



Collecting a Judgment

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COLLECTING A JUDGMENT

Written by Russell D. Garrett

CAUTION: Collection of debts typically requires compliance with the Fair Debt Collection Practices Act, 15 USC § 1692 *et seq.* (“FDCPA”), and attorneys do qualify as debt collectors subject to those Acts. The requirements for compliance with the FDCPA and many state statutes addressing collection are the subject of entire CLE presentations and beyond the scope of this presentation. Be certain to comply with those Acts if you intend to do any collection work.

A. *Notice of Demand to Pay Judgment*

- Before a Judgment Debtor Examination can be obtained, statutes generally require that it be supported by one of the following:

- 1) Return of a writ of execution showing the Judgment has not been satisfied;
- 2) Garnishee response to writ of garnishment that does not fully satisfy the Judgment; or
- 3) Proof of Service of a Notice of Demand to Pay Judgment
 - Notice of Demand must generally give 10 or more days to pay Judgment;
 - Must be served in same manner as summons or by any form of mail addressed to the debtor and requesting a receipt;
 - Service by mail effective on mailing.

B. *Identifying Specific Records and Sources of Information*

1. Motor Vehicle Records – Oregon Department of Transportation – Division of Motor Vehicles

Online: check your own state

- Locate vehicles, drivers, residences and insurance

- Account can be established to allow for rapid discovery over phone but beware of restrictions for use and disclosure

2. Financial Institution Records

- Subpoena typically required

- If business, what about ordering product?

Pay by check and determine where check was deposited.

3. Real Estate Records

- Open to public – many counties online
- Title Search
- Skip Trace

4. UCC Records

Online Search: Check your own state.

(Allows search for information on UCC secured transactions, as well as Farm Product notices, IRS Tax Liens, Agricultural Liens, Agricultural Produce Liens, Grain Producer's Liens, Revenue Warrants and Employment Warrants. Search by debtor name (business or individual) or filing number).

- Very effective to determine other liens
- Check to see position and whether worth pursuing

5. Credit Bureau Reports

Online: www.Equifax.com

www.Experian.com

www.TransUnion.com

- If accessible, very good information
- Beware of Fair Credit Reporting Restrictions (FCRA) 15 USC § 1681a *et seq.*

6. Newspapers

- Search for Debtors in database
- Residence
- Notices
- Articles – sales, purchases, etc.

7. Corporation Division – Business Name Search

- Available in nearly every state
- Use pre-suit to make certain pursuing correct debtor and name correctly

8. UTILIZING INTERNET RESOURCES

- Social Media Networks (i.e. Facebook, LinkedIn, etc.)

- Accurint through LEXIS

9. USING INVESTIGATORS

- Check costs

- Make certain accurate info though

- Are they going to indemnify you for FDCPA issues?

D. Identifying Fraudulent Conveyances of Assets

- Traditional approach – Badges of Fraud

- Modern approach:
 - UFTA
 - Bankruptcy 11 USC § 548

- Present and Future creditors - Transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

 - a) actual intent to hinder, delay or defraud creditor

 - b) without receiving reasonably equivalent value in exchange, and the debtor: 1) About to engage in transaction with unreasonably small assets; or 2) Intended to incur, or reasonably should have believed would incur debts beyond ability to pay

 - Multiple factors to consider intent (i.e. insider, control, concealment, threatened suit, etc.).

- Present Creditors – Transfer without reasonably equivalent value and insolvent.

E. WHEN TO INVOLVE THE COURT

- No Luck Locating Assets.

- No Cooperation.

- Complete Dead-End, But Probable assets.

- See Preliminary Concerns and Practical Considerations above.

F. JUDICIAL ASSISTED DISCOVERY. Judicial assistance can be obtained in Supplementary Proceedings in aid of execution.

1. POST-JUDGMENT INTERROGATORIES. Many state statutes provide that written interrogatories concerning the judgment debtor's property and financial affairs may be served, in the same manner as the summons, or by any form of mail, return receipt requested. The interrogatories must notify the judgment debtor that the judgment debtor's failure to answer the interrogatories truthfully shall subject the judgment debtor to penalties for false swearing and contempt.

The judgment debtor must answer the interrogatories and return them to the judgment creditor or the judgment creditor's attorney typically within 20 days after receipt. Should the judgment debtor fail to comply with the interrogatory process, the judgment creditor can file a motion, affidavit and order for the judgment debtor to show cause why he/she should not be held in contempt. Check each state statute.

2. JUDGMENT DEBTOR EXAMINATIONS. Once a judgment is entered, the judgment creditor may file a motion for a "Judgment Debtor Examination" under most state statutes. The motion must generally be supported by either: a) proof of service (in manner of summons or by mail with return receipt requested) of a notice of demand to pay the judgment within 10-20 days; b) a return of a writ of execution showing that the Judgment remains unsatisfied; or c) a garnishee response to a writ of garnishment that does not fully satisfy the judgment. The order requiring the judgment debtor to appear may also contain a restraining order if the state statute allows.

Under many statutes a judgment debtor may be required to attend a Judgment Debtor Examination over 100 miles from the debtor's residence under certain circumstances. Some restrict appearance to the county of residence.

Many statutes provide that both the judgment creditor and judgment debtor may subpoena and examine witnesses.

The witnesses may also be required to produce documents pursuant to a subpoena duces tecum. Subpoena also allows for the creditors to require witnesses to produce documents.

Document requests should include all documents associated with the debtor's financial affairs including tax returns, check registers, financial records, financial statements, stock certificates, brokerage account summaries, corporate minute books and stock ledgers for those debtors who are sole shareholders of corporations. Also request copies of any documents associated with any transfers of any assets within the previous 12 months.

G. USING MOTIONS TO COMPEL COMPLIANCE WITH POST-JUDGMENT DISCOVERY

- Liability of Garnishee.
 - Arises from failure to timely respond to garnishment. Liable for lesser of Garnishment satisfaction or value of garnishable property, and costs (even if no property)
- Seizure of Property Identified in JDE
 - If appears property at JDE, then court may seize. Bring blank order for use if property identified
 - Non-Compliance with Interrogatories
 - Contempt, Corporate & Individual fines & jail
Remedial = future & Punitive = past
 - Contempt can also be used as basis for Restraining Order pending JDE

H. GARNISHMENTS: WHEN TO USE WRIT OF GARNISHMENT AND PROPERTY SUBJECT TO WRIT

1. Garnishment is a procedure which enables a creditor to receive tangible or intangible personal property of a debtor in the possession, custody or control of a third-party. The property includes debts, wages or other monetary obligations owing by the third-party.

2. **Limitations on garnishments.** Generally, the garnishee is liable only for the amount of the debt up to the limit of the judgment or the value of the property, whichever is less.

The debtor's obligation need not be presently due or owing, but the debt must be in existence. A debtor/defendant's prior assignment of an interest is *effective* against a later garnishment.

Equitable interests, property in the custody of the law, conservator, or personal representative and the debtor's exempt property are not subject to garnishment.

3. **Procedure.** Writs are issued either by the court clerk or by an attorney.

4. **Duration of the Writ.** Writs are valid for X days after the date of *issuance*. A writ is issued when it is signed.

5. **Delivery of the Writ.** Writs are generally delivered or served, pursuant to the terms of the statute.

Delivery can occur either in person, by the sheriff or by any other person who carries errors and omissions insurance with statutory limits.

6. **Garnishee's Responsibilities Upon Receipt of Writ.** Review state statutes.

7. **Issues:**

a. Multiple writs/priority;

b. Expiration of writs during the middle of the pay period;

c. Partial releases and releases.

J. GARNISHEE LIABILITY

Garnishees are generally personally liable to the plaintiff for the value of the defendant's property at the time of the delivery of the writ or the amount necessary to satisfy the creditor/plaintiff's judgment, whichever is less. In the event that a garnishee fails to serve the response within seven calendar days from the receipt, the garnishee may be ordered to appear and be found in contempt.

In the event that the garnishee fails to properly complete the form, or if the garnishor believes that the form is improperly completed or erroneous, the garnishee may be ordered to appear for an examination under oath concerning the response.

Garnishors, believing that the garnishees have either completed the response to garnishment form improperly or that have failed to respond at all, may apply to the court for an order to show cause why the garnishee should not be held in contempt. In such a case, the garnishor may ask the court to include language restraining the garnishee from disposing of or injuring the property alleged to be in the garnishee's possession. In addition to the order to show cause, the garnishor may serve allegations in interrogatories on the garnishee.

K. SATISFACTION OF JUDGMENT/MONEY AWARD State statutes provide the mechanism for satisfying judgments through filing of a satisfaction document.

L. EXEMPTIONS

1. State law exemption/exceptions.
2. Federal non-bankruptcy exemptions/exceptions.
3. Federal bankruptcy exceptions 11 USC § 522.

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