

SILVERMAN  THEOLOGOU

THE COLLECTIONS ROUNDTABLE

Turning Judgments into Payments

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## What Some of Our Clients Have Been Told by Lawyers

“A judgment is an investment in the future. The judgment accumulates interest and will be paid when the judgment debtor seeks to buy a house, or a car, and they will then call you up to see how much the judgment is and pay it. All you have to do is, keep renewing the judgments, wait and, eventually you will get paid.”



## Judgment Reality

- Of the thousands of judgments Silverman Theologou, LLP has taken for clients for the last twenty-five years, only a handful have been paid voluntarily and without creditor effort.
- Obtaining the judgment is usually the easy part in consumer collections. The real work begins in attempting to turn the judgment into money.



## What a Judgment Is

- A court order establishing liability of one or more parties to another.
- This order avails the plaintiff of judicial procedures to attempt to enforce that judgment against the debtor's personal property.
- A Judgment can typically be used to create liens on real property belonging to the debtor.
- A Judgment can be domesticated in all 50 states for enforcement.



## What a Judgment Is Not

- A cash award
- An ATM machine for the Plaintiff
- A self-enforcing mechanism
- Permanent
- Immune from Bankruptcy
- Immune from Exemptions
- Always Paid
- A relaxing stress-free experience for the judgment creditor
- An investment in the future

# § Judicial Procedures for Enforcement

- Wage Garnishment
- Personal Property Garnishment
- Personal Property Seizure
- Judicial Liens and Real Property Seizure
- Till Tap/Cash Register Levy from a business.
- Examinations of the debtor
- Renew the Judgment
- Confessed for commercial loans
- Out of state garnishments



# Confessed vs. Non-Confessed Judgments

## Highlights

- Confessed Judgments permit commercial lenders to obtain a judgment by filing a single form with the court.
- Once judgment is entered and served, the judgment may (usually) be enforced in 30 days.
- Accounts where a confessed judgment is not permitted, a suit must be filed, service obtained, a court date scheduled and a hearing attended.
- Confessed judgments are entered immediately, Non-Confessed judgments can take between 6 – 9 months to be entered.
- Non-confessed judgments are required for consumer loans.

## Practical Tips

- Credit Applications (or a guaranty, note, etc.) must contain a provision for confessing judgment.
- Most jurisdictions require specific language to obtain confessed judgment.
- Execution on a confessed judgment is usually stayed for 30 days pending the appeal process (same as non-confessed judgment).
- Some states require the debtor's counsel to sign a confessed judgment.



# Wage Garnishment

- Garnishment is a fancy word for “seizure order.”
- The person or entity holding the property seized is often called the “garnishee.” Another way to say this is the “judgment creditor” takes the property of the “judgment debtor” from the “garnishee.”
- Wage garnishments are the most successful tool in collecting debts through the judicial process for consumer debtors:
  - Directs an employer to seize or withhold a portion of the debtor’s pay
  - Funds are paid to the creditor or to the court for creditor collection, depending on the state
  - Most states set the amount of a wage garnishment at a certain percentage of the debtor’s disposable income and restrict garnishment payments to that amount (usually is less than 25%)
  - Not all states allow wage garnishments including PA, NC, SC, and TX
  - Some states requires to be renewed over a certain period



# Challenges to Wage Garnishment

- Exemptions (to be covered in a later slide).
- Typically limited to 25% of net take home pay.
- Other Judgment creditors may be ahead of you.
- Child support garnishments are given priority.
- The judgment creditor must figure out who the employer is.
- This information can also be asked at debtor examinations to be discussed later.
- For some states like Virginia the wage garnishment must be renewed.
- Garnishing a self-employed person with a business entity - the individual may have to be hauled into court if they do not provide the information about their business because in essence they have to garnish themselves.



## Case Study and Exercise Scenario

- Judgment Debtor lives in Pennsylvania but works in Maryland. PA does not allow for wage garnishments, but MD does. Can the debtor's wages be garnished?
- What if the Judgment Debtor lives in MD but works in PA?
- Does it matter if the employer of the Debtor is a national company with offices in both states?

# § Case Study and Exercise Conclusion

- While state specific and somewhat unclear, courts want a connection between the judgment debtor, the property being seized, and the state of judgment enforcement. *Livingston v. Maylor* 173 Md. App. 488.
- That case involved a NC Judgment against a Marriot employee, a NC debtor, where wage garnishment is not permissible. The judgment creditor domesticated the judgment in Maryland and attempted to garnish the Marriot wages of the NC debtor in MD. Because the resident did not live in MD or receive the wages in MD, the garnishment was limited only to earnings in MD.
- This means that the debtor must work or live in a state that allows for a wage garnishment. If the PA debtor worked in MD, then the MD wages could be garnished in a MD court. If the MD debtor worked in PA, those wages could possibly be garnished if jurisdiction over the garnishee could be established in MD. However, the court did not address this issue.

# Personal Property Garnishment

- Property garnishment orders are most commonly used to seize bank accounts or other sources of revenue such as money owed to a judgment debtor landlord.
- Directs a garnishee to freeze debtor's funds and release them to the creditor up to the amount of the judgment
  - Debtor and the garnishee have the ability to object payment.
  - The property seized must be subject to the jurisdiction of the Court issuing the order otherwise the garnishment order may be ignored by the garnishee.
- If the garnishee fails to answer or properly answer a garnishment summons, a court may then enter a judgment against the garnishee in favor of the judgment creditor.

# § Challenges to Property Garnishments

- Information and speed.
  - If the judgment debtor knows that the judgment creditor is aware of where their property is, they can move the property before the judgment creditor has time to get the court order to the garnishee to freeze the funds.
  - Please provide your counsel with SSN, bank account numbers and any other information that can assist in discovering the location of bank accounts without the debtor's knowledge.
  - Some states use a "snapshot approach" where the only amount the creditor has to hold is the money in the account when the garnishment is received.
  - Other states use a "perpetuity" approach where the garnishee must hold all money that comes into that account.
- Tenancy by the Entirety may block a Garnishment
  - In the Mid-Atlantic region, if a bank account is owned by a married couple, it is most likely designated a "TBE" account.
  - The judgment must be against both spouses in order for a judgment creditor to garnish a TBE account.



## Case Study and Exercise Scenario

- Credit Union receives a bank garnishment of a member from a court in a state where it has no physical branches/ATMs. Should it respond to the garnishment?
- Credit Union receives the garnishment that is incomplete or filled out incorrectly. Should it respond?
- Credit Union receives a garnishment against debtor A only on a joint account between A and B. Garnishable?
- If A and B are married, does the credit union have to bring up the TBE defense?
- Credit Union receives two garnishments on the same day in different cases for the same debtor?



## Case Study and Exercise Conclusion (continued)

- Out of state garnishments – it depends.
  - While not addressed by many courts, the states that have addressed this issue hold that any obligation, such as a bank account, owed by a garnishee to a judgment debtor can be pursued by a judgment creditor in any state where the issuing court has personal jurisdiction over the garnishee.
  - Personal jurisdiction is defined by each state and by case law interpreting the due process clause of the U.S. Constitution in applying the long arm statutes. Some state’s long arm statutes are very broad and cover “any business transactions in the state.”
  - Among other factors in applying due process to the application of the long arm statutes, the concept of “purposeful availment” of the person or entity to the state in which the legal proceeding is being pursued is paramount. In other words, is it foreseeable that the credit union will be subject to litigation in that state based upon its conduct?



## Case Study and Exercise Conclusion (continued)

- Increasingly, credit unions are expanding their businesses operations beyond their state of origin. Judgment creditors are seeking to garnish accounts in states where credit unions operate “affiliate” branches as a basis for jurisdiction, and a target of an instate court order. While there is any physical location of the credit union, or its agents, the out of state garnishment forms most likely will have to be honored. These credit unions are “purposefully availing themselves” to be sued in these states.
- This may be contrasted to a credit union with limited scope of operation and a member who simply leaves for another state. It is possible that the new state to which the debtor moves does not have personal jurisdiction over the credit union. ☐ If the credit union decides not to answer, it risks a judgment being entered against it for failing to answer.
- If jurisdiction is to be challenged, it is best to do so in the court where the garnishment is issued to prevent a judgment from being entered in the first place rather than challenging it later.



## Case Study and Exercise Conclusion (continued)

- **Best Practice for Judgment Creditors on Foreign Garnishments**

- If personal jurisdiction is an issue, the judgment creditor has the option of “domesticating” the judgment in the target state. By doing so the judgment creditor now has the full power of the new court to enforce that judgment.
- Failing to domesticate the judgment puts the judgment creditor at the risk that jurisdiction could be challenged and can slow down the enforcement of the judgment.
- The best practice for the judgment creditor is to domesticate the judgment where the debtor banks and has assets for seizure.

- **Best Practice for Garnishees Receiving Foreign Judgments**

- Contact counsel regarding out of state garnishments.
- Complete garnishments issued from states where the credit union actively solicits/conducts business, even if the credit union does not have direct branches in that state.



## Case Study and Exercise Conclusion (continued)

- Incomplete Garnishments - Garnishments should be responded to even if they are incomplete with the missing/incorrect information identified.
- Joint Accounts - unless the debtors are married and the account is TBE, the joint account may be seized for the garnishment of one of the accounts.
- Defenses - it is the credit union's option whether or not to raise a defense to a garnishment. It can leave it up to the member if it chooses.
- Multiple Garnishments - the garnishment received first must be honored first.



# Personal Property Attachment

- This remedy directs the sheriff or other official to seize personal property and levy or auction that property to satisfy the judgment.
- This is typically used for automobiles, boats or big ticket items.
- They can be obtained in any jurisdiction where the judgment has been recorded.
- The assets to be attached must be located in the jurisdiction where the writ is issued.
- To distinguish from a Replevin or Debtinue action, this involves a forced sale by the Sheriff while a Replevin/Debtinue simply involves a transfer of possession.

## **Challenges**

- Usually a sheriff's sale of this kind attracts little attention and few bids.
- Exemptions (more on this later) can be used to exempt property.
- There are seldom sufficient proceeds to pay off a judgment.
- Apathy of law enforcement for these types of seizures.
- If an item seized has a perfected lien, that lien will take precedent in the sale.
- The order must be from the court where the property is located.



# Judicial Liens

- Depending on the court, these liens can either automatically attach to any real property located in the jurisdiction where judgment is entered or a copy of the judgment has to be recorded in land records for that given county.
- Creditor can request that the real property which the judgment lien has attached be sold and the proceeds used to satisfy the judgment. Often this is called a judicial foreclosure.

## Challenges

- Prior liens such as mortgages will usually take up all of the equity to seize.
- Homestead exemptions (more on this later).
- Usually a judicial sale is costly and slow in developing.
- Judgment liens are most effective when the debtor attempts to later convey the real property or refinance.
- Judgment liens can prevent a debtor from refinancing or selling their home.
- Bankruptcy often wipes out these liens.



## Other Post-Judgment Procedures

- **Till Tap/Cash Register Levy from a Business.**

If the debtor is a business, then the judgment creditor can direct the Sheriff to go to the business to seize all the money in the cash register.

- **Examinations of the Debtor.**

The Judgment Creditor may bring the Judgment Debtor into court to answer questions under oath and provide financial documentation on the debtor's assets. If they do not provide that information, a judgment debtor may be held in contempt and sent to jail.

- **Judgment Renewals.**

Judgments do not last forever. They must be timely renewed depending upon the requirements in the state where the judgment is located (usually at 10 to 12 year intervals).

# § Case Study and Exercise Scenario

- A and B owe money on a car, a credit card, and a balance on an old now unsecured HELOC. A single judgment is taken on all three loans. Both A and B work, and they own a home. Which post judgment remedy can the debtor use?
- If a consensual lien on a vehicle still exists in the event of a judgment, can the credit union still repossess the vehicle without court order? Would it matter if the case was prejudgment?
- A judgment debtor deposits money in an account with the same institution as the judgment creditor. Does the judgment creditor have to then garnish itself?



# Case Study and Exercise Conclusion

- The post judgment judicial remedies are not exclusive. All can be pursued simultaneously.
- Non-judicial remedies such as the right of setoff and the right of repossession are not impacted by litigation, including post-judgment proceedings. They are independent remedies and can work together.
- A creditor can use the setoff to take money it comes into possession of - judgment or not.



## Non-Judicial Remedies

- Right of Setoff - the right to seize money in possession of the credit union in the accounts.
- Right to Repossess - at any time during a judicial proceeding or post judgment. The post judgment process can aid in finding information that can be used by the repossession. Examples of this include figuring out the location of the debtor's vehicle in an oral exam and then relaying that information so the vehicle can be repossessed.
- Cross-collateralization clauses also may be enforced regardless of who is in the judgment or not.
- The benefits of using these methods is that they are much faster than the judgment enforcement process and are not subject to exemptions.



# EXEMPTIONS

- States put caps on how much money judgment creditors may seize from judgment debtors through the use of post judgment procedures previously described – these exemptions vary widely from state to state. Here are some examples:
- Homestead Exemption—blocks judicial liens on the debtor’s home.
  - PA - no homestead exemption.
  - DC - unlimited homestead exemption.
- Wildcard exemption—any property whatsoever:
  - CA - \$26,925.00
  - MD - \$6,000.00
- Firearms
  - VA - 1 firearm with a \$3,000.00 cash limit
  - TX - 2 firearms no cash limit
  - CA - no firearm exemption
- Social Security, unemployment and child support are also exempt, but if the funds are co-mingled with non-exempt funds the money may lose its exemption.
- The judgment debtor or the garnishee must bring the exemption and if there is a dispute, a judge will make a determination if the exemption applies.

# § Case Study and Exercise Scenario

- Judgment Debtor receives money from his parents intended to take care of their grandchild (his child) and claims a child support exemption. Is this exempt?
- Judgment Debtor receives social security intended for a disabled minor child in an account registered to the judgment debtor (not the minor child). Is this exempt?
- Judgment debtor keeps using a wildcard exemption to block a wage garnishment pay period after pay period. Will it ever end?



## Case Study and Exercise Conclusion

- A child support payment must be an actual child support payment related to a court order.
- While co-mingling of exempt funds and non-exempt funds puts at risk the exempt amount, and thus make the funds appear to be non-exempt, it is doubtful a court would uphold this seizure when the credit union has knowledge that the funds were essentially being held in trust for the minor.
- A debtor can use the wild card on a wage garnishment, they can only use the exemption once per judgment.



# Post Judgment and the Deceased

- Death of the judgment debtor severely limits enforcement of the judgment - no more garnishments.
- The judgment must be turned into a claim against the debtor's estate, assuming one is opened by a relative of the other creditor. Hopefully the estate will pay what the decedent refused to pay in life, but that rarely happens.
- Judicial liens against property can survive as long as the property was not owned TBE or with a Joint Tenancy with Right of Survivorship between multiple debtors, and the judicial lien is only as to one debtor. This is because upon death, the owner loses interest, it is not a transfer, in the property and there is no basis for the lien to continue.



## Case Study and Exercise Scenario

- A and B own property as spouses in TBE. A took out a loan without B's knowledge with the credit union and judgment was attained against A. After judgment, A dies. Is the lien still valid? What if A and B divorced prior A's death?
- X and Y own property as Joint Tenants. Y takes out a mortgage without X's knowledge to partially payoff a judgment against Y. Y dies. Is X in the clear?
- G and H own property as Joint Tenants. H is a judgment debtor and a judicial lien is placed on the property. After judicial foreclosure, H dies. G wants to rescind the foreclosure. Can G?



## Case Study and Exercise Conclusion

- A judicial lien is not enforceable against property TBE because it is only severable by divorce. Therefore, the judgment creditor of A should pray for A and B's divorce.
- Y is not in the clear because it is easy to sever a joint tenancy and taking on a mortgage removes the joint tenancy protection for judgment enforcement.
- The action of foreclosing on a joint tenancy severs the joint tenancy. As long as the foreclosure happened before H's death, G will not get protection.

# § Judgments in Community Property Cases

- Much of the Western United States uses a system of spousal ownership called “community property” which has impacts on judgments being enforced there.
- Spouses have 50-50 ownership of property acquired during the marriage, as well as joint liability for “community debt.”
- This means that even if spouse A took out a loan without spouse B’s knowledge, spouse B can still be personally liable for the community debt if it is community debt.
- For post judgment purposes on community debt, all community property can be seized to enforce that judgment, even if only one spouse actually signed for the debt.



# Bankruptcy and Post Judgment

- Bankruptcies automatically block all post judgment proceedings just as it would block a lawsuit from proceeding pre-judgment.
- If a judgment is entered post judgment after the automatic stay is in effect that judgment is void.
- Any property seized within the 90 days prior to the bankruptcy in the aggregate of >\$600.00 are preferences in consumer bankruptcy cases.
  - These monies are supposed to go to the Trustee
  - The debtor may exempt the property in the bankruptcy and thus get the garnished monies back
  - Check to make sure the debtor has not already used up their exemptions in Schedule C of the petition.
- If a judicial lien impairs an exemption claimed by the debtor, that lien is blocked to the extent it impairs the exemption.



## Case Study and Exercise Scenario

- Judgment creditor has a garnishment in effect on judgment debtor's wages. The judgment debtor's counsel sends a fax indicating that a bankruptcy case has been filed but never tells the state court or the garnishee and the garnishment continues. Can the judgment creditor get in trouble?
- Judgment Creditor receives a check for \$5,000.00 to settle a \$7,500.00 debt voluntarily from the Judgment Debtor. 89 days later, the debtor files for bankruptcy. Can the Trustee demand this money back as a preference?



## Case Study and Exercise Conclusion

- It is the judgment creditor's responsibility to stop any garnishment once the bankruptcy is filed, even if the debtor's attorney does not do anything to notify anyone.
- Preferences also include voluntary settlement payments and can also be exempted, thus the money can go back to the debtor.



For Additional Information



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