CHAPTER 17

Enforcement of Judgment

INTRODUCTION

Congratulations! You have a judgment. This means you “won” your case, either through default judgment or a contested trial, and the defendant can no longer contest that it owes you the money. It also means that you can get the “aide of the court” in enforcing the judgment.

Court judgments are not self-enforcing. Solvent or honest debtors will want to pay soon after judgment is entered. A judgment will show up on credit reports and will be a matter of public record. This will be a problem for any judgment debtor attempting to borrow money. Most banks will require any unsatisfied judgments to be paid before they will lend new money.

If the judgment debtor does not voluntarily pay the judgment, however, it is up to the judgment creditor to enforce. A judgment is not self-enforcing. The judgment creditor does now have the “aide of the court” and the ability to use various judgment enforcement techniques such as attachments and garnishments.

All enforcement techniques involve locating assets of the debtor, attaching the judgment as a lien on those assets, and then liquidating or selling those assets for cash to satisfy the judgment.

The greatest success in enforcing judgments is always when a client can identify assets of the judgment debtor to attach. This is not legal work and many private vendors provide this service. It is legal work to enforce a judgment through attachments, foreclosures, debtor’s interrogatories or other techniques.

This discussion will give you general overview of some of the concepts involved in judgment enforcement. Most of this law originates in the English Common Law and still use centuries old English terms. Since the law in most states originates from the English Common Law, the general concepts of judgment enforcement are also consistent from state to state. The law in any particular state can vary, however. Any particular case will also depend upon the specific facts in that case. A licensed attorney should be consulted in any particular case, but the following discussion should provide helpful general concepts in judgment enforcement in most states.

WHAT IS A LIEN?

Liens can be “consensual” or “statutory” or “judicial.” A mortgage is an example of a consensual lien. A mechanic’s lien is statutory. A judgment lien is an example of a judicial lien.

Think about what happened the last time you bought a house. You were asked to sign two sheets of paper. The first was a promissory note. This was your “contract” or unsecured promise to pay. This paper said that you would repay the bank in monthly payments over a period of years. If you fail to keep this agreement, the bank could file suit “on the contract” and obtain a judgment.

The other paper you signed was a mortgage. The mortgage granted the bank a “security interest” or “lien” in a specific piece of property (your house). The mortgage said that if you failed to keep your contract to repay the loan, the bank could sell the “security property” and take the sale proceeds to repay the loan.

The last time you bought an automobile, you probably obtained a car loan and granted a security interest in your new car, very similar to the mortgage on real estate. Your car loan security agreement said that if you failed to keep your car loan payments, the bank could repossess the car and sell it. It is possible to grant a similar consensual security interest in almost any type of property, including equipment or accounts receivable.

A judgment is a “floating lien.” The creditor needs to get this floating judgment lien to “attach” to specific property of the judgment debtor. Once the judgment lien attaches, it works very much like the consensual lien of a mortgage, a car loan or a security interest in accounts receivable. The creditor can foreclose on the judgment lien property. Accordingly, the judgment creditor needs to find the debtor’s assets, then get the aide of the court to make the judgment lien attach to that asset and then foreclose on that asset.

Priority

Various types of liens can be placed on a piece of real estate or other types of property. Some liens are placed on property purposefully by the property owner, such as a mortgage. Other liens are "involuntary" or "judicial," including judgment liens.

The general rule is that all liens have priority in the order that they are filed in the land records. The term "first mortgage" or "first trust" means that this was the first in time to be filed in the land records. A "second mortgage" is the second in time to be recorded in the land records on that property. If the property is foreclosed, the first lien holder has a "higher priority" to the proceeds of sale and will receive all of the proceeds of sale until paid in full. If there are any sales proceeds left, they go to the second mortgage holder, until the second mortgage holder is paid in full, and so on.

The priority of any type of lien is extremely important and will often determine whether or not the lien holder gets paid. If there is insufficient equity in the property, a lien creditor can be "under secured" and will receive less than their full debt on foreclosure. A lien creditor can also be completely "unsecured," if there is no equity in the property after the payment of prior liens. A lien with low priority can easily be worthless.

The priority of security interests in personal property is very similar to the priority of liens on real estate. Generally, whichever secured creditor has "perfected" the security interest first will have the first priority. In order to perfect a consensual lien, the secured creditor must have a valid security agreement and, in most cases, file a valid financing statement. Judgment lien creditors must perfect their judgment lien by getting it to "attach" to property. The manner of "attachment" depends on the type of property, as discussed in detail below.

The priorities of various liens on property determine whether or not the liens survive foreclosure. If the first mortgage holder forecloses, then the second and third mortgage holders are eliminated. These inferior lien holders have no security interest in the property after foreclosure. All liens that are "inferior" to the foreclosing lien holder are eliminated, but liens that are "prior" will survive the foreclosure. If a second mortgage holder forecloses, the first mortgage holder would be unaffected. The foreclosure purchaser now owns the property "subject to" the prior first mortgage lien.

A security interest will be helpful to you even if another lender's lien is prior. First, the security interest will still give you a "hammer" that allows you to quickly get the debtor's attention. A judgment lien in equipment can empower you to immediately foreclose on equipment, even if the sale is subject to the prior lien. A lien on accounts receivable can allow you to garnish the debtor's accounts for direct payment.

Second, you may be able to require a superior lender to "marshal assets." If one lender has a security interest in multiple pieces of property, it cannot destroy another lender's security interest in just one piece of property, unless it is necessary to collect the debt. In other words, the superior creditor can be required to go against all other property of the debtor, before it goes after the piece of property with a junior security interest.

If the debtor becomes insolvent, there will be insufficient assets to pay all of the creditors. Other creditors will attack any lien or security interest that has a weakness, in order to leave more assets for the general *un*secured creditors. As a result, the technical rules on lien attachment or perfection must be followed closely.

Asset Searches

The greatest success in enforcing judgments is always when a client can identify assets of the judgment debtor to attach. The most successful creditors will have asset information in their credit file, collected in the ordinary course of business. Just like a bank gets a complete financial statement with a loan application, a creditor should collect as much information as possible early in the business relationship. Even if you are not able to just hand the debtor an application, it is much easier to collect information from your debtor while you are friends.[1] Credit information should include bank accounts, vehicles and equipment owned and real estate owned. The credit application should also tell you how title to this property is held and identify existing liens on the same property.

It is, of course, important to collect financial information from the account throughout the relationship. The single most important thing you can do is collect copies of checks received from the debtor. Checks include much information, including addresses, legal name, bank name and bank account number. Even if you do not keep a copy of every check, copies should be made periodically. You may also be able to get copies of checks deposited from your bank. If so, it is less important to make your own copies.

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[1] *See* chapter, Credit Management; section, Collecting Information.

You also know that it is important to qualify each project where you will supply labor or materials. You need to know whether each project is financially viable. You need the identity of the owner, general contractor and other players.[2] You need to evaluate your mechanic's lien and payment bond rights to determine whether you are a secured creditor or unsecured creditor on each project.[3] This type of project information is also important in order to identify assets for judgment enforcement. Even if you do not have mechanic's lien or payment bond rights, every project where you delivered labor or materials may be an account receivable of your judgment debtor that you can attach through garnishment.

A creditor that already has asset information will be able to move faster and at a lower cost to enforce their judgment. It is often necessary, however, to perform an asset search. This is not legal work and can be performed by the client or any number of commercial services that are cheaper than an attorney. Commercial Internet-based services can be very effective at identifying assets at a very low cost. Various private investigators will perform this service, normally at an hourly rate.

Most cities and counties have tax assessment information on the Internet. Personal property tax assessments will identify the vehicles a debtor has registered in the county. Real estate tax assessments will identify real property. Most counties have search engines on their tax assessment roles that can search by owner name or by property address.

Most state Department of Motor Vehicles will provide motor vehicle and lien information, including the Virginia Division of Motor Vehicles. You must qualify for information from the Virginia DMV, however. Most legitimate businesses would qualify to get this information but must go through an application process.

FORMS OF OWNERSHIP

Real estate, equipment and other property can be owned by a single individual, a corporation or by other limited liability entities. Multiple people and entities can also own property. In order to enforce your judgment against any type of property, your judgment must be in the same name as the property owner. This is something lawyers and clients need to think about when filing suit. The "caption" on the first page of the lawsuit normally lists the defendant's names. If you win the lawsuit, this caption will normally dictate the names of the defendants on the judgment. If your judgment is in a name different from the property owner, the judgment will not attach until you take an additional step to change the judgment name. It is good to perform asset searches before you file suit to think ahead toward judgment enforcement, starting with obtaining a judgment in the same name as potential enforcement property.

Problems often arise from married names, middle names or initials and trade names. It is often important to list a defendant's name more than once on the lawsuit caption, in order to make sure an eventual judgment will be recorded in all important variations. If a business is operated as a sole proprietorship, then the individual and the "business" are one in the same. If you have judgment in the business name, however, you will have difficulty garnishing a bank account in the individual name and vice versa. It is easy to simply name the same defendant twice in the initial lawsuit, once in the individual name and once in the business name. This will save you a lot of trouble in later enforcement.

When property has multiple owners, there are various types of joint ownership. The deed conveying the property into the current owners will normally dictates the type of ownership. The deed or bill of sale will normally say "seller grants and conveys the described real estate to Mr. Smith and Mr. Jones as tenants in common," or "as tenants by the entirety," or "as joint tenants." The normal or default manner of multiple ownership is "tenancy in common." If two people own a property and no legal papers say how they hold title, then they are tenants in common.

Tenants in common each own one half of the property, unless the deed describes some other percentage of ownership or if there is some type of outside agreement. Each tenant owns a one half "undivided interest" in the property. If you obtain a judgment against just one of the property owners, your judgment will attach to the one-half undivided interest of your judgment debtor. You could then foreclose on your judgment lien and sell the one-half undivided interest at a foreclosure auction. The purchaser at the auction would then own an undivided one-half interest in the property, together with the other non-debtor owner. If one tenant in common dies, then that one-half

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[2] *See* chapter, Credit Management; section, Collectability; subsection, Qualifying the Project.

[3] *See* chapter, Bankruptcy Primer for Creditors; section, Introduction; subsection, The Importance of Security.

undivided interest passes to their heirs. Those heirs are then tenants in common with the remaining non-deceased tenant in common.

Property can also be owned as “joint tenants with common law right of survivorship.” This works basically the same as tenants in common, except that if one joint tenant dies, the property automatically passes to the other joint tenant. A judgment against just one of the joint tenants will attach to real estate owned by that joint tenant.

There is a special type of joint tenancy for people who are married to each other. This is called “tenancy by the entirety.” In a tenancy by the entirety, joint action by both tenants is necessary to sell the real estate or create a lien. Therefore, a judgment will not attach unless it is against both husband and wife. For this reason, it is important to get the signature of both husband and wife on any contract with a sole proprietor or on any personal guaranty. You must be careful, however, with the Equal Credit Opportunity Act and any blanket policy requiring spousal signatures.[4]

Even if you have a judgment against only one tenant by the entirety, it would still be important to docket that judgment in all counties where real estate is located. If tenants by the entirety get divorced, ownership of all real estate is automatically converted to a tenancy in common. Any judgments that have already been docketed against one of the tenants would automatically attach to the real estate the moment the divorce decree is entered by the court. Similarly, when one tenant by the entirety dies, full ownership passes to the surviving tenant by the entirety. If you happen to have a judgment docketed against that surviving tenant, your judgment has now attached to the entire real estate.

Other types of property can have the same forms of multiple ownerships. Banks accounts and equipment can be held as tenants in common, joint tenants or as tenants by the entirety.

ATTACHING JUDGMENT LIEN TO REAL ESTATE

Any lien on any real estate, consensual or judicial, must appear in the county land records to be effective. Once a judgment is “docketed” in the county land records, it constitutes a lien on all real estate owned by the debtor in that county.[5] Once docketed, a judgment lien works very much like a mortgage. The judgment runs interest at the judgment rate. The creditor can foreclose on the judgment lien and auction the property through judicial process.

If the judgment lien has attached to real estate, the judgment creditor will often want to simply be patient and wait. The judgment continues to run interest at the judgment rate of 6% (or the contract interest rate) in the state of Virginia[6] and the judgment rate of 10% (or the contract interest rate) in Maryland[7]. This is currently much higher than market savings or mortgage rates. The real estate will usually continue to appreciate in value. If there is an existing prior mortgage, the judgment debtor will continue to pay it down. As a result of all of these factors, the judgment creditor’s position normally becomes stronger with time, once the judgment has attached to real estate.

If the judgment debtor has only personal property and no real estate, the situation is very different. Personal property depreciates with time, can be damaged and can be easily hidden. Real estate is not going anywhere. One of two things will eventually happen with a judgment lien on real estate. If the debtor is financially viable, he will eventually have to pay off the judgment lien in order to sell or refinance the property. One day, the telephone will ring and someone will want to know where to send the check.

If the debtor is insolvent, a prior mortgage holder may eventually foreclose. If there is enough equity in the property, this will also result in payment to the judgment creditor. The property may have already been encumbered by one large mortgage, multiple mortgages or other judgment liens. In this case, it is possible for a judgment lien creditor to be under secured or completely unsecured. If a prior mortgage holder forecloses in this case, the judgment creditor may get nothing and the judgment lien is eliminated. The only good news is that the judgment lien creditor did not expend additional legal fees in foreclosing on the real estate.

It is expensive to enforce a judgment lien on real estate. This requires a lawsuit involving the property owner, all mortgage holders, all judgment lien holders and anyone else with an interest in the property. A commissioner in chancery or special master often hears the case and must be paid hourly for this purpose. A title search on the property is necessary, and the foreclosure auction must be advertised in the newspaper. It is practically impossible

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[4] *See* chapter, Credit Management; section, Creditworthiness; subsection, Credit Checks.

[5] Virginia Code §8.01-458 (Michie 1950) and Maryland Rule 2-621.

[6] Virginia Code §6.2-302 (Michie 1950).

[7] Maryland Code §11-107 and Maryland Code §11-106.

to recover attorney's fees incurred while foreclosing on a judgment lien. It is also impossible to settle such a case by agreement, unless the judgment debtor is solvent.

Accordingly, it is often the best strategy for a judgment creditor to simply wait. If judgment creditors are impatient and insist on foreclosing on the judgment lien, this will result in high costs and a lower chance of recovery. Foreclosure is normally a good strategy only if the judgment debtor has the ability to pay the judgment or the judgment is large and there is ample equity in the property.

The judgment will not attach to the real estate unless it is docketed in the name of the property owner. Therefore, it is important to look ahead and know the name of the property owner before filing the lawsuit to obtain a judgment. Common problems involve married names, trade names, middle names and initials. It is normally possible to list a defendant more than once, with variations of their names. Then the judgment will be entered in all variations of the name, and is more likely to attach to property.

DOCKETING THE JUDGMENT

In Virginia and Maryland, a judgment in the circuit court will automatically be docketed in the land records of that county.[8] A judgment in the district court, however, is not automatically docketed. The creditor must obtain an abstract of the judgment from the district court and have the judgment docketed in the circuit court land records.

Judgment liens on real estate are also county specific. A judgment docketed in one county will not attach to real estate in another county. Again the creditor must request an abstract of the judgment from the original court of entry and then have that judgment docketed in any county in which the debtor owns real estate. Docketing a judgment in the land records is normally so easy and inexpensive that a judgment creditor will normally want to docket the judgment in all counties in which the judgment debtor will ever possibly obtain an interest in real estate. A judgment lien normally lasts for at least a decade and can normally be extended for decades more.[9] Over the passage of this time, many things can happen causing the judgment to attach to real estate.

Once a judgment is docketed in a county, if the judgment debtor *ever* buys real estate in that county the judgment lien will immediately attach. Real estate often passes by inheritance. If your judgment debtor's parents live in a certain county, this is reason enough to have the judgment docketed there. If real estate is owned by tenants by the entirety, a judgment against just one tenant will not attach. However, if the parties' later divorce or the non-debtor passes away, the judgment will immediately attach. Docketing a judgment is so cheap and lasts so long, it is often worthwhile to docket the judgment in any county in which the debtor, lives, may live in the future or has relatives.

RENEWING THE JUDGMENT

The right to enforce a judgment will normally expire after some period of time. The creditor usually has the right to renew the judgment, but must take affirmative steps to do that, normally before the judgment expires.

In Virginia, a judgment can be enforced for only 20 years.[10] That time period can be extended another 20 years by filing a motion with the court before the expiration of the original judgment or any previous extension.

In Maryland, a judgment is valid for 12 years.[11] If the creditor has not been able to collect the judgment within that time, the creditor must renew the judgment to continue collection efforts.[12] The judgment creditor must file a Notice of Renewal with the Court while the judgment is still valid. Otherwise, the judgment has expired and will no longer be honored.

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[8] Virginia Code §8.01-446 (Michie 1950) and Maryland Rules 2-601, 3-601.

[9] Maryland Code Courts and Judicial Proceedings §11-402; Virginia Code §8.01-458 (Michie 1950).

[10] Virginia Code §8.01-251 (Michie 1950). The 20-year time limit also applies to judgments entered in another state or country. A Virginia General District Court judgment is only enforceable for 10 years, unless it has been docketed in the Circuit Court. Virginia Code §16.1-94.1 (Michie 1950).

[11] Maryland Rules 3-625, Maryland District Court Rule 3-625.

[12] The Maryland District Court Notice to Renew Judgment (form DC/CV 23) is available at http://www.courts.state.md.us/district/forms/civil/dccv023.pdf.

DOMESTICATING THE JUDGMENT IN ANOTHER STATE

If the judgment debtor owns real estate or other assets in another state, the process is similar, but somewhat more complicated and expensive. The creditor must have their judgment "domesticated" in the state where the real estate is located. Most states including Maryland, Virginia and the District of Columbia have adopted the Uniform Enforcement of Foreign Judgments Act (UEFJA).[13] In these states, the domestication process is simpler, cheaper and faster. The UEFJA allows the creditor to obtain an effective judgment in a different state by just filing proof of their judgment, providing the last known address of the debtor and creditor, and paying the correct filing fees. This is quicker and more cost effective than filing a separate action. Once you have gone through the process of domesticating your judgment into the correct state, your judgment will have the same effect as any other judgment in that jurisdiction.

Under the UEFJA, the creditor must obtain a "triple seal" abstract from the court where the judgment was entered. This abstract is then mailed to the court in the new state, along with domestication forms. Each jurisdiction may have different requirements as to the actual papers that are filed, but an example of what those papers may look like for Virginia and Maryland is the Request for Registration of Foreign Judgment in the Appendices.

After the correct papers have been filed with the clerk of the court, the clerk will send notice to the debtor, normally by certified mail. The debtor will have a certain number of days to respond. If the debtor does not timely respond, the judgment will be entered and will be the same as any other judgment in that state.

If the debtor does respond in a timely manner, he may request a hearing to dispute the enforcement of the judgment or the timeliness of the enforcement. However, the debtor is normally restricted to "procedural" defenses. For example the debtor can show that the original court lacked jurisdiction or that the debtor was not properly served. The judgment debtor cannot, however, reargue the merits of the case and whether they owe the creditor money. The previous court has already made a decision on the merits of the case. This is normally true even in the case of a default judgment.

If the debtor can show such a "procedural" defense, however, then the judgment is void, at least in the new domestication state. The creditor would have to start the process over in that new state and the debtor would be free to argue the merits of the debt.

Some states have not adopted the Uniform Enforcement of Judgment Act, including California, Indiana, Massachusetts, North Carolina and Vermont. In such states, it is necessary to actually file a new lawsuit in the state in order to obtain or enforce a judgment in that state.

ATTACHING JUDGMENT LIEN TO PERSONAL PROPERTY

Personal property can include bank accounts, stocks, bonds, vehicles or other equipment. Many of the concepts are the same in enforcing a judgment against personal property and real estate. A judgment is not enforceable against personal property until it has attached. Personal property can be owned as tenants in common, tenants by the entirety or joint tenants with common law right of survivorship. Personal property can have multiple liens, consensual or judicial, that have priority in the order in which they attach.

The manner in which a judgment attaches to personal property, however, is different than real estate. Real estate is not moveable and ownership is a matter determined by land records. The judgment lien attaches as soon as it is recorded in the land records. Personal property, however, is moveable and there is usually no central registry for ownership, except for automobiles. Ownership can be a simple matter of possession.

A judgment is somewhat like a cloud floating over all of the debtor's personal property in the state. The judgment does not become a lien on that personal property, however, until it attaches. The manner of attachment varies according to the type of personal property.

First, the judgment creditor must obtain a "Writ of Execution" or "Writ of *Fiera Facias*." The Writ of Execution is an order from the court to the sheriff to satisfy the judgment from any personal property of the debtor in the sheriff's bailiwick (county). A Writ of Execution or *Fiera Facias* is an ancient English law concept that has become somewhat of a legal fiction in modern society. In the Virginia General District Court, a Writ of *Fiera Facias* is automatically issued anytime the creditor requests debtor's interrogatories, a levy or a garnishment. The Virginia General District

[13] Virginia Code §8.01-465.1 (Michie 1950) *et seq*.

Court forms for garnishment, levy or debtor's interrogatories include a Writ of *Fiera Facias*.[14] Occasionally, however, it can be important to understand the concept of a Writ of Execution. An example is the Virginia Notice of Lien on Intangibles, discussed below.

In order to attach the judgment lien to personal property, the judgment creditor must know the identity and location of the personal property. Again the creditor that collected more financial information from the debtor at earlier stages of their relationship will have greater success in locating assets for judgment enforcement. After judgment, a creditor will have greater success if it can locate assets without notifying a judgment debtor. Most personal property is mobile and will be moved if a creditor is in pursuit.

A creditor may be able to locate assets through the Internet, private investigation or other techniques discussed above. A creditor can conduct debtor's interrogatories or depositions, requiring the debtor to disclose assets. This is discussed in greater detail below. The problem with debtor's interrogatories is that it makes crystal clear that the creditor is in pursuit of assets and will cause a sophisticated debtor to move assets. Accordingly, it is a better creditor strategy to first go after any assets that can be identified without contacting the debtor.

GARNISHMENTS

Garnishments have significant advantages. They are quick, and the asset is very liquid. It is unnecessary to conduct a foreclosure on a bank account. The bank will simply send a check to the court or to the judgment creditor in the amount of the garnishment or any lesser amount being withheld. The garnishment process can be a little expensive and complicated but well worth the trouble if a bank account or account receivable is identified.

A creditor can file a garnishment on anyone who owes the judgment debtor money. Banks are just one example. A bank account is actually just a debt owed by the bank to the depositor. Similarly, a garnishment can be served on any account receivable of the debtor. There are opportunities to file garnishments on an employer that owes wages to the debtor, a tenant that owes regular rent payments, a promissory note payer or anyone that has a contract with the judgment debtor. In the construction industry, this means general contractors or owners on other projects at which the judgment debtor supplied labor and materials.

A garnishment is actually a separate lawsuit. The garnishee can contest whether it owes the judgment debtor anything. A judgment creditor is entitled to discovery and a full trial against the garnishee to determine the amount owed to the judgment debtor. These steps are normally unnecessary for bank garnishees, but they may be necessary for the judgment debtor's contract accounts receivable and other assets.

It is often worthwhile for construction suppliers or subcontractors to file a garnishment on the project where they supplied unpaid labor and materials. Smart construction material suppliers will keep good information on *all* projects where materials are supplied. This is important to protect mechanic's lien and bond rights. It can also be helpful to identify candidates for garnishments. Acquaintances in the business may be able to provide information on other projects where the debtor is working. Networking groups such as the National Association of Credit Management are also a good source of project information. It is important to note, however, that a valid mechanic's lien from another creditor will take priority over a garnishment.

Bank garnishments depend upon good knowledge of the debtor's banking habits. Smart creditors will keep copies of all checks received on accounts in the ordinary course of business. Checks can contain much valuable information, including names, addresses, phone numbers, bank names and account numbers. It is a good habit for creditors to keep copies of all checks received on all accounts or to have a policy of copying checks from time to time. The creditor's bank may also be able to provide copies of checks deposited, but creditors may need to know *when* checks were deposited for this purpose.

Good credit applications also include banking information. Likewise, financial reports may contain helpful information. The bank that has a security interest on all of the debtor's equipment probably also has bank accounts of the debtor. Bank accounts are often at a bank in the same building or near the debtor's place of business. In markets with just a couple of dominant banks, garnishments on just a few banks may cover the majority of the bank accounts in the market.

Creditors may need a Social Security number to file a garnishment on an individual debtor. This information should be requested on all credit applications.

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14 Some of these forms are available on the Virginia Court website http://www.courts.state.va.us/forms/district/civil.html.

The bank account is frozen upon service of the garnishment on the bank. The bank will not allow the debtor to take any funds out of the account once the judgment lien has attached by service. The garnishment will include deposits made after service.

The garnishment is "returnable" to a court appearance after a period of time. The maximum return date period is 90 days in Virginia, except that a wage garnishment can run 180 days.[15] It is often a good idea to use the maximum number of days to catch any possible deposits or funds that may become due to the debtor. On the return date in Virginia, an "answer" is due from the garnishee (bank). In Maryland, the garnishee has 30 days after service of the Writ of Garnishment to file its answer with the court.[16]

The answer will state that the garnishee (bank) is holding no funds, or it will identify the amount held. On the return date in Virginia, the creditor can obtain an "order of payment." This is an order from the court directing the bank to pay funds held to the creditor. Upon receipt of the answer in Maryland, the judgment creditor must wait 30 days to allow the debtor to reply to the garnishment. If no reply is filed, the court is allowed to enter judgment for the creditor pursuant to the bank's answer. A wage garnishment has slightly different rules.

The district courts in Maryland and Virginia have forms for use in garnishments. The Writ of *Fiera Facias* or Writ of Execution is included on the form and is automatically issued on a request for a garnishment. The creditor must mathematically compute the total debt that will be due on the garnishment return day. This means the debtor must compute accrued interest to the date of the court appearance and provide all allowable credits. This is sometimes complicated mathematically and results in some garnishments refused by the court clerk office. The creditor is also required by law to include a variety of forms to the debtor with the garnishment, including a notice describing allowable exemptions and a form that the debtor can mail to request a hearing on exemptions.

The creditor must include these forms concerning exemptions on *all* garnishments, even though exemptions apply only to individual and not corporate debtors. Commercial creditors will normally face exemption issues only when enforcing a personal guaranty.

LEVY

A judgment lien attaches to tangible personal property by way of levy. Tangible personal property includes vehicles, equipment, desks and chairs.

Levies are generally better theatre than an effective mechanism for collecting on a judgment. Tangible personal property will tend to be either without significant value or subject to prior liens. Vehicles and equipment will usually have a bank lien. Many construction contractors have a bank credit line, secured by *all* property of the debtor. "Free and clear" personal property will tend to be old and without much foreclosure value. The procedure for a levy tends to be involved and expensive, especially if the judgment creditor intends to foreclose on the property.

The initial steps of a levy are not very expensive, however, and can be effective to motivate a debtor to pay a judgment. A levy is also certainly an effective tool to collect if the debtor happens to have significant property that is free and clear or subject to small liens.

A levy is requested from the sheriff. The Virginia levy form is called a Writ of *Fiera Facias*, and the Maryland form is called a Request for Writ of Execution. The levy request must identify the address where the sheriff can find the levy property and must show the dollar amount of the judgment.

The creditor and the sheriff have two choices for a levy in Virginia. The sheriff can "list and leave" the property or "levy and seize" the property. In Maryland, the sheriff can also exclude others from access to or use of the property. In any event, the judgment lien attaches to the property at that time. The timing of the levy will establish the priority of the judgment lien versus other lien claimants, such as recorded UCC financing statements or other judgment liens. Whoever got to the property first has the highest priority lien.

The sheriff can seize the property and put it in storage to await the foreclosure sale.[17] This procedure is worthwhile if the levied property is valuable and is likely to otherwise disappear. The downside of this procedure is that the creditor must post a cash or surety bond to protect the debtor, the sheriff and other lien creditors from a wrongful levy.[18] The debtor also has an opportunity to request that the court return the property to the debtor.

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[15] Virginia Code §8.01-514 (Michie 1950).

[16] Maryland Rules 2-645, 2-321, 3-645.

[17] Virginia Code §8.01-550 (Michie 1950).

[18] Virginia Code §8.01-553 (Michie 1950).

It is considerably cheaper for a creditor to have the sheriff "list and leave" the property. The sheriff literally makes a list of the property on the premises, tapes an identification tag on the property, and leaves it in place.[19] The debtor can continue to use the property, but the creditor's judgment lien attaches at the time that the sheriff lists the property. This procedure is often effective to prompt a debtor to pay, because it is intimidating and embarrassing to have all of the employees see the sheriff in the office listing and tagging all business property.

Whether the property is seized or listed, the creditor can then request a sheriff's sale. This procedure does involve considerable expense for advertising, the sheriff's fee and the required bond.[20] This is rarely worthwhile for the purpose of selling used desks, chairs and filing cabinets.

Depending on the business of the debtor, a levy can be very effective in the form of a "till tap." If the debtor is a restaurant or similar retail business, for example the sheriff can literally require the debtor to open that cash register and hand over the contents.

LIEN ON INTANGIBLES

Some states, like Virginia, have an inexpensive and effective method to attach the judgment lien to intangible personal property such as stocks, bonds, debts and other "causes of action."[21] If anyone owes your judgment debtor money, this is intangible property subject to attachment. The judgment debtor may own a "cause of action," which is the right to sue someone. If someone breached a contract with the debtor or ran into the debtor's car, then the debtor has the right to sue that person for money. This is a cause of action owned by the judgment debtor, which can be attached by the creditor.

Under Virginia law, the judgment lien actually attaches to all intangible property of the debtor in the entire state from the moment a Writ of *Fiera Facias* (Writ of Execution) is delivered to the sheriff. For this reason alone, it is normally worthwhile to have a Writ of *Fiera Facias* issued and delivered to the sheriff soon after a judgment, while the judgment creditor investigates the existence of tangible and intangible property. Remember that a Writ of *Fiera Facias* is automatically issued as a part of any garnishment, levy or request for debtor's interrogatories. It is also possible to request just a Writ of *Fiera Facias* from the clerk, but it must also be delivered to the sheriff to be an effective lien. It is not much more expensive, however, to simply request a garnishment or levy, and this is normally a better mechanism to get the Writ of *Fiera Facias*.

While the judgment lien theoretically attaches to intangible property at the time the Writ of *Fiera Facias* is delivered to the sheriff, it is not binding on any third party until they receive notice.[22] A third party without notice is free to continue paying money to the debtor until that third party receives a notice of the lien. For this reason, it is a good practice to send notices of lien on intangibles early and often.

The greatest advantages to notices of lien on intangibles are that they are cheap, relative to garnishments, and very effective. There is no filing fee and no sheriff's service fee. A creditor can prepare a single notice, make copies and mail them out to anyone who has ever done business with the judgment debtor. Any asset in the entire state can be attached, no matter which county court entered the judgment. This is particularly helpful when a debtor is out of state, but someone in the state owes the debtor money. Another advantage to this lien on intangibles is that it lasts for one year, rather than the 90 days for a garnishment.

Depending on the business of the debtor, it may be easy to identify everyone that the debtor may have done business with and simply send out blanket notices. A construction material supplier may be aware of general contractors or developers that may owe the judgment debtor money. Every delivery address for materials over the previous year is a candidate for intangible assets. A notice of lien on intangibles may also be sent to all of the banks in the area, even though cost considerations may prohibit garnishments.

The notice of lien does not "liquidate" the intangible property into cash or force payment to the creditor. A garnishment may be necessary for this purpose, resulting in an "order of payment" from the court ordering third-party payment to the judgment creditor. It is often a good strategy to send out blanket notices of lien immediately after getting judgment, in order to establish attachment of the lien and freeze money. The creditor can then determine who is holding money. As discussed below, a creditor is entitled to debtor's interrogatories not just against the debtor

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19 Maryland Rules 2-642, 3-642.

20 Virginia Code §8.01-551 (Michie 1950).

21 Virginia Code §8.01-551 (Michie 1950).

22 Virginia Code §8.01-502 (Michie 1950).

but also against anyone who may owe the debtor money. Often, informal contacts will also reveal who holds assets of the debtor. Once this is determined, a limited number of garnishments can be filed to get payment.

DEBTOR'S INTERROGATORIES

Creditors often want to know whether a debtor has any assets before the creditor begins legal proceedings to obtain a judgment. This is a logical question, because there is no point in wasting legal fees if a judgment will be uncollectible. A smart creditor will be aware of specific assets and the general financial strength of a debtor before doing business and lending money. A creditor can also perform various types of asset searches without the cooperation of the debtor. A creditor cannot *compel* a debtor to produce asset information, however, until the creditor obtains a judgment. The judgment is the first legal recognition from the court that the debtor does owe money, providing the creditor the aid of the court for post-judgment asset and liability discovery.

Debtor's interrogatories, sometimes called a deposition or discovery in aid of enforcement, are a mechanism to learn about the debtor's estate. The creditor can put the debtor under oath and request information about bank accounts, vehicles, accounts receivable and other assets. The creditor can also request the production of documents that evidence these assets.

The biggest problem with filing debtor's interrogatories is that there is plenty of notice to the debtor. This may cause a debtor to simply pay the judgment, but it also gives a debtor plenty of time to hide assets. Once served with debtor's interrogatories, the debtor's only obligation is to show up and tell the truth. There is nothing stopping a debtor from moving bank accounts immediately after debtor's interrogatories. Accordingly, it is usually a better strategy to file garnishments or perform levies first, to enforce the judgment against known assets. In other words, debtor's interrogatories are unnecessary unless the creditor is unaware of any assets.

It is normally a bad sign for a creditor if a debtor actually shows up for debtor's interrogatories. This usually means the debtor will be able to tell the truth and report that the debtor has no assets and provide a long list of liabilities. The debtor has then fulfilled all obligations under the summons. Of course, a debtor could be lying about the absence of assets, but it is often difficult or impossible to know. If a creditor becomes aware of assets later, the debtor has committed perjury. A court may be willing to fine or imprison the debtor for perjury, but this will not put money in the creditor's pocket. In fact, the creditor will normally need to expend time or legal fees to get a perjury proceeding started. If a creditor becomes aware of undisclosed assets, the creditor may just foreclose on the assets and move on.

Once a creditor has exhausted all known assets, it is worthwhile to file for debtor's interrogatories. It is better than doing nothing, and it may result in payment. Debtors that have assets do not like the embarrassment of debtor's interrogatories and will often contact the creditor to make payment or agree to some payment plan.

In Virginia, a creditor is only allowed to conduct debtor's interrogatories every six months on any one judgment debtor. This is to prevent harassment. In the district court, the case is placed on the regular return day. The court will normally explain the procedure and the debtor's obligations to disclose assets and then send the parties out into the hallway to discuss the debtor's assets. The creditor's attorney can go back into the court later, if the debtor has not cooperated or if there are other procedural matters to discuss.

The circuit court (for larger judgments) can use a similar procedure for an informal conference between the parties on a motions day. In the circuit court, however, the judgment creditor can request or the court may require the appointment of a Commissioner in Chancery.[23] This is an experienced local attorney, appointed to be "judge for a day." The judgment creditor will contact the commissioner, make an appointment and then serve the judgment debtor with a subpoena to appear at that time and place. The judgment creditor has the option of arranging for a court reporter to record all of the questioning.

It is always a good idea to have a "Subpoena *Duces Tecum*" or "Request for Production of Documents" served together with the Summons to Answer Debtor's Interrogatories. The creditor is allowed to request the production of tax returns, bank account statements, titles to vehicles or real estate, promissory notes or other pending contracts for which the debtor may be owed money. A creditor can also request information on other judgments or liabilities of the debtor.

This is a good way to get hard information about the debtor's assets and liabilities. Even an honest debtor will have difficulty remembering bank account numbers and other asset information. Documents will provide much more detail on assets and give a creditor a better chance of locating and attaching those assets. The debtor will rarely bring all

[23] In Maryland, these persons are known as Masters or Examiners.

documents requested. The court or Commissioner in Chancery will routinely order the debtor to return for a second deposition and to bring the omitted documents. This can be a helpful mechanism to get "two bites at the apple" in Virginia, where a creditor is otherwise only allowed to conduct debtor's interrogatories once every six months.

The rules for judgment enforcement discovery in Maryland are generally the same as the rules for prejudgment discovery in a pending lawsuit. The creditor has the use of written interrogatories, requests for production of documents and depositions.[24]

The procedure allowing written interrogatories and a request for production of documents is helpful. Since the same list of interrogatories can be used for almost any debtor, this procedure is much cheaper than having an attorney appear in person for a deposition. Unfortunately, debtors rarely answer these written interrogatories. As a result, the creditor must follow up with a motion for contempt of court or "rule to show cause." As a result, it is often more efficient for a creditor to go straight to service of a subpoena to appear for a deposition.

In Virginia, the court or a commissioner in debtor's interrogatory proceedings can order the debtor to immediately turn over any cash, jewelry or other assets on their possession. The court or commissioner can also order the debtor to immediately convey promissory notes or securities to the creditor, including stock owned. This can be helpful when enforcing a judgment based on a personal guaranty. If nothing else, the creditor can come away as the owner of the stock in the corporation that was the original customer. In Virginia, the court or commissioner can also order the immediate conveyance of any real estate owned by the judgment debtor out of state.

A judgment creditor is also allowed discovery on third parties that may owe the judgment debtor money. The most common example in the construction industry would be general contractors or developers that have had contracts with the judgment debtor and may owe money. These third parties also can be required to produce contracts, cancelled checks and other documents to establish the amount of the debt. In Virginia, it is often a good strategy to start by sending out multiple notices of lien on intangibles, scheduling depositions on any third parties that do not cooperate in providing information and then filing garnishments on third parties that owe the judgment debtor money.

If the judgment debtor or any third parties fail to comply with a subpoena to appear for a deposition or to produce documents, the creditor can request a "Rule to Show Cause" and ask the court to hold them in contempt. This will normally cause a debtor to comply. If not, the court will issue a "*Capias*" or arrest warrant ordering the sheriff to take the debtor into custody.

FRAUDULENT CONVEYANCES

Creditors are often frustrated to hear a corporate customer announce that it is going "out of business" and will be unable to pay its debts. Soon thereafter, the same people that ran the old business are operating a new business with a similar name out of the same business address. Creditors often feel that this is fraudulent and that there must be a way to force this new business and the people running it to pay the debts of the old business.

Creditors must understand the purpose of limited liability entities, such as corporations, limited partnerships and limited liability companies. Every modern society in the world has created these types of limited liability entities to allow insulation or protection for personal assets. People would not be willing to start new business ventures, creating jobs and opportunities for vendors, if business failure meant that creditors could pursue individual assets for the rest of the debtor's natural life. Limited liability entities promote economic growth.

Anyone doing business with a limited liability entity must understand that they will only be paid as long as the business succeeds and has a cash flow. If a creditor is not satisfied with this arrangement, the creditor must require personal guaranties or security before lending money. Banks and other institutional lenders usually provide good examples of how to limit risk in lending money.

It is also possible for an individual to own more than one limited liability entity and operate them both from the same business address. Legitimate businesses will often have separate "divisions" structured as separate corporations. If one part of the business fails, the assets of the other divisions are protected. Heavy equipment and other valuable machinery used in the business are often actually owned by the individual shareholders and leased to the business. This is partly in order to protect these assets in the event of a failed business. Similarly, any real estate used in the business, will usually not be in the business name, but in the name of individual shareholders or a separate limited liability entity. This is partly for tax advantages but also to protect assets. As one business begins to fail, the stockholders will often create a new entity to "take over" the business. If done properly, this may be

[24] Maryland Rules 2-401, 3-401.

unassailable by creditors of the old business. In order to have a fraudulent conveyance, there must be a conveyance or transfer of assets.

It is generally a fraudulent conveyance to transfer property with the intent to hinder, delay or defraud creditors or for less than its full value, at a time that creditors are unpaid.[25] If a debtor gives valuable real estate away to friends or family, at a time that creditors are closing in, this is a fraudulent conveyance and the creditors can still go after the real estate. Similarly, if a failing business simply transfers its cash and pending contracts to a new limited liability entity, this is also a fraudulent conveyance. It is also possible that valuable goodwill and business relationships have been conveyed to a new business for insufficient value.

Most debtors are too optimistic for too long about saving a failing business and may transfer assets fraudulently in the final hour. If structured properly, however, a business can be transferred to a new entity in a manner that will not be a fraudulent conveyance. The business must make sure that all old contracts in the old business name are completed in the old business name. All proceeds from those contracts must go in the old business accounts and used to pay old business liabilities. It is possible, however, to make sure that all old business cash is used to pay creditors with personal guaranties or security interests in assets. The result is that the only unpaid creditors are general unsecured creditors with no personal guaranties.

Simultaneously, any new contracts are placed in the name of the new limited liability entity. Many of the same employees, including officers, can be working for both the old business and the new business at the same time. They just must be careful to keep their time separately and receive fair market payment for services rendered to each entity. Real estate, heavy equipment and other valuable machinery used in the business, but owned by the individual shareholders, may now be leased to the new business. Transferring "free and clear" equipment to the new corporation without fair market payment would be a fraudulent conveyance. If the old business sells used property for a "fair market value," this conveyance will not be fraudulent, if there is no intent to hinder, delay or defraud creditors. Transferring equipment that is already subject to a security interest greater than its value may also not be fraudulent. It is all a matter of timing and how the transactions are structured.

The real assets of any construction contracting business are the contracts to supply labor and materials. As long as a debtor takes the time to carefully back out of one business entity, while starting up a new business entity, then creditors of the old business may have no legal ability to attach the assets of the new business. If this type of transfer is executed properly, the same people, from the same office with the same equipment, will soon operate the new business. The old business liabilities may be uncollectible. At most, a few desks, chairs, computers and file cabinets will be "fraudulently conveyed" to the new business, but these will be of little value. If the goodwill and business relationships are valuable and have been conveyed to a new business for nothing, these can be assets transferred fraudulently. The value of goodwill and business relationships is often questionable, however, and a business could sell these assets for value. It is all about whether there was a conveyance of assets for less than full value or intent to hinder, delay or defraud creditors.

Pursuing fraudulent conveyances are lengthy and expensive. By definition, any debtor willing to hide assets and conduct fraudulent conveyances is also willing to lie and commit other fraudulent activity to thwart creditors. Even in the event of a genuinely fraudulent conveyance of assets, it is difficult for a creditor to make legal action profitable. It is a matter of objectives. It is often possible to make a debtor miserable and sorry that they did not pay a creditor. It is much more difficult, however, to actually collect money in excess of what it will cost to pursue the assets.

There is no question that fraudulent conveyances occur in real life. Valuable real estate is sometimes transferred between family members when a debtor gets in financial trouble. Debtors often transfer assets from an old company to a new limited liability entity without structuring the transactions correctly. If there is fairly clear evidence that assets were transferred for less than full consideration, if the judgment is large enough, if the assets are valuable and if the assets can still be identified, it can be very worthwhile to pursue a fraudulent conveyance.

BANKRUPTCY

Insolvency or bankruptcy is the same as a debtor disappearing. If a debtor stops doing business or does not have assets, the contract or promise to pay will be worthless. The lender will not collect unless the lender has security. In the event of bankruptcy, the "secured creditor's" rights in the "security property" are not affected by the bankruptcy. The debtor has, in effect, disappeared and the lender's contract rights against the debtor are now worthless. However,

[25] *McCarthy v. Giron*, 2014 U.S. Dist. LEXIS 79007, Case No. 1:2013cv01559 (E.D. Va. June 6, 2014).

the secured creditor, while perhaps delayed from foreclosing against the property, will eventually collect as long as there is sufficient equity in the property.

"General *un*secured creditors," however, will share only in assets that are not already encumbered as security property for a secured lender. Typically, there are not many unencumbered assets. If there were, there probably would not have been a bankruptcy. The bottom line in bankruptcy is that secured creditors get some or all of their money while unsecured creditors get very little or nothing.[26]

One of the most important components of bankruptcy is the "automatic stay." This automatic stay ends the "race to the courthouse." Creditors are no longer allowed to sue the debtor, to obtain preferential payments from the debtor or to obtain new security property from the debtor. Accordingly, advanced planning is very important. You are not allowed to obtain security property after bankruptcy or even 90 days before a bankruptcy. In addition, the debtor will have very few available assets shortly before a bankruptcy, either to voluntarily grant a security interest or for a creditor to attach with a judgment lien. As a lender, you must think ahead to make sure you have adequate security as the account is opened and as the relationship grows.

If a property owner files bankruptcy within 90 days after a lien is established, that lien may be a preference that can be avoided (set aside) by the bankruptcy court, just as cash payments can be a preference. This is true with consensual security interests granted by a debtor within 90 days of bankruptcy, as well as involuntary judgment liens.

A judgment creditor is not secured until obtaining a judgment and attaching that judgment to a specific piece of property. If the debtor files bankruptcy within 90 days after the judgment lien attaches, that lien can be avoided and set aside as a preference. Indeed, such an attachment may be the *cause* of a bankruptcy. Many creditors will fight long and hard to obtain a judgment, incurring large legal fees. The judgment lien may attach to valuable real estate. If the debtor files bankruptcy within 90 days after the attachment, however, all of this time and money has been for nothing. The judgment creditor will be a general unsecured creditor in the bankruptcy once the judgment lien is avoided. Similarly, a successful bank garnishment will often precipitate a bankruptcy filing. The bank account frozen with the garnishment will be released and returned to the bankruptcy estate.

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[26] *See* chapter, Bankruptcy Primer for Creditors.