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Attachment On Trustee Process: A Primer For The Practitioner

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Attachment On Trustee Process: A Primer For The Practitioner

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Introduction to Prejudgment Trustee Process

Trustee process can make or break a lawsuit. It gives a plaintiff the ability to seize assets early in the case, providing security for payment on the judgment. It encourages quick and efficient settlement: the court's ruling on the motion for trustee process gives the parties early feedback on the merits of their claims and defenses. Finally, from a defense perspective, it can seriously impair the defendant's financial position for the duration of the litigation. Being able to wield and defend against trustee process is a vital skill for all litigators.

However, the law of trustee process is complex and full of pitfalls for the unwary. This isn't surprising: trustee process has been a part of the laws of Maine since statehood and has its roots in early Massachusetts law. The authority governing trustee process includes Rule 4B, 89 statutory provisions, and more than 200 years of case law. Successfully using or defending against trustee process requires in-depth analysis of these authorities. This article is intended to provide lawyers with a guide for navigating this maze.

One point of clarification: there are two forms of attachment. Attachment (under Rule 4A) permits a plaintiff to place a lien on assets in the hands of the defendant (e.g., a lien on defendant's residence). Attachment on trustee process (under Rule 4B) permits a plaintiff to freeze the defendant's assets that are in the hands of a third party (e.g., a lien on defendant's bank account). This article only addresses attachment on trustee process (trustee process). While there are substantial overlaps between the two remedies, there are key differences as well. Caution should be used in applying this article in a pure Rule 4A attachment context.

When to Request Trustee Process

The general rule is that trustee process may be used in "any personal action . . . in Superior Court or District Court."[2] Of course, there are exceptions to the rule; trustee process may not be used in actions involving:[3] specific recovery of goods and chattels; malicious prosecution; slander by writing or speaking; assault and battery;[4] collection of consumer debts;[5] and civil actions against an employee of a governmental entity based on a negligent act or omission of such employee in the course of scope of his duties.[6]

In cases involving multiple claims where trustee process is not allowed for some of the claims, trustee process may still be granted on the allowable claims. For example, trustee process has been granted for emotional distress based on slanderous statements (but would not have been for the slander itself).[7]

Trustee process is available to any party bringing a claim, counterclaim, cross-claim, or third-party complaint (the party bringing the motion will be referred to here as the plaintiff). However, trustee process that is based on cross-claims, third-party claims, or non-compulsory counterclaims is only permitted if the trustee resides (or has a place of business, if an entity) in the county where the action was brought. If the counterclaim is compulsory, this venue limitation does not apply.[8]

The plaintiff may move for trustee process at the beginning of a case, more than once during a case,[9] and during the pendency of an interlocutory appeal.[10]

Trustee process is available in actions in the United States District Court of Maine.[11]

Where a Maine court has subject matter jurisdiction over the underlying claim, it will have subject matter jurisdiction over the trustee process aspect of the case as well because "[t]rustee process is ancillary to the underlying action."[12]

Motions for Trustee Process

Drafting the motion for trustee process properly is vital. After all, this is likely the first time that the court will make a ruling on the merits of the case. In addition to high levels of advocacy, however, the careful practitioner will ensure that his or her motion and supporting documents comply with statutory requirements. The Law Court has admonished that "there must be strict compliance with the procedures prescribed by legislation and implemented by court rules" "[b]ecause prejudgment attachment may operate harshly upon the party against whom it is sought."[13]

The only issues before the court in deciding a motion for approval of attachment on trustee process "are (1) the amount of the judgment that the plaintiff [will more likely than not recover] and (2) the amount of any liability insurance or other security that is already available to satisfy the judgment."[14]

The motion for trustee process must be accompanied by affidavits that "set forth specific facts sufficient to warrant the required findings" of liability and to prove damages.[15] The only evidence that may be considered must be submitted with a supporting affidavit.[16]

The jurat on the supporting affidavit should track the language of the rule and state that the facts in the affidavit are "based on the affiant's own knowledge, or if they are based on the affiant's information and belief, the affiant must state that the affiant believes the information to be true."[17] Failure to carefully track the language of the rule may result in the affidavit being stricken and the denial of the motion.[18] Some courts have permitted counsel to resubmit an affidavit with corrected affidavit prior to a ruling on the motion.[19] Other courts have accepted affidavits with insufficient jurats where the substance of the affidavit indicates that the requirements of the rule have been met.[20]

Motions: Standard of Liability

The plaintiff has the burden of proof in requesting trustee process.[21] The court must find that it is "more likely than not" that the plaintiff will recover the requisite sum.[22] In other words, "[a] moving party must show a greater than 50 percent chance of prevailing."[23]

Before 1992, the standard was lower: the plaintiff was only required to show that the plaintiff was "reasonably likely" to recover damages in the amount sought to be attached on trustee process.[24] The Law Court stated that under this standard, a motion for trustee process would be denied "only when a plaintiff has virtually no chance of recovery."[25] This change in the plaintiff's burden means that pre-1992 cases discussing the plaintiff's burden should be cited only with caution.

The court may analyze liability and damages questions separately, applying the applicable standard to each.[26] The court should liberally construe the statutes governing trustee process in furtherance of the goal of rendering effects and credits of principal debtor in the hands of a trustee available for the benefit of a creditor.[27]

A court may not deny a motion for trustee process on public policy or equitable grounds.[28] Similarly, the court has no discretion to deny a motion for trustee process because it concludes that the defendant would have sufficient assets to satisfy any anticipated judgment.[29]

Motions: Damages

Counsel moving for trustee process must make a strategic choice of how much to request. As a general rule, the simpler the motion for trustee process, the better. It may be wise to seek trustee process only on claims that are easy to value and leave more complex claims for trial. This increases the likelihood of success and decreases the costs of the motion.

A plaintiff "can make a sufficiently specific showing of damages if he or she can provide, among other things, evidence 'from which some informed projection could be made' as to the amount of damages suffered by the party."[30] In other words, vague statements about damages are likely to be deemed insufficient while predictions of future damages based on well-grounded affidavits may succeed.

A plaintiff may include anticipated legal fees if a claim for recovery of those fees exists.[31] However, failure to provide a sufficiently detailed affidavit may imperil the request.[32] Prejudgment interest may be included.[33] Punitive damages are not eligible to be included in an order for trustee process because such an award is discretionary and cannot be predicted.[34] If the amount of damages sought is only nominal, granting an attachment would be an abuse of judicial process.[35]

The amount of a trustee process order must take into consideration any other security available to satisfy the judgment.[36] The defendant has the burden of showing that the security exists and is available to satisfy the judgment.[37] Where there are multiple defendants, each with independent liability, attachment may be had against each, even where the plaintiff already has security as to one defendant.[38]

The mere existence of a commercial general liability insurance policy for the requisite period is insufficient proof of security. Even if the insurance company agrees to undertake the duty of defense, the policy may not represent security because the insurance company may not indemnify defendant and therefore, without more, the insurance policy does not provide security.[39]

Any offsetting claim by the defendant against the plaintiff does not represent "security" and does not reduce the amount to be trusteed.[40]

Venue for Trustee Process

The statutes governing trustee process contain numerous provisions governing venue based on the residence (or place of business) of the trustee.[41] These statutes refer to venue for the "action" of trustee process.[42] Under modern practice, trustee process is usually an ancillary part of an underlying claim instead of being a stand-alone action. As a result, these venue restrictions are not generally followed. These provisions are likely obsolete. However, their continued existence provides fertile ground for creative defense counsel. Very few cases interpreting these provisions have been handed down in the last several decades.

Objections to Motions for Trustee Process

Opposition to a motion for trustee process is straightforward: attack the plaintiff's case either on a technical basis (e.g., defective affidavits) or with a substantive argument (e.g., plaintiff is not more likely than not to recover).

Affirmative defenses may prove sufficient (if supported by adequate evidence) to prevent plaintiff's motion from succeeding.[43]

If the defendant is out of state, the trustee may appear on defendant's behalf and plead and defend in defendant's name.[44]

Hearings on Motions for Trustee Process

An order of attachment on trustee process "may be entered only after notice to the defendant and hearing."[45] However, the Law Court has held that failure to hold a formal hearing with oral argument is harmless error.[46] The hearing is non-testimonial: "The required showing is to be made through affidavits; there is no right to an evidentiary hearing."[47] Some courts have granted a motion for expedited hearing on a motion for trustee process.[48] The hearing may be held telephonically.[49]

Ex Parte Motions for Trustee Process

A motion for trustee process may be filed on an *ex parte* basis. In addition to showing that plaintiff is more likely than not to recover the amount in question, plaintiff must meet one of two additional danger standards. These standards require the plaintiff to demonstrate that notification of the defendant will result in the assets in question becoming unavailable — hidden, destroyed, dissipated, or the like.[50] However, "the court should insist on a showing of something more than the mere possibility, present in every case, that a defendant forewarned of the trustee process will withdraw a bank account or other credit and put the proceeds out of reach of process."[51]

Hearings on Motions to Dissolve *Ex Parte* Trustee Process

After trustee process has been granted on an *ex parte* basis, defense counsel may move for a hearing on only two days of notice to plaintiff.[52] The dissolution hearing "allows a party objecting to an attachment the opportunity to bring any objections promptly to the attention of the trial court and to have those objections, and the arguments regarding the adequacy of the plaintiff's attachment request, addressed by the trial court."[53]

At a hearing on a motion to dissolve, the plaintiff has the burden of justifying any finding in the *ex parte* order that the moving party has challenged by affidavit.[54] Conversely, where defendant fails to challenge a finding by affidavit, the plaintiff has no burden to justify them.[55] Where the defendant argues that the plaintiff has adequate security, the burden is on the defendant.[56]

Where the plaintiff overreached and improperly obtained trustee process on an *ex parte* basis, usually the sole remedy available to the defendant is the opportunity for a quick hearing to dissolve the attachment at which the plaintiff must meet its burden of proof.[57] In rare situations, the court may grant a more punitive remedy, including sanctions or the dissolution of the trustee process.[58]

Motions to Modify

After an order for trustee process has been granted, if the defendant shows that specific property, cash, or a bond is available to satisfy judgment, the court may modify its order of trustee process to limit it to the specific assets.[59] The burden of proof is on the defendant to show that the specific property will adequately secure the amount of the attachment.[60] The property being offered as substitute must be similar in liquidity to that already attached. For example, real estate may not be substituted for cash.[61]

Appeals Regarding Motions for Trustee Process

An order granting, denying, or dissolving trustee process is immediately appealable under the collateral order exception to the final judgment rule.[62] In addition to the parties, the trustee may appeal an order regarding trustee process.[63] An order determining which creditor is entitled to the funds held by a trustee is not immediately appealable.[64]

Any appeal must be filed within 30 days of the entry of the order. The failure to file an appeal waives the party's right to challenge the order at a later date because collateral orders are not merged into the final judgment.[65] A party challenging the entry of an ex parte order granting trustee process must request a dissolution hearing before appealing.[66]

During the pendency of an appeal, any attachment on trustee process remains valid and in place.[67] However, if the trial court dissolves the attachment on trustee process and the Law Court reverses and reinstates trustee process, the reinstated trustee process is not retroactive.[68]

Using An Order of Attachment on Trustee Process

Once obtained, an order of attachment on trustee process must be served on all potential trustees within 30 days of the date of the order.[69] Once thirty days has elapsed, the order is ineffective. However, this does not preclude a second similar order.[70]

The order must be attached to a trustee summons directed to the trustee that must describe the principal defendant "with reasonable certainty" and be received "at a time and in a manner that affords the trustee a reasonable opportunity to act on it."[71] The practitioner is advised to use the form provided by the court. Proof of service must be filed within 20 days under Rule 4(h).[72]

In general, a trustee summons is served "in like manner and with the same effect as other process."[73] There are some peculiarities, though. Where a bank has multiple branches, service on the bank itself is all that is necessary; it is not necessary to serve the branch where the defendant did its banking.[74] Service on one member of a partnership is effective if (1) service is made at

a place of business of the "firm" or (2) service is later made on other partners.[75]

Service on a financial institution or credit union authorized to do business in Maine presents special problems. By statute, service may be completed in only two ways: (1) service on an office designated by the financial institution or credit union in a registry maintained by the Secretary of State; or (2) acceptance of service in writing by an officer or employer expressly authorized to accept service of trustee process.[76] Interestingly, only a few of the financial institutions and credit unions in Maine have registered with the Secretary of State's Trustee Process database.[77] Under the strict wording of the statute, in order to serve one of the financial institutions or credit unions not registered with the Secretary of State, counsel must secure acceptance of service in writing—and ensure that the officer accepting service is authorized to do so. This raises particular difficulties in cases where the financial institution in question also has a claim to the money to be trusteed. In such a situation, the financial institution may choose to seize the money out of defendant's accounts for itself before accepting service. It would seem appropriate to amend 14 M.R.S.A. § 2608-A to state that if a financial institution or credit union did not choose to record a preferred officer to receive service, then that entity could be served by any means authorized by Rule 4.

What may be Attached on Trustee Process

When a trustee is served with trustee summons, the trustee is obligated to "bind all goods, effects or credits of the principal defendant entrusted to or deposited in the trustee's possession."[78] There are numerous exceptions to this general rule.[79]

When service of the trustee summons is made by leaving a copy or a summons and the trustee paid the debt owed to the principal defendant before actual notice of service or "reasonable ground of belief that it was made," trustee may not be held liable.[80] Where the defendant sold goods on consignment but never received title to them, the proceeds of the sale are not subject to trustee process because the proceeds belong to the original owner pursuant to the contract between the defendant as salesman and original owner.[81] A corporation may set off any amount due from defendant to the corporation for taxes against any amounts due to the defendant and thereby susceptible to attachment on trustee process.[82]

One of the more hotly litigated exemptions to property that is attachable on trustee process states that "[n]o person shall be adjudged trustee . . . [b]y reason of any money or other thing due from him to the principal defendant unless, at the time of the service of the summons upon him, it is due absolutely and not on any contingency."[83] The question of when a debt is due absolutely and not on any contingency remains somewhat open. This exemption doesn't apply when the amount of the debt due from the trustee to the defendant is in question. It only applies when the existence of the obligation is uncertain.[84] Contingent debts are not subject to trustee process.[85] However, when money or another thing is due absolutely to the defendant but is not yet payable, it may still be trusteed. The trustee is not required to pay it until the time provided for in the contract.[86]

Where a contract requires the fulfillment of a condition precedent before a debt becomes due, the debt is contingent and not attachable on trustee process.[87] Whether a condition is a condition precedent or condition subsequent depends on the parties' intent, to be determined by the language of the clause, the language of the whole contract, the nature of the act required, and the subject matter to which it relates.[88] Any potential liability resulting from a suit by the principal defendant against the putative trustee is contingent, not absolute.[89] Where a bank receives a deposit specifically intended to fund checks that had been presented to the bank and was immediately thereafter served with trustee process, the trustee process would not reach the deposit because those funds were held in trust by the bank for the benefit of the holders of the check and were not held by the bank as a debtor of the defendant.[90] An award from the court is not subject to trustee process prior to its actual adjudication —up until then, it is a mere contingent right.[91]

Of particular interest to attorneys is the question of whether funds held by a law firm can be attached on trustee process. Obviously, if a law firm is simply holding money in escrow on behalf of a client, those funds represents goods, effects, or credits that are absolutely due and payable to the client. If the money has been deposited to pay for legal fees, however, the funds appear to be subject to trustee process if they represent "advance payments" held in trust for the client but are not subject to trustee process is they represent a retainer.[92] At the conclusion of the case, if the underlying claims were to recover property stolen by the defendant, the plaintiff's claim to assets held by the attorney takes priority over any attorney's lien for services provided to the defendant.[93]

The Trustee Disclosure

The trustee must serve a disclosure under oath within 20 days after the service of trustee summons.[94] The disclosure is intended to put upon the record those facts "upon which the liability of the trustee depends."[95] It is vital that the disclosure be complete.[96] The trustee should disclose all goods, effects, or credits in its possession even if the trustee intends to assert defenses or claims of its own.[97] "In the absence of any proffered controversy, the trustee's sworn answers and statements must be deemed true."[98]

Trustee Disclosure: Affirmative Defenses and Assignments

A trustee disclosure is a pleading.[99] Accordingly, any affirmative defenses that the trustee wishes to assert must be raised in the disclosure. Failure to do so waives those defenses.[100]

If the trustee disclosure reveals that the goods, effects, or credits held by the trustee are claimed by a thirty party by assignment or otherwise, the third party may appear and argue for possession. Failure to appear prevents the assignment from defeating the trustee process.[101] The plaintiff may not be awarded adjudication against a trustee which would expose the trustee to litigation with any third party "whose claim to the fund by virtue of an assignment from the principal debtor, or in any other way, has been made known by the trustee in his disclosure."[102] A third party claimant of the property at issue may need to petition to become a party to the action.[103]

Trustee Disclosure: Failure to Serve Disclosure

When a trustee fails to appear and answer trustee summons, the "trustee must be defaulted and adjudged trustee to the extent that such a person holds goods, effects or credits of the principal defendant otherwise available to satisfy the unsatisfied portion of final judgment."[104] Prior to 2003, a defaulting trustee was "adjudged trustee as alleged"[105] or, in other words, would have a judgment entered against it in the full amount of the trustee summons, regardless of what assets the trustee actually possessed at the time of service.[106] Under the new standard, the liability of the trustee is limited to the amount in the trustee's possession at the time of service of trustee summons.[107] If the trustee is a resident of the county in which the action was commenced and fails to serve its disclosure "without reasonable excuse," the trustee is liable for all costs "afterwards arising in the action."[108]

If the trustee fails to respond to a trustee summons, the plaintiff may move for entry of default and default judgment.[109] However, default judgment may not be entered against the trustee until the plaintiff has achieved judgment in the underlying case against the defendant.[110] A trustee who has had entry of default entered against it must first move to set aside the default before attempting to modify or dissolve the trustee process.[111] To set aside entry of default, the trustee must demonstrate good cause for its failure to respond to the trustee summons.[112] To set aside default judgment, the trustee must make a showing that satisfies Rule 60(b).[113]

Trustee Disclosure: Effective Time of Trustee Summons

The precise time at which trustee summons is served on the trustee determines what property is subject to attachment.[114] Property that has already left the trustee's hands is not subject to the trustee summons.[115] Similarly, trustee process does not reach assets prior to the time those assets come into the hands of the trustee.[116] The time at which the trustee summons is considered to be effective is a factual inquiry and at least one court has ruled that the trustee must have a reasonable opportunity to act on the summons before property is attached.[117]

Trustee Process After Judgment

Motions for attachment on trustee process are usually merely a preliminary salvo in litigation against the defendant. The trustee must hold any assets seized and the collection of those assets "must of necessity await the entry of final judgment against the principal defendant."[118] After judgment has become final, trustee process continues for 60 days if the judgment is for the plaintiff but is dissolved forthwith if it is for the defendant.[119] Judgment is entered against the non-discharged trustee for the goods, effects, and credits as well as against the principal defendant "in the usual form."[120] When only part of the goods, assets, and credits held by the trustee is taken in judgment, the trustee may deliver the remainder to the defendant or wait until 30 days after satisfaction of the execution.[121] Any appeal on whether the trustee is properly chargeable must await final judgment against the principal defendant.[122]

Conclusion

The intricacies of trustee process are a gift to defense counsel and a trap for plaintiff's counsel. It's worth it, though. Successful use of trustee process will help ensure collectability of a judgment, potentially speed resolution of the case, and force the opposing party into a defensive posture. Good luck!

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1. With thanks to Peter Murray, Peter Plumb, Richard O'Meara, and Christopher Branson for their thoughtful comments on initial drafts of this article.

2. 14 M.R.S.A. § 2601.

3. M.R. Civ. P. 4B(a); 14 M.R.S.A. § 2601.

4. This exception did not bar the use of trustee process in a negligence action against a non-profit alleging that it was negligent for failing to prevent assault and battery. *Sweeney v. Hope House, Inc.*, 656 A.2d 1215, 1217 (Me. 1995).

5. M.R. Civ. P. 4B(a); *see also* 9-A M.R.S.A. § 1-301(12) (providing definition of consumer debt)

6. 14 M.R.S.A. § 8111(2).

7. *Calvert v. Corthell*, 599 A.2d 69, 71 (Me. 1991); *Vogt v. Churchill*, 679 A.2d 522, 523 n. 3 (Me. 1996).

8. M.R. Civ. P. 4B(g).

9. M.R. Civ. P. 4B(h); *Tammac Corporation v. Miller-Meehan*, 643 A.2d 370, 371 (Me. 1994) (affirming denial of motion for attachment but noting that "there is nothing to prevent a second motion for an attachment).

10. *V.I.P., Inc. v. First Tree Development, LLC*, 2002 WL 450376 *3-4 (Me. Super.) (noting that court should not act upon request for trustee process until certification of disposition of appeal).

11. F.R.C.P. 64; D. Me. Local R. 64; *Telerent Leasing Corp. v. Pine State Plumbing & Heating, Inc.*, 231 F.Supp.2d 352, 354 (D. Me. 2002) (Action for trustee process in the District of Maine "is governed by Maine Rule[] of Civil Procedure . . . 4B and the associated interpretive decisions of the Maine Law Court").

12. *Sanders v. Sanders*, 711 A.2d 124, 127, 1998 ME 100 ¶ 10 (upholding trustee process order in part because court had subject matter jurisdiction over underlying action to enforce California judgment to pay alimony); *R.C. Moore, Inc. v. Les-Care Kitchens, Inc.*, 931 A.2d 1081, 1086, 2007 ME 138 ¶ 21.

13. *Wilson v. DelPapa*, 634 A.2d 1252, 1254 (Me. 1993) (discussing Rule 4A attachment); *Lindner v. Barry*, 828 A.2d 788, 789, 2003 ME 91 ¶ 3; *Anderson v. Kennebec River Pulp & Paper Co.*, 433 A.2d 752, 755 (Me. 1981) (Requirements of the rule "must be strictly complied with since the prejudgment attachment process is in derogation of the common law"); *Quimby v. Hewey*, 42 A. 344, 345 (Me. 1898) (citation omitted) ("Attachment of property of the principal debtor in the hands of trustees is wholly regulated by statute. To charge the trustee, the attaching creditor must allege and prove every material fact necessary to bring his case within the purview of the statute.").

14. *Sinclair v. Anderson*, 473 A.2d 872, 874-875 (Me. 1984).

15. *Lindner v. Barry*, 828 A.2d 788, 790, 2003 ME 91 ¶ 5 (reversing lower court's grant of trustee process because movant failed to submit supporting affidavits); *Svenska Ortmedicinska Institutet, AB v. DeSoto*, 164 F.Supp.2d 27, 33 (D. Me. 2001) (denying motion for attachment in part because auditor's letter, without requisite affidavit, was not admissible); The *Dartmouth Company v. Day's, Inc.*, 419 A.2d 366, 366 (Me. 1980) (affirming the denial of the motion because no affidavit was submitted); *Smith v. Campbell*, 2006 WL 1669664 *1 n.1 (Me. Super. 2006) (noting that "the court cannot consider factual material not presented by affidavit"); *Svenska Ortmedicinska Institutet, AB v. DeSoto*, 164 F.Supp.2d 27, 34 (D. Me. 2001) (an auditor's letter, unsupported by affidavit, is insufficient evidence); *Ford Motor Credit Co. v. Thompson Machine, Inc.*, 615 A.2d 608, 609 (Me. 1992) (requiring affidavits to "state specific facts to support claim for recovery and certain evidence from which some informed projection can be made as to the amount of damages suffered by the party"); *Atlantic Heating Co., Inc. v. Lavin*, 572 A.2d 478, 479 (Me. 1990) (noting that the defective affidavit merely set forth the general allegations of the complaint and lacked the factual specificity required to fix the amount of attachment); *Stewart v. Tobey*, 498 A.2d 1180, 1180 (Me. 1985) (where plaintiff failed to supply the Superior Court with particular facts bearing on the amount of her damages, the denial of her motion was not clearly erroneous); *Xaphes v. Mowry*, 478 A.2d 299, 300 (Me. 1984) (upholding denial where plaintiff showed damages and belief of liability but no facts to support liability).

16. "[G]eneral unsubstantiated allegations of [plaintiff], without more, are inadequate to establish grounds for an attachment." *Trans Coastal Corp. v. Curtis*, 622 A.2d 1186, 1189 (Me. 1993) (rejecting affidavits that lacked dates or key identifying facts).

17. M.R. Civ. P. 4A(i); M.R. Civ. P. 4B(c).

18. *Official Post Confirmation Committee of Creditors Holding Unsecured Claims v. Markheim*, 877 A.2d 155, 158-160, 2005 ME 81 ¶ 13-19 (rejecting affidavit information where affiants failed to state that they believed it to be true); *Herrick v. Theberge*, 474 A.2d 870, 873-874 (Me. 1984) (finding affidavits with "sloppily prepared" jurats to meet the requirements of the Rule but noting that "[a]ny problem is readily avoided by fashioning a jurat that tracks the exact language" of the Rule); *Chase Commercial Corp. v. Hamilton & Son*, 473 A.2d 1281, 1283 (Me. 1984) (noting that where the affidavit is not made on the affiant's own knowledge, information, or belief, it fails to establish sufficient facts to warrant the requisite finding by the court); *Englebrecht v. Development Corp. for Evergreen Valley*, 361 A.2d 908, 910 (Me. 1976) (holding that affidavit was deficient because it "asserts facts to the best of the affiant's knowledge, information and belief" instead of being "on the affiant's own knowledge, information and belief" and because it fails to assert that, to the extent that the facts are upon information and belief, the affiant believes the information to be true).

19. *Unite v. Globaltex, LLC*, 2001 WL 135846 *3 n.2 (D. Me. 2001).

20. *Anderson v. Kennebec River Pulp & Paper Co.*, 433 A.2d 752, 755 n.3 (Me. 1981) (holding that where none of the affidavits were based on information or belief, it was unnecessary for the affiants to include a statement that the information was believed to be true); *Herrick v. Theberge*, 474 A.2d 870, 874 (Me. 1984) (holding that an affidavit was valid where the jurat omitted the phrase "upon personal knowledge" but none of the facts within the affidavit where based upon personal knowledge).

21. *General Commerce & Industry, Inc. v. Hillside Construction Co., Inc.*, 564 A.2d 763, 765 (Me. 1989).

22. M.R. Civ. P. 4B(c).

23. M.R. Civ. P. 4A advisory committee's notes to 2002 amend. (discussing change to both Rule 4A and 4B); *Liberty v. Liberty*, 769 A.2d 845, 847 n. 4, 2001 ME 19 ¶ 12 n. 4 (noting change in standard).

24. *Casco Northern Bank, N.A. v. Moore*, 583 A.2d 697, 699 (Me. 1990) (characterizing the standard as a "low threshold"); *Sinclair v. Anderson*, 473 A.2d 872, 874 (Me. 1984) (low hurdle); *Beesley v. Landmark Realty, Inc.*, 464 A.2d 936, 937 (Me. 1983) (same).

25. *Brickyard Assocs. v. Auburn Venture Partners*, 626 A.2d 930, 934 (Me. 1993); *General Commerce & Industry, Inc. v. Hillside Construction Co., Inc.*, 564 A.2d 763, 765 (Me. 1989); *Herrick v. Theberge*, 474 A.2d 870, 874 (Me. 1984).

26. *Schneider v. Cooper*, 687 A.2d 606, 608 (applying the "more likely than not" standard).

27. *Whitney v. Moore*, 19 Me. 42 (1841).

28. *Sweeney v. Hope House, Inc.*, 656 A.2d 1215, 1217 (Me. 1995) (reversing trial court which had denied a motion for attachment based on an equitable concern for protecting the public financial support for the defendant); *Maine National Bank v. Anderschat*, 462 A.2d 482, 484 (Me. 1983) (holding that trial court "has no discretion to deny an attachment on the sole ground that to do so would be 'inequitable'").

29. *Dartmouth Co. v. Day's, Inc.*, 419 A.2d 366, 367 n.1 (Me. 1980).

30. *Bates Fabrics, Inc. v. LeVeen*, 590 A.2d 528, 531 (Me. 1991).

31. *Ali, Inc. v. Fishman*, 855 F.Supp. 440, 443-444 (D. Me. 1994) (granting motion for trustee process on sum including $40,000 in collection costs on guaranty); *General Commerce & Industry, Inc. v. Hillside Construction Co., Inc.*, 564 A.2d 763, 764 (Me. 1989) (affirming an attachment order that included $14,000 in attorney's fees and prejudgment interest); *Smith v. Campbell*, 2006 WL 1669664 *1 (Me. Super. 2006) (including attorneys fees in trustee order).

32. *Frontiervision Operating Partnership, L.P. v. Chiaravetlotti*, 2000 WL 892026 * (D. Me. 2000) (including $10,000 in attorney fees in order of attachment and trustee process where plaintiff requested $40,000 and finding that plaintiff's estimate of legal fees lacked sufficient supporting evidence); *St. Hilaire v. Industrial Roofing Co.*, 346 F.Supp.2d 212, 215 (D. Me. 2004) (declining to add $20,000 to attachment amount for "bald projection" of future legal fees where "Plaintiff's counsel has not provided the Court with an affidavit indicating an analytically-based expectation of litigation costs").

33. *General Commerce & Industry, Inc. v. Hillside Construction Co., Inc.*, 564 A.2d 763, 765 (Me. 1989) (finding no error in trial court's inclusion of prejudgment interest).

34. *Smith v. Campbell*, 2006 WL 1669664 *1 (Me. Super.).

35. *Tammac Corporation v. Miller-Meehan*, 643 A.2d 370, 371 (Me. 1994); *see also Svenska Ortmedicinska Institutet, AB v. DeSoto*, 164 F.Supp.2d 27, 34 (D. Me. 2001) (denying motion for attachment as "inappropriate" where claim was for $50 plus the costs associated with a bounced check).

36. *Citizens Bank New Hampshire v. Acadia Group, Inc.*, 766 A.2d 1021, 1024, 2001 ME 41 ¶ 12.

37. M.R. Civ. P. 4B(c); *Maine National Bank v. Anderschat*, 462 A.2d 482, 484 (Me. 1983); *Ford Motor Credit Co. v. Thompson Machine, Inc.*, 615 A.2d 608, 609 (Me. 1992); *Beesley v. Landmark Realty, Inc.*, 464 A.2d 936, 938 (Me. 1983).

38. *Casco Northern Bank, N.A. v. Moore*,

583 A.2d 697, 699 (Me. 1990) (allowing attachment in full against guarantor even where collateral exists to secure the obligation of the principal debtor); *Chase Commercial Corp. v. Hamilton & Son*, 473 A.2d 1281, 1283-1284 (Me. 1984) (same and also holding that attachment in full may be had against each of the guarantors separately because the creditor has a separate cause of action against each guarantor); *Ali, Inc. v. Fishman*, 855 F.Supp. 440, 444 (D. Me. 1994).

39. *Telerent Leasing Corp. v. Pine State Plumbing & Heating, Inc.*, 231 F.Supp.2d 352, 357-358 (D. Me. 2002) (noting that the duty to defend is much broader than the duty to indemnify); *but see Glenwood Farms, Inc. v. Ivey*, 2005 WL 1773743 *4 (D. Me. 2005) (declining to grant motion in part because plaintiffs failed to show that the amount they would recover "would exceed the amount of insurance coverage available"; it appears from the decision that the plaintiffs had waived any argument that the insurance policy might not provide security).

40. *Casco National Bank, N.A. v. New England Sales, Inc.*, 573 A.2d 795, 797 (Me. 1990); *see also Herrick v. Theberge*, 474 A.2d 870, 874-875 (Me. 1984) (holding that plaintiff does not have to show a lack of comparative fault to get trustee process).

41. The proper venue for an action on trustee process is the county where all trustees live (if the same county) or the county where at least one lives (if different counties). 14 M.R.S.A. § 2604. A corporation is deemed to live in the county where it: has established or usual place of business or held its last annual meeting or usually holds it meetings. *Id.* A railroad corporation is deemed to live in any county where it runs and operates its road. *Id.* A financial institution or credit union authorized to do business in Maine is deemed to reside in any county where it maintains a place of business. *Id.* Venue in some actions does not depend on the situs of the trustee. In a divorce action, the venue is the county where the court has jurisdiction over the parties. *Id.* When a trustee is summonsed pursuant to a counterclaim, venue is appropriate in the county where the action is pending. *Id.* If the trustee is not a resident of Maine, venue is appropriate where either party resides. 14 M.R.S.A. § 2610.

42. *See* 14 M.R.S.A. § 2605 (referring to "an action commenced by trustee process) (emphasis added).

43. *See, e.g., Fleet Nat'l Bank v. Liberty*, 2003 WL 1618552 *2 (Me. Super. 2003) (analyzing whether an affirmative defense was adequately supported by the law to refute plaintiff's claims — and deciding that it was not adequately supported).

44. 14 M.R.S.A. § 2607.

45. M.R. Civ. P. 4B(c).

46. *Southern Maine Properties Co., Inc. v. Johnson*, 724 A.2d 1255, 1257, 1999 ME 37 ¶ 9 (acknowledging requirement of Rule 4A(c) and noting that in Cumberland County, non-dispositive motions are decided without oral argument, and that defendant had ample opportunity to file written materials); *Atlantic Heating Co., Inc. v. Lavin*, 572 A.2d 478, 479 (Me. 1990) (holding that "[u]nder the rules, a hearing is not required to be held prior to ruling on a motion for approval of attachment"); *Smith v. Campbell*, 2006 WL 1669664 *1 (Me. Super.) (ruling on motion without argument where court's schedule precluded hearing for at least another month); *Peter Condakes Co., Inc. v. Sandler Bros.*, 642 F.Supp.2d 33, 36 n.2 (D. Me. 2009) (granting motion without hearing in accordance with Local Rule 7(f) and noting that "[n]otwithstanding the express hearing requirement [of Rule 4B], a formal hearing is not necessary prior to ordering attachment"); *but see St. Hilaire v. Industrial Roofing Co.*, 346 F.Supp.2d 212, 214(D. Me. 2004) (noting that "[i]n accordance with the Maine Rules, a hearing was held before the Court").

47. M.R. Civ. P. 4A advisory committee's notes to 2002 amend.; *Liberty v. Liberty*, 769 A.2d 845, 847 n. 4, 2001 ME 19 ¶ 12 n. 4; *General Commerce & Industry, Inc. v. Hillside Construction Co., Inc.*, 564 A.2d 763, 765 (Me. 1989) (holding that there is no constitutional right to a hearing in such circumstances and that the trial court has the discretion to deny such a hearing); *Smith v. Campbell*, 2006 WL 1669664 *1 n.1 (Me. Super. 2006) (noting that "the court cannot consider factual material not presented by affidavit"); *Englebrecht v. Development Corp. for Evergreen Valley*, 361 A.2d 908, 910 (Me. 1976) ("Oral arguments of counsel made at the hearing . . . cannot substitute for sworn statements of specific facts," discussing application of Rule 4A); *Anderson v. Kennebec River Pulp & Paper Co.*, 433 A.2d 752, 754 n.1 (Me. 1981) (holding that the Rule "contemplates a non-testimonial proceeding" and that the motion and its supporting affidavits constitute the basis for the court's ruling on the motion); *Atlantic Heating Co., Inc. v. Lavin*, 572 A.2d 478, 479 (Me. 1990) (noting that "had a hearing been conducted, the [Plaintiffs] could not have used oral testimony to replace or supplement the defective affidavit"); *but see Katahdin Publishing LLC v. Kessler*, 2006 WL 1680054 *1 (Me. Super. 2006) (also found at 2006 WL 5255521) (permitting defendants to rely on evidence presented in a separate testimonial hearing regarding a preliminary injunction).

48. *See, e.g., Schneider v. Cooper*, 687 A.2d 606, 608 (Me. 1996) (noting that trial court had granted such a motion); *Mitchell v. Lavigne*, 770 A.2d 109, 110, 2001 ME 67 ¶ 6 (citing to Schneider as evidence of expedited hearings).

49. *Schneider v. Cooper*, 687 A.2d 606, 608 (Me. 1996) (noting without discussion use of telephonic hearing over defendant's objection and reversing trial court on other grounds).

50. M.R. Civ. P. 4B(i).

51. M.R. Civ. P. 4B advisory committee's note to 1973 amend.

52. M.R. Civ. P. 4B(j).

53. *Mitchell v. Lavigne*, 770 A.2d 109, 110, 2001 ME 67 ¶ 5.

54. M.R. Civ. P. 4B(j); *Sanders v. Sanders*, 711 A.2d 124, 126-127, 1998 ME 100 ¶ 7.

55. *Sanders v. Sanders*, 711 A.2d 124, 126-127, 1998 ME 100 ¶ 7.

56. *Maine National Bank v. Anderschat*, 462 A.2d 482, 484 (Me. 1983).

57. *Plourde v. Plourde*, 678 A.2d 1032, 1035 (Me. 1996); *Citizens Bank New Hampshire v. Acadia Group, Inc.*, 766 A.2d 1021, 1022 n. 2, 2001 ME 41 ¶ 5 n. 2 (holding that when a hearing is held on a motion to dissolve the attachment, the propriety of the order being issued ex parte is moot); *Herrick v. Theberge*, 474 A.2d 870, 876 (Me. 1984) (holding that any quarrel with the trial court's finding of ex parte need was mooted by the holding of a hearing).

58. *Casco National Bank, N.A. v. New England Sales, Inc.*, 573 A.2d 795, 797 n.3 (Me. 1990) (noting that dissolution of the attachment is a sanction that may be imposed by the court for abuse of the *ex parte* process, particularly where the plaintiff made a knowingly false statement); *Herrick v. Theberge*, 474 A.2d 870, 876 (Me. 1984) (noting that plaintiff's attorney is subject to Rule 11 and the Maine Bar Rules).

59. M.R. Civ. P. 4B(j).

60. *Maine National Bank v. Anderschat*, 462 A.2d 482, 484 (Me. 1983).

61. *Town of Poland v. T&M Mortgage Solutions, Inc.*, 2010 ME 2 ¶ 8 (reversing trial court's grant of motion to substitute real property for attached bank account and holding that "liquid assets may only be released upon substitution of a similar species of property, that is, goods, credits, cash, or bond").

62. *Town of Poland v. T&M Mortgage Solutions, Inc.*, 2010 ME 2 ¶ 4 n.1; *Tammac Corporation v. Miller-Meehan*, 643 A.2d 370, 371 (Me. 1994) (denial of motion immediately appealable); *Fern Construction Co., Inc. v. Binnall*, 443 A.2d 67, 69 (Me. 1982) (permitting an appeal of an order discharging the trustee); 2 Field, McKusick & Wroth, Maine Civil Procedure § 73.2 at 435 (2d ed. Supp. 1981) (explaining that this exception to the normal final judgment rule "is to protect the interests of the principal parties — the plaintiff's interest in preserving security for the judgment and the principal defendant's interest in protecting his property from encumbrances during the pendency of the action").

63. *First National Bank of Boston v. New England Sales, Inc.*, 629 A.2d 1230, 1231 (Me. 1993) (noting without discussion that the appeal was brought by the trustee for determination of whether the funds held by the trustee are properly subject to trustee process).

64. *Casco Bank & Trust Co. v. Emery*, 416 A.2d 261, 262 (Me. 1980).

65. *V.I.P., Inc. v. First Tree Development, LLC*, 2002 WL 450376 *5 (Me. Super.); *Nynex Worldwide Services Group v. Dineen*, 740 A.2d 568, 570, 1999 ME 166 ¶ 6.

66. *Mitchell v. Lavigne*, 770 A.2d 109, 110, 2001 ME 67 ¶ 6.

67. M.R. Civ. P. 62(f); *First NH Banks Granite State v. Scarborough*, 615 A.2d 248, 251 (Me. 1992) (citing to 14 M.R.S.A. § 4601 concerning attachments).

68. *Citizens Bank New Hampshire v. Acadia Group, Inc.*, 766 A.2d 1021, 1024 n. 3, 2001 ME 41 ¶ 13 n. 3; *But see Plumbago Mining Corp. v. Sweatt*, 444 A.2d 361, 368 (Me. 1982) (ordering reinstatement of trustee process in unusual case involving civil and criminal seizures/attachments).

69. M.R. Civ. P. 4B(c); *Coombs v. Russell*, 511 A.2d 448, 449 (Me. 1986) (holding that "[u]pon the expiration of thirty days from the entry of the order approving trustee process, that order lapsed"); *see also Scott Dugas Trucking & Excavating, Inc. v. Homeplace Building & Remodeling, Inc.*, 651 A.2d 327, 329 (Me. 1994) (holding that where order was mailed by court, the deadline is not extended by three days under Rule 6(c)).

70. *TBA Partnership v. Maxwell*, 591 A.2d 239, 239 (1991).

71. 14 M.R.S.A. § 2603.

72. M.R. Civ. P. 4(h); *Spruce v. Jackson*, 2004 WL 844180 *2 (Me. Super. 2004) (setting aside trustee default where plaintiff failed to file proof of service and failed to file for entry of default for over two years).

73. M.R. Civ. P. 4B(c).

74. *R.C. Moore, Inc. v. Les-Care Kitchens, Inc.*, 931 A.2d 1081, 1085, 2007 ME 138 ¶ 19.

75. 14 M.R.S.A. § 2603.

76. 14 M.R.S.A. § 2608-A

77. https://www10.informe.org/icrs/trustee/.

78. 14 M.R.S.A. § 2603 (1980); *Coombs v. Russell*, 511 A.2d 448, 449 (Me. 1986). "The single question . . . to be determined in charging a trustee, is the amount of the goods, effects or credits belonging to the debtor in the hands of the alleged trustee at the time of service upon the latter." *Davis v. U.S. Bobbin & Shuttle Co.*, 118 Me. 285, 107 A. 865 (1919) (holding that the trustee's liability to the plaintiff is measured by his liability to the defendant; "[b]eyond that the trustee process does not reach").

79. Property not attachable on trustee process includes: a negotiable bill, draft, note or other security drawn, accepted, made or indorsed by trustee, 14 M.R.S.A. § 2602(1), (unless representing fraudulently conveyed goods, *id.* § 2629); money or other thing collected by trustee "as an officer, by force of a legal process in favor of the principal defendant in the trustee process, although it has been previously demanded of him by the defendant," *id.* § 2602(2); money held by a public officer, *id.* § 2602(3); money or other thing owed to defendant unless it is due absolutely and not on any contingency, *id.* § 2602(5); money owed by the trustee to the defendant for a judgment "while he is liable to an execution thereon," *id.*; money due from the trustee to the defendant for earnings (which includes "compensation paid or payable for personal services," including periodic payments to pension/retirement program), M.R. Civ. P. 4B(a); money due for board furnished to a member of the Legislature while in attendance thereon, 14 M.R.S.A. § 2602(8); a safety deposit box rented by national bank, trust company, savings bank, savings and loan association, credit union, or safe deposit company, or its contents, *id.* § 2602(9); money deposited in a real estate broker's trust account pursuant to 32 M.R.S.A. § 13189 (except as provided), *id.* § 2602(10); 32 M.R.S.A. § 13189; disability benefits, 14 M.R.S.A. § 4422(13)(C); *Sanders v. Sanders*, 711 A.2d 124, 127-128, 1998 ME 100 ¶ 12; unemployment benefits, unless the underlying claim is for "necessaries" furnished to the defendant, spouse, or dependents during time of unemployment, 26 M.R.S.A. § 1044(3); 14 M.R.S.A. § 4422(13)(A); pension/annuity payments to the extent they are reasonably necessary for the support of the debtor and the debtor's dependents, 14 M.R.S.A. § 4422(13)(E); *Sanders v. Sanders*, 711 A.2d 124, 127-128, 1998 ME 100 ¶ 12 (determining that disability insurance payments received by defendant were future earnings under (13)(E), not disability benefits under (13)(C), and therefore only partially exempt because he was eligible to receive the payments for life or until he no longer was eligible; defendant failed to provide the court with evidence supporting his argument that they were fully exempt); individual retirement accounts (up to $15,000 or that which is necessary for support of debtor and dependents), 14 M.R.S.A. § 4422(13)(F); municipal pension benefits, 14 M.R.S.A. § 4422(13)(A),(E); state retirement benefits, unless the underlying action is for child support of for "qualified domestic relations orders," 5 M.R.S.A. § 17054; 5 M.R.S.A. § 17059 (defining qualified domestic relations orders); worker's compensation benefits, unless the underlying action is for spousal or child support, 39-A M.R.S.A. § 106; the first $47,500 of the defendant's aggregate interest in a residence (or $95,000 if minors live there or if the defendant is over 60 or disabled), 14 M.R.S.A. § 4422(1) (2007). Proceeds from the sale of a residence continue to be exempt for 6 months after the sale for purpose of reinvesting in residence. 14 M.R.S.A. § 4422(1)(C) (2007); *see also Brown v. Corriveau*, 576 A.2d 200, 201-202 (Me. 1990) (holding under previous law lacking this clause that where defendant does not intend to use proceeds of sale of home for reinvestment, those funds are not exempt from trustee process); certain amounts of personal property (including motor vehicles, clothing, jewelry, appliances, trade tools, produce, fishing boats, farm/logging equipment, health aids), 14 M.R.S.A. § 4422 (setting specific limits on each category); the value of an unmatured life insurance contract or life insurance dividends, interest, and loan value, *id.* § 4422(10), (11); and certain legal awards, 14 M.R.S.A. § 4422(14) (including awards under a crime victim's reparation law, payment on a wrongful death claim or on a life insurance contract where the defendant was a dependent and the amounts are reasonably necessary for the support of the defendant and any dependents of defendant, payments up to $12,500 for personal injury of defendant or an individual of whom the defendant is a dependent, and payment for loss of future earning of defendant or an individual of whom the defendant is a dependent to the extent those sums are necessary for the support of defendant or any dependent of defendant). When one of these exemptions applies and trustee process is served on multiple occasions, the exemption is applied in full each time. *Howard Coal Co. v. Savage*, 100 A. 369, 369 (Me. 1917) (holding that where trustee process was served three times on employer, exemption of $20 applied on each occasion — which meant that no money was seized by trustee process).

80. 14 M.R.S.A. § 2602(7).

81. *Thomas v. Parsons*, 32 A. 876 (Me. 1895).

82. 14 M.R.S.A. § 2609.

83. 14 M.R.S.A. § 2602(4).

84. *Loyal Erectors, Inc. v. Hamilton & Son, Inc.*, 312 A.2d 748, 752 (Me. 1973).

85. *Biette v. Scott Dugas Trucking and Excavating, Inc.*, 676 A.2d 490, 497-498 (Me. 1996) (dicta).

86. 14 M.R.S.A. § 2628.

87. *Loyal Erectors, Inc. v. Hamilton & Son, Inc.*, 312 A.2d 748, 753 (Me. 1973) (holding that where a construction contract requires the approval of an architect before payment is made, trustee process served prior to approval does not attach those funds because they represent a contingent debt); *Davis v. Davis*, 49 Me. 282 (1862) (holding that where the preliminary proof of loss required by a fire insurance policy was a condition precedent to the right of the insured to recover, the funds are exempt because the liability of the insurer does not become absolute until the condition precedent is fulfilled); *Wilson v. Wood*, 34 Me. 123 (1852) (holding that where a contract called for the payment of a commission when a note was collected, there was no absolute indebtedness until after the note had been collected; until that point, there was only a contingent liability); *Jordan v. Jordan*, 75 Me. 100 (1883) (holding where a contract to pay commissions on the sale of goods as the goods as paid for creates a contingent debt because "this is not a debt due in the present and payable in the future, for there may never be a debt"); *Holmes v. Hilliard*, 130 Me. 392, 294, 156 A. 692 (1931) (holding that payment was not attached on trustee process because the crops had not yet been delivered and therefore payment was not due to the defendant under contract that called for the purchase and sale of certain crops that met certain standards); *Otis v. Ford*, 54 Me. 104 (1866) (holding that where the contract held that the price was payable upon completion of the work and there was no acceptance of the work by the trustee, there was nothing yet due and no reassurance that there ever

would be).

88. *Loyal Erectors, Inc. v. Hamilton & Son, Inc.*, 312 A.2d 748, 753 (Me. 1973).

89. *Loyal Erectors, Inc. v. Hamilton & Son, Inc.*, 312 A.2d 748, 755-756 (Me. 1973).

90. *Foss v. Hume*, 130 Me. 22, 153 A. 181 (1931).

91. *Hussey v. Titcomb*, 127 Me. 423, 427, 144 A. 218 (1929) (holding that a widow's allowance was contingent because it was at the discretion of the probate judge).

92. *First National Bank of Boston v. New England Sales, Inc.*, 629 A.2d 1230, 1231 (Me. 1993) (evenly divided court couldn't decide whether the money held by the law firm was pledged (and not subject to trustee process) or was advance payments held in trust by the law firm for the client (and therefore subject to trustee process) and therefore affirmed the lower court's finding that the money was subject to trustee process); M.R. Prof. Conduct 1.15(b)(1) (discussing advance payments); M.R. Prof. Conduct 1.15(b)(7)(iii) (defining retainer); *see also In re Saturley*, 131 B.R. 509, 514 (D. Me. Bktcy. 1991) (noting that creditor had served trustee process on debtor's bankruptcy counsel and holding that that lien must be handled as any other lien would in the Chapter 7 proceedings).

93. 14 M.R.S.A. § 2602-A.

94. M.R. Civ. P. 4B(e); 14 M.R.S.A. § 2706 (Disclosure must be sworn to); *Worrey v. Fournier*, 729 A.2d 907, 909, 1999 ME 78 ¶ 6 (holding that the trustee, not the plaintiff, is responsible for filing disclosure and suffers consequences of not making a timely disclosure).

95. *Loyal Erectors, Inc. v. Hamilton & Sons, Inc.*, 312 A.2d 748, 751 (Me. 1973) ("[i]t is upon those facts as disclosed by the trustee's sworn statements that the court must decide whether the alleged trustee had credits of the principal defendant in its possession of such a nature and under such conditions as made them available to the plaintiff in trustee process").

96. "The law attributes great weight to the disclosure of a trustee properly made, and hence the plaintiff is entitled to have the conscience of the trustee thoroughly searched, in the fear of spiritual and temporal penalties for perjury." *Thompson v. Dyer*, 100 Me. 421, 62 A. 76 (1905) (holding that if disclosure includes statements made by others, plaintiff must make oath that he believes them to be true). "A trustee's answer should be sufficient to put the plaintiff on notice of any funds that might be pursued even if the trustee has claims of its own or if the availability of those funds is disputed." *R.C. Moore, Inc. v. Les-Care Kitchens, Inc.*,2006 WL 2590064 *8 (Me. Super.).

97. "The person summoned as trustee is not to determine the question of his liability. It is a fundamental rule that the disclosure of a trustee must be full and complete." *Otis v. Springfield Fire & Marine Ins. Co.*, 122 Me. 239, 119 A. 612 (1923) (noting that failure to disclose properly can lead to liability for the trustee). "The trustee in relation to the plaintiff is an adverse party in the suit and is entitled to make his defense, as the principal defendant may, either upon issues of law or of fact." *Hibbard v. Newman*, 101 Me. 410, 64 A. 720 (1906) (noting that a trustee may plead lack of jurisdiction as a defense).

98. *Loyal Erectors, Inc. v. Hamilton & Son, Inc.*, 312 A.2d 748, 751 (Me. 1973); 14 M.R.S.A. § 2710 ("The answers and statements sworn to by a trustee shall be deemed true in deciding how far he is chargeable until the contrary is proved, but the plaintiff, defendant and trustee may allege and prove any facts material in deciding that question.").

99. M.R. Civ. P. 7(a).

100. M.R. Civ. P. 12(b); *R.C. Moore, Inc. v. Les-Care Kitchens, Inc.*, 931 A.2d 1081, 1085-1086, 2007 ME 138 ¶ 20 (holding that trustee's failure to assert lack of personal jurisdiction or offset in its disclosure waives the defense and implying, by its citation of Rule 12(h)(1)(B) that the same analysis applies to the defenses of improper venue, insufficiency of process, and insufficiency of service of process); *but see Hibbard v. Newman*, 101 Me. 410, 64 A. 720 (1906) (holding, in this case predating the Rules of Civil Procedure, that the defense of lack of jurisdiction would not be "admissible" in the disclosure).

101. 14 M.R.S.A. § 2616.

102. *Biette v. Scott Dugas Trucking and Excavating, Inc.*, 676 A.2d 490, 497-498 (Me. 1996) (dicta); *Jordan v. Harmon*, 73 Me. 259, 261 (1882).

103. *Walcott v. Richman*, 94 Me. 364, 47 A. 901 (1900) (allowing third party claimant to pursue claims despite failure to petition where all parties consented).

104. 14 M.R.S.A. § 2614.

105. 14 M.R.S.A. § 2614 (1980).

106. *Levine v. Keybank N.A.*, 861 A.2d 678, 685, 2004 ME 131 ¶ 24; *Estate of Cobb v. Potter*, 2003 WL 21387184 *1 (Me. Super. 2003) (noting that "[t]he penalty for not complying with the [rule regarding trustee disclosures] is stringent").

107. 14 M.R.S.A. § 2614 (Supp. 2003); *Levine v. Keybank N.A.*, 861 A.2d 678, 685 n. 7, 2004 ME 131 ¶ 24 n. 7.

108. 14 M.R.S.A. § 2701.

109. M.R. Civ. P. 55.

110. *Levine v. Keybank N.A.*, 861 A.2d 678, 681, 2004 ME 131 ¶ 4 (describing without comment trial court's reasoning that trustee's liability could not be determined until the plaintiff had succeeded on the claim against defendant).

111. *Levine v. Keybank N.A.*, 861 A.2d 678, 682, 2004 ME 131 ¶ 9.

112. *Levine v. Keybank N.A.*, 861 A.2d 678, 684, 2004 ME 131 ¶ 21 ("The foundation of a good excuse is a reasonable explanation, which KeyBank failed to provide"); *Coombs v. Government Employees Ins. Co.*, 534 A.2d 676, 679 (Me. 1987) (holding that "[f]orgetting to file the response" is not good cause); *R.C. Moore, Inc. v. Les-Care Kitchens, Inc.*, 931 A.2d 1081, 1087, 2007 ME 138 ¶ 28-29 (holding that trial court did not abuse its discretion in finding that trustee failed to offer a reasonable excuse where defaulted trustee showed that it had a system that required summons to pass through four offices in four states over several days before any action could be taken).

113. *Butler v. D/Wave Seafood, Inc.*, 791 A.2d 928, 932, 2002 ME 41 ¶ 18 (holding that defaulted trustee that failed to respond to two trustee summons and failed to attend hearing of which it had notice by phone does not have a reasonable excuse sufficient to lift default); *Coombs v. Government Employees Ins. Co.*, 534 A.2d 676, 679 (Me. 1987) (holding that "[f]orgetting to file the response" is not excusable neglect); *Spruce v. Jackson*, 2004 WL 844180 *2 (Me. Super. 2004) (holding that where KeyBank showed that its document processing system had an error rate of only 0.006%, where plaintiff failed to file the proof of service of trustee summons within 20 days as required by the rule and failed to request default for more than 2 years, and where trustee had no assets of the defendant, KeyBank had met the requirements for setting aside default judgment).

114. *Coombs v. Russell*, 511 A.2d 448, 449 (Me. 1986) (noting that "[w]e determine the validity of trustee process on the state of facts existing at the moment process was served"); *First National Bank of Boston v. New England Sales, Inc.*, 629 A.2d 1230, 1231 (Me. 1993) (noting that check issued in the morning was not subject to trustee process served later that day); *Otis v. Springfield Fire & Marine Ins. Co.*, 122 Me. 239, 119 A. 612 (1923) (holding that "[t]he precise and only question to be determined is whether, at the time of service of the process upon it, the trustee had in its hands money or other property due or belonging to the principal defendant absolutely and without any contingency"); *Loyal Erectors, Inc. v. Hamilton & Son, Inc.*, 312 A.2d 748, 752 (Me. 1973) (holding that "[t]his determination must be made as of the time the trustee process was served, since the validity of the trustee process depends upon the state of facts as they existed at that moment"); *Holmes v. Hilliard*, 130 Me. 392, 294, 156 A. 692 (1931) ("The validity of trustee process depends upon the state of facts existing at the time of the service of the writ on the alleged trustee"); *Otis v. Springfield Fire & Marine Ins. Co.*, 122 Me. 239, 119 A. 612 (1923) ("The liability to trustee process must be determined by the relations existing at the time when the process was served upon the alleged trustee, and no subsequent act of the trustee could render him chargeable").

115. *Id.; see also First National Bank of Boston v. New England Sales, Inc.*, 629 A.2d 1230, 1231 (Me. 1993) (holding that a check issued and delivered before service of trustee summons "creates an implied agreement that the check will be honored when presented, and no duty arises for the trustee to stop payment on the check for the benefit of the plaintiff" and that the funds conveyed by the trustee

to the defendant by check before service of trustee summons were not subject to trustee process).

116. *Id.; see also Casco Bank & Trust Co. v. Emery,* 416 A.2d 261, 262 (Me. 1980) (noting without comment that District Court had so ruled and not reaching the issue, dismissing the appeal as premature).

117. *R.C. Moore, Inc. v. Les-Care Kitchens, Inc.,* 2006 WL 2590064 *7 (Me. Super. 2006) (holding that 12 hours provided the trustee with a reasonable opportunity to act); 931 A.2d 1081, 1085, 2007 ME 138 ¶ 19 (affirming on this point by evenly divided Law Court and therefore not directly addressing the issue).

118. *Smith v. Davis,* 131 Me. 9, 12, 158 A. 359 (1932).

119. M.R. Civ. P. 62(f).

120. 14 M.R.S.A. § 2618.

121. 14 M.R.S.A. § 2621.

122. *Casco Bank & Trust Co. v. Emery,* 416 A.2d 261, 262 (Me. 1980) (dismissing appeal of order determining priority between competing creditors and their respective trustee summons as premature); *see also R.C. Moore, Inc. v. Les-Care Kitchens, Inc.,* 931 A.2d 1081, 1086, 2007 ME 138 ¶ 21 (noting that appeal was stayed so that plaintiff could obtain judgment against the principal defendant).