THE JOB TRAINING INNOVATION  
ACT. Favorable Report on GAE.

DEPUTY SPEAKER COLEMAN:

Representative Betkoski.

REP. BETKOSKI: (105th)

Mr. Speaker, I move acceptance of the Joint  
Committee's Favorable Report and passage of the bill.

DEPUTY SPEAKER COLEMAN:

The question is acceptance and passage. Will you  
remark further?

REP. BETKOSKI: (105th)

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So what I would like to say, Mr. Chairman, I hope this is the banner year that we can take and see you raise both these bills. I would suggest on SB19, it has an effective date of October 1, 1993, that would be impossible. That should have to be changed to October 1, 1995 because the Constitutional Amendment 6 would have to be put on the machine in the next general election, which is next year, and I would hope that we can get both these items passed this year, prepare for it and have a good sheriff system.

REP. TULISANO: Thank you.

SEN. GUNTHER: Are there any questions?

REP. TULISANO: Thank you.

SEN. GUNTHER: The silence is deafening.

REP. TULISANO: Well, we've asked you questions about ten years ago, so --.

SEN. GUNTHER: Pardon?

REP. TULISANO: Nothing. Milton Widem and David Hemond. This is a twosome. It still will take as half as much time this way, right?

ATTY. MILTON WIDEM: No.

REP. TULISANO: No?

ATTY. MILTON WIDEM: Mr. Chairman, members of the Judiciary Committee, I am Milton Widem. I'm a member of the Connecticut Law Revision Commission and here in support of HB7329. You have before you a very definitive statement of the position taken by the Law Revision Commission unanimously in support of HB7329, which deals essentially with the, in my opinion, the constitutionally mandated changes to our prejudgment remedy statutes in Connecticut, and most particularly, we're concerned with Section 52-278e(a)(1).

The United States Supreme Court in Connecticut vs. Doebr, which is cited in Mr. Hemond's statement, clearly stated that due process, under the Fourteenth Amendment of the United States

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Constitution, which is applicable to the state's mandates that our statute was unconstitutional in that it related -- it did not provide numerous safeguards which due process requires under our Constitution.

What the commission has done at the request of the Judiciary Committee, has revamped the prejudgment remedy statute and particularly with respect to the ex parte real estate attachment, which you recall under the present statute, all one needs to do is never to get an ex parte attachment which does not require a judicial hearing of any kind, is that you go in, file your affidavit and if you're going to secure the attachment of real property, nothing further is required.

The situation arise in an unfortunate case, Connecticut vs. Doehr, was the worse type of situation, factual situation, which could have been presented for the United States Supreme Court. It was an assault and battery, which obviously doesn't lend itself to any sort of definitive statement with respect to the facts or the circumstances and more particularly with respect to the damages which flow therefrom, but unfortunately, that's the case that the United States Supreme Court granted certiorari and that's the matter we're dealing with.

What we have sought to do with the revisions to 52-278e(a)(1) essentially was to modify the statute in an effort to meet what we consider to be the due process requirements mandated by the United States Supreme Court.

Now we clearly recognize that the Connecticut Supreme Court, as well as the Second Circuit of Court of Appeals in Shaumyan vs. O'Neil and the Connecticut Supreme Court in Union Trust Company vs. Heggelund, both cases of which are cited in Mr. Hemond's statement, clearly take the position that since Connecticut vs. Doehr was an assault and battery, a tort matter, that the unconstitutional aspects of our statute dealt only with tort matters and Shaumyan was a contract matter with an installment sales situation and the Second Circuit Court of Appeals held that interpreted Connecticut vs. Doehr as relating to a tort matter and did not

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relate to contract matters where the Second Circuit took the position that a contract matter lends itself more to -- to more definitive types of factual situations and a more definitive statement with respect to the damages that flow therefrom. However --.

REP. TULISANO: The bill before us represents last year's -- you worked on the --.

ATTY. MILTON WIDEM: Subcommittee.

REP. TULISANO: The Subcommittee of the Law Revision Commission.

ATTY. MILTON WIDEM: That's correct.

REP. TULISANO: This represents the total recommendations of the committee.

ATTY. MILTON WIDEM: It does.

REP. TULISANO: Do you think it puts our statute as constitutional as possible?

ATTY. MILTON WIDEM: I think it does, Mr. Chairman.

REP. TULISANO: Is there any case that's still outstanding in which the statute is still under attack?

ATTY. MILTON WIDEM: Not that I know of at this point, although I expect that it will be raised again.

REP. TULISANO: Even after this --? What are the deformities even if we pass the statute, what can be raised against?

ATTY. MILTON WIDEM: I think we've -- I think in my opinion, Mr. Chairman, that if we pass this sort of a statute, I think we've met constitutional muster in terms of the due process argument. I think because what we have done in effect is to provide for the exigent circumstances, which is clearly lacking in our situation, we're limiting it to very much an exigent type circumstances, which the Supreme Court felt was lacking in with respect to real merits.

The U.S. Supreme Court took the position in Doebr that merely at attachment of real property was not an exigent circumstance to justify the granting of an ex parte attachment and I think that makes our present statute most vulnerable.

Now I don't believe, as a matter of practice, that most prudent lawyers are utilizing that statute to allow a sheriff to go ahead and attach real property. I think most sheriffs are leary about going forward on that basis, but I do think that our statute has to be updated because clearly it lacks the basic requirements which Doebr has mandated and I am very much concerned, our commission is very much concerned that unless we update our statute to meet these minimum requirements, we're going to be faced with additional problems and I think it requires -- I think the further reason for the support of our bill, it would give the Bar of the State of Connecticut greater assurance, as well as the judiciary, that we have a statute which does meet the minimum requirements and what we have done further is attempt to clarify a number of other issues.

We are concerned with the probable cause matter and we have modified that to provide that it being more probable than not and the case which we cite to that is Calfee vs. Usman, which is cited in the statement and where the Supreme Court of Connecticut has taken the position that when you talk about probable cause, the court says, on Page 37 of that opinion, the court's role in such a hearing is to determine probable success by weighing probabilities and this weighing process applies to both legal and factual issues.

REP. TULISANO: All right, okay. Wait a minute. The problem I have is, is there anything out there in any and other states which effectively say any prejudgment remedy, attachments, no matter what process you use, will lend itself to be a claim of unconstitutionality in the separation of property?

ATTY. MILTON WIDEM: Well, I think the --.

REP. TULISANO: Has that claim been made anywhere that you know of?

ATTY. MILTON WIDEM: David, do you have any?

ATTY. DAVID HEMOND: Yes, just briefly.

REP. TULISANO: And what happened as a result of those claims?

ATTY. DAVID HEMOND: Basically, every other state has a more protective process than we do. That fact was cited.

ATTY. DAVID HEMOND: I don't have any other cases out there that are in other states that would render our statutes we're proposing non-constitutional.

REP. TULISANO: It would look like the other statutes?

ATTY. DAVID HEMOND: Our statute, as we're redesigning it, looks much more like the other state statutes. The only issue that I can think of that might still come up is the issue of whether there should be a mandatory bond requirement. Our statute, our proposal provides for a discretionary bond requirement. The judge can look at the facts and say no bond is required. It can also require a bond.

REP. TULISANO: The other states have had theirs held up?

ATTY. DAVID HEMOND: There is no other attack against another state that I know of that's currently before the U.S. Supreme Court.

REP. TULISANO: But (inaudible) in the standards that the trend since 19 -- early 70s, if not late 60s, had to restrict more and more the ability to attach property without a full hearing.

ATTY. DAVID HEMOND: That's certainly true, but the basic --.

REP. TULISANO: And so why are we wasting our time if five years from now it's all out?

ATTY. DAVID HEMOND: Well, quite clearly, what we're doing is limiting it to exigent circumstances, a heightened threat against a plaintiff's interest and the U.S. Supreme Court has said if you can show

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ATTY. MILTON WIDEM: exigent circumstances, that is a minimum sort of showing under which you can get an ex parte without a hearing and that's what we provide for.

ATTY. MILTON WIDEM: I think our bill, as a whole, really I think covers the gamut because if you look at the statutes --.

REP. TULISANO: Time's a running, guys. You don't get much more time. Mr. Wollenberg has a question.

ATTY. MILTON WIDEM: Go ahead.

REP. WOLLENBERG: Well, we did all of this because of Doehr.

ATTY. MILTON WIDEM: Exactly.

REP. WOLLENBERG: When Doehr came out a lot of people said this really should never have been done, the negligence case, they never should have done it for tort.

ATTY. MILTON WIDEM: Well, it was a tort case, not negligence.

REP. WOLLENBERG: Well, it was. It was an automobile accident, wasn't it, and they went after the property.

ATTY. MILTON WIDEM: No, no, Doehr was as an assault. It was an assault and battery.

REP. WOLLENBERG: It was an injury, yes, okay.

ATTY. MILTON WIDEM: It was the worst type of case that could have come up.

REP. WOLLENBERG: It didn't fit anyway and anybody knew that and we did all this to get there and some judge says it does apply and so now we've had Doehr kind, they kind of say, and what is it the case, the Shaumyan Case.

ATTY. MILTON WIDEM: Shaumyan vs. O'Neill.

REP. WOLLENBERG: Yes. Now they say what you were doing all the time was okay. You never should have done Doehr under your statute.

ATTY. DAVID HEMOND: Can I say Shaumyan really does not, cannot really be reconciled with the language in Doebr. Doebr very clearly applies both to contract cases and tort cases, I believe, and I think that it -- because it was based -- Shaumyan came along and limited it to the factual underlying basis, but if you read the language of Doebr, Doebr is very clear in saying that you really need a heightened threat to the plaintiff's interests if you're going to allow an attachment without a hearing.

REP. WOLLENBERG: Well, what did Shaumyan say?

ATTY. DAVID HEMOND: Shaumyan said that that rationale only applies to tort cases. What I'm saying is that Doebr, which cites all the other states right now, and basically every other state requires exigent circumstances even in contract cases, sometimes it even requires a bond in those circumstances.

There is no other state like Connecticut that allows an ex parte, even in a contract situation, allows an ex parte attachment without a bond.

REP. WOLLENBERG: We've always had a more liberal --.

REP. TULISANO: We've been very liberal.

REP. WOLLENBERG: You know, there was a time when it wasn't even -- it didn't even have to -- you just go out and send a sheriff.

ATTY. DAVID HEMOND: We have been the most (inaudible) of all states, frankly, in terms of the rights, protective rights in terms of seeking the attachment.

REP. WOLLENBERG: You just to send a sheriff, remember?

ATTY. DAVID HEMOND: We used to issue it on our own signature for many years.

REP. WOLLENBERG: And all of a sudden somebody came along and said you couldn't.

ATTY. DAVID HEMOND: But I think the whole concept of due process has changed very rapidly.

REP. WOLLENBERG: You felt (inaudible, two people speaking at same time) over both of them? Okay.

ATTY. DAVID HEMOND: Any other questions? Thank you, Mr. Chairman.

REP. TULISANO: No. Do have something to add to the record? Do you want to give us your statement or are you going to stay something?

ATTY. DAVID HEMOND: No, my statement for the record.

REP. TULISANO: Faith Arkin. You want to amend that bill? Thank you. Anything else? I have that statement. I understand it's very simple, yes.

REP. TULISANO: Should I just state it for the record?

REP. TULISANO: No, you don't have to. We'll incorporate it by reference if you'd like to.

REP. TULISANO: Good morning. My name is Faith Arkin. I was going to talk on two bills today. One was HB7329. I have submitted written testimony and Representative Tulisano says that was fine.

REP. TULISANO: Yes, it's just a matter of changing two lines, right?

REP. TULISANO: Two lines and also the effective date to January 1 because we can't get the forms out in time.

REP. TULISANO: That's it.

REP. TULISANO: Okay. The second bill is HB7324, AN ACT CONCERNING CRIMINAL RECORDS. The Statement of Purpose indicates that the proposed language is to provide that the criminal history record information other than non-conviction information shall be made available to the public. Under current law the public now has access to this criminal record history information.

HB7324 would not amend that access, but the provisions that are being proposed to be deleted would allow the Family Division and Executive Branch Agencies to access information currently being maintained by the State Police Bureau of

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REP. TULISANO: Thank you. Attorney Susan Smith. Did you have the other statement on PJRs also?

ATTY. SUSAN SMITH: Yes, I do.

REP. TULISANO: Okay.

ATTY. SUSAN SMITH: Good morning, Mr. Chairman, members of the committee. My name is Susan Smith. I'm an attorney in private practice. I speak today on behalf of the Connecticut Network of Victims' Attorneys and the Connecticut Sexual Assault Crisis Service.

REP. TULISANO: The who?

ATTY. SUSAN SMITH: CONNSACS, sir.

REP. TULISANO: No, Connecticut Attorneys for Victims --?

ATTY. SUSAN SMITH: The Connecticut Network of Victims' Attorneys.

REP. TULISANO: That's a new one. Thank you.

ATTY. SUSAN SMITH: We're a group of attorneys from all the Judicial Districts in Connecticut that represent victims of sexual abuse. I also speak on behalf of all civil victims who use the device of prejudgment attachment to secure remedies in uninsured cases. HB 7329

While we laud the efforts of the Law Revision Commission in attempting to protect the statute from further constitutional attack, we believe that the commission is overreacting to the Doehr Case and takes the case too far.

Our concern is the issue of the burden of proof standard, the standard of probable cause and the discretionary bond requirement. Speaking first to the probable cause issue, I would like to summarize my testimony. I've given a full statement to the committee, and state that the Doehr Case did not reach the issue of probable cause. It was not before the court. The court had inadequate information as to Connecticut's interpretation of the standard.

If you read the Doebr Case in its entirety, its main concern was ex parte attachments. The same is true of the Shaumyan Case. With the addition of adversary hearings prior to the deprivation, we believe that those cases read very differently. Indeed, the Supreme Court in a colloquy with the U.S. Supreme Court in the Calfee Case explicated Connecticut's probable cause standard and stated, very ably I think, that the concept of probable cause is one that has been around for centuries and is used in a variety of contexts including the criminal context. There's nothing unconstitutionally vague about holding somebody in jail in lieu of bond on a probable cause finding.

Under the lesser scrutiny of property interests, we believe that the probable cause standard need not be changed. Indeed, to change the standard to a standard more likely than not will simply breed further litigation. I'm open for any questions.

SEN. JEPSEN: Representative Wollenberg.

REP. WOLLENBERG: You were here when the other people testified?

ATTY. SUSAN SMITH: Yes, I was.

REP. WOLLENBERG: That's kind of what I was getting at. I thought when Doebr came out it was limited to its facts and then finally the court came out and said it was limited to its facts and we seem to have jumped through the hoops doing Doebr and then the other case came out and it seems to me that I kind of agree with you. I think we've gone too far. I think we got into the mode of correcting something and all of a sudden it didn't need to be corrected and we never got out of the mode.

ATTY. SUSAN SMITH: Yes. I'm sorry to interrupt. My fear is that the more likely than not scenario is going to be read as a fair preponderance of the evidence and we're going to end up with the type of mini-trial adversary proceeding that's simply going to overburden the courts, create additional questions. Do those hearings create collateral, estoppel questions?

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REP. WOLLENBERG: With Doehr, originally we had to do something.

ATTY. SUSAN SMITH: Exactly.

REP. WOLLENBERG: But once that cleared up, I'm not sure we weren't just as well to go back to where we were because we weren't bad.

ATTY. SUSAN SMITH: This is true. Probably the ex parte, the degree to which Connecticut had ex parte procedures is probably constitutionally offensive. We were holdouts on that. I mean in the old days you just put an additional sentence in your writ.

REP. WOLLENBERG: That's all you did.

ATTY. SUSAN SMITH: And the sheriff went to the clerk's office with hopefully a legible writ.

REP. WOLLENBERG: It was always for security, though, not pressure, right?

ATTY. SUSAN SMITH: Right. And the other concern that we have, Representative, is the bond requirement. We feel that that goes too far. There has been no case that has been cited or has come up that has held the bond requirement to be unconstitutional and when you talk about the type of tort victims that we represent or the type of tort victims that have uninsured claims, it is difficult enough for those people to find counsel to represent them and bring their cases into court.

If we impose bond requirements, it's simply another hurdle they have to overcome to access the system and we do feel strongly that that probable cause standard is going to create another hurdle and rather than clearing up litigation, it's going to create more litigation because we don't know how to interpret a more probable than not standard, yet we have an entire pre-existing body of constitutionally upheld probable cause law.

REP. WOLLENBERG: Thank you.

SEN. JEPSEN: Anything further? Kevin Boyle, to be followed by Helene Fitch. Is Kevin Boyle not here? He's not. Go ahead. Are you Helene Fitch.

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This association has nothing to do with the State of Connecticut. It's not a licensing body. It's merely -- we've said this before, it's merely a slush fund for the sheriffs. We would ask that you support this bill. We're looking to eliminate the middle man. The individual special deputy sheriffs are dedicated individuals working for the State of Connecticut.

REP. TULISANO: Would you expect that they all start new and will get jobs according to some normal service or we would have to just move these folks in?

ATTY. KEVIN BOYLE: Well, I'd expect that they'd have to some criterion.

REP. TULISANO: So there may be some who won't have jobs.

ATTY. KEVIN BOYLE: That's right.

REP. TULISANO: We'll establish some and they'd all take their exam or whatever the criteria is or --?

ATTY. KEVIN BOYLE: That's right. The reason why we started this was that we wanted to establish some professionalism and some training in these departments. My experience with these people is that the vast majority of these people are dedicated to the jobs. They want to make this their career. They want to work for the State of Connecticut. They want to work in the field of law enforcement and they're looking to raise the standards in their department.

REP. TULISANO: Okay. Any questions? Thank you.

ATTY. KEVIN BOYLE: Thank you for your time. Raphie Podolsky.

ATTY. RAPHAEL PODOLSKY: Thank you, Mr. Chairman. My name is Raphael Podolsky. I'm with the Legal Assistance Resource Center. I want to speak in favor of HB7329, which deals with prejudgment remedies and I want to speak against SB1092, which deals with the shut off of water service in apartment buildings.

On HB7329, I was on the Subcommittee of the Law Revision Commission that drafted this bill. It's an effort to constitutionalize the prejudgment remedy statute in light of Doebr. There is obviously some unsettled aspects to the law and there are different ways that this could be done, but I think that it represents a fair balance and I would recommend it.

My only hesitation in the draft was that it does create a limited bond requirement which can have the effect of making it harder for a plaintiff to begin an action. Given -- the language it uses, though, is a compromised language, which I think is reasonable and does make provision for waiver and it's discretionary with the court.

SB1092, I think, is essentially a recipe for the abandonment of buildings and I strongly would urge you to reject it. What it -- what that bill does is it allows the water to be shut off in an apartment building if there's a water receiver appointed and rents aren't coming in.

It really works on the false assumption that by shutting off the water, you'll collect the money. That may happen in some cases, but in plenty of other cases what you're going to end up with is an abandoned building and what it means is the water company goes in under receivership because the landlord is not paying the water bill and ends up not with -- it starts with a functional occupied building and it ends up with a vacant building.

Under the status quo, if you have a master metered building for water and people aren't paying rent, you can evict -- the receiver can evict them for nonpayment of rent and it can be done on an individualized basis as to whichever tenants are not paying the rent.

The problems -- there are at least four problems with this bill. First of all, it creates a very dangerous sanitary situation. You can't even flush the toilet if you don't have water in the building. It's an extremely unhealthy situation to allow in a multi-family building.

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Raised Bill 7309 HB 7329  
An Act Concerning Prejudgment Remedies  
Hearing April 22, 1993

**Testimony of Susan K. Smith<sup>1</sup>**

Good morning, members of the Committee. My name is Susan Smith. I am an attorney in private practice with the law firm of Santos, Peck & Smith here in Hartford. I am here today on behalf of myself, the members of the Connecticut Network of Victims Attorneys, the Connecticut Sexual Assault Crisis Service --CONNSACS-- and Connecticut's victims of crime and survivors of abuse and exploitation.

The Connecticut Network of Victims Attorneys is a group of 20 or so attorneys from all of Connecticut's judicial districts who represent victims of crime, sexual assault, and sexual abuse. This committee is undoubtedly familiar with the fine work of CONNSACS, directed by Gail Burns-Smith. CONNSACS workers and volunteers have assisted thousands of victims of sexual assault and abuse through its 13 sexual assault crisis centers across the State.

I also speak on behalf of all civil victims who use the device of pre-judgment attachment to secure a remedy in uninsured claims.

**A.**

**The Prejudgment Remedy Statute  
Provides a Significant Legal Mechanism  
for Victims of Crime and Abuse**

In 1991, this Committee and the Legislature of the State of Connecticut passed legislation that allowed victims of abuse to bring civil actions for

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<sup>1</sup>The contribution of Attorney Helen L. McGonigle of Danbury is acknowledged with thanks.

sexual abuse until they reach the age of 35. I speak of P.A. 91-240, codified at § 52-577d. In so doing, this Committee and the Legislature demonstrated an enlightened understanding of the seriousness and long-term nature of the injury that is inflicted on abuse victims. Since 1991, many survivors of childhood abuse have brought actions against their abusers. In this past year, the statute has been upheld in two important court decisions: one in the Connecticut Supreme Court and another in the U.S. District Court. We believe that the bringing of these actions serves not only to achieve justice for victims, but to help those victims become empowered and to regain control of their lives. But more significantly, we believe that the existence of the civil remedy serves as an important deterrent.

The vast majority of those claims under the sexual abuse statute have been instituted with an Application for Prejudgment Remedy. PJR applications are necessary because in many --if not most-- situations, there is either no insurance to cover the abuser or, if it exists, coverage is contested under a reservation of rights.

I am here today to ask that you consider the impact that passage of House Bill 7329 will have on the remedy that the Legislature has provided for victims of sexual abuse. We ask that you not render that remedy meaningless by depriving victims of a means of effectively enforcing their claims.

In support of our request, I make several points concerning the merits of the bill in the context of Connecticut's pre-existing law.

**B.**  
**The Burden of Proof Required by the  
Statute is Unnecessarily Stringent**

First I speak to the burden of proof required by the language of the Bill. The Bill appears to heighten the burden of proof required to obtain a PJR. By replacing the probable cause burden with a burden of showing "it is more probable than not" that Plaintiff will prevail, the Bill arguably imposes a burden that is tantamount to the "preponderance of the evidence" burden required at trial.

The heightened burden of proof will require civil victims in tort cases to put on extensive evidence and bring in expert testimony at the preliminary stage of litigation. It will require victims to try their cases twice, once at the PJR hearing stage and once at trial. This would erect a barrier for victims of uninsured claims who find it difficult enough as it is to obtain representation to bring those claims into the courts.

More extensive PJR hearings will create additional work for our already overburdened court system.

Courts reviewing the existing probable cause requirement, have found it to pass Constitutional muster. In 1992, in *Calfee v. Usman* our Supreme Court reviewed the probable cause standard and found that it was not unconstitutionally vague.<sup>2</sup> The Court described the trial court's role as "weighing probabil-

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<sup>2</sup>The Court held that the probable cause formulations contained in § 52-278c and § 52-278d were not in conflict and required the trial court to make the same inquiry. "The trial court's function is to determine whether there is probable cause to believe that a judgment will be rendered in favor of the plaintiff in a trial on the merits. . . . The hearing in probable cause for the issuance of a prejudgment remedy is not contemplated to be a full scale trial on the merits of the plaintiff's claim. The plaintiff does

ities" that there is probable cause to believe that a judgment will be rendered in favor of the plaintiff at trial.

The *Calfee* court pointed to another significant point in support of the probable cause standard: It is one that has been used to test significant personal and property rights. In fact, a finding of probable cause is Constitutionally sufficient to hold a person in jail in lieu of bond. And as our Court pointed out, an impairment of liberty rights is a much more serious deprivation than a property attachment.<sup>3</sup>

Further, as a practical matter, there is a body of pre-existing law defining and interpreting what is meant by the phrase "probable cause."<sup>4</sup> To introduce

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not have to establish that he will prevail, only that there is probable cause to sustain the validity of the claim. . . . The court's role in such a hearing is to determine probable success by weighing probabilities.' . . . Moreover, this weighing process applies to both legal and factual issues. 224 Conn. 29, 36-37.

In reaching its decision, the Connecticut Supreme Court ably interpreted the decision of the U.S. Supreme Court in *Connecticut v. Doebr*, \_\_\_\_\_ U.S. \_\_\_\_\_, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991). The *Doebr* court's decision turned upon the fact that the attachment under scrutiny was granted *ex parte* based upon a "skeletal" affidavit. "It is self-evidence that the judge could make no realistic assessment concerning the likelihood of an action's success based upon these one-sided, self-serving and conclusory submissions." 11 S. Ct. 2114. The Court endorsed the Second Circuit's conclusion that fairness could not be served by a "secret, one-sided determination of facts." *Id.* As such, the risk of erroneous deprivation was too great. The *Doebr* court's observations would no longer be accurate under the revised prejudgment remedy statute affording the defendant an adversary hearing.

<sup>3</sup>The Court stated: "Probable cause is a standard widely used to validate a preliminary impairment of a broad range of personal and property rights, from the suspension of professional licenses to the issuances of warrants for seizure and arrest. . . . The validity of a probable cause standard has regularly been upheld in the criminal law context. Such impairment of liberty rights is undeniably more serious than the impairment of property rights arising out of an attachment. 224 Conn. at 38 & n.6.

<sup>4</sup>Probable cause has been defined as

"a bona fide belief in the existence of the facts essential under the law for the action and such would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it." *Wall v. Topmey*, 52 Conn. 35, 36 (1884). Probable cause is a flexible common sense standard. It does not demand that a belief be correct or more likely true than false. *Texas*

a new standard in the law will create a flurry of litigation on the meaning of the language and how it relates to pre-existing standards.

**C.**  
**The Bond Requirement Imposes  
an Unnecessary and Undue Burden on Litigants**

The Bill provides an express option for Defendants to request that the Court require the Plaintiff seeking and obtaining a Prejudgment Remedy to post a Bond. The decision whether a bond should be required would rest in the discretion of the trial court.

Although not a mandatory requirement, the Bill invites Defendants to request bonds to a much greater degree than the existing statute. Arguably, parties have the leeway to request and judges have the discretion to order bonds under the current statutory scheme. Section 278d(a) provides that the court may grant an attachment "as requested or as modified" by it. The statute therefore gives the Court complete discretion to determine the terms and conditions of the prejudgment remedy.

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*v. Brown*, 460 U.S. 730, 103 S. Ct. 1535, 75 L.Ed.2d 502 (1983).

*Three S. Development Co. v. Santore*, 193 Conn. 174, 175, 474 A.2d 795 (1984).

The fair preponderance of the evidence is not required at a probable cause hearing, but rather, the Plaintiff need only show the probable validity of her claim. *New England Land Co. Ltd. v. DeMarkey*, 213 Conn. 612, 620, 569 A.2d 1098 (1990). See also *Darrah-Wantz v. Brown*, 131 F.R.D. 20, 23. The hearing is not contemplated to be a full scale trial on the merits of the Plaintiff's claim. *New England Land Co., Ltd. v. DeMarkey*, 213 Conn. 612, 620, 569 A.2d 1098 (1991). The trial court's role in such a hearing is to determine probable success by weighing probabilities. *Green v. Holy Trinity Church of God in Christ*, 16 Conn. App. 700, 549 A.2d 281 (1988). The weighing process applies to both legal and factual issues. *Augeri v. C. F. Wooding Co.*, 173 Conn. 426, 429, 378 A.2d 538 (1977). The court must also evaluate not only the Plaintiff's claim, but also any defenses raised by the Defendant. *Haxhi v. Moss*, 25 Conn. App. 16 (1991).

Greater imposition of bonds would have a chilling effect on claims brought by victims of sexual assault and abuse. It would make even more difficult the retention of counsel to bring uninsured claims and in many instances would impose an insurmountable barrier to the security of a remedy.

Connecticut's PJR statute was evaluated in terms of the absence of a mandatory bond requirement by the Second Circuit Court of Appeals. In *Shaumyan v. O'Neill*, Slip. Op., Docket No. 92-7656, 2 Cir. (Mar. 3, 1993), the federal appeals court upheld Connecticut's pre-*Doehr* version of the PJR statute. Noting that a similar argument was rejected by a plurality of the justices in *Doehr*, the Second Circuit Court reasoned that Connecticut's vexatious litigation statute allowed a counterclaim for vexatious litigation claims. The existence of that remedy which provided for double or treble damages, without having to initiate a new action, was adequate to protect the interests of a Defendant. Slip. Op., at 1720-1721.

Both the *Doehr* Court and the *Shaumyan* courts reasoned that the presence of a bond would not serve to cure any Constitutional defects in the PJR scheme. And if the statute was constituted with adequate safeguards against erroneous deprivation of property, the bond requirement is not necessary to satisfy due process.

Finally, both courts looked to the long-standing Mechanic's Lien procedure for which bond has never been required.

The *Shaumyan* decision is significant because the bond requirement was evaluated in terms of the pre-*Doehr* version of the statute that did not require a pre-deprivation hearing. With the additional safeguards of an adversary hearing currently required, the arguments against the need for a mandatory or discretionary bond are even greater.

Although justices of the Connecticut Supreme Court in *Calfee v. Usman*, 224 Conn. 29 (1992) expressed concern over the bond issue, because the claim was not raised in the trial court they refused to address the question. Justice Berdon, in dissent, stated that he would reach the issue rather than return it unguided to the trial court.<sup>5</sup> Thereafter, the Second Circuit's decision in *Shaumyan* was released. The *Shaumyan* decision will be influential on Connecticut courts, especially since it is the same court that decided *Pinsky v. Duncan*, 898 F.2d 852 (2d Cir. 1990), the case that the U.S. Supreme Court affirmed in *Doehr*.

In sum, there is a likelihood that Connecticut's post-*Doehr* statutory scheme will pass constitutional muster in view of its pre-deprivation adversary hearing requirements.

Balanced against the insurmountable barrier that bond requirements will would place before victims of uninsured claims, we urge this Committee not to pass a mandatory or discretionary bond provision.

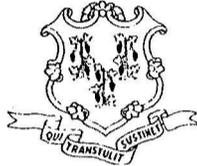
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<sup>5</sup>There is currently a split of authority in the State trial courts as to whether a bond is constitutionally required. For instance, Judge Dean held in *Ambrose v. William Rayeis Real Estate*, CV 92 127456, Jan. 26, 1993 that a bond was required; Judge O'Neil held in *Connecticut National Bank v. Ellis*, 92 0703670, Jan. 15, 1993 that it was not.

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## Connecticut General Assembly



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Testimony of David L. Hemond  
Chief Attorney, Connecticut Law Revision Commission

to the Judiciary Committee

in favor of House Bill 7329

An Act Concerning Prejudgment Remedies

April 22, 1993

The Connecticut Law Revision Commission recommends enactment of House Bill 7329, An Act Concerning Prejudgment Remedies. That draft reflects the work of the Commission's Prejudgment Remedy Committee (Attorneys Jay Levin, Raphael Podolsky, and Milton Widem), who reviewed the status of current law and advised on the need for the proposed amendments to the prejudgment remedy statutes. The recommendations were prepared in response to the decision of the United States Supreme Court in Connecticut v. Doehr, 59 U.S.L.W. 4588, decided June 6, 1991, which struck down Connecticut's ex parte real estate attachment and placed suspicion on the constitutionality of Connecticut's other prejudgment remedy provisions.

The proposed amendments reflect the following decisions:

1. **Repeal of the ex parte real estate attachment.**

Following directly from the decision in Doehr that the ex parte real estate attachment is unconstitutional, section 52-278e(a)(1) is repealed by section 4 of the draft. The Commission reaffirms its recommendation, notwithstanding recent District Court and Court of Appeal decisions in the case of Shaumyan v. O'Neil, 19 CLT 14, which may have revived

use of ex parte real estate attachments in certain contract cases. In the view of the Commission, the decision in Doehr has discredited routine use of ex parte real estate attachments and by dicta has indicated that such attachments should be limited to parties demonstrating exigent circumstances.

**2. Discretionary bond requirement.**

Substantial consideration was given as to whether the granting of prejudgment remedies should be conditioned on the posting by the applicant of a bond to protect the defendant from resulting damages. Four of the nine justices in the Doehr decision ruled that such a bond was necessary. The other justices did not reach the bond issue. A mandatory requirement, however, might prejudice the rights of indigent and less wealthy plaintiffs to obtain prejudgment protection and would add the cost of a bond to the other costs of litigation even in situations where the danger of damage being caused by the remedy is small. Comments received from the private bar covered the full spectrum from assertions that bonds were clearly mandated (Attorney Joanne Faulkner, for example) to claims that any bond will destroy fundamental rights to litigate, particularly for the poor (comments of Attorney Michael O. Sheehan).

Because of the possible prejudice to plaintiffs, because of the inflexibility and cost of a mandatory requirement, because Connecticut has not previously required such a mandatory bond, and because the United States Supreme Court did not give clear direction that a bond is always necessary, section 3 of the draft provides for a discretionary bond to be set by the court pursuant to the defendant's request. As a minimum, such a discretionary bond will avoid the cost of bonding in default cases where no defense to the action is raised. The bond is to be "in an amount sufficient to reasonably protect the defendant's interest in the property that is subject to the remedy against damages that may be caused by the remedy." The draft requires that, in determining the amount of the bond, the court is to consider the nature of the property subject to the remedy, the methods of retention or storage of the property, and the potential harm to the defendant that the remedy might cause. The Commission expects that the amount of the bond would vary, for example, depending on whether real or personal property were attached. An attachment of perishable personal property would naturally carry with it a substantial risk of damage.

**3. Standard for issuance of the remedy after a hearing. Replacement of the "probable cause" standard with a "more probable than not" standard.**

The United States Supreme Court in the Doehr decision criticized Connecticut's probable cause standard, noting that "What probable cause means in [the context of attachments] remains obscure." Doehr at 59 U.S.L.W 4590. Because of this criticism, and because probable cause in the context of prejudgment remedies can be confused with use of the term in criminal and other contexts, the Commission recommends that a different and more precise standard should be adopted. Having considered a variety of alternatives, the Commission recommends adoption of a standard that restricts issuance of a prejudgment remedy to cases in which the plaintiff shows that "it is more probable than not" that the

plaintiff will be successful on the merits of the claim. That standard clearly requires the court, after consideration of the available evidence, to find that the probabilities favor the plaintiff before issuing the remedy. The draft applies this standard uniformly in the various sections in which it appears.

The draft also clarifies that the showing must go to the net judgment that the plaintiff is likely to win, taking into account known counterclaims and setoffs.

**4. Consideration of available insurance.**

The intent of a prejudgment remedy is to protect the plaintiff against the possibility that the defendant will dissipate his assets during the course of the litigation leaving insufficient resources from which the plaintiff can recover a potential judgment. However, in cases where any judgment that may be rendered is covered by adequate insurance, the plaintiff does not have a reasonable need for the additional protection of a prejudgment seizure of the defendant's assets. The proposed draft, therefore, makes the existence of insurance to cover the claim a defense to issuance of the remedy and requires the plaintiff to disclose any knowledge he may have of such insurance when applying for the remedy. This criteria shows up in both section 52-278c (section 1 of the draft) and section 52-278e (section 4) and elsewhere.

**5. Grounds for ex parte attachments.**

The review included consideration of the grounds available under section 52-278e for ex parte attachments. The draft deletes two grounds for ex parte attachments in addition to the ex parte real estate attachment struck down by Doehr.

The draft deletes section 52-278e(a)(2)(A) which allows an ex parte remedy if the defendant "neither resides in nor maintains an office or place of business in this state and is not otherwise subject to jurisdiction over his person by the court." That section has been superseded by Connecticut's long-arm statute, section 52-59b, which essentially extends Connecticut jurisdiction over non-residents to its constitutional limit.

The draft also deletes section 52-578e(a)(2)(F) which allows an ex parte remedy if the defendant "has stated he is insolvent or has stated he is unable to pay his debts as they mature." In the consumer context, consumers routinely deny payment with the comment that they "cannot afford to pay" at the moment. This ground could, therefore, be invoked to obtain emergency ex parte remedies in routine nonpayment cases where a prior hearing is appropriate. In line with prior recommendations of the Law Revision Commission, the Commission recommends that this ground be deleted as a basis for ex parte attachments.

6. Notices to the defendant.

The notice that a defendant receives of his rights to contest a prejudgment remedy is critical to the due process balance drawn between the parties. The draft strengthens the notice requirements by requiring a notice with all applications for prejudgment remedies to be given to the defendant of his rights to defend against the application. The existing notice of rights, contained in section 52-278e, is given to a defendant only after an ex parte seizure of assets. The Commission draft also expands the details of the notice to include the new rights given by this act, such as to request a bond or defend based on adequate insurance. Finally, the draft clarifies that the defendant may request a hearing to assert rights through return to the court of a claim form that is to be part of the notice. This enhanced notice should provide consumer debtors with a practical process for asserting rights against an attachment.

7. Commercial waivers.

The Commission gave considerable consideration to what amendments should be recommended to the commercial waiver provisions of section 52-278f. The draft amends the section to reflect the recommendation that adequate insurance should be a basis for non-issuance of such a remedy.

The Commission also considered whether the statute should require that the remedy be issued by a magistrate. Under the statute, the defendant must have waived his right to notice and a hearing. Two Commission members felt that the prejudgment papers should be reviewed for adequacy by a magistrate prior to issuance, as is done with all other remedies, and that the defendant's right to such a review has not been waived and should not be waived. Other members felt that, at least in this commercial context, the parties could bargain for such a waiver of rights and that the current statute allowing attorneys to issue the remedy reflects a longstanding legislative policy that had not been affected by the Doehr decision. The final draft does not require that a remedy pursuant to a commercial waiver be issued by a magistrate.

**Court decisions since Doehr.**

A number of court decisions have been released since Doehr was decided that have construed Connecticut statutes in the light of that decision. The legislature should be aware of that ongoing litigation in passing judgment on this complex issue. In particular:

A recent federal District Court decision, Shaumyan v. O'Neill, Civ. No. N 87-463 (May 29, 1992) (Judge Nevas), affirmed by the Court of Appeals at 19 CLT 14, and a recent decision by the Connecticut Supreme Court, Union Trust Co v. Heggelund, 219 Conn. 620 (1991) are the primary opinions since Doehr construing the effect of Doehr on the existing prejudgment statutes. In Shaumyan, Judge Nevas found that the United States Supreme Court opinion in Doehr, striking down the use of Connecticut's ex parte real estate attachment statute in a cause of action grounded in tort, did not address the constitutionality of that attachment

statute as applied to the breach of contract claim in the Shaumyan case. The court held that, notwithstanding Doehr, the ex parte real estate attachment statute remained constitutional in its application to a breach of contract action involving the attachment of real property in which the attaching plaintiff seeks payment for material installed and labor performed on that piece of real property. The court expressly offered no view as to the statute's validity in any other context. The court buttressed its finding by citing the rationale of Judge Pratt in Pinsky v. Duncan, 898 F.2d 852 (2d Cir. 1990), the Court of Appeals decision in the Doehr case, where Judge Pratt contrasted the disputed factual nature of the fist fight in Doehr with the "sharply focused and easily documented" nature of creditor-debtor issues. Such debtor-creditor disputes, it was posited, involved "uncomplicated matters that lend themselves to documentary proof" and minimize the risk of a wrongful ex parte deprivation by the court. (Citing also Mitchell v. Grant, 416 U.S. 600 (1974) and Mathews v. Eldridge, 424 U.S. 319 (1976)). Noting the United States Supreme Court's affirmance of Arizona's mechanic's lien statute, in Spielman-Fond, Inc. v. Hanson's Inc., 379 F.Supp. 997 (D. Ariz. 1973), aff'd 417 U.S. 901 (1974), Judge Nevas went on to analogize the Shaumyan case, which attached the actual assets in dispute, with the situation under such mechanic's liens statute, where the plaintiff similarly claims a direct interest in the particular asset seized.

Judge Nevas also addressed and refused to strike down the ex parte provision based on its lack of a bond requirement. Judge Nevas noted that the Second Circuit has expressly rejected the view that the lack of a provision requiring a bond rendered the statute constitutionally infirm and noted that in Doehr, only four of the justices, only three of whom currently sit, considered the lack of a bond to be a problem.

In United Trust Company v. Joseph Heggelund, the Connecticut Supreme Court briefly addressed the impact of Doehr in a footnote. After noting the lack of a sufficient record to determine if Heggelund even involved an ex parte attachment, the court continued:

Even if the attachments were ex parte, this is not a tort suit, but a suit on a debt, and "disputes between debtors and creditors more readily lend themselves to accurate ex parte assessments of the merits." (Citing Doehr at 59 U.S.L.W. 4587, 4591, June 4, 1991) Here, as in Mitchell v. W. T. Grant Co., 416 U.S. 6000, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974), "the risk of error was minimal because the likelihood of recovery involved uncomplicated matters that lent themselves to documentary proof...." Connecticut v. Doehr, supra, 4591.

In short, the decision in Shaumyan holds that Connecticut's ex parte real estate attachment remains constitutional as applied to a contract action where the plaintiff claims a direct interest in the property seized. Moreover, both Shaumyan and Heggelund read the Doehr case restrictively, as applicable only to the tort action involved in that case. In their view, Doehr simply did not address contract cases. In other words, the constitutionality of Connecticut's ex parte real estate attachment has not been ruled on and the statute may be, but is not necessarily, valid in any such contract action.

The Law Revision Commission's initial recommendation on the prejudgment remedy statutes was again reviewed in the light of these decisions because the initial Commission recommendation assumed that Doehr fully invalidated ex parte real estate attachments unless there were a commercial waiver or some further showing of extenuating circumstances providing additional grounds for the ex parte attachment. Acting on that assumption, the Commission recommended that the ex parte real estate attachment provision, section 52-278e(a)(1), be repealed. The decisions in Shaumyan and Heggelund, however, provided a rationale for a more limited revision under which ex parte real estate attachments might be allowed in debtor/creditor and other contract situations. After a careful review, the Commission reaffirmed its view that the ex parte real estate attachment reflected in section 52-278e(a)(1) remains fundamentally unsound and should be repealed.

The Shaumyan decision also expressly reaffirms the District Court's refusal to find a constitutionally-mandated bond requirement - an issue that the Commission had viewed as uncertain in the light of the opinion of the four Supreme Court Justices in Doehr that such a bond was required. The Commission recommendation provides a discretionary bond requirement that is set at the discretion of the court only after a request by the defendant. The refusal of Judge Nevas to find any constitutional bond requirement, notwithstanding Doehr, provides a rationale for reexamining and for removing the discretionary bond from the Commission's recommendation. On the other hand, in a more recent Connecticut Superior Court case, Ambroise v. William Raveis Real Estate, Inc., (noted at 19 CLT 8, page 6), Judge Harold Dean relied on the minority opinion in Doehr to hold Connecticut's lack of a mandatory bond requirement to be constitutionally fatal.

The short of it is that the various restrictive readings of Doehr are difficult to reconcile with the expansive language of Doehr itself. The decision in Doehr went to considerable lengths to detail the extent to which Connecticut prejudgment remedy law is out of the judicial mainstream and allows an unreasonable risk of erroneous deprivation of property. The Supreme Court, for example, states:

Connecticut's statute appears even more suspect in light of current practice. A survey of state attachment provisions reveals that nearly every State requires either a preattachment hearing, a showing of some exigent circumstances, or both, before permitting an attachment to take place.... Only Washington, Connecticut, and Rhode Island authorize attachments without a prior hearing in situations that do not involve any purportedly heightened threat to the plaintiff's interest. Even those States permit ex parte deprivations only in certain types of cases; Rhode Island does so only when the claim is equitable; Connecticut and Washington do so only when real estate is to be attached, and even Washington requires a bond....

.... We do believe... that the procedures of almost all the States confirm our view that the Connecticut provision before us, by failing to provide a preattachment hearing without at least requiring a showing of some exigent circumstances, clearly falls short of the demands of due process. 59 LW at 4592.

Although there is precedent supporting the distinction between tort and contract actions suggested by Judge Nevas in the Shaumyan decision, it is self-evident, I believe, that contract actions may also involve complex factual and legal situations that are subject to dispute and that cannot be reliably evaluated in an ex parte setting on the basis of submitted documents. Moreover, the particular situation in which Judge Nevas upheld the prejudgment remedy, where the property subject to dispute was the subject of the attachment, is, in fact, already covered for most purposes by a statutory remedy under the mechanic's lien act. A restricted ex parte attachment to cover that circumstance, while possibly constitutional, may not be appropriate.

In fact, the Commission's 1991 recommendation, with the exception of the ex parte real estate attachment, was not presented to the legislature as expressly mandated by Doehr. Rather, the recommendations viewed various portions of the statute as placed under suspicion by Doehr and recommended enactment of a statute that fell more closely within the judicial mainstream. While the Shaumyan and Heggelund decisions invite a more conservative approach, I believe that ex parte attachments brought under a revised statute restricted to contract actions generally would remain under a cloud of suspicion. Moreover, if such a statute were subsequently overturned, parties acting in reliance on the statute could well be prejudiced. In any case, the Commission, after review of Shaumyan, reaffirmed its initial recommendations for repeal of the ex parte real estate attachment and enactment of a discretionary bond requirement.

Finally, in Calfee v. Usman, 224 Conn. 29 (1992), the Connecticut Supreme Court expressly upheld the probable cause standard criticized in Doehr and revised in the Commission draft. The Commission, in light of Doehr's criticism of the probable cause standard, took substantial efforts to address the standard under which a remedy should be granted. The Commission ultimately settled on a "more probable than not" standard. While the Calfee decision provides a rationale for retaining the existing probable cause standard, the Doehr decision and the considerable Superior Court litigation before Calfee in connection with the probable standard highlight the underlying difficulties with understanding what a "probable cause" standard means. See, for example, Stamford Computer Group, Inc. v. Leep Associates Limited Partnership, 5 Conn. L. Rptr. No. 20, 557 (March 2, 1992, Leheny, J.), M & L Building Corp. v. CNF Industries, Inc., 5 Conn. L. Rptr. No. 19, 509 (February 24, 1992, McWeeney, J.), Halloran v. Byington, 5 Conn. L. Rptr. No 7, 161 (November 18, 1991, Spear J.), Scaffone, dba v. Annulli & Sons, Inc. 7 CSCR 238 (February 24, 1992, Hodgson, J.), Brant v. Grassi, 7 CSCR 913, 915 (August 10, 1992), and Republic National Bank of New York v. Hill, 5 Conn. L. Rptr. No. 9, 209 (Dec. 9, 1991). The "more probable than not" standard recommended by the Commission is reasonable and is as stringent as that required by many states. Because "more probable than not" states the standard of proof required of a plaintiff more clearly than the term "probable cause", the Commission's revision constitutes a useful improvement to the current difficult language.

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Further Superior Court case law has considered the issue of the validity of commercial waivers under section 52-278f. The majority of those decisions have upheld the constitutionality of the commercial waiver. See The Connecticut National Bank v. Rieck, 7 CSCR 810 (July 13, 1992); Rhode Island Hospital Trust National Bank v. Klewin, 4 Conn. L. Rptr. No. 16, 516 (September 2, 1991, Dunn, J); Country Lumber Inc. v. Sarris, [6CSCR 472] 3 Conn. L. Rptr. 414 (1991, Schaller, J.); and CNB v. Cooke, 3 Conn. L. Rptr. 412 (1991, Dunnell, J.). On the other hand, the section 52-278f commercial waiver was ruled unconstitutional by Judge Pickett in Peoples's Bank v. Pepburn, [6 CSCR 661] 3 Conn. L. Rptr. 212 (1991), a case considered by the Commission at the time of its recommendation. The proposed bill does not address the primary commercial waiver issue.

In conclusion, an analysis of case law shows that considerable uncertainty remains with respect to the prejudgment remedy statutes. Moreover, the Shaumyan and Heggelund decisions provide a ground for a more restricted revision than that recommended by the Commission, since those cases read Doehr as only clearly applicable to tort cases. However, the Commission, on review of those decisions, reaffirmed its recommendation for a substantive revision of Connecticut prejudgment remedy law more in line with the prejudgment practice available in other states. A cribbed and restrictive approach that fails to recognize the legitimate concerns of defendants as to abuse of prejudgment remedies will merely perpetuate the existing climate of uncertainty and litigation. The Commission's recommendations, by contrast, represent a reasoned and fair effort to protect both plaintiffs and defendants and resolve a difficult public policy.

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**State of Connecticut**  
JUDICIAL DEPARTMENT  
OFFICE OF THE CHIEF COURT ADMINISTRATOR  
Drawer N, Station A  
Hartford, Connecticut 06106

Testimony of Faith P. Arkin  
Judiciary Committee Public Hearing  
Thursday, April 22, 1993

House Bill 7329, An Act Concerning Prejudgment Remedies

I would like to briefly address House Bill 7329, An Act Concerning Prejudgment Remedies. The Judicial Branch respectfully requests that, if this bill is to be favorably considered by the Judiciary Committee, lines 119 and 274 be amended to provide that the notice and claim form be in such form as may be prescribed by the "Office of the Chief Court Administrator" rather than by "the rules of the superior court". This amendment is consistent with many other provisions of the general statutes that require forms to be prescribed by the Office of the Chief Court Administrator.

In addition, we respectfully request that the bill be effective on January 1, 1994. This would provide the office of the chief court administrator with sufficient time to draft and print the forms. An October 1, 1993 effective date does not provide the necessary time to draft, and make available, these forms. Attached to my testimony is proposed substitute language for your consideration.

Thank you for giving me this opportunity to testify.

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**State of Connecticut**  
JUDICIAL DEPARTMENT  
OFFICE OF THE CHIEF COURT ADMINISTRATOR  
Drawer N, Station A  
Hartford, Connecticut 06106

**Proposed Amendment to House Bill 7329  
An Act Concerning Prejudgment Remedies**

1. In line 119, delete "RULES OF THE SUPERIOR COURT" and substitute in lieu thereof "OFFICE OF THE CHIEF COURT ADMINISTRATOR"
2. In line 274, delete "RULES OF THE SUPERIOR COURT" and substitute in lieu thereof "OFFICE OF THE CHIEF COURT ADMINISTRATOR"
3. Add a new Section 8.

Section 8. This act shall take effect January 1, 1994.