

## **CHASING DOLLARS**

*The Basic Landscape Of Commercial Collection Litigation*

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No matter what your practice may be, at one time or another, you will likely come in contact with commercial collection litigation ("CCL"). A general understanding of what this involves will better enable you to advise clients, control outside counsel, and directly handle litigation matters. Some of the procedures used in CCL, such as provisional remedies, can be useful tools in other areas of practice. This article sets forth some of the common tenants of CCL under California law and is focused on the perspective of a creditor.

### **I. GENERAL CONCEPTS IN COMMERCIAL COLLECTION LITIGATION**

#### **A. What Is Commercial Collection Litigation?**

CCL is a term which encompasses any form of litigation used to enforce the obligations of a debtor. This includes the enforcement of obligations arising from ongoing business relationships for the purchase and sale of goods or services, as well as those arising from the loaning of money or credit, whether the creditor is secured or unsecured. This article focuses on commercial obligations, i.e., obligations which are not personal, family, and household debts. The enforcement of such obligations invokes certain statutory schemes which are not addressed in this article.

#### **B. Managing Client Expectations**

As with any matter, it is crucial to manage, and create, realistic client expectations. In CCL, the general theme is often damage control. There is simply no benefit to your client spending attorneys' fees to obtain an uncollectible judgment. It is important to have the client continually examine the value of the CCL matter as information about collectability is obtained. Your client may initiate the matter based on principal and emotion; however, following litigation expense and case fatigue, your client will be dissatisfied if the end result is that your client threw good money after bad.

#### **C. How Do I Tell If The Debtor Is Worth Suing?**

One of the primary concerns in CCL is collectability. It is important to determine why a debtor has breached its obligations. If it because the debtor lacks the ability to pay its obligations, then a judgment may not be enforceable -- you cannot get blood from a turnip. You need help from the client to make an educated prediction as to whether a judgment will be enforceable -- nobody likes a story with a bad ending.

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### 1. Private Investigators

Most private investigators will perform asset searches for a relatively modest fee. These reports are often superficial at best -- misleading at worst. These searches are usually based on credit checks and public record searches, and often fail to disclose certain types of liens in the debtor's assets and accounts, such as tax liens, agricultural and livestock liens, and lis pendens. Such security interests will likely be senior to any judgment your client obtains and may stand to prevent enforcement against those assets.

### 2. Online Asset Searches

Many of the legal publishers offer online asset searches. These are expensive and, because of privacy laws, are usually superficial and not enlightening.

### 3. Client Files

Documents that your client likely already has, such as credit applications, financial statements, loan files, and payment checks, are rich with information about the debtor. Information can then be subpoenaed from the parties identified in those materials. This often proves to be very valuable. You should also review of the records of the Secretary of State for Uniform Commercial Code ("UCC") filings. In the circumstance of entity debtors, these filings will be filed with the Secretary of State for the state in which the debtor entity was formed. The search should also include a review of the official records for the counties in which real property owned by the debtor is located.

### 4. Depositions

Upon obtaining a right to attach order (discussed below), a creditor is entitled to examine the debtor and third-parties regarding the debtor's attachable assets including bank accounts. The information obtained from this process can be very useful in gauging whether the debtor will be able to satisfy a judgment.

### D. Shhh! - keep it a secret

Hope for the best, but plan for the worst. You must assume the debtor intends to thwart your client's collection efforts. Thus, do not inform the debtor that you are about to initiate collection efforts (other than the requisite default and acceleration notices). The potential peril is that the debtor may take steps to transfer or hide assets. While such efforts may be undone, that will involve additional expense and increases the risk of collection problems.

### E. Time is of the essence!

Debtors commonly seek additional time to resolve their obligations. This may enable a debtor to improve its financial status to honor its obligations to your client -- this is especially true for debtors in seasonal industries. That said, your client should not underwrite the debtor's success without receiving a benefit. Thus, any forbearance of enforcement should require the debtor to provide certain incentives to your

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client, such as security interests in the debtor's assets and accounts, a stipulated judgment, a general release, and discovery about the debtor's financial condition.

The risk of delaying is that a debtor's situation may worsen. Any delay in enforcement may allow the debtor to prefer other creditors to your client's detriment. Remember, your client is likely not the only creditor seeking payment from the debtor. You want the debtor to make paying your client its priority. Further, if the debtor ultimately ends up in Bankruptcy proceedings (whether voluntarily or involuntarily), any liens, payments, or security interests granted in the 90 days preceding the Bankruptcy filing may be set aside as an improper preference. Thus, any extension of time granted to a debtor can significantly prejudice your client.

## II. COMMON ISSUES IN COMMERCIAL COLLECTION LITIGATION

### A. The One Action Rule

California Code of Civil Procedure section 726(a) provides that a creditor may bring only one lawsuit for the recovery of a particular debt which is secured by a deed of trust on real property. Thus, the filing of a lawsuit which does not include a cause of action for judicial foreclosure upon the creditor's real property collateral may be deemed a waiver of the creditor's rights to that collateral.

### B. Purchase Money Notes

California Code of Civil Procedure section 580b provides that there can be no deficiency judgment against a debtor for the failure to pay to the seller under a note secured by a deed of trust on real property given to secure payment of the balance of the purchase price of that property. A creditor also cannot obtain a deficiency judgment based on a purchase money note that is secured by a deed of trust on a dwelling consisting of four or less units occupied in whole or part by the debtor. This includes loans made to construct a residence on the real property.

### C. Non-Judicial Foreclosure Of Real Property

A creditor can non-judicially foreclose against its real property collateral without initiating a lawsuit. California Code of Civil Procedure section 580d, however, precludes the creditor from obtaining a deficiency judgment from a non-judicial foreclosure sale. In circumstances involving a debt secured by multiple parcels of real property, a non-judicial foreclosure against any one of the parcels acts as a waiver of the right to obtain a deficiency judgment on any of the remaining parcels. The anti-deficiency prohibition, however, does not apply to a junior lienholder which has had its security interests extinguished by reason of a non-judicial foreclosure by a senior lienholder. Further, a junior lienholder which bids and acquires the subject real property collateral at the non-judicial foreclosure sale of a senior lienholder may be required to apply to the court for a determination of the fair value of the acquired interests and to provide the debtor a credit against its obligations for that fair value to preserve its rights to a deficiency judgment.

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For a non-judicial foreclosure, the creditor should use a foreclosure trustee to conduct the sale. The creditor should have the foreclosure trustee obtain a trustee's sale guaranty from a title insurer to protect the creditor from any claimed defects with the sale procedure.

### **D. Judicial Foreclosure Of Real Property**

California Code of Civil Procedure section 726(b) enables a creditor to file a lawsuit seeking a judgment that the encumbered

real property be sold at a foreclosure sale. In such a lawsuit, the creditor may obtain a deficiency judgment against the debtor unless otherwise prohibited by law. The resulting judgment orders that the encumbered real property be sold at a foreclosure sale, that the proceeds of the sale be applied to the secured debt, and that judgment be entered against the debtor for any deficiency.

A debtor is entitled to credit for the fair value for the sold real property. Unlike a non-judicial foreclosure, the debtor has one year if a deficiency remains, and three months in the absence of a deficiency, to repurchase the real property for the sale amount plus costs and interest. This is commonly referred to as the "right of redemption."

### **E. Guarantors**

A guaranty is an agreement in which one agrees to answer for the debt of another. Depending on the language contained in the guaranty, a creditor may sue a guarantor first without proceeding against the borrower or the collateral. If the guarantor satisfies the debtor's obligations to the creditor, then the creditor's rights against the debtor will be subrogated to the guarantor. If, however, the creditor proceeds against the debtor or the collateral first, then the guarantor may be exonerated by the benefits of the anti-deficiency laws to the debtor.

### **F. Judicial Versus Non-Judicial Foreclosure**

A judicial foreclosure preserves the right to a deficiency judgment against the debtor and guarantors may be joined as defendants in the same lawsuit. Non-judicial foreclosures are quicker and less expensive, and the debtor does not have a right of redemption. A secured creditor may commence a non-judicial foreclosure under its power of sale and file a lawsuit for judicial foreclosure simultaneously. The creditor does not need to make an election until one of the proceedings is completed.

### **G. Personal Property Collateral**

Chapter 9 of the California Commercial Code ("Chapter 9") governs the enforcement against collateral other than real property (i.e., personal property) which was not given by the buyer to the seller in a retail goods installment sale or given in a conditional sales contract for a vehicle primarily intended for personal or family use. The sale of collateral under Chapter 9 may be either private or public. General notice

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requirements include sending a notice to all persons liable on the obligation or known to the creditor as having a claimed security interest in the collateral. The failure to give proper notice may result in the loss of the right of the creditor to a deficiency judgment. The sale also must be conducted in a commercially reasonable manner.

### **H. Obligations Secured By Both Real And Personal Property**

A creditor risks waiving the right to a deficiency judgment when enforcing against the collateral of a debt which is secured by both real and personal property. To preserve the right to a deficiency judgment, the creditor may simultaneously foreclose against the personal property and real property collateral in a unified sale, or foreclose against the personal property collateral first.

## **III. COMMON PROCEDURES IN COMMERCIAL LITIGATION**

### **A. Starting The Lawsuit**

In CCL, the common forms of action are for breach of contract and common counts. Common counts, such as an account stated in writing or goods sold and delivered, are generally plead in addition to a breach of contract claim in the alternative. Tort claims, such as fraud, often are included, but an election of remedies will need to be made at the time of judgment and may create issues as to provisional remedies. As with any lawsuit, where the lawsuit is brought is governed by venue and jurisdictional elements outside of the creditor's control, and is subject to any arbitration agreement amongst the parties. Federal and state jurisdictions each have their own positives and negatives. The determination of which forum to file in requires a detailed analysis of many factors. Some of the factors which are relevant to CCL matters are that state courts are generally more familiar with the provisional remedies available under state law; whereas, federal courts generally provide a quicker path to having a motion for summary judgment heard.

As a general matter, a creditor cannot recover its attorneys' fees from a debtor unless it is provided for in their contractual agreement. California Code of Civil Procedure 1717.5, however, provides that the prevailing party in an action to enforce a contract based on a book account, which lacks a prevailing party attorneys' fees clause, nevertheless is entitled to an award of reasonable attorneys' fees as a component of costs.

### **B. The Lawsuit Is Filed, Now What?**

You must always think of the debtor as a sinking ship. It is your job to salvage as much of what is owed to your client before the ship is lost. Provisional remedies can help with this and can be one of the most valuable tools to protect your client.

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### 1. A Right To Attach Order

A right to attach order ("RTAO") is an order issued by a court which allows a creditor to create a lien on certain of the debtor's assets prior to judgment. The assets upon which the lien applies are tied up, and as a result thereof, may remain available to satisfy a judgment. The issuance of a RTAO also entitles the creditor to examine the debtor under oath to ascertain what assets, if any, are available to levy upon. This information may also be used to gauge the enforceability of any resulting judgment.

A RTAO is available against corporations, partnerships, and against individuals for claims arising out of their trade, business, or profession. A RTAO requires a pending lawsuit against the debtor involving a contract based claim, which includes certain common counts. In that lawsuit, the creditor can apply for a RTAO on either a noticed or ex parte basis.

#### a. How Do I Get A RTAO?

The procedures for obtaining a RTAO are governed by Part 2, Title 6.5 of the California Code of Civil Procedure, commencing at section 481.010. To obtain a RTAO on a noticed basis, the creditor need only establish the probable validity of its contract based claim to a fixed or readily ascertainable amount. To obtain a RTAO on an ex parte basis, the creditor must also show that delay of the attachment would result in great or irreparable injury. This can be established with a showing that the debtor is insolvent or that a notice of bulk sale has been recorded and published. The creditor can support its ex parte application with hearsay evidence and declarations based upon information and belief. Upon issuance of a RTAO, the creditor can obtain a writ of attachment following the posting of a \$10,000 bond. The debtor can apply to the court to have the amount of the bond increased.

#### b. How Do I Use A RTAO To Protect My Client?

With a RTAO, the creditor can have a writ of attachment issued and then levied upon certain of the debtor's assets. The availability and procedures for levy depend on the nature of the property to be attached:

**Equipment Of An Ongoing Business:** The creditor files a notice of attachment with the Secretary of State;

**Personal Property:** The creditor generally has a levying officer take possession of the debtor's tangible personal property;

**Real Property:** The creditor records a writ of attachment in the official records of a county in which the debtor's real property is located;

**Motor Vehicles:** The creditor files a notice of lien with the Department of Motor Vehicles;



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**Business Revenues:** The creditor submits the writ of attachment with instructions and levy fees to the office of the sheriff, which then places a keeper at the debtor's place of business to take custody of the debtor's business inventory and to collect the debtor's generated revenues up to the amount of the writ of attachment; and

**Deposit Accounts:** The creditor submits the writ of attachment, with instructions and levy fees to a levying officer (often a sheriff, marshal, or registered process server), who then serves a financial institution with the writ of attachment. The financial institution is then obligated to turn over the levied funds. It is usually best to levy upon deposit accounts during the first couple days of the month, as the debtor's monthly payables will likely not yet have cleared. You may also want to coordinate the levy to the debtor's payroll schedule.

### c. How Do I Identify The Debtor's Attachable Assets?

The first step is to thoroughly review the creditor's files for copies of checks, loan applications, financial statements, insurance certificates, and other documentation that will identify the debtor's assets and accounts. A creditor can also use the UCC filings of other creditors to find such information. Upon issuance of the RTAO, the creditor is entitled to examine the debtor and third- parties about the debtor's attachable assets. A corporate debtor is required to designate and produce a representative to be examined on this issue. The examination is conducted similar to a judgment debtor examination. Arguably, this also makes such information subject to discovery procedures, such as document production requests and depositions. The results of these procedures can also be used to ascertain the potential for collection of any resulting judgment against the debtor.

### d. Are There Any Ways That A Debtor Can Limit A RTAO?

A debtor may post a bond to prevent the writ of attachment from being levied. A natural person debtor may make a claim of exemption to the levying officer -- such exemptions are generally unavailable to corporate defendants. The debtor may also apply to the court to have the amount of the writ of attachment reduced by any indebtedness owed by the creditor to the debtor.

### e. What Are The Downsides To A RTAO?

If the debtor lacks attachable assets the RTAO procedure may be an expensive and futile gesture. If a debtor's assets are already lienied by another creditor, then the liens created by the RTAO will be subordinate to those senior security interests. If the creditor fails to recover judgment against the debtor, then the creditor may be liable for the damages the debtor suffered as a result of the attachment. The debtor may make a claim against the RTAO bond for these damages. A RTAO may constitute an election of remedies, and may act to waive any tort being concurrently asserted with the creditor's contract based claims (e.g., a fraud claim). A RTAO may act as the catalyst for a debtor filing a petition

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for protection in Bankruptcy, and if that occurs within 90 days from issuance of the RTAO, then the RTAO attachment liens may be set aside by the Bankruptcy court as an improper preference.

### 2. Temporary Protective Order

If a court not willing to grant a RTAO on an ex parte basis, however, finds that the creditor has demonstrated the probable validity of its claims and that there is danger of irreparable harm, then the court can issue a temporary protective order (a "TPO") and set a hearing for the debtor's RTAO application on full notice. The TPO, as with a RTAO, requires the creditor to post a \$10,000 bond which the debtor can claim against if the creditor fails to establish its claims. The TPO is valid for up to 40 days, and the court can extend the duration of the TPO for good cause. The TPO acts to restrain the debtor from transferring its attachable assets pending the hearing on the RTAO. The debtor, however, may continue its business in its usual course and transfer certain property in the ordinary course of business on a C.O.D. basis. The TPO does not prevent the debtor from issuing checks for C.O.D. goods, taxes, payroll, and legal fees. The TPO creates a lien in favor of the debtor in the property described in the order, and any resulting attachment lien relates back to the date of issuance of the TPO for lien priority purposes.

### 3. Appointment Of A Receiver

A creditor may obtain an order from the court appointing a receiver to take possession of the debtor's business and/or property. The receiver may be used to enter the debtor's premises and protect the collateral of the creditor, including the rents and profits generated from real property. The receiver may continue to operate the collateral and secure the income generated therefrom. A receiver acts as an officer of the Court and owes a fiduciary duty to both the creditor and the debtor.

#### a. How Do I Get A Receiver Appointed?

The availability of the receiver in a California state court is governed by section 564 of the Code of Civil Procedure and the contractual agreements between the creditor and debtor. In federal court, the issue is governed by federal law. Generally, under California law, a receiver is available if it is necessary to preserve the property or rights of a party. Following the filing of a lawsuit, the creditor may apply to the court on either a noticed or ex parte basis for the appointment of a receiver. To obtain a receiver on an ex parte basis, the creditor must show that if a receiver is not appointed immediately, there is a substantial danger that the debtor's assets will be depleted, damaged, destroyed or concealed before a noticed hearing can be held. If the receiver is appointed on an ex parte basis, then a hearing is set to confirm the appointment of the receiver. The receiver will need to file a declaration certifying that it is disinterested in the lawsuit, file an oath, and post a bond in an amount ordered by the Court.

Generally, the creditor will seek a temporary restraining order in aid of the receiver pending the confirmation hearing, at which, the creditor will seek a preliminary injunction in aid of the receiver. If the



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preliminary injunction is granted, the creditor will be required to post a bond in an amount to secure the harm caused by a wrongful injunction.

### **b. What Does The Receiver Do?**

The receiver's duties and powers are, for the most part, limited by the scope of the order of appointment. Generally, the receiver's duties are focused on protecting the creditor's collateral. This may include running the debtor's business, collecting the debtor's accounts receivables, and managing the debtor's operations. The receiver is required to provide an initial inventory within 30 days of being appointed, and monthly operating reports thereafter. The receiver is also required to provide a final accounting prior to discharge.

### **c. Why Should, And Why Shouldn't, I Seek The Appointment Of A Receiver?**

In cases of suspected mismanagement or improper dissipation of collateral, a receiver can prove to be very valuable. Thus, a receiver may be appropriate when the debtor is in default and using the creditor's collateral to pay others. The receiver can take control of the debtor's business and accounts and manage them in a proper way to maximize value. A receiver, however, can be very expensive. In addition to the receiver's fees, receivers often employ counsel, accountants, and consultants to assist in their duties. These fees are deducted from the receivership estate. The creditor may need to advance these costs against the receivership estate.

## **4. Writ Of Possession**

A secured creditor entitled to possession of specific property which has been pledged by a debtor as collateral may obtain a writ of possession if the debtor refuses to turn over that collateral. A writ of possession allows a creditor to recover possession of specific property, as compared to a writ of attachment which attaches a lien on such property.

### **a. How Do I Get A Writ Of Possession?**

The procedures for obtaining a writ of possession are governed by Part 2, Title 7, Article 2 of the California Code of Civil Procedure, commencing at section 511.010. Following the filing of a lawsuit, a creditor can apply to the court either on a noticed or ex parte basis for a writ of possession. To obtain a writ of possession, a creditor must show its right to possession and the debtor's wrongful detention of the property. To obtain a writ of possession on an ex parte basis, the general standard is that the creditor must show that the property was acquired in the debtor's ordinary course of business and there exists an immediate danger that the property will become unavailable for levy or substantially impaired in value. The creditor may also seek a temporary restraining order to prevent the debtor from concealing or transferring the property pending the hearing on its application for a writ of possession.

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### **b. How Do I Use A Writ Of Possession To Protect My Client**

Following issuance of a writ of possession, the creditor must post a bond for twice the value of the debtor's interest in the property for which possession is sought. The court may issue an order directing the debtor to transfer possession of the property to the creditor, or directing a levying officer (usually a sheriff or marshal) to take possession of the property. It is important to request that the writ of possession include a provision which allows the levying officer to enter the private premises of the debtor to take possession of the property.

The levying officer must hold the property in a secure place. The debtor may post a redelivery bond within ten days of levy to have the property returned. If the debtor has an interest in the property, then the redelivery bond must be in the same amount as the creditor's bond. If the debtor has no interest in the property, then the redelivery bond will be for an amount determined by the court to be sufficient to reimburse the creditor for the damages which could result from the failure to retain such property. If the debtor fails to post a bond, then the levying officer must deliver to the creditor the property upon receipt of its fees for the levy process. The creditor then must keep the property for possible return should the debtor prevail at trial. If, however, the creditor can show that it is in the interests of both parties, then the creditor can immediately sell the collateral by a commercially reasonable method (e.g., perishable or time sensitive property).

### **c. Why Shouldn't My Client Want A Writ Of Possession?**

In addition to the legal expenses associated with obtaining a writ of possession, depending on the nature of the property, the levying officer's fees can be very expensive. For example, taking possession of building materials or processed produce could require specialized equipment and personnel. Further, if the debtor is concealing its assets, the writ of possession may not be very effective as the only remedy is to seek to have the court hold the debtor in contempt of court -- a fairly expensive and drawn-out process which is quasi-criminal in nature and affords the debtor protections such as Fifth Amendment rights. Further, if the creditor fails to recover a judgment, it must redeliver the property to the debtor and will be liable to the debtor for any damages resulting from the levy or loss of possession of the property.

## **C. Settling The Lawsuit**

Most litigation settles. In the context of CCL, debtors often do not have the capital to pay the settlement amount all at once. Further, if a debtor satisfies one creditor's claims in its entirety when it lacks the ability to do so, the debtor may be forced into Bankruptcy, which may result in that payment being set aside as an improper preference. Thus, it may be preferable to enter into a payment plan which will allow the debtor to work its way out of debt.

One of the preferred ways to document such a settlement is with a stipulation for entry of judgment securing a payment plan. This is preferred because the debtor has already once before agreed to pay

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your client -- there is no need to have that promise restated by a settlement agreement which will require further litigation to enforce.

In such an agreement, the debtor agrees to the entry of a judgment, and the creditor agrees not to take steps to enforce the judgment so long as the debtor does not default on the payment plan. This can be structured with the judgment being entered and not enforced until the debtor defaults, or the judgment not being entered until the debtor defaults. Entering the judgment enables the creditor to advance its position by recording and filing the judgment; however, this may act as an event of default under the debtor's other obligations and may prevent the debtor from obtaining the necessary credit to continue operations. Upon entry of the judgment, interest is limited to the post-judgment legal rate of 10% per annum. An agreement to only enter the judgment upon default creates the risk of other creditors obtaining and perfecting security interests ahead of your client pending payment. In such circumstances, your client should obtain security interests through a security agreement or a stipulated RTAO. A RTAO expires after three years - thus, renewal of the RTAO is important if the payment plan is secured by attachment liens. It is also important to note that if a debtor pledges a deed of trust to secure a stipulation to entry of judgment, then the creditor may be limited in its collection remedies by the one action rule. Further, corporate entities require representation by an attorney to enter such a stipulation, as corporations cannot appear in pro per.

A stipulation for entry of judgment should include a general release of the creditor, a waiver of the five year requirement to bring the action to trial, and the judgment should be for the full amount of the obligation, notwithstanding any compromised amount agreed upon in the payment plan. It is preferable to obtain an initial payment that is as large as possible.

This is a distinct procedure from a confession of judgment, which is a written admission of liability without the filing of a lawsuit. Confessions of judgment are generally disfavored by courts and are subject to being set aside on the ground that the debtor did not appreciate the consequences of confessing to judgment.

### **D. So I Have A Judgment, Now What?**

Enforcing judgments is not unique to CCL; however, enforcing a judgment against a debtor can often prove challenging. This is why provisional remedies, such as a RTAO, are very valuable to a creditor. It is important to calendar renewal of the judgment. A judgment must be renewed within every ten year period; however, it is advisable to do so earlier to compound interest in favor of the judgment creditor.

#### **1. What Is Subject To My Client's Judgment?**

As a general matter, a judgment may be executed against real property, personal property that can be manually delivered, shares of stock, debts due to the debtor, crops, checks, drafts, money orders, and

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interests in property from the estate of a decedent. Natural person judgment debtors have a significant number of exempt assets, which include income and assets necessary for supporting their family and themselves, including up to a certain amount of equity in the judgment debtor's primary residence, depending on various factors.

### **2. How Do I Find Out What Assets The Debtor Has?**

The goal is to find the judgment debtor's non-exempt assets quickly and to promptly execute upon the same. As discussed above, a private investigator can perform a search, which is generally based on a credit report. Searching the creditor's own files for information such as deposit accounts identified in payment checks and assets identified in credit applications can be very useful.

An effective procedure for identifying the judgment debtor's assets can be a judgment debtor examination. In such, a judgment debtor, or a third person which is reasonably believed to have assets of the judgment debtor, is ordered by the court to testify, under oath, as to the existence of the debtor's non-exempt assets and accounts, as well as anything else relevant to the collection of the judgment. You can also request that documents, such as bank account statements and financial statements, be produced at the examination. Service of the order of examination on the judgment debtor generally creates a one-year lien on all of the debtor's non-exempt personal property whether or not it is in the debtor's possession and control. If the judgment debtor (or third party examinee) fails to appear, then he/she is subject to contempt. Usually, the court will issue a warning letter for the first failure to appear, and a bench warrant for future violations of the order. Following the examination, the judgment creditor can request the court to order the judgment debtor to turn over any identified non-exempt assets. If the examinee fails to comply, then he/she is subject to being held in contempt of court. A judgment creditor may examine a judgment debtor every 120 days, and may apply to the court to examine the judgment debtor more frequently.

### **3. What Should I Do To Secure My Client's Priority Over Future Creditors?**

Immediately following entry of judgment, the judgment creditor should file abstracts of judgment in each county where the judgment debtor resides and where he/she may own real property. An abstract of judgment creates a lien on real property owned by the debtor in that county which is superior to all subsequent security interests recorded against the debtor's real property in that county. Abstracts of judgment are valid for ten years and should be renewed at the same time the judgment is renewed.

Similarly, a notice of judgment lien should be promptly filed with the Secretary of State. This creates liens in various types of non real property assets and accounts of the judgment debtor. The personal property judgment lien is good for five years from the date of filing and may not be renewed.

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### 4. Executing Against The Judgment Debtor

A judgment creditor can obtain a writ of execution and then engage a levying officer, such as a sheriff or marshal, to seize the judgment debtor's accounts or assets. This can be relatively simple for levying upon a deposit account, or a very difficult and expensive process for taking possession of the debtor's assets. In the case of ongoing businesses, the judgment creditor can, upon obtaining a court order, install a keeper to levy upon generated revenues and accounts receivables. If the judgment debtor is sequestering valuable personal property, the creditor may seek from the court an order requiring the debtor to turn over that property to the levying officer for execution. A judgment creditor may also seek an order from the court authorizing the levying officer to enter the private premises of the debtor to obtain possession of the property.

A judgment creditor may seek to enforce a judgment against third persons, other than the debtor. This includes those who are the recipients of fraudulently transferred assets or funds. A fraudulent transfer, generally, is the transfer of an asset or funds with either the actual intent to hinder, delay, or defraud creditors, or, a transfer which is made when the transferor is insolvent and for which the transferee did not give reasonably equivalent value. A judgment creditor may seek to enforce a judgment against guarantors, persons or entities which have voluntarily assumed the debt, and spouses of the debtor to the extent of any community property owned by the debtor and the debtor's spouse. A judgment creditor may also seek to enforce its judgment against third-parties based on the theories of successor liability or alter-ego liability.

## IV. IN CLOSING

The issues and procedures common to CCL are not unique. Certain concerns, such as collectability, must be made a top priority. Provisional remedies are often valuable tools for a creditor to create liens on property or to obtain possession of property to mitigate the harm which can occur during the pendency of litigation. The overarching theme is that a creditor should be persistent and diligent, because delay can result in the lack of the ability of the creditor to collect. Informed decisions, continuous evaluation of the economics of the lawsuit, and assiduous litigation are the ingredients to a successful CCL strategy.

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