Litigation News

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Collecting on a Judgment

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Note from the Chair: Gearing Up for the New Year

by Kasey D. Huebner

Happy New Year and welcome to 2013's first issue of *Litigation News*. I am writing with an update regarding the Section's past and upcoming activities for the 2012-13 fiscal year.

We continue to focus on addressing and commenting upon pending legislation that could affect the Section and its members. To that end, we have formed a special legislative sub-committee headed by former Section Chair Bob Siderius. The sub-committee takes in and reviews all potentially relevant proposed legislation provided by the WSBA and makes a recommendation to the Executive Committee regarding whether the Section should take a position with regard to the legislation. The Executive Committee then votes on the recommendation and passes the results on to the WSBA's Legislative Liaison.

The Section will continue to produce newsletters with articles focusing on a specific topic area. We have received favorable responses to this practice over the past several years. This issue addresses how to collect on a judgment, and the next issue will address issues relating to attorneys' fees. We welcome any suggestions you may have for future topics. Similarly, if you are interested in writing an article for publication in this newsletter, please let us know.

Our annual half-yearly CLE has taken off over the past few years with high attendance, compelling speakers, and positive feedback from attendees. This year's CLE is scheduled for Aug. 23, 2013, so be sure to mark your calendars for this event, which also serves as the Litigation Section's annual meeting.

Finally, we are continuing our history of community and law school outreach. As I write this introductory piece, the Section is preparing to participate in the third-annual WSBA Open Section Night, sponsored by the WSBA Young Lawyers Committee and the WSBA sections. We also are in the process of organizing outreach events at each of the state's law schools at which we will present $750 scholarships to support the schools' moot court programs.

As you can see, we have a lot happening in the Litigation Section this year. We welcome your input and ideas for how to make the Section more active and vital as we move forward in 2013.

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Prejudgment Remedies: Preparing for Collection from the Start Can Help Ensure Your Lawsuit Pays Off

by Elizabeth R. Hebener

The ultimate goal when bringing suit for a client is typically to obtain a money judgment and then collect on that judgment. But what are you doing at the outset of your client's case to ensure that your client's potential judgment is and remains a "collectible judgment?"

Washington law provides a number of "prejudgment remedies," which are available to increase the chances of collecting from the start of a lawsuit. These remedies can provide significant benefit to a client, both in the form of protecting assets for purposes of collection at the end of litigation, and for encouraging early settlement. However, these remedies are often underused by many practitioners, if not completely unknown to them. Practitioners should be sure to learn the basics and be aware of the availability of prejudgment remedies to adequately advise their clients of their options when initiating litigation.

This article is intended to provide an overview of prejudgment remedies and a brief outline of the process involved in actually having a prejudgment writ issued. Once the prejudgment writ is issued by the court, the process of attachment is very similar to that of a post-judgment writ of execution on real or personal property.

What are prejudgment remedies? Quite simply, prejudgment remedies are statutorily authorized remedies available from the outset of a lawsuit, designed to secure the assets of a potential judgment debtor, such that the "status quo" may be maintained through the course of litigation. There are a number of such remedies available under Washington law: Prejudgment attachment (RCW 6.25); prejudgment garnishment (RCW 6.26); prejudgment replevin (RCW 7.64); prejudgment attachment debtor exams (RCW 6.25.170); in addition to injunctions and receivership, which may be appropriate in some circumstances. In this article, I focus on the most common and generally most effective remedy—prejudgment attachment.

Prejudgment attachment is the process whereby the court authorizes issuance of a prejudgment writ of attachment that directs the sheriff to seize a debtor's property and hold that property as security for the satisfaction of the judgment the creditor may ultimately obtain in litigation. Prejudgment attachment can apply to debtor's real or personal property.

Why use prejudgment remedies? There are several advantages to be gained by employing Washington's prejudgment remedies. The first benefit is the most obvious—preservation of assets. All too often a successful plaintiff will have gone through the time, effort and energy to obtain a judgment, only to find out that by the time that judgment is entered, the debtor has spent or transferred assets and there is no longer sufficient property to satisfy the judgment. By pursing prejudgment attachment, a creditor can identify and have the sheriff seize and hold assets to ensure they are available when judgment is ultimately entered.

Prejudgment remedies can also provide strategic benefit to the client. They can create settlement leverage by showing a defendant that the claimant intends to fully pursue the matter. Experience demonstrates that successful use of prejudgment remedies will prompt early and (hopefully) productive settlement negotiations. Additionally, when pursuing prejudgment remedies, the procedures discussed below require that both the client and the debtor (if he is opposing your motion) set forth on the record the specific facts on which their respective claims and defenses or offsets are based. This gives valuable insight into the defendant's case with more specifics than a basic answer to the complaint, and provides you and your client

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a "reality check" as to the viability of the claims going forward.

Additionally, prejudgment remedies establish your client's priority among creditors to a debtor's assets. Under Washington law, an executed prejudgment attachment relates back to the date of attachment, as opposed to the date of judgment, for priority purposes. This can be of great benefit if the debtor continues to encumber property during the pendency of your client's action. *See August v. Craig*, 139 Wash. 221 (1926).

How do I get started? Once you have decided to seek prejudgment attachment, the first thing you will need is a summons and complaint. It is important to remember that prejudgment remedies are ancillary proceedings, meaning they can only be employed in connection with a pending lawsuit. You can seek prejudgment remedies immediately upon filing, or anytime up through entry of judgment.

Next, determine whether your client has grounds for seeking issuance of a writ of attachment. RCW 6.25.030 lays out 10 statutory grounds for issuance of a writ of attachment when the debt is due. The most expansive of the grounds is found in RCW 6.25.030(10): "That the object for which the action in brought is to recover on a contract, express or implied." Since the vast majority of civil litigation cases seeking a money judgment are going to arise out of *some* kind of contractual relationship, you are likely going to be able to employ this basis for your claims.

Other statutory grounds for seeking prejudgment attachment when a debt is due are based on more extraordinary, or arguably exigent, circumstances. These can include if the debtor is a foreign corporation or not a resident of the state; if he conceals himself so ordinary process cannot be served, or has left his usual above to avoid service; if he has or is about to remove property from the state, assign or dispose of property, or convert property to cash to defraud creditors or otherwise put it beyond the reach of creditors; if the debtor has been guilty of fraud in contracting the debt or incurring the obligation, or if the damages are for injuries arising from the commission of a felony, gross misdemeanor or misdemeanor. *See* RCW 6.25.030. Closely review the statute to determine if your client's situation falls under one or more of the stated grounds, and do not hesitate to move under multiple grounds where appropriate.

A writ of attachment may also be sought when the debt is *not yet due* and "nothing but time is wanting to fix an absolute indebtedness." RCW 6.25.040. A promissory note that is not yet due is a good example. Under these circumstances, a writ of attachment can be sought on a debt not yet due if the debt was obtained under false pretenses, if the debtor is about to or has disposed of his property to defraud creditors, or if the debtor is about to remove from the state without making arrangements for payment of the debt when it becomes due. Again, review the statute to determine if RCW 6.25.040 is applicable under your client's circumstances.

What is the procedure to obtain a writ? In order to obtain a writ of attachment, a creditor petitions the court for an order authorizing issuance of a prejudgment writ. Application can be made in either superior or district court, but only the superior court can issue a writ of attachment on real property in addition to personal property. When considering prejudgment remedies, keep this in mind when determining where to file suit.

Statutorily, the procedure for obtaining a writ requires the creditor to submit an affidavit or declaration stating that the writ is not sought for any improper purpose (delay, defraud or to otherwise hinder creditors of the debtor), and that at least one of the statutory grounds for issuance of a writ of attachment exists (as discussed above and set forth in RCW 6.25.030 and 6.25.040). *See* RCW 6.25.060. The creditor must then note a hearing (except for certain limited circumstances) and provide notice to the debtor, which may be given by a show cause order. At the hearing, the statute provides that the creditor must "establish the probable validity of the claim sued on [over and above any offsets] and that there is probable cause to believe that the alleged ground for attachment exists." RCW 6.25.070.

The *actual* procedure for obtaining a writ may vary depending on the county and even the assigned judge. Reach out to the clerk of the court, the judicial assistant or whoever is in charge of scheduling civil motions in your specific case to make sure you are presenting things in accordance with local practice, as well as the applicable civil rules. For example, some judges prefer to sign their own show cause orders, while others will have it submitted to the *ex parte* department. Some counties will have the hearings set in front of the chief civil judge or the *ex parte* department, while others will require it be heard on the assigned judge's motion calendar. The only way to know that you are doing it right is to ask. But do not assume support staff will know what you are referring to when you contact the court. Some court employees do not have much experience with requests for prejudgment attachment hearings, so be prepared to walk through the procedure set forth in the statute and explain why you are indeed authorized to set a hearing with oral argument and have the matter set on the calendar.

Your order to show cause and all supporting documents (check the statute for what you need to serve on your debtor, including exemption statutes and notices) must be *served* on the defendant—not merely delivered to the attorney or dropped in the mail. RCW 6.25.070(4). Those pleadings will set forth specific facts supporting the allegations in the creditor's affidavit or declaration which provide the basis for issuance of the writ of attachment. In opposition to such a showing, a debtor must also submit an affidavit supporting his defenses, offset, credits or affirmative defenses, as he bears the burden of proving the validity of any defenses, offsets or counterclaims. *See Rogoski v. Hammond*, 9 Wn. App.500 (1973). This procedure provides a great

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Want To Make It Official? Perfection, Duration and Domestication of Judgments

by Laurin S. Schweet

Congratulations! You have obtained a judgment for your client. You won the battle, but you have not won the war until you have collected on that judgment. The primary factor determining the collectability of a judgment is, of course, the solvency of the judgment debtor. But you can also improve the odds of successfully collecting on your hard-won judgment by familiarizing yourself with the ground rules governing the perfection, duration, and domestication of judgments and the liens they create.

Perfection of Judgment Liens

Judgment liens upon non-homestead real property (not personal property or real estate contracts) are created by operation of law. How and when a judgment lien on a judgment debtor's real property commences depends on which court entered the judgment and where the property is located. If the property lies within the same county in which the federal district court or superior court is located, the lien will commence instantly upon entry of a federal judgment or filing in the execution docket of a superior court judgment. RCW 4.56.200(1)-(2). In the event the judgment was rendered by a superior court or federal district court in a different county, or a state appellate court, the lien does not commence until a certified abstract of the judgment is filed with the superior court of the county in which the property is located. RCW 4.56.200(3).

Extra steps are necessary to create a lien based on a state district court judgment. First, a certified transcript of the district court docket must be filed with the superior court of that county. If the property lies within that county, the judgment transforms into a superior court judgment, and the lien commences at that point. RCW 4.56.200(4). If the property is in another county, however, a second step is required. The judgment creditor must file a certified abstract of the record of the judgment from the first superior court with the second superior court (i.e., the court of the county in which the real property is located). Upon this second filing, the lien commences upon real estate located in that county. RCW 4.56.200(5).

Practice tip: Judgment liens are primarily brought to the attention of the public by title companies issuing policies for sales or refinancing. In the interest of being conservative, a title company will often list as exceptions judgments against individuals with similar or commonly occurring names. This can be a great source of frustration to a non-debtor property owner cursed with a common surname like Smith or Jones. In such cases, the non-debtor owner's wrath is often misdirected at the judgment creditor or his counsel. Fortunately, these situations are easily remedied by a title examiner declaration clarifying that these pesky pseudo-liens do not, in fact, affect the subject property based on proof that the property owner is not the judgment debtor.

A different rule applies to real property occupied as a homestead (or declared as such) by the judgment debtor. A lien on homestead property does not commence until the judgment is recorded in the county in which the property lies. RCW 6.13.090. An unrecorded judgment creates a lien only on non-homestead real property. The generally accepted method of recording a judgment is to obtain a certified copy from the court clerk and to then record the same with the cover page required by the county auditor or recorder. In the context of a judgment, the grantor is the judgment debtor and the grantee is the judgment creditor. *continues … next page*

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sneak pek at the future of your case, as the debtor will be putting his defenses and offsets on the record at the outset. Such information can prove valuable even if you do not ultimately proceed with your writ of attachment.

At the show cause hearing, it will again be incumbent upon you to walk the court through not only the facts that support issuance of the writ, but also the statutory framework that provides for such writs. Again, even when you are before the court, do not assume that it is familiar with the prejudgment attachment process or statute. These remedies are not often used and some judges may have limited experience in considering them, so do yourself a favor and be prepared by thoroughly reviewing the entire statute, as well as the case law interpreting it.

Once you have successfully obtained a writ of attachment, things really heat up in that you will then be authorized to engage the sheriff and begin the process of actually attaching the real and personal property of your debtor. The attachment process is very similar to that of a post-judgment writ of execution on real or personal property, so generally plan on following those same statutes, tips and procedures to enforce.

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Practice tip: The holder of a freshly entered judgment should both record and file a certified abstract of the judgment in each county in which the judgment debtor is believed to own real property. A judgment debtor can convert property from homestead to non-homestead, and vice versa, quite easily.

A judgment lien is usually unaffected by the bankruptcy filing of the judgment debtor. A bankruptcy discharge does, however, eliminate the obligation as a personal liability of the debtor. After the closure of the bankruptcy case, the judgment creditor is restricted to pursuing his *in rem* rights against the property; no collection action can be taken against the discharged debtor personally. Additionally, under bankruptcy law, a debtor or trustee may be entitled to avoid a judgment lien under certain circumstances, such as when the lien impairs a homestead exemption (11 U.S.C. § 522(f)), the lien was preferential (11 U.S.C. § 547), or the judgment lien was never perfected (11 U.S.C. § 544). However, these actions are subject to due process procedures and are not automatic.

Domestication of Foreign Judgments

A foreign judgment (i.e., any judgment entered by a court outside of the Washington court system), must be domesticated prior to its enforcement by our state's courts. To domesticate a foreign judgment, the judgment creditor must file an exemplified or certified copy with the superior court clerk; thereafter, it will be treated as any other judgment of the superior court. RCW 6.36.025(1). The foreign judgment can also be filed in state district court if certain jurisdictional and venue requirements are met. RCW 6.36.025(2).

At the time of filing of the foreign judgment, the judgment creditor (or her attorney) must also file a declaration that specifies the name and last known address of the judgment debtor and judgment creditor, together with the filing and expiration date of the judgment in the originating jurisdiction. RCW 6.36.035(1). Notice of the filing must be mailed to the judgment debtor at his last known address and must include the name and address of the judgment creditor, along with the name of her Washington attorney, if any. RCW 6.36.035(2). Proof of this mailing must be filed. No execution on this domesticated judgment is permitted until 10 days (14 days in district court) after the filing date of the proof of mailing. RCW 6.36.035(3). In addition to the typical information required in judgment summaries by RCW 4.64.030, domesticated judgment summaries also require the filing and expiration dates of the judgment under the laws of the originating jurisdiction.

Duration Of Judgments

The duration of a judgment is generally 10 years. RCW 4.56.190, .210. The 10-year period begins immediately upon entry of the judgment, regardless of when recording or other perfection method occurs. *Hazel v. Van Beek,* 135 Wn.2d 45, 54 (1998). Within 90 days of the end of this 10-year period, the judgment creditor may apply for a court order extending the life of the judgment by an additional 10 years. RCW 6.17.020(3). All steps of an execution sale, including entry of the order confirming the sale, must be completed during the lifetime of the judgment. *Camp Finance, LLC v. Brazington,* 133 Wn. App. 156, 165 (2006).

Practice tip: The court clerk charges an additional filing fee for a judgment extension, but this is a recoverable cost that can be included in the updated judgment summary required on the first page of the renewed judgment. Also, a renewal of the judgment does not affect the priority of the judgment lien. The renewal relates back, so recording the renewed judgment is unnecessary.

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Think Strategically When Executing on Personal Property for Cost-Effective Results

by Jesse Conway

Obtaining a judgment can often feel like only the beginning of your case. If the judgment debtor does not immediately hand you a sack of cash, you may have your work cut out for you. Knowing a little more about your collection options can help turn that paper judgment into paper money.

The first step is learning what type of assets the debtor has. The best method is to file an *ex parte* motion and order for supplemental proceedings. After proper service of the motion and order you can conduct a debtor's exam. At $20 for filing and about $40 for a process server, this is an inexpensive option. If you want to save time you can serve the debtor with a questionnaire that he or she can answer under penalty of perjury in lieu of attending the hearing. I find that when presented with the option, most debtors will opt for a questionnaire over a court hearing. If you can save your client an hour or so of billable time and get the same answers, then the questionnaire is clearly the better choice.

If you decide on a hearing, you can ask the court to issue an order directing the sheriff to seize non-exempt assets that the debtor has brought with him. This may include cash, jewelry and even a car. Be sure to bring a form motion and order with you and be ready to post a bond. If you are not prepared to immediately seize the assets you may not get a second chance, as debtors typically will learn from their mistake and will not bring assets to subsequent proceedings. Keep in mind that if you a draft motion and order and post a bond only to recover assets worth $200 on $20,000 judgment, you probably have wasted your time.

If you learn through the hearing or questionnaire that the debtors have additional non-exempt property that they did not bring with them, you can file an *ex parte* motion and order to obtain a writ of execution directing the sheriff to seize the property and sell it. A writ of execution is a great tool but navigating the process successfully is no easy task.

Throughout the process, you will need to maintain the element of surprise. If the debtor learns that the sheriff is showing up at the end of the week to seize his rare coin collection, this coin collection has a very high probability of disappearing. Make sure not to telegraph to the debtor that you are executing a writ. During one negotiation, I discussed with the debtor the creditor's rights to seize his assets, hoping to spur settlement discussions. Instead the debtor relocated his assets, making our eventual recovery much more difficult.

Before the writ is executed, the sheriff will require your client to post an indemnity bond for double the amount of the assets being seized. The premium is typically only one percent of the bond amount so this is not a great expense. However, your client will have to pass a credit check. Check his credit beforehand! I have filed a complaint, obtained default and judgment, held supplemental proceedings and obtained a writ only to find that my client had a poor credit record and no underwriter would grant a bond. Avoid this pitfall by discussing your client's credit early on.

Another potential mishap is that the sheriff will go to execute the writ but no one will be home or come to the door. A quick and easy solution is to have the judge sign a break–and-enter order and deliver this to the sheriff along with the writ. With this order in hand, the sheriff may forcefully enter the property. This order takes minutes to draft and can be entered along with the writ. This order is a very inexpensive tool to ensure that the execution of your writ runs smoothly.

Lastly, if you are aware of specific assets of the debtor, such as a non-exempt boat or personal watercraft, do a title search with the DMV. The sheriff will want proof that the assets being seized are not subject to superior liens. You will want to know this as well so you do not seize a non-exempt Corvette only to find that the bank has a first-position interest likely exceeding the value of the asset. A title officer will often do this search for free. A quick, free search ahead of time will save you a potential headache down the road.

If you discover the debtor has liquid assets, file a writ of garnishment against her bank accounts as soon as possible. The bank is only obligated to turn over the non-exempt funds in the account at the time you execute the writ so a debtor can easily withdraw funds ahead of time. If you know when your debtor gets paid, plan to deliver the writ to the bank soon after that time. Since you can recover filing fees, service fees, postage, and other expenses, garnishing a bank account is a great tool.

Where applicable, execute a writ of garnishment on the debtor's employer at the same time. This has worked particularly well in cases where the debtor has long-term, stable employment. It has not been as successful where the debtor has less-than-steady employment. You may not want to through the garnishment process only to issue the writ and have the debtor switch jobs. More resources may be spent trying to track him from job to job than it is worth. It is also difficult to garnish the wages of someone who is self-employed as they can often keep money in the company (instead of drawing a salary) until the writ expires. If this is the case, you may want to look into a charging order against the company, which would give you the rights to seize the ownership interest of the debtor.

Consider also whether the debtor has other garnishments in place. If you clear the first few hurdles but find that the debtor pays child support and alimony, you are not likely to recover enough to make the writ worthwhile. When doing your own cost/benefit analysis, keep in mind that the writ is only good for 60 days before you have to reissue, and you

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Going for Broke: Judgment-Debtor Bankruptcy May Impact Collection Efforts

by William F. Malaier, Jr. and Gloria Nagler

The filing of a voluntary bankruptcy petition by a debtor engaged in pre-bankruptcy litigation is akin to the "nuclear option," a last resort used for several purposes. Among these are the termination of ongoing litigation and the discharge of most, if not all, pre-bankruptcy obligations. Specifically, a bankruptcy filing imposes automatically, as a matter of law, a broad injunction against continued collection acts—including litigation—against the debtor and the property of the debtor's bankruptcy estate. *See generally*, 11 U.S.C. § 362.

Although the automatic stay is powerful, Congress imposed severe restrictions on its use in 2005: If the debtor has filed a prior bankruptcy case in the past 12 months, the stay is limited to 30 days, absent court order extending it. If the debtor has filed two cases in the past 12 months there is no stay at all, and collection can continue until the bankruptcy court orders otherwise. 11 U.S.C. § 362(c)(3). (Practice tip: Check the filing history of the debtor.)

As soon as your client gets a notice that the debtor has filed bankruptcy, counsel should file a Request for Special Notice with the bankruptcy court. Notices of deadlines for filing claims and notices of case dismissal may slip past your client's attention, but counsel is more likely to keep tabs. If a case has been dismissed, your client can continue collection actions, and you want to be among the first to know. If a Chapter 13 is converted to a Chapter 7, you want prompt notice because more kinds of debts are non-dischargeable in a Chapter 7.

Your creditor client should receive notice of a debtor's bankruptcy filing setting forth the date and time of the debtor's Section 341 Meeting of Creditors, the deadline by which proofs of claim are due to be filed with the Bankruptcy Court, and the deadline by which complaints objecting to the discharge of particular debts must be filed. Failure to file such a complaint prior to the deadline jurisdictionally bars further litigation of that issue, unless a court-approved extension is obtained.

An overlooked tool is the opportunity to object to the exemptions asserted by the debtor. Because our state has not opted out of the federal exemption scheme, citizens of Washington are free to elect either the exemptions afforded under state law (refer to RCW 6.13 and 6.15) or the exemptions afforded under federal bankruptcy law (11 U.S.C. § 522). Creditors should review a debtor's asset and exemption schedules to see if the debtor has accurately valued his property and applied the proper exemption statute to particular property. If the debtor has undervalued his property, or has applied the wrong exemption, a creditor should consider filing a formal objection to exemptions in the bankruptcy case. For example, specific items of household goods are limited to a low dollar value. Exemptions available under state and federal law can be found at RCW 6.15.010 and 11 U.S.C. § 522, respectively. For instance, if the debtor lists the piano at a value of $400, but you know it is a grand piano worth far more, make the objection or call the trustee—she will make the objection for you. The deadline to do so is statutory and jurisdictional: 30 days following the First Meeting of Creditors. The trustee can liquidate non-exempt property and pay the proceeds to creditors.

Several debts are automatically non-dischargeable and require no litigation in the bankruptcy court to survive the bankruptcy discharge. An exhaustive list of such debts can be found at 11 U.S.C. § 523, but the most common are domestic support obligations, debts arising from a divorce decree or separation agreement (in Chapter 7 and 11 cases only; they are dischargeable in Chapter 13), restitution, student loans, and damages arising from operation of a motor vehicle or vessel while intoxicated. In contrast, the dischargeability of other debts requires formal litigation. These include debts arising from fraud or false pretenses, debts arising from fraud or defalcation by a fiduciary (including embezzlement or larceny), and debts arising from the intentional injury to a person or property. Look at state law for support (for example, misapplication of a consumer deposit may be larceny or conversion,

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can only recover up to 25 percent of the debtor's pay.

If the debtor has income-producing property you may have grounds to have a receiver appointed by the court to manage the debtor's income-producing property. I recently had a receiver appointed to manage the rental property of a debtor. Every month the receiver would collect rent, subtract his fee, and pay the creditor the balance. Although a receiver is relatively expensive, charging $500 or more a month, we had a steady tenant in a high-end property so this worked out nicely.

Keep in mind that you have these and many other collection tools available to you. By determining the debtor's asset situation you can choose the tool that is right for you. You may even find that after a few seizures and garnishments the debtor may be more willing to work with you to satisfy the judgment. Good luck!

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Executing Judgments Against Real Property Requires Proceeding with Caution

by Scott M. Ellerby

Successfully enforcing a judgment against real property in Washington is largely a matter of paying close attention to RCW 6.17 and the specific steps and preliminaries involved. Strict compliance with the statutory requirements is necessary, form prevails over substance, and many traps for the unwary exist. The law requires a judgment creditor to first pursue personal property assets if sufficient amounts exist to satisfy the judgment.

Predicate Judgment

Execution against the real property of a judgment debtor is commenced by the issuance of a court order called a Writ of Execution to the sheriff of a particular county. The writ directs the seizure and sale of the property of the judgment debtor not exempt from execution. Only superior courts may issue writs of execution against real property, making it necessary to transfer a district court judgment to the superior court if a real property execution is desired. A judgment is effective for an initial 10-year period and can be extended by application prior to expiration for an additional 10 years. One trap for the unwary is that every component part of the execution must be completed prior to expiration of the judgment, including the levy (seizure by the sheriff), the sale, and the sale confirmation. Another practice tip is to verify that the judgment is properly recorded in the superior court clerk's judgment docket prior to requesting issuance of the writ of execution. It is not uncommon for a lawyer to find that a pleading entitled "Judgment" signed by the court and filed with the clerk was not entered in the judgment docket because of a missing or incomplete judgment summary or some other technical deficiency. No writ may issue until after five court days following entry of the judgment. To obtain a judgment lien on property qualifying as a homestead, it is necessary to record the judgment with the county auditor.

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both potentially non-dischargeable if proven).

Bankruptcy trials are usually scheduled within five or six months of the bankruptcy filing, and all forms of discovery available under the Federal Rules of Civil Procedure are available under the Federal Rules of Bankruptcy Procedure.

Distinctions between a creditor's rights and remedies in bankruptcy vary depending on the chapter of the Bankruptcy Code. Chapter 7 bankruptcies are liquidation proceedings in which a trustee is appointed to liquidate a debtor's non-exempt property for the benefit of creditors. Cases filed under the reorganization chapters of the Bankruptcy Code (most commonly, Chapters 11 and 13) are controlled by the debtor who will file a plan outlining the terms of repayment (which may be partial or full payment). The Notice of Bankruptcy Filing that your client will receive at the outset of the case will clearly identify the chapter of the Bankruptcy Code under which the case was filed.

In Chapter 13 cases, your client will receive a copy of the debtor's proposed plan. Deadlines for objections to plan confirmation are identified in the Notice. The most common objections to confirmation are alleged bad faith by the debtor, or lack of feasibility (e.g., the debtor's sworn income and expense schedules do not appear to be sufficient to service the proposed bankruptcy plan payment). The Chapter 13 trustee will sometimes raise objections to confirmation, but a creditor should make an independent evaluation of whether to object to a proposed plan.

The most important thing for a creditor to do in a Chapter 13 case is to file a timely proof of claim. Failure to do so will prevent the creditor from receiving his *pro rata* distribution from the debtor's reorganization payments. File any supporting documentation (e.g., copy of judgment, copy of invoice) with the claim. Most Chapter 7 petitions (more than 90 percent) are "no-asset" cases, meaning there is no point to filing a claim. The Chapter 7 trustee will let your client know if a claim should be filed.

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Due Diligence Affidavit

Prior to requesting issuance of the writ of execution, the judgment creditor must file an affidavit stating that due diligence has been exercised to ascertain if the judgment debtor has sufficient non-exempt personal property to satisfy the judgment, identifying the items and location of personal property, whether the personal property is exempt, and whether any real property is being occupied or claimed as a homestead. The "due diligence" required of the judgment creditor includes physically inspecting property, interviewing occupants and neighbors, and searching the county real property records. The most common way for judgment creditors to satisfy the due diligence requirement is to examine the judgment debtor in supplemental proceedings concerning personal property and real property assets, and exemptions.

In addition to filing with the court, the judgment creditor must mail a copy of the due diligence affidavit to the debtor, allowing the debtor to challenge its contentions. Once the writ of execution is issued by the clerk, the judgment creditor takes the writ of execution to the sheriff for service on the judgment debtor with copies of specified exemption statutes. Service is either by personal service or by regular and certified mail.

Execution May Issue Only Where Judgment Was Originally Entered

Practice Tip: A common mistake made by counsel for judgment creditors is to file a transcript of a judgment entered in another county and then have the new court clerk issue execution writs. Execution can lawfully issue only from the superior court in which the judgment was entered, and the superior court issues writs of execution to the sheriff of the county where the real or personal property is located. Court clerks will not always pick up on the fact that the writ of execution is sought on a judgment that was transcribed from a different county.

Pre-Writ of Execution Communications with the Sheriff's Civil Division

Although generally similar in approach, each sheriff's office has its own requirements for levying writs of execution and conducting sheriff's sales. Counsel contemplating pursuing a writ of execution on real property should contact the civil division of the sheriff's office in the county where the real property is located early in the process to learn the particular requirements of that office. Many sheriffs post their procedures and requirements online. The sheriff will likely require multiple copies of the writ and judgment, a letter of instructions detailing the judgment debtor's personal information, legal description, tax identification number, the applicable redemption period pursuant to RCW 6.23.020, and instructions on obtaining access to the property. In addition, each sheriff will have her own execution fee and mileage charge to the property for posting of the notice of sale and for service on the judgment debtor if at a different address. The sheriff will then prepare a notice of sale and arrange publication in a local paper of record after the sheriff determines the sale date.

Economic Considerations

When deciding whether to execute on real property, the judgment creditor must take into consideration the market value of the judgment debtor's interest in the real property—the purchaser at the execution sale acquires only the interest of the judgment debtor. Unless the judgment debtor has sufficient equity in excess of the homestead exemption amount of $125,000, the judgment creditor should not proceed with an execution sale, especially considering the costs of sale which are added to the judgment amount. Most sheriffs will require prepayment of all execution fees.

Litigation Guaranty: Title Report

A judgment creditor executing on real property will typically obtain a title report known as a litigation guaranty prior to commencement of the execution sale in order to identify any superior lien interests and tax liens. Although junior lienholders are not entitled to any notice beyond the standard recording posting and publication, the IRS is entitled to special notice even if the tax lien is junior to the judgment lien.

Priority Considerations

The lien created by the filing of a judgment in the county where the real property is located is entitled to priority over all subsequently-filed encumbrances. However, prior unrecorded claims or interests in the property take precedence over the lien of a judgment creditor purchasing at its own sheriff's sale because the judgment creditor does not qualify as a *bona fide* purchaser. For this reason, some judgment creditors arrange for a third party to purchase at the execution sale and then subsequently purchase from the third party.

Stopping the Execution Sale

The judgment debtor has the ability under the execution statute to stop the execution sale by paying the amount of the judgment plus the costs of execution or by posting a bond of sufficient amount to satisfy the judgment plus costs. A judgment creditor may also stop an execution sale by filing a supersedeas bond pending an appeal, or by obtaining a stay from the trial court pursuant to CR 62(b). In addition, RCW 6.17.040 provides a mechanism for a judgment debtor to stay the execution of a judgment, depending on the size of the judgment, to retain the property while paying off the judgment. This option requires the filing of a bond for double the amount of the judgment and costs, reducing its attractiveness. Similarly, an adverse claimant to the property may prevent the levy and sale on the property by giving the sheriff a sufficient bond pursuant to RCW 6.17.180. Finally, on any irregular or improperly issued writs of execution, the judgment debtor or other claimants may move to quash the writ or enjoin the sale.

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Show Me the Money: Finding and Obtaining Assets Through Supplemental Proceedings and Garnishment

by Bennett Taylor

As a litigator, you have probably found yourself in this situation: There is a money judgment in favor of your client sitting on your desk. You made it. You won. Whether you battled through years of litigation or received a default judgment, your client is now legally entitled to what it is owed. But what if the opposing party refuses to pay? What if they ignore your letters, phone calls and emails to discuss satisfying the money judgment?

A preliminary question to ask your client here is how aggressively he wants to collect the judgment. A passive way a judgment creditor can collect on a judgment is to record it with the county recorder's office. The judgment is good for ten years, attaches to any real property the debtor owns in the county and is a blemish on the debtor's credit history. Practically speaking, it means if the debtor ever wants to sell his home (if he owns one), refinance or obtain credit in the future, the judgment will act as an obstacle and the debtor will have to deal with your judgment at that time. The legal fees and costs involved are minimal, but this strategy requires a lot of patience from a judgment creditor who just wants to get paid. And that might not happen for up to 10 years, if not longer, with this tactic.

What if your client wants a more aggressive approach?

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Executing Judgments Against Real Property Requires Proceeding with Caution *from previous page*

Sheriff's Sale Mechanics

If the real property consists of several lots, they must be sold together or separately in the manner most likely to bring the highest price. Most sheriffs hold execution sales on Friday mornings outside the courthouse entrance. The sheriff posts the notice of sale for at least four weeks prior to the sale at three public places in the county, one of which is at the courthouse entrance, and publishes notice once a week for four weeks in a newspaper of record nearest to the place of sale. In addition, not less than 30 days prior to the sale, the judgment creditor must serve a copy of a notice meeting the requirements of RCW 6.21.040 on the judgment debtor by personal service or by regular and certified mail, and mail a copy of the notice to the judgment debtor's attorney of record. The judgment creditor must also file an affidavit declaring that all notices required by the statute have been provided.

Most judgment creditors submit a bid letter to the sheriff prior to the sale date specifying the amount that the judgment creditor wishes to bid. The judgment creditor can credit bid up to the total amount of the outstanding judgment, and can also bid additional money to compete for the winning bid. If the judgment creditor wishes to bid more than the amount in its bid letter, the judgment creditor must attend the sale. The sheriff conducting the sale will typically give the successful bidder a reasonable amount of time—one to two hours—to produce the purchase price, typically in the form of a cashier's check.

Confirmation of Sale

Following the sale, the sheriff mails the notice of filing of the return of sale, and 20 days after the mailing the judgment creditor or successful bidder may move for an order confirming the sale. If objections to the confirmation motion are filed, the court may refuse to confirm the sale when substantial irregularities in the sale caused probable injury to the party objecting.

Redemption

Pursuant to RCW 6.23.010, the judgment debtor, successors-in-interest, and creditors having liens that were foreclosed by the sheriff's sale have the right to redeem the property by paying the bid amount plus interest, taxes, and other expenses at any time within one year from the sale date (note that different redemption periods apply to farming property where the complaint waived any right to a deficiency judgment). Other redemptioners have the lesser of one year or 60 days from the last redemption by another redemptioner in which to redeem, allowing for a cascade of redemptions. The purchaser at the sheriff's sale or a redemptioner must provide notice of the expiration of the redemption period at least 40 and not more than 60 days prior to expiration of the redemption period. Failure to provide such a notice to the judgment debtor and property occupant extends the redemption period for an additional six months.

The details of the redemption amount and other complications are beyond the scope of this article and counsel is well-advised to carefully consult the redemption statute, RCW 6.23.010, in detail prior to proceeding.

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At that point, ask your client if he has any knowledge about where the judgment debtor is employed or has bank accounts. Garnishing a debtor's wages or bank accounts is the most common way to enforce a judgment. Depending upon the client's answer, the two most common tools used in this situation are asset hearings, also known as supplemental proceedings, and garnishment proceedings.

If the client does not know where the debtor works or banks, you can order the judgment debtor to appear at an asset hearing. Under RCW 6.32, at any time within 10 years of entry of a judgment, a judgment creditor, initiated by motion, can request an order requiring the debtor to appear at a specified time and place to answer questions regarding his assets. The motion and order will specify what the judgment debtor must bring to the hearing, including tax returns, recent pay stubs and bank statements, mortgage statements and the time, date and location of the hearing. This information will help you understand the full scope of the assets the judgment debtor has in his possession to potentially satisfy the judgment.

Once the order is entered that commands the debtor to appear at the asset hearing with the documents mentioned above, you must serve the debtor with a copy of the motion, the supporting declaration, order and notice of hearing at least seven days prior to the hearing. Make sure to set the hearing date far enough out in advance to have the debtor served on time. Furthermore, it is generally good practice to have the debtor served earlier than seven days before the hearing because upon service, it could prompt him to contact you to set up a payment plan or some other arrangement to satisfy the judgment. That would save a lot of time, but unfortunately, things do not always go that smoothly.

Once the hearing begins, the judge will swear in the debtor and allow you to question him, usually in a secluded area of the courtroom or the hallway outside of the courtroom. It is then that you review the documents the debtor brought to determine where he works and how much money he has in the bank, if any, or if he has any other assets to satisfy the judgment.

You should also use this as an opportunity to discuss the debtor's financial situation and possibly find a resolution that does not require the garnishment of wages or bank accounts. Emphasize to the debtor why it is in his best interest to make arrangements to pay the debt so he does not feel threatened. Many debtors are already on edge, knowing that they have been brought into court for a debt they owe, and they can become hostile. Offering an olive branch at this point in a strategic manner could de-escalate the matter and help meet the needs of both parties without further court involvement.

If at this point you cannot broker a deal with the debtor at the hearing and there is money to be obtained, the next step is to determine if a wage garnishment or bank account garnishment would be appropriate. Bank account garnishments are typically preferable to wage garnishments because they take significantly less time and your client gets paid faster. A typical wage garnishment takes five to six months while a bank garnishment takes about half that time.

The process to start both types of garnishment is the same: after the automatic stay period has passed, you file an affidavit In support of issuance of writ of garnishment, two copies of the writ of garnishment and the $20 filing fee with the court clerk. In my experience, some courts require a pen and ink signature for garnishment pleadings, so it is best to sign the pleadings this way whenever possible.

Once the signed writ is returned, you must personally serve the original signed writ of garnishment along with one Answer form, or send it via certified mail with return receipt requested to the employer or bank (i.e., the garnishee defendant). This is also called the First Answer form for a wage garnishment. If the garnishee defendant is a bank, you must also include a $20 check made payable to the bank. Within two days of serving or mailing the garnishee defendant, you must serve upon the debtor or send via certified mail (with return receipt requested) the following documents: a copy of the writ, a copy of the affidavit in support of issuance of writ, notice of garnishment rights and an exemption form. These forms may be found on the Washington State Courts website on the Court Forms page. Since the garnishment process is quite technical, as a practical matter, it is good practice to serve or mail the forms to the garnishee defendant and the debtor on the same day to avoid any violation, however minor it may seem.

Next, the garnishee defendant has 20 days to answer the writ. If he does not, he may be liable for the full amount of the judgment. The Answer or First Answer will tell you exactly how much money the employer or bank is withholding from the debtor, which will roughly be the amount your client can expect to see. Wage garnishments last 60 days, so upon receipt of the garnishee defendant's First Answer for a wage garnishment, wait about 50 days before sending a Second Answer to the employer. No Second Answer is necessary for a bank garnishment.

Finally, you are ready to get your client paid. File the Second Answer or Answer, Judgment on Answer and Order to Pay, Declaration of Non-Military Service and Certificate of Service with the court. Wait a day or two for the court to enter your order. Send a copy of that signed order to the employer or bank. It should then release the funds to the court, and the court will pay you through its registry.

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