Getting Plaintiffs (and Their Lawyers) Paid on Judgments in Excess of Available Insurance (or Congrats: You Won! Now What?)

by Andrew R. Schwartz

I. Introduction

Law schools train budding lawyers how to win judgments, but not how to enforce them. Many defendants do not automatically pay judgments upon their rendition – especially large ones – and taking a large judgment may prove to be only "round one" in protracted litigation. You may have considered collection law the "ugly stepchild" of civil litigation, but it suddenly looks ***extremely*** useful when the debtor has inadequate insurance and simply refuses to pay.

The following article provides a primer on how to monetize your brilliant courtroom advocacy, both for your clients and yourself.

II. Sample Fact Pattern

Great job! After years of work and a hard-fought trial, the jury just returned a massive eight-figure verdict for your client. The trial judge says he will enter judgment on that verdict and asks you to type up a judgment for entry and submit a petition for pre-judgment interest, which will tack on many millions more to your total judgment.

The champagne is already flowing when you reach the office. Your receptionist says several bar associations have already called, asking you to speak about the trial, and two local TV news reporters also called to interview you for a story on the evening news about your case.

As you draft your petition for pre-judgment interest, your mind races ahead to the inevitable posttrial motion and appeal. You believe the judge ruled fairly on the evidence and that you will beat the posttrial motion. You report the news to your client, who is thrilled with the result and wants you to seek prejudgment interest. But then she asks when she can expect her money, "now that the case is finally over." That starts your gut churning: *How will you collect anything close to the amount of this verdict, which dwarfs the insurance limits – where opposing counsel promised to "fight this judgment until Hell freezes over – and then to fight on the ice"*?

III. Don't Panic

Take a deep breath and hold it. Close your eyes and imagine the tongue-lashing the defendant – now judgment debtor – is giving opposing counsel. Try not to laugh out loud when you remember him assuring you that you could never win this case in the first place. Drink the champagne your law partner just handed you. Then get back to work.

IV. Is Your Judgment Final?

The first step in any collection is to ensure that you have a ***final*** judgment because a creditor cannot even start collections without one.[1] Therefore, we first focus on that threshold step and discuss what constitutes a "final" judgment under Illinois law.

A. Converting a Verdict into a Judgment

The entry of judgment on a jury verdict should happen as a matter of course. *See* 735 ILCS 5/2-1201(b) ("Promptly upon the return of a verdict, the court ***shall enter judgment*** thereon") (emphasis added). However, any motions for J.N.O.V. must be resolved before the judgment can become "final" and collectible.

B. Finality of Judgments

An order or judgment lacks "finality" unless it terminates the litigation between the parties on the merits or disposes of the rights of the parties.[2] By contrast, an order or judgment is "interlocutory" if claims remain unresolved. Therefore, the successful plaintiff's lawyer must either (1) resolve all claims in the case before s/he can proceed to collection, or (2) obtain a S.Ct.Rule 304(a) finding of partial finality.

A non-exclusive list of events that may defeat "finality" includes the following:

- **Filing a petition for pre-judgment interest (PJI)**. 735 ILCS 5/2-1303(c) lets successful personal injury and wrongful death plaintiffs recover PJI from the date the action is filed under certain conditions. PJI awards can be sizable in a large case – especially if it takes a long time to get to trial, but the judgment will not become "final" until the court resolves it because a PJI award will increase the amount owed.

  Practice Tip: *If you anticipate a prejudgment interest award, calculate it before the court enters judgment on the verdict and include it in the judgment. This will aid your client to enforce the judgment during the "gap" period discussed below.*

- **Filing a motion seeking costs**. If the judgment does not award costs and the prevailing party seeks a cost award, the judgment is not

"final" because the cost award may increase the amount owed.

• **Filing a posttrial motion**. In a jury case, a posttrial motion filed in apt time stays enforcement of the judgment.[3] The same holds true for the filing of a motion to reconsider in a non-jury case.[4] However, note that the ***filing*** of the posttrial motion stays enforcement of the judgment, which means a judgment may be final and enforceable from the date of its rendition until the filing of the posttrial motion. We refer to this as the "gap" period, which plays a significant role in successful collections.

• **Filing a timely S.Ct.Rule 137 motion for sanctions**. Rule 303(a)(1) provides that "[a]judgment or order is not final and appealable while a Rule 137 claim remains pending unless the court enters a finding pursuant to Rule 304(a)."[5]

Practice Tip: *If you expect a fee petition or a sanctions motion, tell the judge and request a S.Ct.Rule 304(a) finding.*[6]

C. Special Problems with Severance Orders in Multi-Party Cases

Mass tort cases present a special problem for the successful plaintiff's lawyer. For example, consider the *Sterigenics* litigation in Cook County involving ethylene oxide (EtO) contamination in Willowbrook, IL. The first of those cases to reach trial involved a plaintiff named Sue Kamuda, who claimed that the EtO emissions caused her to develop breast cancer. Her son Brian (who claimed a different EtO-related injury) had joined her case, but the defendants later successfully moved to sever Brian's claims from Sue's claims, resulting in Sue going to trial while Brian had to await a later trial date.

Sue's case proceeded to trial, where she took a whopping $363 million+ judgment and immediately moved to enforce that judgment by issuing and serving citations to discover assets upon each judgment debtor (we discuss that procedure *infra*). The judgment debtors moved to quash the citations, arguing that Sue's judgment was not "final" because (a) Brian remained a party to Sue's case post-severance, (b) Brian's claims remained unresolved, and (c) the trial court had not made a Rule 304(a) finding of partial finality and appealability as to Sue's claims.

Sue defeated the judgment debtors' motions to quash by persuading the trial court that its earlier severance order completely separated her claims from Brian's claims, such that the two cases would proceed independently from one another and that judgment in Sue's case was final and enforceable.[7] Sue persuaded the trial court to enter an order confirming that its use of the term "sever" in its prior severance order was intended in the narrow sense to entirely separate the cases of Sue and Brian.

The elimination of a party from a multi-plaintiff case presents an interesting problem for the plaintiff's lawyer because severance orders typically do not contain significant details. Therefore, if a case is severed to eliminate one of multiple plaintiffs, the

getting plaintiffs continued on page 42

getting plaintiffs continued from page 41
alert plaintiff's lawyer must either draft the severance order clearly or obtain a Rule 304(a) finding in the judgment.

1. Drafting a proper severance order

Illinois law does not define the term "severance" too well.[8] Any plaintiff's lawyer who faces a pretrial severance motion should review *Carter* carefully for guidance. The plaintiff's lawyer faces a choice: S/he may ask the trial judge to include clear and unequivocal language in the severance order stating that the claim, counterclaim or the party has indeed been "severed" (in the narrow sense of that word) and that the severed claim, counterclaim or party shall proceed thereafter separate from the other claims, counterclaims or parties to the case. Alternatively, the plaintiff's lawyer must ask the trial judge to include a Rule 304(a) finding in the judgment order. Otherwise, the judgment debtor may attack the finality of the judgment order as a way to forestall collection proceedings.

V. Move Quickly and Prosecute Collections Aggressively During the "Gap" Period

Preparation is the key to all effective litigation, and the same holds true in collections. Your humungous judgment exceeds the available insurance coverage and threatens the debtor with dire consequences, so expect the debtor to fight back. Hard. If the debtor is a large company, it will have resources and high-priced lawyers to continue the battle. If the debtor is a smaller company, your excess judgment may put it out of business, so the debtor has nothing to lose by fighting tooth and nail. If your judgment arose from a medical malpractice case and the debtor is an individual doctor, paying the judgment may drive him/her into bankruptcy.

A. Assembling the Proper Collections Team

Much of our practice focuses on helping top trial attorneys (including many ITLA members) collect their excess judgments. Debtor-creditor and collection law can become quite complicated and fraught with danger for lawyers who venture outside their areas of expertise and choose to "dabble."

We recognize the legal talent of our injury lawyer colleagues, but we always stress the need to have a proper team in place to handle the postjudgment collection work, including an experienced collection attorney and a forensic accountant/certified fraud examiner. For example, in the *Sterigenics* litigation we worked with a veritable "all-star" team of injury lawyers to identify potential fraudulent transfer and bankruptcy issues well over a year before Sue Kamuda's case went to trial. We then introduced our injury lawyer colleagues to a top-notch forensic accounting team, who helped identify over $1 billion in suspicious transactions designed to strip the primary defendants of equity and make collection from them more difficult.

B. Speed is Essential

Judgment creditors should ***always*** move as quickly as possible to initiate collections and secure assets before they "get away." Debtors facing massive civil judgments often "play dirty" to frustrate collections by hiding, moving and/or improperly encumbering assets otherwise available for collection. Section VII below discusses various methods of collection, and how the creditor may prevent these shenanigans. Quick action by the creditor may limit and/or prevent these shenanigans and avoid the need for the creditor to take extraordinary measures.

C. Using the "Gap" Period to Ensure a Successful Collection

Please reread the third bullet point of Part IV.B above. The "gap" period presents a golden opportunity to flex your client's newfound power as a judgment creditor and ensure a successful collection. That brief period – between the entry of the final judgment and a §2-1202(d) stay of enforcement – allows the judgment creditor to record a judgment lien and to begin collection proceedings immediately. This is significant because the collection procedures discussed in Part VII below provide for the imposition of a lien on the judgment debtor's assets. Moreover, supplementary proceedings, as discussed in Part VII.A below lets the judgment creditor acquire necessary information for further collections.

The imposition of a lien lets your client really "put the blocks to" the judgment debtor immediately – especially if the debtor is an ongoing business. Most businesses require the free flow of cash to operate. A lien which stops that flow creates immensely powerful leverage and will require the debtor to seek judicial relief to modify that lien.

Another point bears mention here: Although the filing of a posttrial motion stays "enforcement," of the judgment, it does ***not*** affect any perfected liens or halt the gathering of information. Therefore, any judgment-based liens perfected during the "gap" will remain in place during the pendency of the posttrial motion. Read that sentence a second time because it allows the judgment creditor to maintain pressure on the debtor.

VI. Effective Collection Requires Information

The first thing we do in our collection cases is locate the judgment debtor and search the grantor/grantee index in the office of the Recorder of Deeds or County Clerk for that county. That basic search (online in some counties, including Cook) may provide valuable information about realty owned by the debtor, as well as

getting plaintiffs continued on page 44

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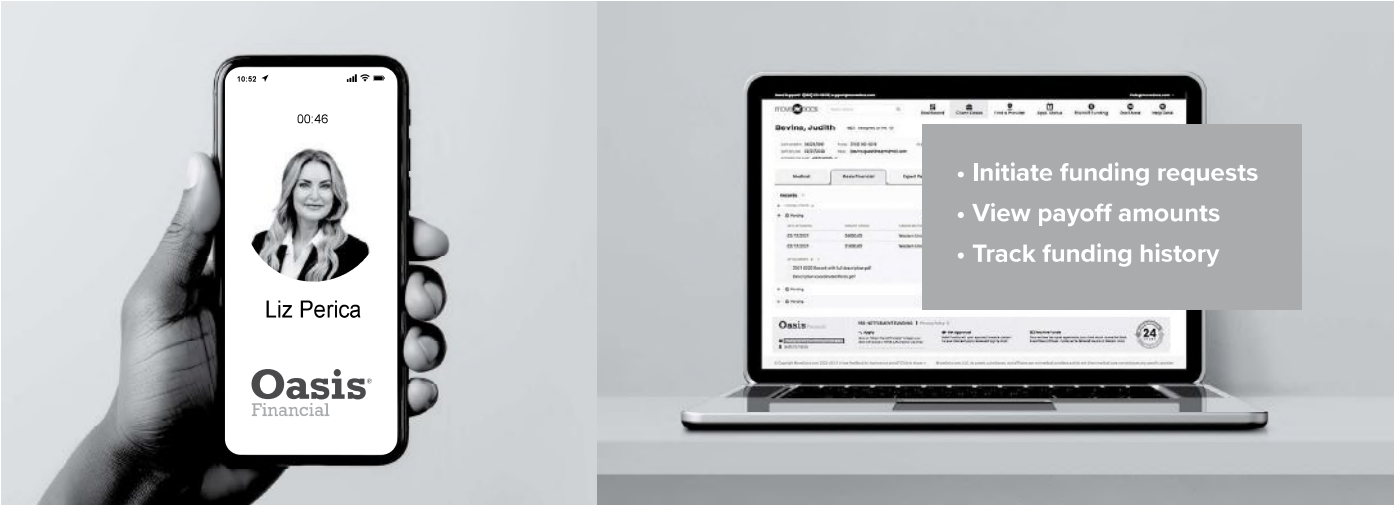

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getting plaintiffs continued from page 42

recent real estate transfers. Next, we usually run a Westlaw *PeopleMap* search of individual debtors, which often turns up valuable information about the debtor's cars, UCC filings and the like. A simple Google search may also provide useful information.

Two extremely useful documents in collection practice are tax returns and copies of old checks. If you (or your client) have access to either type of document, you probably know enough financial information about the debtor to begin effective collection proceedings.

VII. Basic Collection Procedures Under Illinois Law

Illinois law authorizes three basic collection methods: (1) citations to discover assets ("citations"), (2) non-wage garnishments and (3) wage deductions. We typically prefer citations, because they offer greater flexibility and help the creditor find the debtor's assets.

A. Supplementary Proceedings (735 ILCS 5/2-1402 and S.Ct.Rule 277)

Supplementary proceedings (citations) are our favorite collections procedure and provide "one-stop shopping" for creditors. A citation lets a judgment creditor (1) examine the judgment debtor or any other person to discover assets or income of the debtor not exempt from the enforcement of the judgment, (2) obtain a wage deduction order, (3) garnish assets belonging to the judgment debtor, ***and*** (4) compel the application of non-exempt assets or income discovered toward the payment of the amount due under the judgment.[9] In essence, a citation lets the judgment creditor do virtually everything it could do under the wage deduction and non-wage garnishment statutes ***and*** to conduct examinations of the debtor and third parties who may have information useful to the collection efforts. Citations also let the creditor capture equitable interests and future indebtedness and give creditors a formidable array of remedies.

A supplementary proceeding is commenced by the service of a citation issued by the clerk.[10] We usually attach a rider to our citations (similar to riders to subpoenas and deposition notices) identifying documents the citation respondent must produce.[11] Collection courts typically require the citation respondent to produce the requested documents prior to the examination.

735 ILCS 5/2-1402 is a lengthy statute, as is Rule 277. Any lawyer wishing to issue citations should read both §2-1402 and Rule 277 carefully before doing so.

The citation provides a mechanism to discover ***and*** recover assets.[12] It lets the judgment creditor conduct a "fishing expedition" for assets in the context of an initial proceeding to discover assets "if it is based on a belief that such assets are in the third party's possession."[13] It allows an extremely broad inquiry as to information that may lead to the discovery of a debtor's assets. In one notable case, the U.S. district court authorized the

use of citation discovery to investigate possible alter egos and fraudulent transfers, holding:

> … [the creditor] is merely seeking information about any potential alter egos of the defendants and any transfers of assets the defendants may have made to them. Such requests plainly may lead to information about the defendants' assets, and they are thus allowable.[14]

Rule 277(e) provides that the citation examination "… shall be before the court, or, if the court so orders, before an officer authorized to administer oaths designated by the court, unless the judgment creditor elects, by so indicating in the citation or subpoena served or by requesting the court to so order, to conduct all or a part of the hearing by deposition as provided by the rules of this court for discovery depositions." In practice, most citation examinations occur outside of court, using the rules for discovery depositions.

A citation continues until terminated by motion of the judgment creditor, court order, or satisfaction of the judgment. However, it ***automatically*** terminates six months from the date of (1) the citation respondent's first personal appearance pursuant to the citation or (2) the citation respondent's first personal appearance pursuant to subsequent process issued to enforce the citation, whichever is sooner. The court may grant extensions beyond the six months as justice may require. Orders for the payment of money continue in effect notwithstanding the termination of the proceedings until the judgment is satisfied or the court orders otherwise.[15]

Once a party discovers assets, the citation statute gives the creditor several remedies to freeze, seize and squeeze those assets. We discuss citation remedies later in these materials.

B. Non-Wage Garnishments (735 ILCS 5/12-701, et. seq.)

In football terms, a non-wage garnishment lets a judgment creditor "intercept" the judgment debtor's assets held by a third party (the "garnishee"). Non-wage garnishments are most useful when the judgment creditor already knows where the debtor has bank accounts and/or brokerage accounts containing liquid cash and/or marketable securities, or if the debtor has whole life insurance policies. However, we find non-wage garnishments inferior to citations for the following reasons.

First, garnishments affect only certain types of property.[16] The property rights must be of a legal, rather than an equitable character, so beneficial and equitable estates or interests cannot be garnished.[17] Intangible personal property, such as beneficial interests in land trusts, seats on exchanges and private club memberships have been held to be outside the scope of garnishment proceedings.[18]

Second, garnishment requires an indebtedness ***presently due and owing*** from the garnishee to the debtor at the

getting plaintiffs continued on page 46

getting plaintiffs continued from page 45

time the garnishment answer is filed.[19] Garnishment cannot recover contingent debts, or debts that may become due in the future.[20] Garnishment is an ineffective remedy when the judgment creditor seeks a contingent or an unliquidated asset, and the trial court need not decide claims based on unliquidated assets.[21] A creditor cannot recover money from the garnishee unless there a legal obligation exists that the debtor could enforce.[22]

Third, garnishment does not work to acquire information effectively. In one case, the creditor served garnishments on twenty-seven banks in Chicago and Evanston seeking assets of the debtors. The garnishee need only answer the garnishment interrogatories submitted with the garnishment summons. The court dismissed the garnishments, holding that the creditor could not have reasonably believed that the debtors held funds in every bank as alleged in the affidavits of garnishment.[23]

C. Wage Deductions (735 ILCS 5/12-801, et. seq.)

As its name suggests, a wage deduction lets a judgment creditor force the debtor's employer to deduct a portion of the debtor's wages, and then to pay the deducted funds to the creditor. Wage garnishments are most useful when the judgment creditor already knows where the judgment debtor works. Wage deduction orders have the effect of a judgment and are enforceable as judgments.[24] A wage deduction continues until the debt is fully satisfied, the employment terminates, or the underlying judgment is modified or vacated.[25]

The statute[26] defines the following terms used in the wage deduction statutes that pertain to our discussion:

- "**Deduction order**" means an order entered pursuant to Section 12-811.
- "**Employer**" means the person named as employer in the affidavit filed under Section 12-805.
- "**Judgment creditor**" means the recipient of any judgment, except a judgment by confession which has not been confirmed.
- "**Judgment debtor**" means a person against whom a judgment has been obtained.
- "**Wages**" means any hourly pay, salaries, commissions, bonuses, or other compensation owed by an employer to a judgment debtor.

The key definitions in this list are "employer" and "wages," which are much broader in the wage deduction context than in other areas of the law. The first district has deemed an independent contractor as an "employee" under the wage deduction statute and able to assert statutory exemptions.[27] In doing so, the court relied on the definitions in §12-801. Therefore, a party that is not an "employer" under the standard tests for an employment relationship may be served with a wage deduction as an "employer." That employer must answer the wage deduction proceedings and withhold wages from its employee, or potentially face a conditional judgment entered against it.

Under Illinois law, the amount of wages available for collection is 15 percent of the debtor/employee's gross wages or the amount by which disposable earnings for a week exceed 45 times the greater of the federal and Illinois minimum wage.[28]

VIII. Perfection of Liens

Debtors often disagree with judgments against them and engage in shenanigans to frustrate collection. Therefore, once the judgment creditor's lawyer finds assets of the judgment debtor, the next step is to prevent those assets from getting away. This requires a working knowledge of how to perfect various types of liens relating to judgments.

A. Judgment Liens Against Real Estate

The statute governing judgment liens against realty[29] reads as follows, in relevant part:

> As to real estate [not subject to the Torrens Act], a judgment is a lien on the real estate of the person against whom it is entered in any county in this State, including the county in which it is entered, only from the time a transcript, certified copy or memorandum of the judgment is filed in the office of the recorder in the county in which the real estate is located. …

Recording a judgment in the county where the debtor is located provides an easy and inexpensive way to protect one's judgment rights, and the creditor's lawyer who fails to record does a real disservice to his/her client.

A recorded judgment lien puts a "brick" on all realty in that county and often forces the judgment debtor to pay up. For example, an individual judgment debtor wishing to sell his house will find it impossible to do so without either obtaining a release of the judgment lien or posting a "T.I." (title indemnity) bond with the title company. Having a perfected judgment lien under these circumstances often results in a panicked request for a payoff letter from the real estate lawyer representing the judgment debtor, who typically offers to pay the debt from the closing proceeds.

A judgment lien perfected by recording also taints the judgment debtor's credit, making it more difficult (and expensive) for the debtor to borrow money. This often encourages debtors in interest-sensitive industries to resolve their outstanding judgment debts.

B. Garnishment/Wage Deduction/ Citation Liens

1. Non-wage garnishment liens

The service of a garnishment summons creates a "garnishment lien," which requires the garnishee to hold non-exempt property.[30]

getting plaintiffs continued on page 48

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getting plaintiffs continued from page 46

2. Wage deduction liens

Similarly, the service of a wage deduction summons creates a "wage deduction lien," which requires the employer to deduct and hold non-exempt wages.[31] The creditor's lawyer also serves wage deduction interrogatories upon the employer with the summons.[32]

3. Citation liens

Service of a citation to discover assets creates and perfects a "citation lien," which binds nonexempt personal property, including money, choses in action, and effects of the judgment debtor. The lien established under this section does not affect the rights of citation respondents in property prior to the service of the citation upon them and does not affect the rights of *bona fide* purchasers or lenders without notice of the citation. The lien is effective for the duration of the citation.[33] When the citation is directed against the judgment debtor, the citation lien attaches upon all personal property belonging to the judgment debtor in his/her/its possession or control, or which may thereafter be acquired or come due to the judgment debtor to the time of the disposition of the citation.[34] When directed against a third party, the citation lien attaches to all personal property belonging to the judgment debtor in the possession or control of the third party or which thereafter may be acquired or come due the judgment debtor and comes into the possession or control of the third party to the time of the disposition of the citation.[35]

Always keep in mind that (1) a citation lasts only six months from the citation respondent's first personal appearance, and (2) a citation lien usually lasts only as long as the citation remains in force.[36] Therefore, the judgment creditor must work quickly to acquire citation discovery and take appropriate steps to preserve the citation lien, if necessary.

C. Judicial Liens

If a creditor discovers personal property of the judgment debtor that is subject to the citation lien, the creditor may have the court impress a lien against a specific item of personal property, including a beneficial interest in a land trust. The lien survives termination of the citation proceedings and remains as a lien against the personal property in the same manner that a judgment lien recorded against real property pursuant to 735 ILCS 5/12-101 remains a lien on real property. If the judgment is revived before dormancy, the lien shall remain. A lien against personal property may, but need not, be recorded in the office of the recorder or filed as an informational filing pursuant to the UCC.[37] This "judicial lien" provides a powerful continuing lien on all personal property subject to the citation. We find judicial liens especially useful where the debtor is a plaintiff in a separate lawsuit and/or arbitration case. In such cases, we typically move to intervene in the other case and spread our judicial lien of record; doing so places our client in position to intercept any proceeds from the debtor's case.[38]

IX. Executing on the Debtor's Assets

A. Turnover Orders

1. Wage deductions

The service of a wage deduction summons and interrogatories upon an employer requires the employer to:

> … file, on or before the return date or within the further time that the court for cause may allow, a written answer under oath to the interrogatories, setting forth the amount due as wages to the judgment debtor for the payroll periods ending immediately prior to the service of the summons and a summary of the computation used to determine the amount of non-exempt wages. Except as provided in subsection (b-5), the employer shall mail by first class mail or hand deliver a copy of the answer to the judgment debtor at the address specified in the affidavit filed under Section 12-805 of this Act, or at any other address or location of the judgment debtor known to the employer.

If the employer files an answer indicating that it can make deductions from the debtor's wages, the creditor's lawyer should prepare a wage deduction order and ask the court to enter it on the return date.[39]

If an employer fails to appear and answer the wage deduction, the court may enter a conditional judgment against the employer for the full amount due on the judgment against the judgment debtor. The creditor should then ask the clerk to issue a summons to confirm the conditional judgment against the employer, returnable not less than twenty-one nor more than thirty days after the date of issuance, commanding the employer to show cause why the judgment should not be made final. If the employer, after being served with summons to confirm the conditional judgment or after being notified as provided in subsection (b) hereof, fails to appear and answer, the court shall confirm such judgment to the amount of the judgment against the judgment debtor and award costs.[40] If the employer appears and answers in response to the summons to confirm, the court typically vacates the conditional judgment and enters a wage deduction order on the employer's answer.

2. Non-wage garnishments

The service of a garnishment summons and interrogatories requires the garnishee to:

> … file, on or before the return date, or within the further time that the court for cause may allow, a written answer under oath to the interrogatories, setting forth as of the date of service of the garnishment summons any indebtedness due or to become due to the judgment debtor and

any other property in his, her or its possession, custody or control belonging to the judgment debtor or in which the judgment debtor has an interest. The garnishee shall mail, by first class mail, a copy of the answer to the judgment creditor or its attorney and to the judgment debtor at the address specified in the affidavit filed under Section 12-701 of this Act, or at any other address or location of the judgment debtor known to the garnishee and shall certify in the answer that it was so mailed to the judgment debtor.[41]

If the employer files an answer indicating that it is indebted to the debtor, the creditor's lawyer should prepare a garnishment order and ask the court to enter it on the return date.[42]

If the garnishee fails to answer, the court may enter a conditional judgment against the garnishee for the amount due upon the judgment against the judgment debtor. A summons to confirm the conditional judgment may issue against the garnishee, commanding the garnishee to show cause why the judgment should not be made final. If the garnishee, after being served with summons to confirm the conditional judgment or after being notified as provided in subsection (b) hereof, fails to appear and answer, the court shall confirm such judgment to the amount of the judgment against the judgment debtor and award costs.[43] If the employer appears and answers in response to the summons to confirm, the court typically vacates the conditional judgment and enters a garnishment order on the garnishee's answer.

3. Citations to discover assets

The citation statute governs the enforcement procedure in supplementary proceedings, and reads as follows, in relevant part:

> When assets or income of the judgment debtor not exempt from the satisfaction of a judgment, a deduction order or garnishment are discovered, the court may, by appropriate order or judgment:
>
> (1) Compel the judgment debtor to deliver up, to be applied in satisfaction of the judgment, in whole or in part, money, choses in action, property or effects in his or her possession or control, so discovered, capable of delivery and to which his or her title or right of possession is not substantially disputed.
>
> (2) Compel the judgment debtor to pay to the judgment creditor or apply on the judgment, in installments, a portion of his or her income, however or whenever earned or acquired, as the court may deem proper, having due regard for the reasonable requirements of the judgment debtor and his or her family, if dependent upon him or her, as well as any payments required to be made by prior order of court or under wage assignments outstanding; provided that the judgment debtor shall not be compelled to pay income which would be considered exempt as

getting plaintiffs continued on page 50

getting plaintiffs continued from page 49

wages under the Wage Deduction Statute. The court may modify an order for installment payments, from time to time, upon application of either party upon notice to the other.

(3) Compel any person cited, other than the judgment debtor, to deliver up any assets so discovered, to be applied in satisfaction of the judgment, in whole or in part, when those assets are held under such circumstances that in an action by the judgment debtor he or she could recover them in specie or obtain a judgment for the proceeds or value thereof as for conversion or embezzlement. A judgment creditor may recover a corporate judgment debtor's property on behalf of the judgment debtor for use of the judgment creditor by filing an appropriate petition within the citation proceedings.

(4) Enter any order upon or judgment against the person cited that could be entered in any garnishment proceeding.

(5) Compel any person cited to execute an assignment of any chose in action or a conveyance of title to real or personal property or resign memberships in exchanges, clubs, or other entities in the same manner and to the same extent as a court could do in any proceeding by a judgment creditor to enforce payment of a judgment or in aid of the enforcement of a judgment.

(6) Authorize the judgment creditor to maintain an action against any person or corporation that, it appears upon proof satisfactory to the court, is indebted to the judgment debtor, for the recovery of the debt, forbid the transfer or other disposition of the debt until an action can be commenced and prosecuted to judgment, direct that the papers or proof in the possession or control of the debtor and necessary in the prosecution of the action be delivered to the creditor or impounded in court, and provide for the disposition of any moneys in excess of the sum required to pay the judgment creditor's judgment and costs allowed by the court.[44]

This statute empowers the judgment creditor to obtain any wage deduction order or garnishment order, as well as a turnover order requiring the debtor or a third party to turn over any assets owned by or owed to the debtor.

B. Levies

The levy is a venerable drastic remedy; it authorizes the sale of the debtor's property to satisfy a judgment. The levy is the modern-day equivalent of the writ of execution or *fieri facias*. Under a modern-day levy the sheriff is ordered to seize and sell the debtor's property and account for the proceeds to the creditor.[45] Having said that, we find it cumbersome and far less useful than a citation. For one thing, the creditor cannot establish a lien on the personal property of the debtor until the creditor delivers a certified copy of the judgment to the sheriff.[46] For another, the creditor must post a bond before the sheriff will execute on the levy.[47]

C. Charging Orders

Charging orders may provide a remedy where the creditor cannot seize the debtor's ownership interest in a particular asset, such as an LLC membership interest (*see* discussion below). Instead, a charging order creates a lien upon the debtor's distributional interest and intercepts all income payable to the debtor.

X. Dealing with Debtor "Shenanigans"

A. Enforcement of Citations

A collection court may enforce citation liens through its contempt power.[48] If the citation respondent is a corporate entity, collection courts may hold its corporate officers individually liable for citation lien violations.[49] Our supreme court has held that:

> A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt.[50]

B. Avoidance of Fraudulent Transfers

As noted above, debtors facing a massive civil judgment often resort to shenanigans to frustrate collections, including fraudulent transfers of their property to friends, relatives, related companies and other insiders. The terms "fraudulent transfer" and "fraudulent conveyance" refer to a debtor's dissipation of assets to thwart a creditor's ability to collect on a debt. For example, consider the following scenario: On day one, Debtor has a net worth of $100,000, which he holds in a bank account. On day two, Creditor takes a judgment against Debtor for $75,000. On day three, Debtor gives his wife the $100,000 cash. Having given away all of his valuable property, Debtor later testifies at a citation hearing that he cannot afford to pay Creditor's judgment because he has insufficient assets. Illinois considers such dissipation by a debtor a fraud on the debtor's creditors.[51]

A claim under the Uniform Fraudulent Transfer Act (UFTA)[52] depends on a "transfer" of property having occurred.[53] If no transfer has taken place, there is nothing to avoid or recover.[54] UFTA §2(*l*) defines the term "transfer" broadly, to include:

> every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease,

and creation of a lien or other encumbrance.[55]

The basis of any suit to set aside a fraudulent transfer is the debtor's depletion of his or her own net worth to a point at which he or she cannot fully repay the claims of creditors. Whenever a debtor claims insolvency as a basis for nonpayment of a judgment or other claim, the alert creditor's attorney should use discovery to determine (1) whether the debtor has recently transferred any valuable assets and/or incurred a large debt, (2) the identity of the transferee and/or holder of that recent debt, and (3) the consideration, if any, received for that transfer and/or debt. If the debtor recently divested himself or herself of property without receiving adequate value by conveying it into a trust, giving it away to relatives, paying a suspicious large debt, etc., the creditor's attorney should investigate whether the transfer can be set aside as a fraud on the creditor.

Illinois recognizes two basic categories of fraudulent transfers. A debtor commits "fraud in fact" by engaging in a transaction for which the debtor does not receive reasonable value and either (a) transferring assets with the actual intent to hinder, delay, or defraud any creditor or (b) engaging in a business or transaction for which the remaining assets of the debtor are unreasonably small in relation to the business or transaction. A debtor commits "fraud in law" when the transfer of assets has the effect of hindering, delaying, or defrauding any creditor, irrespective of whether the debtor actually intended to hinder, delay, or defraud the creditor.[56]

Fraudulent transfer litigation can get ***extremely*** complicated and presents another practice area for "dabblers" to avoid. If you suspect a fraudulent transfer by the judgment debtor, consult a UFTA litigator.

XI. Conclusion

The post-judgment phase of a case involving an excess judgment may become "round two" of litigation. Collecting excess judgments often proves difficult and involves areas of the law that most injury lawyers simply do not see in their day-to-day practice. The foregoing article discusses some of the basic issues and collection techniques that we use to help our injury lawyer colleagues turn their judgments into cash, so they can monetize their hard work and courtroom successes.

Endnotes

1 *See Bond v. Long*, 338 Ill.App. 1, 4-5 (4th Dist. 1949) ("It is necessary that every execution should have a judgment to support it, and that it should appear from the execution what judgment is intended to be enforced. *** The judgment is the foundation of the execution").

2 *See Wilson-Jump Co. v. McCarthy-Hundrieser and Assoc., Inc.*, 85 Ill.App.3d 179, 182-83 (1st Dist. 1980).

3 735 ILCS 5/2-1202(d).

4 735 ILCS 5/2-1203(b).

getting plaintiffs continued on page 52

getting plaintiffs continued from page 51

[5] *John G. Phillips & Assoc. v. Brown*, 197 Ill. 2d 337, 340 (2001) ("… since a motion for sanctions under Rule 137 is a 'claim,' and a notice of appeal cannot be filed before the trial court has disposed of all claims, a notice of appeal cannot be filed before the trial court has ruled on all Rule 137 motions"). *Marriage of Gutman*, 232 Ill.2d 145, 151 (2008); *John G. Phillips* at 339-40 (characterizing Rule 137 motions as "… the functional equivalent of adding a count to a complaint or counterclaim").

[6] *See Niccum v. Botti, Marinaccio, DeSalvo & Tameling, Ltd.*, 182 Ill.2d 6 (1998).

[7] *See Strahs v. Tovar's Snowplowing, Inc.*, 349 Ill.App.3d 634 (1st Dist. 2004); *Estate of Wrigley*, 104 Ill.App.3d 1008, 1015-16 (1st Dist. 1982) ("Once this severance was ordered, the practical effect was the creation of two distinct cases. The judgment on Count I was final as to that case. We find Rule 301 applicable to this circumstance to serve as the basis for an appeal from that judgment").

[8] *See Carter v. Chicago & Illinois Midland Railway*, 119 Ill.2d 296, 307-08 (1988).

[9] 735 ILCS 5/2-1402(a).

[10] *Id.*

[11] S.Ct.Rule 277(c)(4).

[12] *Bloink v. Olson*, 265 Ill.App.3d 711 (2nd Dist. 1994).

[13] *Regan v. Garfield Ridge Trust & Sav. Bank*, 247 Ill.App.3d 621, 624 (2nd Dist. 1993).

[14] *JPMorgan Chase Bank v. PT Indah Kiat Pulp & Paper*, 2012 WL 2254193, *3 (N.D.Ill. June 14, 2012).

[15] Rule 277(f).

[16] *Capes v. Burgess*, 135 Ill. 61 (1890).

[17] *May v. Baker ex rel. Robbins*, 15 Ill. 89 (1853).

[18] *Netter v. Board of Trade of City of Chicago*, 12 Ill.App. 607 (1st Dist. 1883).

[19] *Baird v. Senne*, 13 Ill.App.3d 226 (1st Dist. 1973).

[20] *Zimek v. Illinois Nat. Casualty Co.*, 370 Ill. 572 (1939) ("the indebtedness sought to be [garnished] must be a liquidated sum due without contingency at the date when the answer to the garnishment suit is filed").

[21] *Stevenson v. Samkow*, 142 Ill.App.3d 293 (1st Dist. 1986).

[22] *See Cole v. Shanior*, 69 Ill.App.3d 505 (1st Dist. 1979) ("to impose a liability upon a garnishee, there must be an equivalent liability by the garnishee to the judgment debtor as would enable the judgment debtor to maintain an action directly against the garnishee in his own name, for his own use, and to recover a judgment against the garnishee").

[23] *Cohen v. North Avenue State Bank*, 304 Ill.App. 413 (1st Dist. 1940).

[24] 735 ILCS 5/12-802.

[25] 735 ILCS 5/12-808(b).

[26] 735 ILCS 5/12-801.

[27] *California-Peterson Currency Exchange, Inc. v. Friedman*, 316 Ill.App.3d 610 (1st Dist. 2000).

[28] 735 ILCS 5/12-803.

[29] 735 ILCS 5/12-101.

[30] 735 ILCS 5/12-707(a).

[31] 735 ILCS 5/12-808.

[32] 735 ILCS 5/12-805(a).

[33] 735 ILCS 5/2-1402(m).

[34] 735 ILCS 5/2-1402(m)(1).

[35] 735 ILCS 5/2-1402(m)(2).

[36] S.Ct.Rule 277(f).

[37] 735 ILCS 5/2-1402(k-10).

[38] Any creditor attorney thinking about judicial liens should also review *Podvinec v. Popov, et al.*, 168 Ill.2d 130 (1995).

[39] 735 ILCS 5/12-808(e).

[40] 735 ILCS 5/12-807(a).

[41] 735 ILCS 5/12-707(b).

[42] 735 ILCS 5/12-718.

[43] 735 ILCS 5/12-706(a).

[44] 735 ILCS 5/2-1402(c).

[45] *See Marriage of Rochford*, 91 Ill. App.3d 769 (1st Dist. 1980).

[46] 735 ILCS 5/12-111.

[47] 735 ILCS 5/12-161.

[48] 735 ILCS 5/2-1402(f)(1) ("The court may punish any party who violates the restraining provision of a citation as and for a contempt …"); S.Ct.Rule 277(h) ("Any person who fails to obey a citation, subpoena, or order or other direction of the court issued pursuant to any provision of this rule may be punished for contempt. …").

[49] *See City of Chicago v. Air Auto Leasing Co.*, 297 Ill.App.3d 873 (1st Dist. 1998).

[50] *People v. Rezek*, 410 Ill. 618, 628 (1951), (*quoting Wilson v. United States*, 221 U.S. 361, 543 (1911).

[51] In *Birney v. Solomon*, 348 Ill. 410 (1932), the Illinois Supreme Court stated the proposition more eloquently: "The doctrine is firmly declared to be that one must be just before he is generous." *Accord Falcon v. Thomas*, 258 Ill.App.3d 900 (4th Dist. 1994).

[52] 740 ILCS 160/1, *et seq.*

[53] *E.g.*, *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 Ill.App.3d 179 (1st Dist. 2010) ("The gravamen of the fraudulent transfer counts in this case is the transfer of proceeds.").

[54] *Edgewater Medical Center v. Edgewater Property Co. (In re Edgewater Medical Center)*, 373 B.R. 845, 852 (Bankr.N.D.Ill. 2007).

[55] 740 ILCS 160/2(*l*).

[56] *Falcon v. Thomas*, 258 Ill.App.3d 900 (4th Dist. 1994) (test is whether conveyance directly tended to or did impair rights of creditors).

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