

By: West S.B. No. 1269
(In the Senate - Filed March 6, 2007; March 14, 2007, read first time and referred to Committee on Jurisprudence; April 16, 2007, reported adversely, with favorable Committee Substitute by the following vote: Yeas 4, Nays 0; April 16, 2007, sent to printer.)

COMMITTEE SUBSTITUTE FOR S.B. No. 1269 By: Wentworth

A BILL TO BE ENTITLED
AN ACT

relating to the performance of certain civil duties by officers in this state.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 7.001, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 7.001. LIABILITY FOR REFUSAL OR NEGLIGENCE IN PERFORMANCE OF OFFICIAL DUTIES. (a) A clerk, sheriff, or other officer who neglects or refuses to perform a duty required under the Texas Rules of Civil Procedure [~~Title 42, Revised Statutes,~~] or under a provision of this code derived from those rules [~~that title~~] is liable for actual damages only in a suit brought by a person injured by the officer's neglect or refusal.

(b) The officer may be punished for contempt of court for neglect or refusal in the performance of those duties. The court shall set the fine at not less than \$10 or more than \$100, with costs. The officer must be given 10 days' notice of the motion.

(c) This section does not create a cause of action for an action that can otherwise be brought under Chapter 34. A party may seek actual damages under this section or Chapter 34, or the party may seek contempt sanctions, but the party may not seek both damages and contempt.

(d) An action or motion brought under this section must comply with and is subject to the provisions in Sections 34.068, 34.069, 34.070, and 34.074, except that a motion brought under Subsection (b) need not comply with Section 34.068(b).

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

(a) Except as provided by Section 34.061, an officer is not liable for damages resulting from the execution of a writ issued by a court of this state if the officer

~~[(1)]~~ in good faith executes or attempts to execute the writ as provided by law and by the Texas Rules of Civil Procedure[, and

~~[(2)] uses reasonable diligence in performing his official duties].~~

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

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

(b) If an injury or loss to an interested party results from the negligence of the officer, the officer and his sureties are liable for the value of the property lost or damaged ~~[the amount of the injury sustained, plus 10 percent of that value or amount. The total amount is recoverable on motion of the injured party filed with the court that issued the writ, following three days' notice].~~

(c) The injured party has the burden to prove:

(1) that the officer took actual possession of the injured party's property; and

(2) the actual value of any property lost or damaged.

SECTION 4. Sections 34.063 through 34.067, Civil Practice and Remedies Code, are amended to read as follows:

Sec. 34.063. IMPROPER ENDORSEMENT OF WRIT. (a) If an officer receives more than one writ of execution on the same day against the same person and fails to number them as received or if an officer falsely endorses a writ of execution, the officer and the officer's [his] sureties are liable to the plaintiff in execution only for actual damages suffered by the plaintiff because of the failure or false endorsement~~[, plus 20 percent of the amount of the execution. The total amount is recoverable on motion of the plaintiff filed with the court that issued the writ, following three days' notice].~~

(b) The plaintiff in execution has the burden to prove:
(1) the officer failed to properly number or endorse the writ of execution;
(2) the officer's failure precluded the levy of executable property owned by the judgment debtor;
(3) the executable property owned by the judgment debtor was not exempt from execution or levy; and
(4) the plaintiff in execution suffered actual damages.

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

(b) Once an officer receives actual notice of an error on a return or of the officer's failure to file a return, the officer shall amend the return or file the return not later than the 30th day after the date of the receipt of notice.

(c) An officer who fails or refuses to amend or file the return may be subject to contempt under Section 7.001(b) [If an officer neglects or refuses to return a writ of execution as required by law or makes a false return on a writ of execution, the officer and his sureties are liable to the person entitled to receive the money collected on the execution for the full amount of the debt, plus interest and costs. The total amount is recoverable on motion of the plaintiff filed with the court that issued the writ, following five days' notice].

Sec. 34.065. FAILURE TO LEVY OR SELL. (a) If an officer fails or refuses to levy on or sell property subject to execution and the levy or sale could have taken place, the officer and the officer's [his] sureties are liable to the party entitled to receive the money collected on execution only for actual damages suffered.

(b) The judgment creditor seeking relief under this section has the burden to prove:

(1) the judgment creditor has a valid judgment against the judgment debtor;
(2) the writ of execution was issued to the judgment creditor;
(3) the writ was delivered to the officer;
(4) the judgment creditor's judgment was unpaid and unsatisfied;
(5) the property to be levied on was subject to execution;
(6) the officer failed or refused to levy under the writ; and
(7) the amount of actual damages suffered.

(c) Property to be levied on is subject to execution for purposes of this section if the judgment creditor proves that the judgment debtor owned the property at issue, the property was accessible to the officer under the law, the property was situated in the officer's county, and the property was not exempt from execution.

(d) Before a court may find that an officer failed or refused to levy under the writ for purposes of this section, the court must find that the judgment creditor specifically informed the officer that the property was owned by the judgment debtor and was subject to execution and that the creditor directed the officer to levy on the property [for the full amount of the debt, plus

~~interest and costs. The total amount is recoverable on motion of the party filed with the court that issued the writ, following five days' notice to the officer and his sureties].~~

(e) In this section, "actual damages" is the amount of money the property would have sold for at a constable or sheriff's auction minus any costs of sale, commissions, and additional expenses of execution.

Sec. 34.066. IMPROPER SALE. (a) If an officer sells property without giving notice as required by the Texas Rules of Civil Procedure or sells property in a manner other than that prescribed by this chapter and the Texas Rules of Civil Procedure, the officer ~~[forfeits and]~~ shall be liable only for actual damages sustained by ~~[pay to]~~ the injured party ~~[not less than \$10 nor more than \$200, in addition to any other damages sustained by the party. The amount is recoverable on motion of the party, following five days' notice to the officer and his sureties].~~

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

Sec. 34.067. FAILURE TO DELIVER MONEY COLLECTED. If an officer fails or refuses to deliver money collected under an execution when demanded by the person entitled to receive the money, the officer and the officer's ~~[his]~~ sureties are liable to the person for the amount collected and for damages at a rate of ~~one~~ [five] percent a month on that amount if proven by the injured party~~[, plus interest and costs. The total amount is recoverable on motion of the person entitled to the money filed with the court that issued the writ, following five days' notice to the officer and his sureties].~~

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

Sec. 34.068. RULES GOVERNING ACTIONS UNDER THIS CHAPTER. (a) This section applies to any claim for damages brought under Section 7.001, 34.061, 34.063, 34.065, 34.066, or 34.067 or under Section 86.023, Local Government Code.

(b) Suit shall be brought in the form of a lawsuit filed against the officer in the county in which the officer holds office.

(c) All suits must be filed not later than the first anniversary of the date on which the injury accrues.

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

Sec. 34.069. PAYMENT OF DAMAGES. A county, at the discretion of the commissioners court, may pay any judgment taken against an officer under Section 7.001, 34.061, 34.063, 34.064, 34.065, 34.066, or 34.067 or under Section 86.023, Local Government Code, provided that this section does not apply if the officer is finally convicted under Section 39.02 or 39.03, Penal Code.

Sec. 34.070. RIGHT OF SUBROGATION. An officer against whom a judgment has been taken under Section 7.001, 7.002, 34.061, 34.063, 34.064, 34.065, 34.066, or 34.067 or under Section 86.023, Local Government Code, or a county that has paid the judgment on behalf of the officer under Section 34.069, has a right of subrogation against the debtor or person against whom the writ was issued.

Sec. 34.071. DUTIES OF EXECUTING OFFICER. An officer receiving a writ of execution does not have a duty to:

(1) search for property belonging to the judgment debtor;

(2) determine whether property belongs to a judgment debtor;

(3) determine whether property belonging to the judgment debtor is exempt property that is not subject to levy;

(4) determine the priority of liens asserted against property subject to execution; or

(5) make multiple levies for cash or multiple levies at the same location.

Sec. 34.072. TIMING OF EXECUTION AND RETURN. (a) An officer receiving a writ of execution may return the writ after the

first levy, or attempted levy, if the judgment creditor cannot designate any more executable property currently owned by the judgment debtor at the time of the first levy or first attempted levy.

(b) Notwithstanding Rule 637, Texas Rules of Civil Procedure, an attempt to levy on property may begin any time during the life of the writ, provided that the officer shall allow enough time for completing the sale of the property.

Sec. 34.073. TRANSFER OF WRIT; NO DUTY TO LEVY OUTSIDE OF COUNTY. (a) An officer receiving a writ may transfer the writ to another officer in another precinct, or to another law enforcement agency authorized to perform executions, within the county of the first officer who received the writ.

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

Sec. 34.074. OFFICER'S SURETY. (a) An officer's surety may only be liable for the penal sum of the surety bond minus any amounts already paid out under the bond. In no event may an officer's surety be liable for more than the penal sum of the officer's surety bond.

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

(c) A surety is not a necessary party to an action brought under this chapter or under Section 7.001. Instead, a prevailing party under these provisions may bring a separate action against a surety failing to pay the amount remaining under the bond on a final judgment. This action must be brought on or before 180 days after the date all appeals are exhausted in the underlying action.

Sec. 34.075. WRONGFUL LEVY. Whenever a distress warrant, writ of execution, sequestration, attachment, or other like writ is levied upon personal property, and the property, or any part of the property, is claimed by any claimant who is not a party to the writ, the only remedy against a sheriff or constable for wrongful levy on the property is by trial of right of property under Part VI, Section 9, Texas Rules of Civil Procedure.

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

SECTION 6. Subsection (a), Section 86.024, Local Government Code, is amended to read as follows:

(a) If a constable fails or refuses to execute and return according to law a process, warrant, or precept that is lawfully directed and delivered to the constable, the constable shall be fined for contempt before the court that issued the process, warrant, or precept on the motion of the person injured by the failure or refusal. This section does not apply to actions brought under or that could have been brought under Chapter 34, Civil Practice and Remedies Code.

SECTION 7. Section 604.005, Government Code, is amended by adding Subsection (c) to read as follows:

(c) In no event may the surety be liable for more than the penal sum of the surety bond minus any amounts already paid out under the bond.

SECTION 8. This Act applies only to the performance of a duty that occurs on or after the effective date of this Act. A duty performed before the effective date of this Act is governed by the law applicable to the performance of the duty immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 9. This Act takes effect September 1, 2007.

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