CLW COMMERCIAL LAW WORLD MAGAZINE

An Official Publication of the Commercial Law League of America

OCTOBER/NOVEMBER/DECEMBER 2023
VOL 37 / ISSUE 4

CREDITORS' RIGHTS

One feature of being a creditors' attorney is that I am never at a loss for how to answer when someone asks “what kind of law do you practice?” Rather than trying to explain how the extension of credit and subsequent collection are the oil which keeps the engine of capitalism humming, I usually just give an example of how what I do will fit into whatever business the person asking me the question does. When the dental hygienist asks, for instance, I can simply gesture at the complicated and clearly expensive equipment that he is using to clean my teeth and point out that very few people can pay cash for that kind of kit, so the result is that the dentist asks the seller or a finance company to front the money – and then sometimes that dentist won’t pay it all back. So whether it is for the seller or a finance company, and whether it is drafting the paperwork for the sale or trying to recover the equipment or the balance of the lease, my clients look to me to reduce the risk that they won’t get paid. And then I usually say that the result is that I end up knowing something about a very wide range of businesses and then get to learn about a new one next week.

All of which is a roundabout way of saying that creditors’ rights isn’t one kind of law for one kind of client but a slice of many kinds of law for many, many clients. And so it is with the creditors’ rights issue of CLW – a collection of articles about many different aspects of the law we deal with on a daily basis, some specific and some general, from a variety of sources. I like to think that there is something in this issue for just about everyone to read and consider.

In bringing the annual creditors’ rights issue together, we were able to secure several contributions from League members who haven’t been in these pages before. Matt Weisberg on Post-Judgment collection and Gil Singer on Offers and Demand for Judgment are just two. We also have another contribution about Florida law, courtesy of the Florida Bar Journal, which graciously allowed us to re-print is an article on the recently-enacted judgment lien laws. Similarly, two more new contributors bring us updates on state laws which will make our jobs harder – Danny Ford writing about the new exemption laws in Arizona and Lori Frank on Michigan’s similar legislative effort. Each of these is a cautionary tale and a call for vigilance in watching your state legislature - to prevent legislation aimed at “consumer protection” from spilling over into the commercial sphere. Because making it harder to recover from a deadbeat dentist in Arizona can have an impact on the cost of doing business everywhere, one of our regular tasks must be to make sure that pro-consumer legislation doesn’t end up being anti-business at the same time.

And I am personally very pleased to have members of our Board of Associate Editors contributing articles to this issue. In addition to Matt’s article, we have Lee Mendelson on workers’ compensation subrogation claims, an area of law that I had not really spent any time considering. And as proof that it was a total team effort this year, Board member Amy Pona brought Arizona’s Proposition 209 to our attention and secured Danny Ford’s article on it and Board member Michelle Gilbert Garcia read the Florida Law Journal article and secured their consent to include it in our magazine as well. Also, Patrick Kilburn has been serving as CRS liaison to the Board and his assistance securing articles (such as Gil’s and Lori’s) was also valuable.

And the process of bringing you issue 4 of volume 37 of this magazine would simply not be possible without the tireless contributions of Wanda Borges. From identifying outside sources we can use, and following up with contributors to get the articles submitted in the first place (possibly her most often-used talent), to her own contributions as a writer of both columns and substantive articles, to the time and attention she spends reading, re-reading and editing almost every word on almost every page, Wanda remains the driving force behind this endeavor.

And, finally, I have to note that with this issue we have to say goodbye to the most valuable member of the CLW team, our Editor Margaret Krafft. While this is a volunteer organization, it is the staff which keeps the place running. For the entire time I have been on the Board of Editors, Margaret has kept us on schedule (as best she can) to put out an issue every quarter, and does all the work to turn these words into a magazine – typesetting and layout, photo spreads, cover art, and getting it all to the printer. She has done it with grace and humor, calmly and cheerfully helping us get each issue from some fuzzy idea about a theme to finished product. She has been a delight to work with at every step. And so I can speak for every member of every Board of Editors in thanking her for all her hard work and saying “you will be missed. ■

Beau Hays
Co-Chair of the Board of Associate Editors

Beau

OCTOBER/NOVEMBER/DECEMBER 2023 | VOL 37 / ISSUE 4

IN THIS ISSUE

LEAGUE VIEWS

INDUSTRY INFORMATION

A NOT-SO-FUNNY THING HAPPENED ON THE WAY TO THE MY FIRST MEETING

It was late July. I had been the President of the League for just over 2 months, and I was starting to settle into my Presidential duties. The time had come for me to attend my first meeting as President. It was the IACC mid-year conference, and I was very much looking forward to representing the CLLA at the event. I had a full slate of meetings booked and I was ready to get to it. It would be a lot of work, but I wouldn't have to break my neck, as the old saying goes. Well...

The evening before the event was to begin, I was a back seat passenger in a ride-share car that was struck by another car at a fairly high speed. The car I was in was spun nearly 90 degrees from a standing-still position, and instantly the car was filled with broken glass and a powdery cloud from the airbag deployment. I was taken by ambulance to Northwestern Hospital where I spent the next several days being treated for a broken cervical vertebrae and numbness in my left hand and arm. I never made it to the conference. Needless to say, it was a very frightening experience.

Over the span of that 2+ days in the hospital, and the months of recovery, I have had a considerable amount of time to reflect on what had happened to me. I have often thought to myself, "There is a lesson to be taken from this." And I knew it was a deeper lesson than to appreciate life because it is fleeting, and tomorrow is never promised to us. Yes, of course that lesson always is an important one and we all need reminding of that. But I thought there had to be more to take away than that. And there is more. There are, in fact, many lessons that should be carried from an experience like this. Frankly as I sit at my desk typing this piece, I am not sure that I have yet realized the full benefit of all of those lessons, but I will share with you some of them.

First, be grateful for things you would otherwise take for granted. During my recovery, people would always ask me how I felt, and I would say, "Not great, but grateful." Sure, my neck was broken, and my hand was numb, but I could still walk. I could feed myself. I could speak. My mind was intact. Considering what could have happened, I was in great shape!

Second, no matter how bad you feel, someone else always has it worse. As I was lying immobilized on a bed in the ER, it was clear to me that, although I was in serious condition, my situation was not as bad as others. I was not experiencing what the man next to me was dealing with – I heard him tell the nurse (in a very animated and boisterous manner) that he had used an 8-ball of cocaine (about 3.5 grams) and drank a full handle (1.75 liters) of vodka over the span of four hours and did not understand why he was involuntarily admitted to the hospital. Or the woman a few beds down from me who was yelling frantically to see an eye-doctor and a mental health professional because she was seeing things and had the presence of mind to know that what she was seeing may be a result of a mental illness from which she was apparently suffering. Or the folks that I never saw or heard, but whose presence on the floor was announced by the radio calls from incoming EMTs, calling out gun shot wounds, stab victims or drug overdoses. Everyone there had it bad, and in most cases way worse than I did.

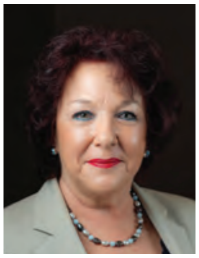
Third, accept help. As lawyers, many of us are driven, type-A, self-sufficient people who get things done. I know that is how I like to be. But this time I could not. I had to let the medical professionals take care of me. I had to let my family help me. I had to let friends and neighbors lend a hand too. Co-workers, partners, and employees all pitched in to help keep the office running smoothly. It became very clear, very quickly that I was not going to make it through this experience on my own. I needed help from other people. I wanted help from other people. The acceptance of help is both a humbling and an uplifting experience.

Finally, don't let annoyances and inconveniences get to you. Things happen for a reason, and you may not know what that reason is. Maybe that person who is driving slowly in the fast lane in front of you keeps you from going through that intersection at the same time as the drunk driver who would have hit you. While that slow driver may be testing your patience, maybe s/he is also saving your life. So don't label things that happen in your life as good or bad, or fair or unfair. Life is neither fair nor unfair. Life is arbitrary. People place the "fair" or "unfair" labels on the things that occur to them. In the immortal words of Paul McCartney's mother, as told to Paul in a dream, "Let it be."

In my last article I spoke about the power of positive thinking, and I suppose this article is really just an extension of that. So yes, cherish each day. But also be grateful. Be grateful for who you are, who you have, and who you help. That's the stuff that really matters. ■

Bill Thrush, Esq.
2023-2024 CLLA President
Weinstock, Friedman & Friedman, P.A.

OUR TEAM 2023-2024



Wanda Borges, Esq.
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Wanda is the principal member of Borges & Associates, LLC, a law firm based in Syosset, NY. For more than 40 years, Ms. Borges has concentrated her practice on commercial litigation and creditors' rights in bankruptcy matters, representing corporate clients and creditors' committees throughout the United States in Chapter 11 proceedings, out-of-court settlements, commercial transactions and preference litigation. **borgeslawllc.com**

Lorie J. Frank
Attorney, *Markoff Law LLC*
Lorie Frank's legal career has centered on retail and consumer creditor rights. After almost 25 years as a solo practitioner she was honored to join the Markoff Law team.
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Danny Ford
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Danny Ford is a resident of Cave Creek, Arizona and leads the Commercial Department for Gurstel Law Firm PC for its Arizona, Nevada, Utah, and Wyoming offices. His practice primarily focuses on business litigation and commercial collection. He is an avid car enthusiast and spends free time with his two golden retrievers.
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Beau Hays
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James W. "Beau" Hays is a 1986 graduate of the University of North Carolina School of Law, after receiving a B.A. in Political Science from UNC in 1983. He was admitted to the Georgia Bar in 1986, and has been admitted in the federal courts in all three districts in Georgia. He has acted as lead counsel in litigation matters for over twenty years, specializing in commercial disputes and bankruptcy law. Mr. Hays is a Past President of the Commercial Law League of America, having served as Recording Secretary of the League and Chair of the Creditor's Rights Section and chaired numerous committees. In addition to being active in the Bankruptcy Section of CLLA, he is an Associate Member of the National Association of Bankruptcy Trustees, and has been a presenter to that organization on issues involving hiring outside counsel. He has also served as Legislative Liaison for the Georgia Bar's Creditor's Rights Section. Mr. Hays is an editor for the National Association of Credit Management's Handbook of Credit and Commercial Laws, chapters related to materialman's liens and construction bonds.

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A Board Certified Creditors' Rights Specialist and contributing author to various legal publications with over 43 years of experience, spearheads the firm's practice.
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Lee M. Mendelson
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Lee M. Mendelson has twenty years of experience in the subrogation and debt collection industries. He is an active member of the National Association of Subrogation Professionals and has obtained the Certified Subrogation Recovery Professional designation from organization. He is also a former member of the Western Region Board of Directors of the Commercial Law League of America as well as the CLLA's Board of Associate Editors for the Depaul Unviverstiy Commercial Law Journal. Lee has presented on various topics including auto subrogation, workers' compensation, creditors' rights, negotiation and legal ethics. He graduated from Northwestern University School of Law in 1997 and earned his Bachelor of Arts at Emory University in 1994. **mendelsonlg.com**

Joseph A. Peiffer, Esq.
Shareholder, *Ag & Business Legal Strategies*
Joseph A. Peiffer has focused his practice on business bankruptcy for more than 30 years, and established Ag & Business Legal Strategies (formerly Peiffer Law Office, P.C.) in 2016. As someone who grew up on an Iowa family farm in Delaware County, Iowa, Joe Peiffer has a keen interest in agricultural law. He graduated from Iowa State University as the top graduate in his class studying Dairy Science, as well as Public Service and Administration. Peiffer received his law degree, with Distinction, from the University of Iowa.
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Gilbert M. Singer
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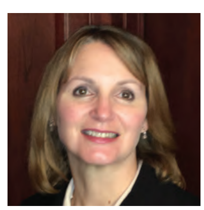
Gil Singer is a Senior Partner in the law firm of Marcadis Singer, P. A, providing legal counsel for clients across the State of Florida. He was born in New York, attended Emory University, graduated from the University of Miami School of Law in 1979 with a JD degree, and was admitted to The Florida Bar in 1979. He is also a member of the Hillsborough County Bar Association, the Commercial Law League of America, and the International Association of Commercial Collectors. He currently is Chair of the Commercial Law League Southern Region, and serves on the CRS and Legislative Committees for the CLLA. In 1996 and again in 2023, Mr. Singer was the recipient of The Florida Bar President's Pro Bono Award. **marcadislaw.com**



Lorna Walker
Managing Attorney, *Sweet & Walker, P.C.*
Lorna is the principal of Sweet & Walker, a Professional Corporation. She has practiced law in the San Francisco Bay Area for more than 25 years and focuses on commercial collection litigation, commercial contract litigation, and judgment enforce-ment. She has handled a variety of commercial matters on behalf of creditors, including breach of contract, commercial code transactions, fraudulent transfer actions, alter-ego claims, successor-in-interest actions, and some bankruptcy matters. Ms. Walker has a high success rate in both her trials and appellate matters.
sweetwalker.com

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WELCOME NEW MEMBERS | OCTOBER/NOVEMBER/DECEMBER 2023

CALIFORNIA

Gary Weis | Law Offices of Gary A. Weis | Canyon Country, CA

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Chuck Busek | Charles T. Busek PC | Norwalk, CT

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TENNESSEE

Travis Davison | Davison Law Firm | Memphis, TN

INTERNATIONAL

Ayman Al Wadi | AW Holding INT'L | Dubai United Arab Emirates

– Continued from page 4

Timothy Wan, Esq.
Senior Partner and CEO
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Timothy Wan, Esq. is Senior Partner and the Chief Executive Officer (CEO) of Smith Carroad Wan & Parikh. His areas of expertise include managing the creditor's rights and collection law practice, serving as General Counsel to various small businesses in the local business community and spearheading practice areas of entertainment law, music law, copyright and intellectual property.
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Matthew B. Weisberg Esq.
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Matthew Weisberg concentrates his practice on financial injury-based litigation, including business disputes, legal malpractice, real estate litigation including mortgage foreclosure, and consumer fraud. Matthew also represents victims of civil rights and employment violations. A peer-acclaimed trial attorney, Matthew also represents individuals (including attorneys) in disciplinary matters.A true "lawyer's lawyer," Matthew is proud to continuously receive referrals and praise from unaffiliated attorneys (even surprisingly from those who were once his opposing counsel) and community leaders. In fact, Matthew regularly represents attorneys in their personal legal matters.
He also serves as an expert witness in complex legal malpractice and title insurance matters, including having been retained by an opponent's law firm in multiple matters. Matthew has appeared before the United States Supreme Court (Rotkiske v. Klemm) and Pennsylvania Supreme Court (Clark v. Stover).
Before joining the firm, Matthew practiced with Weber, Gallagher, Simpson, Stapleton, Fires & Newby, L.L.P. (focusing on general liability defense and commercial foreclosures) and McCabe, Weisberg & Conway, P.C. (representing large, primarily subprime lenders and investors in residential mortgage foreclosure and lender liability-related litigation). Matthew also clerked for the Honorable Albert W. Sheppard Jr. and was an extern for the Australian Federal Parliament. For the Parliament, he published "G-D Save the Queen," on behalf of the Honorable Brendan Nelson, M.P. (leader of the Liberal Party).
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Mark J. Wolfson
Partner, *Foley & Lardner LLP*
Mark J. Wolfson is a partner at Foley & Lardner LLP in its Tampa office. A former chair of the Business Law Section, he has been representing business clients for almost 40 years in commercial litigation, including UCC disputes, post-judgment collection, and state court insolvency proceedings. During his career, Wolfson represented business debtors, secured creditors, asset buyers, and official creditors' committees in complex bankruptcy cases and related adversary proceedings.
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CLW COMMERCIAL LAW WORLD MAGAZINE
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IT'S NOT A CANDY BAR IN THE POOL

One big area of my firm's practice is representing skilled tradespeople. We have a Load of contractors, electricians, plumbers, landscapers, fuel oil contractors, masons, and environmental engineers. Quite commonly, these skilled folks provide their services, and unfortunately, are met with customers who are Junk, and they then Refuse to pay their debts.

We received what would be a routine environmental engineering matter, from my client "Carl Spackler Services" who rendered services at a residential pool house and gazebo, owned by a family whom I shall refer to as the "Caddyshack" family. The Dump of backup documentation sent over to us to review, showed that the services rendered were an inspection, followed by remediation of an environmental condition. First, the condition caused a huge Waste of time spent dealing with a governmental environmental inspection violation, as a result of a plumbing Sewage issue. Number Two, the Caddyshacks owed several thousand dollars to the environmental company to clean up the Debris, in order to comply with the health code, and also ensure that their fancy-schmancy pool was Fecal-free.

What made this particular matter more Messy, is that I actually know the Caddyshacks from the general Gotham community. They are known to Excrete a special brand of elitism in my area of world, as if they sit on a Stool higher than the rest of the community. They are the kind of family who would never Soil themselves to deal with the blue-collar tradespeople that I embrace as my clients, which is likely what led to their Sloppy handling of the environmental regulations. Unfortunately for them, it was not a mere candy bar in the pool.

I disclosed the slightly Muddy conflict of interest to Spackler and I consulted an ethics attorney that I know. Spackler didn't give a Poop, and the ethics attorney didn't Urge me to Eliminate the case, as there would be no ethical violation, merely because I am familiar with the Caddyshacks in the community. It's not like I spent any time with them socially, or have any Dirt on them.

So, we took the case, and sent that first initial demand letter. I took a small amount of joy in signing it, wondering if there would be a Constipated look on their faces to see my name on the letter.

But, alas, we never got that far. Within nine days of me Dropping the letter in the mail, we received the Full payment. I was So Happy I Took the case. ■

Timothy Wan, Esq.
Contributing Editor

FROM THE EXECUTIVE VICE PRESIDENT, CLLA

VIEWPOINT

Another year is behind us and I'm happy to report that the CLLA continues to thrive! Membership is holding steady, events are filling up again and we've taken up some causes important to the industry. I'd like to take this opportunity to thank the volunteer leadership of the League for your tireless efforts to keep our organization vital, the membership for recognizing the value, and our staff for keeping things going strong.

As many of you know, besides the Executive Vice President of the CLLA I hold the position of President and Chief Operating Officer of the National Association of Credit Management's largest affiliate, NACM Connect. This Creditor's Rights issue of CLW is one of many opportunities for me to celebrate the synergies between the two associations. Another important instance is the annual NACM Connect Legal Symposium held every March in the Chicago area. NACM Connect will soon be looking for CLLA speakers and fresh topics for the 2024 Symposium. If you're interested in submitting an idea, please let me know.

I'd also like to take this opportunity to remind you about two of our newer programs – The Champion Program and the Organizational Membership.

The Champion Program provides sponsorship levels to fit your budget and provides an opportunity to showcase your business at all CLLA events while saving you money. Among the many other benefits are ads in CLW, website exposure, and email blasts to all members. Visit the CLLA website and click on CLLA Champions to learn more about the benefits of each level.

If there are two or more members of your team who are interested in CLLA professional membership, discounts are available through the Organizational Membership. This is a cost-effective way to provide additional colleagues with the best available resources while seeking to invest in their development. The more professionals from your organization that join, the deeper the discount. If your organization already has multiple memberships, your discount will be reflected on your annual renewal invoice.

For further information on the Champion Program or the Organizational Membership, visit the website at www.clla.org or contact Dawn Federico at dawn.federico@clla.org.

From the management, staff and volunteer leadership, here's to a successful 2024. Our very best wishes to all of you. ■

Phil Lattanzio
Executive Vice President

ABOUT US

Commercial Law World (ISSN 0888–8000) is published quarterly by the Commercial Law League of America®, 3005 Tollview Drive, Rolling Meadows, IL 60008, (312) 240-1400.

Please email your comments to the editor to editor@clla.org

ARE YOU ON SOCIAL MEDIA?

If not, follow CLLA to receive timely information on newsworthy topics, upcoming events, and now virtual meetings.

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So much has occurred and is happening within the CLLA and in the world since the 3rd quarter issue of the CLW, that it is difficult to know where to begin.

On a positive note, the combined efforts of individual members of the CLLA and Tollview Management Group have resulted in continued growth of the CLLA. As of this writing, the current membership of the League is holding strong. Whether in person at League meetings or during zoom meetings, one can hear the excitement among League members that the CLLA is once again a vibrant and growing organization. In the five years since Tollview took over the management of the League, it has seen a reenergization among its existing and new members. This energy was evident at the recent one-day conference of the Eastern Region of the CLLA at the Manhattan Penthouse in New York City on November 9th.

The conference educational programs' focus on technology provided those members present with information and tools to enable them to learn about and keep up with the latest issues in artificial intelligence, cybersecurity, privacy and data protection in addition to practice management tools. The morning sessions enabled New York attorneys to obtain the continuing legal education credit that is now mandated by the New York Bar on Cybersecurity, Privacy and Data Protection and to obtain the ethics CLE, which is mandated by most states today. Bankruptcy Judge Elizabeth Stong, together with one of her law clerks, Conor Carman and Attorney Sue Chin presented a lively discussion on the Ethics and Use of Artificial Intelligence in the Courts. The panel invited participation from those present; and the participation was outstanding. Everyone present was grateful to Judge Stong, who has presented to the CLLA many times in the past and is a friend to the League.

The cybersecurity, Privacy and Data Protection program provided a wealth of information on the latest cyberattacks and what can be done to thwart those attacks.

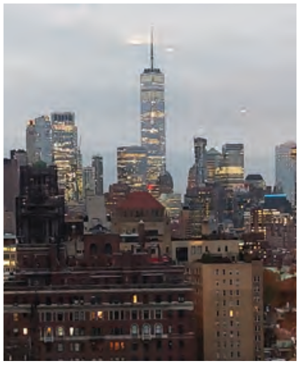
After the lunch break, the afternoon programs continued to educate and entertain. Programs on Streamlining Workflow, Improving Efficiency and Staying in Compliance as well as the use of Artificial Intelligence in the Law Office were well-received by the attendees. At the end of the day networking event, most of the conversations evolved around the programs of the day, how enjoyable and educational they were and all present expressed that this 1-day conference was a worthwhile and rewarding event.

On a completely different note, while we were at the top of Manhattan Penthouse engaged in networking and education, Pro-Israel and Pro-Palestine protestors were peacefully expressing their views of the ongoing Israel/Palestine/Hamas war. As a few members took fresh air breaks during the morning and afternoon, they brought back reports of the demonstration growing from a few dozen to several hundred. Some grew nervous worried that the protests would become physical and there could be danger to our League members as they were leaving the venue. Fortunately, by 5 p.m., the protesters had ended their demonstration and the streets were quiet. Unfortunately, we are living in troubled times with the wars in Israel/Palestine and Ukraine/Russia. Some League members are personally affected with family and/or friends in these countries. As this column is being written during Thanksgiving week, I can only wish all League members, family and friends, whether you celebrate Hanukkah, Christmas or Kwanzaa a peaceful, safe and blessed upcoming holiday season. ■

Wanda Borges, Esq.
Co-Chair of the Board of Associate Editors

Wanda Borges

The Hill Day | March 2023.



CLLA IN NEW YORK, NEW YORK

As chair of the Eastern Region, I wanted to take this opportunity to say thank you for attending the conference whether virtually and in person. The networking was robust, and the education programs were top notch! The Manhattan Penthouse didn't disappoint. It was great seeing so many old friends and meeting many new faces. A shout out to all our sponsors who helped make the event a success. Congratulations again to Wanda Borges, the 2023 recipient of the Warren Pinchuck Volunteer Service Award for her continued contributions to CLLA and the Eastern Region. I hope to see you all in 2024.

Joseph A. Molinaro, Esq.

Chair, CLLA Eastern Region
2023 – 2024

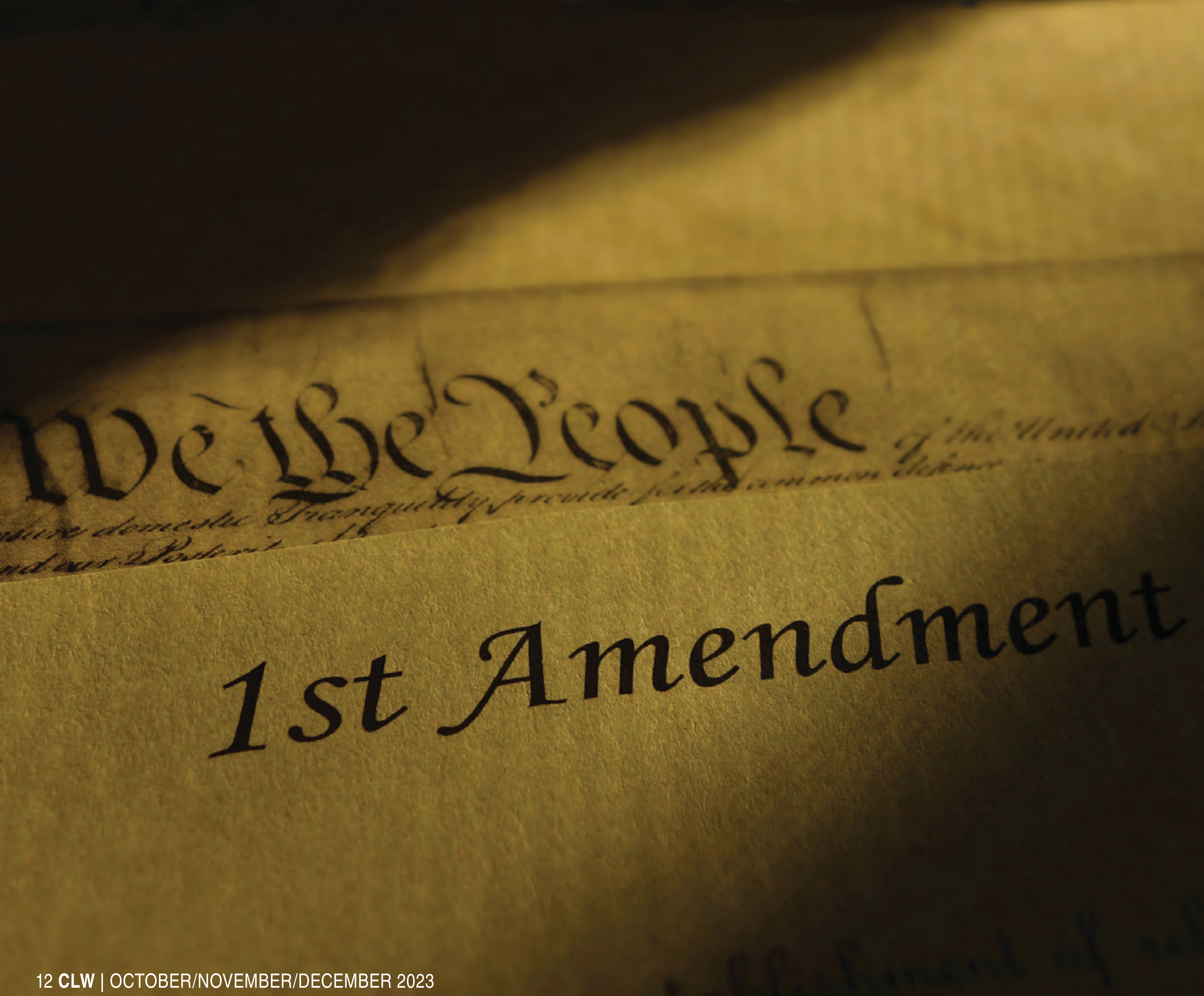
2023 EASTERN REGION CONFERENCE

NOVEMBER 8-9, 2023
Manhattan Penthouse • New York, NY

Joseph A. Marino, Esq.
Managing Member
Marino, Mayers & Jarrach, LLC.

THE FIRST AMENDMENT: VOID WHERE PROHIBITED

[The Necessity and Legitimacy of "Gag Orders" and "In Camera" Filings in Litigation"]



DOES A GAG ORDER ABROGATE THE FIRST AMENDMENT RIGHT TO FREE SPEECH?

The First Amendment to the United States Constitution says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The First Amendment prevents the government from making laws that: regulate an establishment of religion; prohibit the free exercise of religion; abridge the freedom of speech, stifle the freedom of the press, the freedom of assembly, or the right to petition the government for redress of grievances.

Legal scholars agree the Bill of Rights (the first ten amendments to the Constitution of The United States of America), was drafted to protect the rights and liberties of the U.S. citizens against potential government abuse, thus placing restrictions on the government, not the citizens.[1]

This is significant, as it supports the goals of the Founding Fathers set forth in our Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"

The U.S. Constitution memorializes this Liberty, the Spirit of Freedom as set forth in our Declaration of Independence. The prohibition to "abridge the freedom of speech", was intended to be our "First" and most sacred right.

Since 2008, we have seen a growing trend in our colleges to create "safe spaces" to shield students[2] from different views that do not adhere to the far left orthodoxy. Unfortunately, invited guest speakers are sometimes denied the freedom of speech to address their inviters, by a mob who shout, chant and drown out the speaker's voice and message. This has become a very disturbing behavior of intolerance, condoned by the administrations, of "so called" schools of "higher learning", which were historically designed to foster the free exchange of ideas.

Moreover, we have witnessed many newsworthy stories withheld from publication by traditional news networks, and, some social media, contrary to the public's right to know, embedded in the freedom of the press, but not published in social media, such as, the Hunter Biden laptop story.

Recently, The American Civil Liberties Union (ACLU) a nationwide, nonprofit organization which exists to protect the civil liberties of all Americans, sought permission to file an Amicus brief in, U.S. District Court for D.C. vs. Donald J. Trump, case No. 23-cr-257-TSC, in Aid of the Court's Re-evaluation of its Gag Order (the "Order'). Gag Orders are more commonly used in criminal actions but may also be useful in civil actions, particularly when involving proprietary information or intellectual property.

ACLU maintained that the Order's use of the word "target" is unconstitutionally vague, as the entire Order hinges on the meaning of the word "target", which is ambiguous, and fails to provide the fair warning that the Constitution demands, and imposes a prior restraint on speech.

In its Order, the Court barred Defendant Trump from "making any public statements, or directing others to make any public statements, that target

1. the Special Counsel prosecuting or his staff;
2. defense counsel or their staff;
3. any of this court's staff or other supporting personnel; or
4. any reasonably foreseeable witness or the substance of their testimony." [Order at 3 (ECF 105).]

ACLU maintained that the Vagueness Doctrine, is rooted in "due process", requiring "fair notice or warning" of what is prohibited by penal laws.

The gag order restrains both the Defendant Trump, and his counsel. The ACLU focuses on the rights of the Defendant here, in part because he is running for President, as the leading candidate for the Republican Party, and because attorneys can be restrained as officers of the court in ways that non-lawyers cannot. It argues that any restraint on Defendant's speech must be narrowly tailored to prohibit imminent threats against individuals or conduct that would interfere with the administration of justice. ACLU further maintain that the Order suffers from a second flaw: in addition to being impermissibly vague, it is impermissibly broad, and the potential for extrajudicial statements by both the parties and their counsel "pose a significant and immediate risk of prejudice", violating "due process".

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1 Thomas Jefferson and the other Founding Fathers were greatly influenced by John Locke, a British Philosopher's theories of natural rights; "in a natural state, all people are equal on political philosophy. "When a governments fails to honor the will and needs of its people, the people have a right to change it by whatever means necessary."

2 The somewhat derogatory term "snowflake" students has been attributed by the media

Thus, the First Amendment right to speak includes the rest of us retaining the right to hear what he has to say. Thus, any restraint the various Courts imposes upon Trump's future speech must be precisely defined and narrowly tailored to protect the impartial administration of justice.

Moreover, Retired Harvard Law Professor, Emeritus Alan Dershowitz, a staunch advocate of the First Amendment, and no Trump supporter, has publicly renounced the Gag Order as unconstitutional, on First Amendment grounds. Legal Scholar Professor Jonathan Turley of George Washington Law School also maintains the Gag Order is unconstitutional.

While half of the country supports Trump and believes the four indictments are politically motivated, similar to despotic "Banana Republics", the other half may believe the indictments are just, and an exception to free speech should be allowed, because it is Trump.

In a divided country, free speech takes on a greater importance. There are factions on the far left that want to replace our Bill of Rights, particularly the First and Second Amendments and add various other provisions to advance "social justice", which creates numerous standards based upon race, color, creed, economic status, which are not equal justice for all.

Others believe that the use and frequency of Executive Orders is eroding the Separation of the Three Branches of Government and usurping the function of other Branches and the fabric of our Republic.

It is vital to our country's future that people remain free to express their ideas, debate issues and; hear all sides of an issue, or we will descend into anarchy and possible civil war.

We must remember that Freedom is Fragile, and for more than Two Hundred and Fifty Years of Blood and Treasure have been expended to keep our rights and our Republic.

THE USE OF GAG ORDERS IN CREDITORS' RIGHTS' LITIGATION

The use of gag orders in Commercial Litigation is generally governed by constitutional principles and case law rather than specific statutes. Nevertheless, federal rules, state laws and local rules may play a significant role in determining whether and on what basis a specific court will grant a gag order. Simply stated. A gag order in civil litigation is a court order which restricts parties involved in a case from disclosing certain aspects of the case publicly. The primary intention of a gag order is to preserve the integrity of the legal process. The term "gag order" is synonymous with the terms "protective order" or "non-disclosure orders".

There are several instances in commercial litigation where a gag order might be appropriate. In the course of a contractual dispute, the litigation may involve sensitive information concerning the debtor's business operations, assets, or liabilities. The disclosure of confidential financial details could harm the debtor's business reputation or provide its competitors with information giving them an advantage over your defendant. In the midst of settlement negotiations, a gag order can encourage candid discussions between the parties without the fear that information or statements made during those negotiations will be disclosed to the public. Of course, a simple "Non-Disclosure Agreement" among the parties might serve the same purpose. During the course of litigation, proprietary information and/or trade secrets may need to be disclosed among the litigants. A gag order will safeguard sensitive business information and prevent public disclosure. Whether representing or litigating against a publicly traded company, a gag order may prevent the dissemination of information that could lead to fluctuations in the price of that party's stock which could erode investor confidence during the course of the litigation.

COMPARING A GAG ORDER WITH FILING A DOCUMENT "IN CAMERA"

In the context of commercial litigation between a debtor and a creditor, both a gag order and filing a document "in camera" serve the purpose of controlling the flow of information, but they operate in different ways and address distinct aspects of the legal proceedings. During the course of commercial litigation, specific documents may be necessary for the parties to exchange critical information and the court will need that information in making its determination. By filing such a document or documents "in camera" the parties and the court will have access to that information but the general public will not. These documents will remain private among these parties and the court. Such documents may include information on trade secrets, proprietary information or financial information that would do more harm than good if released publicly. The use of "in camera" document filing is often used in bankruptcy proceedings also to protect details of proposed purchase offers.

In summary, each of these tools can be used to balance the competing interests of transparency and confidentiality in the context of commercial litigation. ■

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Customer 5

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OFFERS AND DEMANDS FOR JUDGMENT

During the course of litigation, there is almost always strategic consideration given to the idea of settling the matter before trial. Settlement can be accomplished in a number of ways. Mediation and negotiation are formal methods requiring the use of a neutral third party. There are also informal methods, generally simply contacting the opposing attorney with a settlement offer. Offers and Demands for Judgment are "semi-formal" as they do not require the use of a third party but, when made, the terms of these offers have more significant consequences than an email or phone call might.

Offers and Demands for Judgment differ primarily in who initiates the request for settlement and are controlled by Fla. R. Civ. P. 1.442 and Fla. Stat. 768.79. Defendants make Offers for Judgment, while Plaintiffs make Demands for Judgment. Regardless of the nomenclature, the two operate the same way. Note that the language refers to "judgments" these are not the only remedy available and frequently monetary payment is agreed to. While this article is based on Florida statutes, these principles are generally followed in other states. The offer must be in writing, served on the appropriate party, state the law, facts, and claims supporting the offer, as well as the actual terms of the settlement – any monetary damages or other conditions of the offer.

Once made, the opposing party has 30 days to accept. If the opposing party does nothing before time expires, the offer is deemed rejected. The originating party, in writing, can also withdraw the offer before the other side accepts. Once the offer is withdrawn, it cannot be accepted. In order to accept an offer or demand, it must be in writing and within 30 days of the request in order be timely. Finally, making one offer does not preclude the making of subsequent offers or counter-offers.

The most significant aspect of offers or demands for judgment is often attorney's fees. Under the statute, if a Plaintiff makes a Demand for Judgment and Defendant does not accept, should Plaintiff recover 125% of the offer, Plaintiff is entitled to attorney's fees. Similarly, if the Defendant makes an offer that is not accepted by Plaintiff, if Plaintiff does not recover at least 75% of the offer, then Defendant is entitled to fees. No fees are awarded under the offer/demand for judgment unless these thresholds are met.

For example, if Plaintiff makes a demand for judgment and states that $1,000.00 will settle the case, if Defendant fails to accept and Plaintiff actually recovers anything more that $1,250.00, then Defendant will owe not only that amount, but will also bear the cost of Plaintiff's attorney's fees. Similarly, if Defendant makes an offer for judgment and states that $1,000.00 will settle the case, if Plaintiff fails to accept, Plaintiff must earn a judgment of at least $750.00, or Plaintiff will have to pay Defendant's fees.

It is easy to see how these provisions for attorney's fees are designed to encourage both the offer and acceptance of fair and reasonable offers to settle a case rather expend additional judicial resources to have a judge or jury decide it.

Note however, that these offers and demands can be made strategically. If a claim's value is $1,000.00, a Plaintiff may make a demand for $1,200.00. This puts Defendant in the position of either accepting a high offer or rolling the dice at trial that a judge or jury will not award damages in excess of $1,500.00. Notice that not only the principal amount of the claim applies, but also any prejudgment interest on the claim, or any interest applied to the loan. If punitive damages are awarded, those will also apply towards this amount.

Defendants can similarly make strategic offers of judgment. Once again, the value of the claim is $1,000.00 and Defendant offers $800 for settlement. Now the tables are turned from our previous example. Plaintiff must either accept a low offer or risk not proving damages in excess of $600.00. This may apply when certain offsets or credits are owed to the Defendant that have not been properly applied.

Unlike most other settlement devices, both the offer and acceptance are filed with the Court, so they are public record – visible to almost anyone. Once both the offer and acceptance are filed the Court has jurisdiction to enforce the terms of the settlement and failure to abide by the terms of a settlement agreement may be met with sanctions and even contempt of court.

In conclusion, receiving or making a Demand or Offer of Judgment is a significant event in the course of litigation and can have dire ramifications in the event that the threshold for attorney's fees is met. It requires the careful assessment of the value of the case and the strength of any evidence in support of your claims or defenses. ■

Wanda Borges, Esq.
Principal Member
Borges and Associates, LLC

AUTO RENEW CONTRACT PROVISIONS MAY POSE PROBLEMS FOR OUR CLIENTS

Many of our client's contracts, particularly service contracts include auto-renew provisions. Several years ago, my law firm was caught by such a provision. Not aware that there was an auto-renew provision, we had decided to terminate some book subscriptions only to be told we were notifying Thomson West too late to cancel. Reading the contract, we had no choice but to maintain the subscription for one more year and made sure we cancelled those subscriptions on a timely basis so that they would not renew automatically again. Throughout this article, keep in mind, that as far as business contracts are concerned, the term "person" shall mean an individual, firm, company, partnership or corporation.

FIVE STATES HAVE RESTRICTIVE PROVISIONS FOR AUTO-RENEW CLAUSES RELATED TO BOTH BUSINESSES AND CONSUMERS

New York has adopted the position in the past few years that all contracts with an auto-renew provision – whether business or consumer – to provide a clear and conspicuous notification to the contract holder in order to give that entity an appropriate amount of time to cancel.

New York is unique in that there are two statutes aimed at auto-renew provisions. The first such statute is the **N.Y. General Business Law §§ 527 and 527-a**, which says, in pertinent part, "It shall be unlawful for any business making an automatic renewal or continuous service offer to a consumer in this state to do any of the following: a. fail to present the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity, or in the case of an offer conveyed by voice, in temporal proximity, to the request for consent to the offer. ..."

Clearly, that statute is meant to protect consumers. However, New York has a second statute which is applicable to both consumers and businesses. **N.Y. General Obligations Law § 5-903 says:** "Automatic renewal provision of contract for service, maintenance or repair unenforceable by contractor unless notice thereof given to recipient of services.... 2. No provision of a contract for service, maintenance or repair to or for any real or personal property which states that the term of the contract shall be deemed renewed for a specified additional period unless the person receiving the service, maintenance or repair gives notice to the person furnishing such contract service, maintenance or repair of his intention to terminate the contract at the expiration of such term, shall be enforceable against the person receiving the service, maintenance or repair, unless the person furnishing the service, maintenance or repair, at least fifteen days and not more than thirty days previous to the time specified for serving such notice upon him, shall give to the person receiving the service, maintenance or repair written notice, served personally or by certified mail, calling the attention of that person to the existence of such provision in the contract."

New York's auto-renew restriction does not apply to a contract in which the automatic renewal period specified is one month or less. New York seems to have the most restrictive auto-renewal provisions.

There are three other states which have statutes restricting the use of auto-renew clauses.

North Dakota – N.D.C.C. §§ 51-37-01 to 51-37-06 STATUTE

Although this statute applies to both commercial and consumer transactions, the restrictive auto-renew provision is applicable only with respect to sales of merchandise.

Ohio – CASELAW

Although two separate Ohio statutes refer to consumer issues of leases and gas & electric services, Ohio caselaw has upheld autorenewal clauses in business to business transactions[1] and held that the parties were bound to the terms of the contract. There are no provisions for reminder notifications as to B2B transactions.

Wisconsin Wis. Stat. § 134.49 – STATUTE

"Business contract" means a contract that is entered into for the lease of business equipment, if any of the business equipment is used primarily in this state, or for providing business services, but only if the contract is for the direct benefit of the end user of the business equipment or business services. Wisconsin's statute specifically excludes fifteen types of contracts from the definition of "business contract"

Wisconsin's statute has a specific notification requirement stating "**(3)** NOTICE REQUIRED. If a business contract that has an initial term of more than one year provides that the contract will be automatically renewed or extended for an additional term of more than one year, unless the customer declines renewal or extension, and the deadline for the customer to decline renewal or extension of the contract is more than 60 days after May 1, 2011, the provision is not enforceable against the customer and the contract will terminate at the end of the current contract term unless the seller provides to the customer, at least 15 days but not more than 60 days before the deadline for the customer to decline renewal or extension, a written notice containing all of the following: **(a)** A statement that the contract will be renewed or extended unless the customer declines renewal or extension; **(b)** The

1 *see* Pacific Space Design v. PNC Equipment Finance 2014WL6603288

deadline for the customer to decline renewal or extension; **(c)** A description of any increase in charges to the customer that will apply after renewal or extension; **(d)** A description of action that the customer must take to decline extension or renewal."

REQUIREMENTS FOR AUTO-RENEW CONTRACTS

In reviewing the states with restrictive statutes relating to commercial contracts, generally, the restrictions are:

1. A contract cannot be renewed for any additional period beyond the initial term of the contract unless the person receiving the services affirmatively notifies the person offering the services that they wish to renew the contract.

2. A contract with a fixed initial term and successive, automatic renewal terms may be entered into IF

- The contract **clearly and conspicuously** states that the person receiving the services has the right without additional cost or penalty to terminate the contract at the end of the initial term or the then current renewal.

- The person receiving the services receives a **clear and conspicuous notice** prior to the end of the initial or renewal period that such contract is going to be automatically renewed unless the person gives the service provider notice of their intent to terminate by written notice at least 30 days before the expiration of the initial term or the then current renewal term.

3. The phrase "clear and conspicuous" means one or more of the following:

• For written contracts:

– in larger type than the surrounding text;

– in contrasting type, font, or color to the surrounding text of the same size; or

– set off from the surrounding text of the same size by symbols or other marks in a manner that clearly calls attention to the language.

• For audio disclosures: at a volume and cadence sufficient to be readily audible and understandable.

HOW CAN LAW FIRMS PROTECT THEIR COMMERCIAL CLIENTS AS WELL AS THOSE WHO CONTRACT WITH CONSUMERS

The simplest "fix" for commercial creditors is to eliminate the auto-renew clauses altogether. That, however, is a most unpopular solution. Clients do not want to have to change their contracts nor do they want to be bothered with providing mandatory notifications which are required by some states.

For those who contract in the three states with restrictive provisions, trade credit grantors have three choices:

1. Change the contract to eliminate the auto-renew provision altogether. Some of our clients might prefer this. It can provide our clients the opportunity to get rid of some customers they didn't like anyway.

2. Comply with the restrictions above and give the requisite reminder notice to the contract party

3. Create a solid "Choice of Law" clause for your clients' contracts. Creditors can include a Choice of Law clause on their contracts which states that the contract shall be governed and construed in accordance with the laws of a state without any auto-renewal restrictions.

STATES WITH STATUTES PERTAINING TO CONSUMER TRANSACTIONS ONLY

For those CLLA members with clients involved in Business-to-Consumer transactions, there are twenty-three states which have restrictions or prohibitions altogether on auto-renew provisions. These are listed below. Although each of these statutes applies to Business-to-Consumer transactions, some of them only pertain to specific types of transactions as is noted below.

Arkansas Code Ann. § 4-86-106 **– CONSUMER ONLY**

California Bus. & Prof. Code §§ 17601 to 17606 **– CONSUMER ONLY**

Colorado. Rev. Stat. Ann. § 6-1-732 **– CONSUMER ONLY**

Connecticut Gen. Stat. Ann. § 42-126b. – While not using the word "consumer", Connecticut has a broad law that applies to any person, firm partnership, association, or corporation that sells or offers to sell any products or services used primarily for personal, family, or household purposes. Therefore, this is clearly **CONSUMER ONLY**

6 Delaware C. §§ 2731 to 2737 **– CONSUMER ONLY**

District of Columbia §§ 28A-201 to 28A-221 **– CONSUMER ONLY**

Florida § 501.165, Florida Stat **– CONSUMER ONLY** – The statute is very specific: "Consumer" means an individual, as defined in s. 501.603, receiving service, maintenance, or repair under a service contract. The term does not include an individual engaged in business or employed by or otherwise acting on behalf of a governmental entity if the individual enters into the service contract as part of or ancillary to the individual's business activities or on behalf of the business or governmental entity.

Georgia O.C.G.A. §§ 13-12-1 to 13-12-5 **– CONSUMER ONLY**

Hawaii HRS § 481-9.5 **– CONSUMER ONLY**

Idaho – Idaho Code § 48-603G, eff. Jan. 1, 2023 **– CONSUMER ONLY**

Illinois – 815 ILCS 601/1 to 601/20 **– CONSUMER ONLY –** requires clear and conspicuous notification that there is an auto-renewal clause in effect and details as to the cancellation provisions. The Illinois statute clearly states "This act shall not apply to Business to business transactions." Previously, Illinois auto-renewal restrictions did apply to business transactions but that statute was amended. Indeed, one attempt to enforce the statute in a business-to-business setting since the amendment failed.[2] On appeal, the 7th Circuit Court of Appeals held that contract's automatic renewal clause did not require provider to give law firm fair warning of closing of window to avoid automatic renewal.

Iowa – Iowa Code Ann. § 552.8 **– CONSUMER – only applicable to health club memberships**

Louisiana R.S. 9:2716 **– CONSUMER ONLY**

Maine 10 M.R.S.A. §§ 1210-C and 1210-D **– CONSUMER ONLY**

Maryland Md. Code Ann., Com. Law § 14-12B-06 **– CONSUMER – only applicable to health clubs**

Missouri § 407.675, RSMo **– CONSUMER – only applicable to discount buying clubs**

Montana Admin. R. 38.5.6004(9), (10) **– CONSUMER – only applicable to natural gas contracts**

Nevada NRS 598.940 to 598.966 **– CONSUMERS – only applicable to dance or health clubs**

New Hampshire N.H. RSA §§ 358-I:3 and 358-I:5 **– CONSUMERS – only applicable to health clubs**

New Mexico N.M. Admin. Code 12.2.11.1 to 12.2.11.9 **– CONSUMER ONLY**

Oregon – Or. Rev. Stat. §§ 646A.292 to 646A.295 **– CONSUMER ONLY**

2 Cafferty, Clobes, Meriwether & Sprengel, LLP v. XO Communications Services, LLC. 850 F.3d 840, 7th CA 2017

Pennsylvania 73 P.S. § 2164 **– CONSUMER – applicable only to health clubs**

South Carolina S.C. Code Ann. § 44-79-60(4) **– CONSUMER – applicable only to health clubs**

South Dakota SDCL 49-31-116 **– CONSUMER – applicable only to telecommunication contracts**

Tennessee has two statutes pertaining to auto renew provisions. One statute – T.C.A. § 47-18-133, eff. Jan. 1, 2023 is a very broad law and T.C.A. § 62-32-325 is a much narrower law. Nevertheless both of these statutes are **CONSUMER ONLY**.

Texas – Legislation is pending regarding auto renewal clause requirements. No such statute has been enacted as of this date. The statute as proposed would relate to **CONSUMERS**. However, Texas case law has upheld auto renewal provisions enforceable in business to business transactions on a contract basis.

Utah Code §§ 15-10-201, 15-10-202, and 13-23-1 to 13-23-8 **– CONSUMER ONLY**

Vermont 9 V.S.A. § 2454a **– CONSUMER ONLY**

Virginia Va. Code Ann. §§ 59.1-207.45 to 59.1-207.49 **– CONSUMER ONLY**

In conclusion, it remains to be seen whether other states will follow New York and Wisconsin, which, currently, are the only states with broad restrictions on auto-renew clauses in commercial transactions.

[i] "Business contract" does not include any of the following:

1. A contract in which a customer agrees to purchase from a seller an undetermined amount of business services or lease from the seller an undetermined amount of business equipment, and agrees to pay the seller based on the amount of business services received or business equipment leased, subject to a predetermined minimum payment in a 12-month period specified in the contract, if the predetermined minimum payment is $250,000 or more.
2. A contract for the lease or purchase of real property.
3. A contract for the lease of a vehicle for which a certificate of title has been issued under ch. 342.
4. A contract for the lease of medical equipment.
5. A contract derived from a tariff issued by an energy utility, as defined in s. 196.027 (1) (c).
6. A contract for the lease of equipment that is for personal, family, or household purposes.
7. A contract for the purchase of services that are for personal, family, or household purposes.
8. A contract for the lease or purchase of access service, as defined in s. 196.01 (1b).

9. An interconnection agreement, as defined in s. 196.01 (3b), or a contract or agreement offered by a telecommunications utility, as defined in s. 196.01 (10), to meet obligations imposed on the telecommunications utility under 47 USC 151 to 276.
10. A contract for the lease or purchase of telecommunications service, as defined in s. 196.01 (9m), including commercial mobile service, as defined in s. 196.01 (2i), if the contract is derived from a tariff issued by a telecommunications provider, as defined in s. 196.01 (8p), or if the contract permits the lessee or purchaser to terminate the contract after an automatic renewal by giving written notice, permits the termination to take effect not more than one month after receipt of the written notice, and permits a termination without liability for fees or penalties other than a payment for services or equipment used during the period before the termination takes effect, if the amount of the payment is one of the following:
    a. The amount of the periodic payment due under the contract multiplied by the number of periods during which the services or equipment are provided before the termination takes effect.
    b. If the contract does not provide for periodic payments, a portion of the amount due under the contract that is proportional to the portion of the renewed contract term that elapsed before the termination takes effect.
11. A contract that permits a customer to terminate an automatically renewed or extended contract period by giving the seller notice of the customer's intention to terminate the contract period, if the contract does not require the customer to give notice to the seller more than one month before the date of the customer's intended termination.
12. A contract to which a federal, state, or local government entity is a party.
13. A contract between a cooperative association organized under ch. 185 and a member of the cooperative, or a contract under which a cooperative association organized under ch. 185 is a seller.
14. A contract for the lease, maintenance, repair, service, or inspection of elevator or escalator systems, including mechanical and electrical components of such systems when built into real property.

A contract for the supply of industrial, medical, or other gases in any form, including for the lease, service, or use of cylinders, tanks, hard goods, or other related equipment involved in supplying the gases. ■

The Commercial Law League of America and CLW magazine are looking for articles from our membership. We know many of you are subject matter experts in one field or another and we are hoping you will be willing to share your knowledge with your fellow members. ***Our next issue, January/February/March, is focused on the INTERNATIONAL topics. Submission deadline: January 15.*** *If you are interested in being a contributing author for CLW, please contact Beau Hays at* ***beau@hayspotter.com****.*

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GENERAL PRINCIPLES OF WORKER'S COMPENSATION SUBROGATION

The word “subrogation” means to “substitute”. When a person or company suffers personal injuries or property damage as the result of the action of a third party, that person or company’s insurance carrier will often pay for the damages of their insured. Then, since a third party is at fault, the insurance carrier will demand reimbursement for that payment from the third party. If the third party does not make payment, the result will be often be subrogation litigation. In this instance, pursuant to the terms of the insurance policy, the carrier will subrogate, or “step into the shoes” of the insured to sue the third party.

A subrogation attorney is a Plaintiff’s attorney for insurance carriers. There are four general types of subrogation litigation, based on the line of the insurance policy, namely, (1) Auto, (2) Property, (3) Health and (4) Workers’ Compensation. Attorneys that do not generally handle subrogation matters are most familiar with uninsured motorist automobile subrogation. These are cases within the auto line of insurance where the defendant does not have any coverage. Often, the lawyers that handle these types of claims operate their offices in a very similar manner as collection attorneys. They manage a high volume of auto subrogation files with an average balance due around $5,000.00 to $20,000. These lawsuits often end with default judgments being entered so much of the legwork on the claim is completed on the “back end” with post-judgment skip tracing, levies and executions.

Auto subrogation results in the most profit for insurance carriers of any line simply based on the extremely high volume. However, an attorney that manages an auto subrogation practice or a collection practice, may be missing out on large dollars if he or she does not also add workers’ compensation to the firm’s portfolio. While there are not as many workers’ compensation claims as there are auto cases, the workers’ compensation subrogation lawsuits often result in much larger recoveries. The purpose of this article is to explain the basic principles of workers’ compensation subrogation so that a law firm will be able to consider whether it makes sense for their office to handle these claims.

Workers' compensation coverage is based on something known as the “compensation bargain”. This is a statutory “trade” that employees make wherein the employees right to sue the employer for damages in tort is exchanged for the benefits of a “no-fault” administrative law system. It requires all businesses to carry workers’ compensation coverage for their employees. If an employee is injured within the scope of employment, the employee may not sue the employer. Rather the employee must file a claim with the employer’s workers’ compensation coverage and the amount paid to the employee is then determined statutorily by an administrative law court or board.

This is rather simple when the injury is the fault of the employer, a co-worker or even the employee himself. In these circumstances, the injured worker simply needs to file a claim with the work compensation carrier and he or she will receive the payment per the statutory scheme. However, what happens when a worker is injured within the scope of employment but the person or company at fault is a third party? That is when workers’ compensation subrogation comes into play.

As stated previously, the word subrogation means to “substitute”, thus, with subrogation litigation, the insurance carrier steps into the shoes of their insured to sue the at-fault party. This should be fairly obvious, but it is important to point out that with workers’ compensation the insured is the employer. After all, it is the employer that is paying the insurance premium. Thus, after the employer has paid the statutorily determined amount of benefits to the injured worker through the employers workers compensation policy, the employer then subrogates his rights to the carrier. At that point, the carrier may file suit against the third party that is actually at fault in order to be reimbursed for the payments made to the employee.

A good example of workers’ compensation subrogation is with a truck driver that is in car accident. If another driver rear ends the truck and the driver is injured within the scope of employment, the driver will be able to collect workers’ compensation benefits through the insurance policy of the owner of the truck line. Then, the workers’ compensation carrier for the truckline will be able to file a subrogation lawsuit against the driver and owner of the vehicle that ran into the back of the truck, to be reimbursed for the funds paid to the truck driver.

Before an insurance carrier moves forward with this litigation, the first step to consider is whether the at fault party has insurance coverage for the loss. If there is no coverage, the carrier will often times place the claim with a collection agency or collection law firm. These are experts in resolving unpaid balances. These types of case may be handled very closely to any collection claim, will often result in a default judgment and can result in recovery at a low cost.

If the at fault party has insurance coverage and the third party carrier is unwilling to offer payment, the case is ripe for litigation. Once sent to an attorney, the lawyer will need to determine the best route to file the claim. The most common method is to simply file a direct action against the third party. This is a basic workers’ compensation subrogation lawsuit, but it can become expensive since experts may need to be retained to determine liability and damages and the carrier for the defendant will generally vigorously defend.

Many times, the injured worker will have already filed a lawsuit against the at fault party. While the employee has already been paid through his employers workers’ compensation for medicals and indemnity, he or she may have additional damages that were not covered, sometimes including punitive damages. Thus, the injured workers' pending lawsuit against the third party will usually be for a larger balance. In this type of situation, it often makes sense to file a motion to intervene in the personal injury lawsuit of the employee against the third party rather than to file a separate direct action. This will allow all claims for the same accident to be consolidated into one lawsuit, saving time and money. The injured workers' personal injury attorney will do much of the legwork and will often time split or even front expenses.

One common mistake made by subrogation attorneys when intervening into the injured workers' case is to rest on the laurels of the personal injury attorney. This will result in a much smaller recovery. If the subrogation attorney is passive in the litigation, the personal injury will be able to attempt to obtain attorneys' fees on a contingency basis from the subrogation case under the common fund doctrine. Thus, the subrogation attorney must be active. He or she must propound and respond to discovery and attend all hearings and depositions in order to obtain maximum recovery.

At the end of the day, most of the claims where an intervention is inbolved result in settlement. Since personal injury attorneys have to pay expenses out of pocket or through medical liens, they are usually careful with case selection and only look to file suit on files with recovery potential. They also are generally not interested in taking the chance of going to trial. Thus, after liability is determined through discovery, the subrogation attorney should generally recommend mediation. The injured workers' attorney and defense counsel will nearly always agree.

During mediation, the damages claimed in the subrogation case will be certain based on the amount paid out in workers' compensation. Thus, it is very advantageous to find a mediator that understands subrogation and business in general to resolve the matter. An experienced mediator will know that in most jurisdictions, settlement funds are first distributed for attorneys and fees and expenses, then to the worker's compensation carrier with the remainder going to the injured worker. If the subrogation attorney has been active in the litigation, he or she will be able to demand the attorneys fee payment be split between his office and the injured workers' attorney, resulting in a better recovery.

Creditors' rights attorneys routinely handle uninsured auto subrogation. The more that the attorney understands about subrogation in general, the better the results. Once these basic tenets are learned, adding workers' compensation litigation is a great way to increase the bottom line. ■

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FLORIDA'S NEW JUDGMENT LIEN IMPROVEMENT ACT

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Florida lawyers often hear the cry from their clients that Florida is a "debtor's haven" because of the generous homestead exemption provided by the Florida Constitution, the various personal property exemptions available und[1]er statute,[2] and the "tenancy by the entireties" immunity protection afforded to married couples that own property jointly but the creditor holds a judgment against only one spouse.[3] This column, however, is not about protections from creditors' claims. Rather, the holders of Florida money judgments and the attorneys they hire now have another arrow in their collection quivers thanks to the new Judgment Lien Improvement Act,[4] which took effect on July 1, 2023. However, as is the case with creditor's rights generally, there are some limitations, which are discussed throughout this article.

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1 Fla. Const. art. V, §4(a)(1).

2 Fla. Stat. §222.01, *et seq.*

3 *Beal Bank SSB v. Almand and Associates*, 780 So. 2d 45 (Fla. 2001).

4 The act was passed by the Florida Legislature as Laws of Fla. Ch. 2023-300 (2023). The act was signed by the governor on June 27, 2023.

In broad terms, the act first expands the reach of a Florida judgment lien against a defendant's ownership of certain intangible personal property rights. Specifically, the act amends certain provisions of F.S. Ch. 55, to make "accounts"[1] and "payment intangibles"[2] and "the proceeds thereof,"[3] owing by a third party legally called an "account debtor,"[4] subject to the lien of a judgment lien certificate. Thanks to the act, a judgment creditor, subject to certain requirements, may be able to enforce its judgment against assets a judgment debtor owns but that do not exist in a physical sense. The act applies alike to defendants that are natural persons and business entities. At the same time, the act makes it clear that the rights of pre-existing lienholders are not adversely impacted.

A second focus of the act provides improved methods by which a judgment creditor can ensure its judicial lien is recognized by the State of Florida and effective against its judgment debtor's title to a motor vehicle or vessel. To do this, the act adds a new subsection (b) to F.S. §56.29(6) and makes conforming changes to Ch. 319 regarding the process for recognizing judgment liens against titled vehicles and vessels.

The impetus behind the act was the Business Law Section of The Florida Bar. The section created a task force or subcommittee to study and evaluate issues pertaining to whether a right to receive payment should be subject to attachment by a judgment lien creditor and the practical roadblocks when a judgment creditor attempts to levy upon a non-exempt vehicle or boat because of certificate of title protocols. Several members of the section's subcommittee, including me, contributed drafting suggestions, but University of Florida Levin College of Law Prof. Emeritus Jeff Davis was the primary author of the act.[5] The support of Sen. Darryl Rouson and Rep. Christopher Benjamin, the act's lead sponsors in the Senate and House, respectively, was critical to the concept becoming a Florida law.

WHY THE NEED FOR CHANGE

After winning a civil suit and receiving a monetary award, the plaintiff often faces the challenge of recovering money to satisfy its judgment. Typically, in a large enough case, a judgment creditor will use financial condition information in its files, engage an asset investigator, use web-based asset research tools, and employ the discovery in-aid-of-execution procedures of Fla. R. Civ. P. 1.560(a) to find property that might be subject to levy under F.S. Ch. 56, or perhaps subject to garnishment under F.S. Ch. 77.

Since October 2001,[6] the holder of a money judgment had been entitled to file a judgment lien certificate with the Florida secretary of state, at which time the holder acquires for five years a judgment lien on any of the defendant's non-exempt *tangible* personal property located in Florida.[7] The historical restriction to tangible property may have been the result of lack of appreciation for the existence in the marketplace of significant contract-based revenues a person or entity might be entitled to receive from third parties.[8]

In addition, the previous statutory rules applicable to obtaining non-consensual liens on certificated vehicles and boats made it practically difficult for judgment creditors to execute on a defendant's high-end car or luxury vessel because the owner could transfer the property to a third party free and clear of the judgment lien as that lien did not appear on the face of the certificate of title.[9]

Over a couple years, the section's subcommittee studied, evaluated, and debated the status of post-judgment collection in Florida and issued its "White Paper by Business Law Section of Florida Bar, Bankruptcy/UCC Committee, on Clarifying and Expanding the Scope of Florida's Judgment Lien on Personal Property."[10] The White Paper, which was later updated, discussed the above-described issues, and recommended most of the changes that were incorporated into the act.

WHAT THE NEW LAW DOES SPECIFICALLY

The act addresses the main challenges discussed above. First, the act allows a judgment lien to attach to certain *intangible* personal property, specifically payment intangibles and accounts or accounts

1 An "account" is defined in Fla. Stat. §679.1021 of Fla. Stat. Ch. 679, Florida's version of art. 9 of the Uniform Commercial Code (Florida art. 9).

2 A "payment intangible" is defined in Fla. Stat. §679.1021(1)(iii).

3 "Proceeds" are defined in Fla. Stat. §679.1021(1)(iii) and would include the funds paid to the judgment debtor to satisfy the account or payment intangible owing by an account debtor. See also Fla. Stat. §679.306(1).

4 This term used in the act was taken from art. 9 of Florida's version of the Uniform Commercial Code, specifically Fla. Stat. §§679.607 and 679.1021(c).

5 Prof. Davis was a strong advocate for and was one the "fathers" of Florida's original modern judgment lien statute, effective Oct. 1, 2001, enacted as Laws. of Fla. Ch. 2000-258. *See generally Jeffrey Davis, Fixing Florida Execution Lien Law*, 48 Fla. L. Rev. 657 (1996); and Jeffrey Davis, *Fixing Florida's Execution Lien Law Part Two: Florida's New Judgment Lien on Personal Property*, 54 Fla. L. Rev. 119 (2002).

6 Before then, a judgment creditor would be required to obtain a writ of execution from the clerk of the court for circuit in which the final money judgment was entered and then docket that writ with the sheriff of the Florida county where the creditor believed there was non-exempt tangible personal property owned by the judgment defendant. *See* Fla. Stat. Ch. 56 (1999). With 67 counties in Florida, locating and levying upon movable tangible personal property made post-judgment collection time-consuming, impractical, and expensive.

7 F.S. §55.202(2) (2001). As a practice pointer, lawyers representing judgment creditors generally should not file a judgment lien certificate until the time for re-hearing has expired. *See, e.g., In re Pullum*, 598 B.R. 489 (Bankr. N.D. Fla. 2019).

8 As noted above, in 2001, the Florida adopted a complete revision to art. 9, which, among other things, added the term "payment intangible," Fla. Stat. §679.1021(1)(iii), a subset of previous recognized "general intangible," Fla. Stat. §679.1021(1) (pp).

9 *See* Fla. House of Representatives, *Staff Final Bill Analysis for CS/HB 27, Ch. 2023-300, Laws of Fla. (2023)* (June 30, 2023).

10 *White Paper by Business Law Section of Florida Bar, Bankruptcy/UCC Committee, on Clarifying and Expanding the Scope of Florida's Judgment Lien on Personal Property, available at* https://flabizlaw.org/wp-content/uploads/2021/06/Judgment-Lien-White-Paper.pdf.

receivable. Section 55.202(2), as amended, revised existing law by adding the emphasized (italicized) phrase below:[11]

(2) A judgment lien may be acquired on a judgment debtor's interest in all personal property in this state subject to execution under s. 56.061, *including payment intangibles and accounts, as those terms are defined in s. 679.1021(1), and the proceeds thereof, but excluding other than fixtures, money, negotiable instruments, and mortgages.*

In other words, the act enhances judgment collection remedies because now a judgment creditor has a more direct shot at a defendant's non-exempt cash flow, if it exists in the form of accounts or payment intangibles. Such payment rights could include the judgment defendant's legal entitlement to payment for services rendered[12] or goods sold, which is an account under F.S. §679.1021(1)(b), or the defendant's legal entitlement to receive royalties, rent under a personal property lease, or payments due under a contract such as settlement agreement, each of which is a payment intangible.[13]

Consequently, as of July 1, 2023, a judgment debtor may no longer be able to protect valuable intangible assets with significant equity and avoid responsibility on a valid judgment debt, except to the extent a natural person defendant can use his or her modest personal property dollar exemptions under Fla. Const. art. X, §4(2), or, if applicable, F.S. §222.25(4). A judgment defendant may have an argument to avoid the lien, if the payments rights are owned legitimately as "tenants by the entireties" and that title is not subject to challenge as a fraudulent transfer under F.S. Ch. 727, or a "fraudulent conversion" under F.S. §222.30. In any event, collection lawyers should make sure they revise their discovery in-aid-of-execution checklists to cover these new attachable property rights, including when and how acquired and by whom. At the same time, counsel advising judgment defendants should consider the impact of these new rights when advising clients.

ENFORCEMENT OF A JUDGMENT LIEN AGAINST ACCOUNTS OR PAYMENT INTANGIBLES

So, how does the judgment creditor collect the identified payment streams subject to its judicial lien? During its study process, the section's subcommittee was concerned about permitting creditors using self-help to go after the judgment defendant's revenue stream. This concern existed because of the potential havoc and confusion this type of collection action might cause to an ongoing business, including the adverse impact on employees and any existing secured credit relationship. An entity judgment debtor may have previously pledged its accounts and payment intangibles (and other assets) as part of a secured line of credit transaction to lender or factor. The pre-existing perfected lien takes priority over the lien rights of a judgment creditor in the same asset, under F.S. §55.202(2)1 and art. 9 of Florida's version of the Uniform Commercial Code.[14]

Importantly, unlike a consensual secured creditor under art. 9, a judgment lien creditor cannot invoke the non-judicial notification protocol authorized by F.S. §679.607(1)(a), unless it obtains the written consent of the judgment debtor *after* the creditor's judgment lien certificate has been filed.[15] Such written consent could be obtained as part of an agreement to temporarily forbear from collection remedies after the judgment lien attaches, for instance, although a direct pledge to secure the judgment debt under art. 9 might be preferred in that circumstance. Absent valid consent, self-help against the intangible property is prohibited by the act's language, which requires judicial process to effectuate collection.

The act lists various methods by which the perfected judicial lien creditor can effectuate its judgment lien, but not all of them enable the creditor to get at a defendant's right to receive accounts or payment intangibles. New subsection 55.205(6) provides, in relevant part:

(6) A judgment lien acquired under s. 55.202 may be enforced only through judicial process, including attachment under chapter 76; execution under chapter 56; garnishment under chapter 77; a charging order under s. 605.0503, s. 620.1703, or s. 620.8504; or proceedings supplementary to execution under s. 56.29.

Attachment under F.S. Ch. 76 has a well-established set of rules and protocols, which to this writer seems a cumbersome and time-consuming means to reach the debtor's right to receive payments of money owing by a third party. Moreover, levy of the payment stream of accounts or payment intangibles and an execution sale under F.S. Ch. 56 are not available because §§56.061 and 56.069, do not include these intangibles.

A judgment creditor may use post-judgment garnishment under F.S. §77.03 to obtain what the garnishee/payor owes the judgment defendant, but that approach is limited. This is because Florida does not

11 This quoted section is taken from the House's engrossed bill format for Laws of Fla. Ch. 2023-300 (2023).

12 Lawyers should be cognizant of payments due to the defendant for services rendered constitute exempt "wages" under Fla. Stat. §222.11.

13 See Fla. Stat. §679.1021(1)(iii). *See generally* Fla. House of Rep. Subcomm. on Civ. Justice CS/HB 27 (2023) *Post Meeting Staff Analysis* (June 30, 2023), *available at* https://www.flsenate.gov/Session/Bill/2023/27/Analyses/h0027z1.CJS.PDF.

14 *See* Fla. Stat. §679.301.

15 Fla. Stat. §55.205(6) ("A holder of a judgment lien acquired under s. 55.202, ..., may not enforce his or her rights under this section through self-help repossession or replevin without a court order or without the express consent of the judgment debtor contained in a record authenticated in accordance with s. 668.50 or s. 679.1021(1)(g) after the judgment lien attaches.").

authorize continuing garnishment except for wages.[16] Thus, when money is payable repeatedly or in installments, as often is the case with royalties or lease payments, a new writ of garnishment needs to be served at the time each payment is due to the judgment defendant. There is also a risk the writ is served too late or too early. However, using garnishment may be effective if the judgment creditor is aware of an impending large payment to be made to the judgment defendant.

Another impediment exists with using the garnishment remedy where the garnishee is located outside Florida, in which case the judgment creditor must domesticate the judgment in the state where the payor is located, hire counsel in that state, and implement the garnishment process of that state. Finally, the judgment creditor using the garnishment remedy needs to make sure the court enters a final judgment or order ruling that the payments being made by the account debtor are to be paid to the judgment creditor to complete the judicial process.

New F.S. §55.205(6), recognizes that a judgment creditor can use proceedings supplementary under F.S. §56.29 to obtain a court order authorizing the direct collection of the accounts or payment intangibles from an account debtor. The new law does not mandate the exact form of pleading that must be initiated to obtain the required court order. Instead, F.S. §55.205(7) authorizes the judgment creditor to file and serve an account debtor:

with a complaint or petition by the judgment creditor seeking judicial relief with respect to the payment intangibles or accounts. [After service of process on the account debtor], the account debtor may discharge the account debtor's obligation to pay payment intangibles or accounts or the proceeds thereof under this section only in accordance with a final order or judgment issued in such judicial process that complies with this section.

This amendment adopts some protocols of F.S. §679.607(1)(a) and imposes a duty on the account debtor to cease payment to the judgment debtor once the account debtor has notice of the judgment creditor's claim, which in this context is service of process of the judgment creditor's legal action on the account debtor. The bottom line is that a judgment creditor now has the opportunity to go after a judgment debtor's anticipated revenues before they are collected as long as that creditor serves the account debtor with the required process, consistent with F.S. §55.205(7). At that point, the account debtor can no longer pay its vendor or supplier, who also is the judgment debtor, unless a final order allows those payments to resume. As a practical pointer, from a cost-benefit analysis, however, lawyers advising judgment creditors should discuss with their clients the existence and extent of a pre-existing secured lien filed against the potential accounts and payment intangibles. Such collection action still might be warranted if, for instance, the judgment creditor has reason to believe the defendant is wasting or absconding with the payments collected from the account debtor.

CAVEAT: PRIOR PERFECTED ART. 9 SECURED PARTY UCC LIEN BEATS JUDGMENT LIEN CREDITOR

The act makes it clear that a judgment lien certificate does not prime the existing rights of prior perfected secured parties under art. 9.[17] However, if a secured creditor with a prior-filed financing statement permits its perfected lien to lapse by failing to timely file a continuation amendment within six months of its expiration date,[18] a holder of an effective judgment lien certificate would prime the secured party's priority in the subject accounts and payment intangibles, at least until the judgment lien's five-year life has expired. Moreover, new F.S. §55.205(7) makes it clear that the account debtor retains its obligation to a secured party who has made written demand upon it to turnover payments under F.S. §679.607(1), "except as the rights and obligations under this paragraph are otherwise adjudicated under applicable law in a legal proceeding to which the secured party and account debtor are joined as parties." As noted, unless and until a court enters a final order to the contrary, the account debtor is required to pay its accounts or payment intangibles to the secured party who sent the notice.

ONE POTENTIAL EFFECT OF NEW LAW

The aggressive use of the act's new creditor rights benefits might encourage more bankruptcy filings by judgment defendants whose revenue flows from payments coming from third parties. The judgment lien against a judgment defendant's account or payment intangible becomes perfected for a five-year period the moment the judgment creditor properly files an authorized and properly completed judgment lien certificate with the Florida secretary of state that is accepted.[19] Further, 90 days after the filing of the judgment lien certificate, the judgment creditor's lien in the defendant's right to receive payments as accounts or payment intangibles generally cannot be avoided as a preference under federal bankruptcy law, specifically §547 of Title 11 of the U.S. Code.

16 Fla. Stat. §77.0305.

17 Fla. Stat. §55.202(2)(a)1. As a practice pointer, the act's creation of a judgment creditor's lien in accounts and payment intangibles should act as a reminder to lawyers representing asset based lenders to check the state's judgment lien certificate registry before making secured loans to a person or entity: State Division of Corporations, search engine, https://dos.sunbiz.org/jlilist.html.

18 Fla. Stat. §679.515.

19 Fla. Stat. §55.202(2)(a). Under existing law, a judgment lien creditor can file a second judgment lien certificate for one additional five-year period, although the effective date of perfection of that second lien is the date of the new filing and does not relate back. Fla. Stat. §55.508.

Moreover, the service of a complaint or petition by the judgment lien creditor against the account debtor prohibits that payor from paying its vendor who is a judgment debtor. This initiation of legal action may severely cut off the judgment debtor's cash flow and result in a Ch. 11 filing. However, in Ch. 11, the debtor-in-possession can assert a demand for turnover under 11 U.S.C. §542(b), which generally entitles the company to recapture its receivable payments.[20] Thus, counsel to a defendant that depends upon timely collections of payment entitlements and is facing a likely money judgment may want to discuss with his or her client sooner rather than later the impact of the act and whether some type of bankruptcy protection is warranted.

CLARIFICATIONS TO BETTER RECOGNIZE AND EFFECTUATE A JUDICIAL LIEN AGAINST CERTIFICATED VEHICLES AND VESSELS

In addition to the expansion of a judgment creditor's rights to go after certain intangible property of a judgment defendant, the act 1) creates a new subsection (6) under the proceedings supplementary protocols of F.S. §56.29(b), requiring the trial court to enter an order directing the Florida Department of Highway Safety and Motor Vehicles (DHSMV) to show a creditor's judgment lien certificate on a title certificate for any non-exempt motor vehicle or vessel owned by a judgment defendant; and 2) clarifies the process to obtain notation of a judgment lien on a title certificate of a motor vehicle or vessel. The changes in F.S. Ch. 319, the certificate of title statute, also aid a judgment creditor's ability to recover against non-exempt vehicles or vessels owned by the judgment defendant. A judgment lien creditor must utilize the levy, notice and sale procedures of F.S. Ch. 56 (which are beyond the scope of this article) in order to realize upon its judgment lien against the defendant's car or boat.

This portion of the act affecting cars and boats owned by judgment defendants fills a gap that allowed a judgment defendant to frustrate the judgment creditor's efforts at recovery in situations in which a defendant owns an expensive car or boat with little or no debt. Florida law requires the judgment lien to be noted on the title certificate if the judgment creditor seeks to enforce the lien against someone other than the owner. However, until the act, there was no statutorily approved procedure for a judgment creditor to add this notation to the title certificate. As a result, creditors were uncertain as to how to obtain a court order requiring DHSMV to add the notation — whether through filing a separate action or by initiating a proceeding supplementary to the execution. This ambiguity enabled a judgment debtor to sell luxury automobiles and boats free of an otherwise valid judgment lien, because without the notation of the lien on the official certificate giving notice to third parties of the judgment lien, the judgment creditor generally could not enforce the lien against creditors or a subsequent purchaser.[21]

To resolve the dilemma, the act indicates two ways to obtain notation of a judgment lien on a title certificate: 1) the statute establishes a process in which a judgment creditor may directly request the DHSMV to note a judgment lien on a vehicle or vessel's title certificate;[22] and 2) the new law clarifies that judgment creditors may request a court order in proceeding supplementary to execution, rather than in a separate action.[23] By providing clarity and creating a streamlined process, the act closes a loophole that allowed debtors to evade payment. However, new subsection 55.205(a)(5) states that the "enforceability...against creditors or subsequent purchasers is determined as provided under s. 319.27(2) or s. 328.14, as applicable," which are part of the certificate of title statutory scheme.

TRANSITION RULE

Finally, F.S. §55.208, provides a transition rule that addresses that act's application to existing judgment liens as distinguished from those acquired after the effective date. In this regard, the new law makes it clear that all judgment lien certificates effective as of September 30, 2023, are perfected as of October 1, 2023, with respect to payment intangibles and accounts and the proceeds thereof. The transition provision also confirms that pre-existing, perfected security interests or other liens retain their priority in the same intangible property of the judgment defendant.

CONCLUSION

In summary, Florida has modernized and expanded the remedies of a judgment creditor in its efforts to collect against a judgment defendant and clarified the protocols for the judgment creditor to ensure its judgment lien is more likely to be effective against the defendant's car or boat, subject to the protocols and limitations. The act also provides certain "checks and balances" that apply to the affected parties and generally requiring court supervision of a creditor's lien enforcement actions against the now attachable intangible property. Time will tell whether these changes will have any material impact on a judgment creditor's post-judgment collection actions. ■

20 The prior perfected rights of secured party in the "cash collateral" of the debtor-in-possession would need to be addressed, as contemplated under 11 U.S.C. §363.

21 *See* Fla. Stat. §§319.27(2), 328.145, and 328.14. (These provisions address the rights of creditors and third parties). A bankruptcy trustee or debtor-in-possession is included in this group. 11 U.S.C. §544(a)(1).

22 *See* Fla. Stat. §319.24(4)(a)(2) (2023).

23 See Fla. Stat. §55.205(5)(b) (2023).

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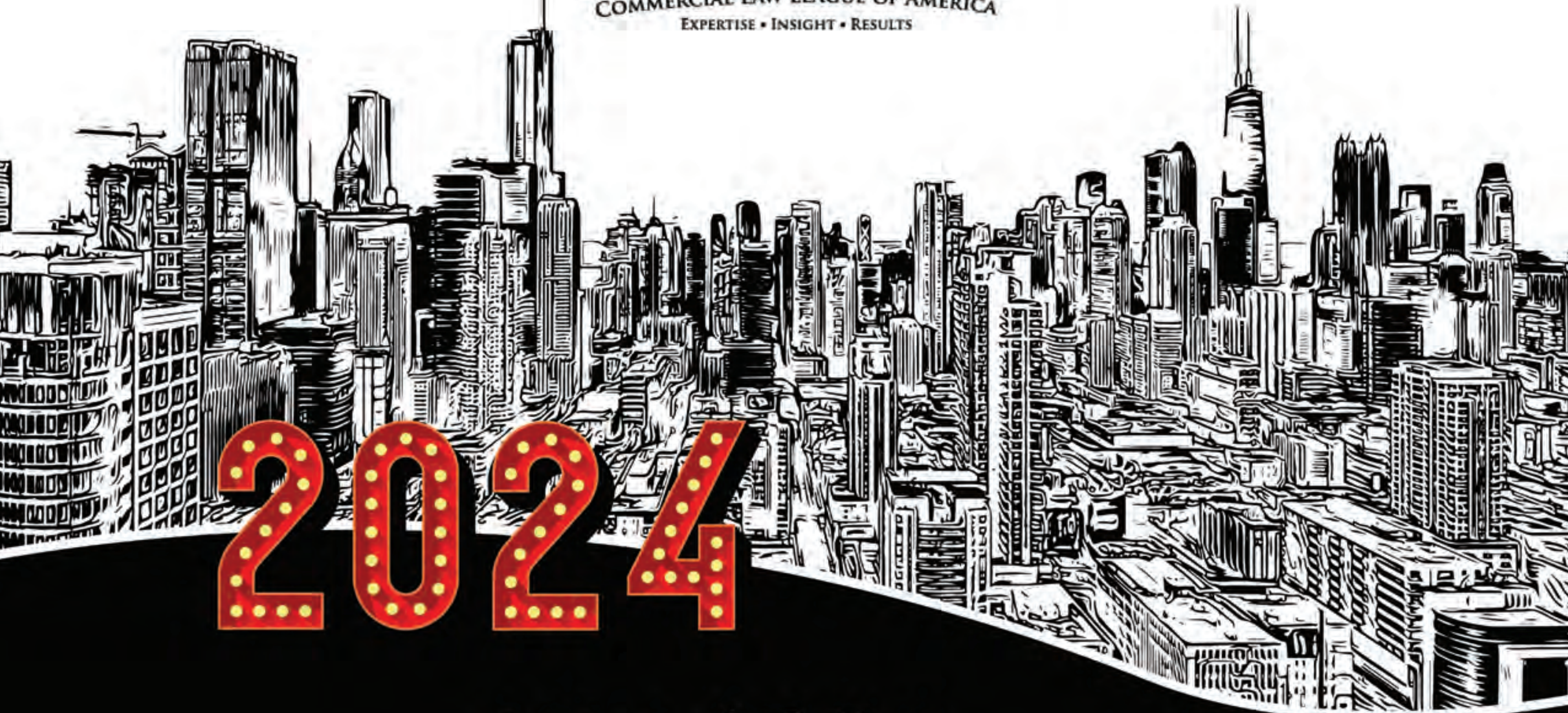

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GET INVOLVED OR GET RUN OVER

Bills and referenda are making the rounds in different states trying to "level the playing field" in the collection world. Unless you are willing to fight back, you and your clients will have to adjust to the aftermath. Recently Michigan introduced Senate Bill 408 and SB 409 and House Bill 4009 which will markedly change both bankruptcy exemptions and collections on debt. Michigan's credit industry is working diligently and effectively to stop the overreach.

Under the bills:

1. At least 15 days and not more than 45 days before requesting a court to issue a writ of garnishment, the person requesting the issuance must serve the judgment debtor, in a manner that complies with Michigan court rules, with a notice in plain language using a form developed by the state court administrative office.

2. A financial institution that is holding money of the debtor in a deposit account that is served with a garnishment shall calculate the amount of money deposited into the account in the 90 days preceding service that was deposited from a source described in section 4032(1) or any other source that is exempt from garnishment. The financial institution shall include its calculations in its disclosure.

3. A $15,000 "wild card" exemption is applicable to bank accounts, real or personal property exemptions.

4. Sec. 6023e. (1) Money received from the sale or transfer of property that is exempt under this chapter or other law remains exempt for 18 months while in the debtor's possession, in a checking or similar account, in a savings account, in a certificate of deposit with a term that does not extend past the 18 months, or otherwise held in a way that the money is regularly available to the debtor and is traceable and may be converted into another type of exempt property.

5. A judgment creditor, court officer, sheriff, or other person shall not levy execution, garnish, attach, or otherwise seize property that may be exempt without a court order reasonably identifying the property and the manner of levy.

6. When a judgment creditor obtains a writ of execution, the clerk of the court, court officer, sheriff, or other person shall give a notice to the judgment debtor, to any person in possession of the property involved, and to any person known to the judgment creditor after reasonable inquiry to have an ownership claim to the property involved. The notice must state the person's right to a hearing to claim exemptions that are not self-executing, to contest the seizure of exempt or necessary property, or to seek to set aside the judgment, and the steps the person may take to assert these rights. If documents are served on the person in connection with the execution, this notice must be included with the documents, but otherwise it must be given by first-class mail.

BACKGROUND

By way of backdrop, Michigan's Supreme Court authorized a Justice For All Commission Debt Collection Workgroup. The focus of this group called for changes to process and forms from the time the suit is filed until judgment. The Pew Research Group, in conjunction with National Consumer Law Center, had input through this workgroup. There were significant prejudgment changes which won't have a deleterious effect on the commercial world. There were some POST judgment changes to exemptions which were benign and limited in scope. The post judgment proposed changes were not accepted by the JFAC because it was outside of the Workgroup's mandate.

Not being satisfied with the results, the Pew Workgroup members almost immediately registered as lobbyists to help introduce and promote these draconian bills. These bills affect ALL creditors including commercial collections and bankruptcy. For three basic reasons: 1) Your clients will be affected, directly and indirectly; 2) it will affect how much money can be collected or exempted; and 3) No collections, no credit. Finally, the changes to the exemptions are automatic. It is important to note the judgment creditor will not know of the exemptions yet, the garnishee defendant, the judgment creditor and court officer, can all be liable for attaching or garnishing the stealth exemptions.

POST JUDGMENT ACTIONS

Michigan has three unique features in post judgment collection:

1. Michigan's judgment cannot become a foreclosable lien on property. A creditor must levy personal property and then real property to obtain a sheriff's deed and sell the property;

2. A judgment debtor can seek an installment payment order to suspend a wage garnishment; and

3. A garnishment can be issued to the State's Treasury office to collect Michigan tax refunds and lottery winnings.

JUDGMENT LIENS

In 2005 Michigan enacted the judgment lien act which provides limited protection. The lien is filed in the county where property is located with only the judgment debtor's social security number and without a legal description. The judgment creditor cannot foreclose on the judgment lien. There is no recourse if

the property is sold without satisfying the judgment lien. This bill, however, allows the judgment debtor to protect the property in the county where the lien was filed to the extent that there is more than $250,000 in equity.

BANK GARNISHMENTS

Under these proposed bills, judgment debtor must have over $17,000 in the bank or make over $78,000 per year for the judgment creditor to be able to collect the money awarded. This means no judgment creditor will ever be paid unless out of the goodness of their opponent's heart.

HARM TO SMALL BUSINESSES

This legislation harms both small businesses (plumbers, contractors, accountants) and consumers. Small businesses may require cash payment from a consumer or a deposit before performing any services. (Lawyers, remember the first rule you learned in law school? Get your money up front!)

The effect of these bills is that all of those who use credit will see a decrease in the availability of credit and an increase in the costs of goods and services. This decrease in credit will impact car sales, home sales, and decrease credit card limits. By creating a class of people who are not obligated to repay their debt, the bills create a permanent underclass of people who will pay exorbitant interest rates, if credit is available to them at all.

These disingenuous bills are disguised as "helping the consumer" with credit card debt. But the result will be more far reaching than "consumers". Michigan does not have a unique case code for "consumer" debt collection cases. Thus, individual guarantors of commercial claims will be caught up in the flotsam and jetsam trailing in the wake of these bills. Neither the courts, financial institutions or court officers will know if the case is a commercial or consumer case. Moreover, there are severe penalties for judgment creditors, garnishees and court officers who try to execute undisclosed exempt assets.

The credit grantors will have to adjust their standards for credit worthiness. The Consumer Financial Protection Bureau wrote: "We estimate that a dollar decrease in the amount of garnishable wages per week decreases the credit card limit by $10.04". **You don't cure an illness by killing the patient.**

BANKRUPTCY EXEMPTIONS

The proposed bill SB 409 increases exemptions:

Crops, farm animals: From $2,000 to $10,000;
Bank account: Look back 18 months: any money from public benefits is exempted;
Motor Vehicle equity: From $2,275 to $15,000;

Tools of the trade: From $2,000 to $10,000;
Homestead equity for under 65 years old: From $30,000 to $250,000;
Over 65: From $45,000 to $350,000; and
Wildcard exemption: $15,000 in ADDITION to all the other exemptions.

Bankruptcy trustees are opposed to these (and other) increases because the rich can shield their assets and the poor can never get the "fresh start". From the Michigan Trustees: "In that regard, exemption of certain property from liquidation is intended to prevent punitive seizures of items of little or no economic value (personal effects, personal care items, ordinary clothing) to creditors, but could have devastating consequences to debtors in economic distress, preventing them from achieving a fresh start. The U.S. Supreme Court recognized that in crafting the provisions of 522 (the federal exemption statute) 'Congress balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors. Schwab v. Reilly, 560 U.S. 770, 771; 130 S. Ct. 2652; 177 L. Ed. 2d 234 (2010)'".

FIGHTING BACK

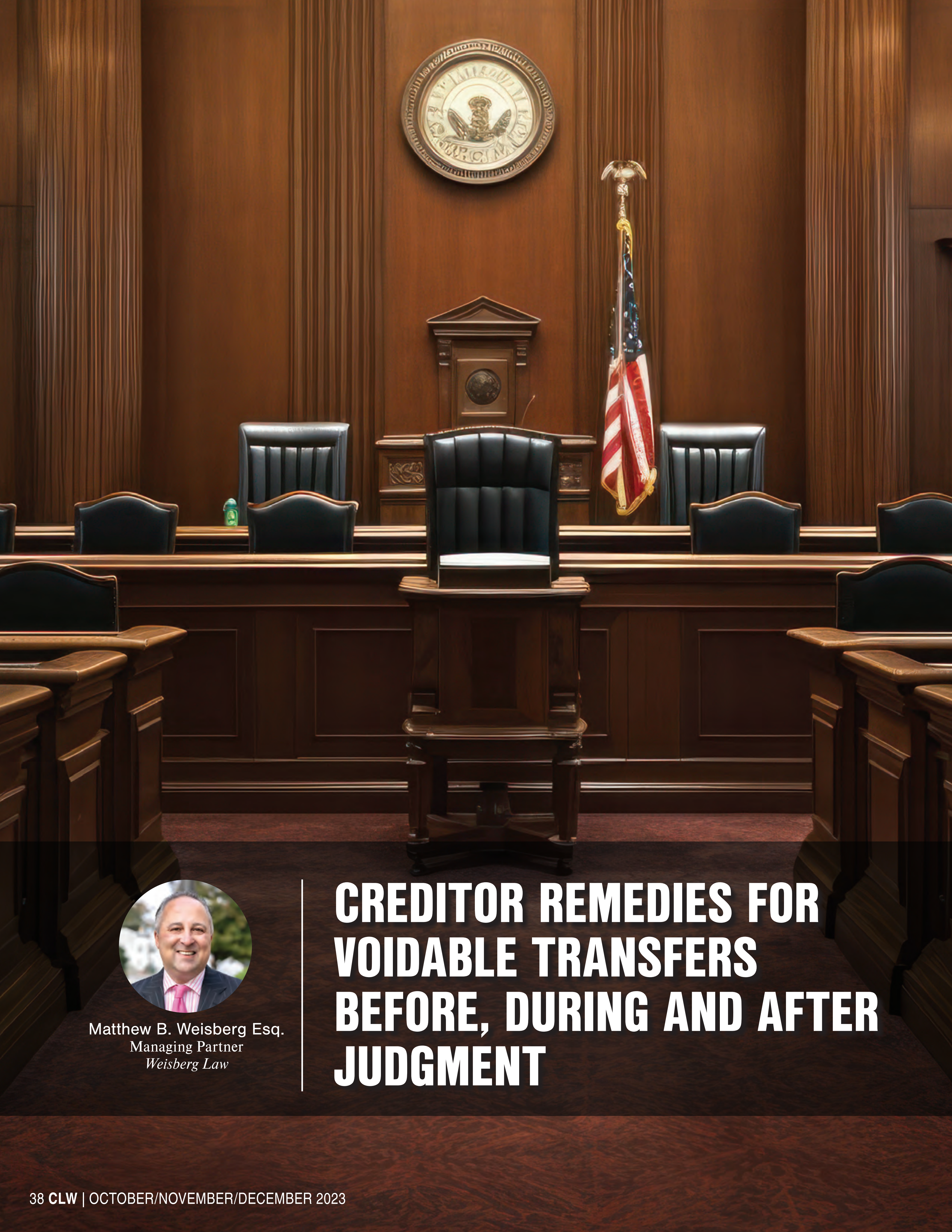
Michigan has a small but very active and engaged creditors' bar association and a coalition made up of banks, credit unions, the bankruptcy trustees, as well as other organizations which will be impacted by these bills. The fight is costly in terms of time and money. Many members attended "in- district" meetings, attended meetings set up by a lobbyist in the capital, Lansing, wrote op-eds and letters to their elected representatives and gave money to MCBA's PAC. It takes many people to be actively engaged to defeat this bill. It is a good lesson for the credit and collection industry and for our CLLA members.

LESSONS FOR US ALL

On a national level as well as state level, we MUST ALL engage in legislative initiatives. Whether it's promoting, amending, or preventing a bill's passage we all must:

1. Be aware of referenda, ballot initiatives or legislation that may affect our industry;
2. Draft a clear message;
3. Educate the legislators and like-minded organizations;
4. Engage with the like-minded groups;
5. Get involved either by writing letters, meeting with your state and/or national legislators; AND
6. DONATE TO THE PAC!

If you don't steer the train you will get run over by it. Engage or suffer the consequences. The job you save may be your own. ■



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CREDITOR REMEDIES FOR VOIDABLE TRANSFERS BEFORE, DURING AND AFTER JUDGMENT

Winning a lawsuit is not enough if the judgment creditor cannot collect the money awarded because the defendants got rid of their assets before being held liable and those assets are dissipated during the litigation. Avoidable transfers can and do occur, sometimes inadvertently, especially with small or family-run businesses. Judgment creditors must be on the look-out for some common scenarios in which they occur, and then act promptly. For example, did the executives reimburse the company for any credit card use that was personal in nature. Where the company debtor operates more than one entity, and one of the entities routinely pays the debts of another due to cash flow issues, was a reconciliation of such payments completed when cash is available. Did an insolvent debtor transfer property to a relative or other insider? What should a creditor do in those circumstances?

Avoidance laws[1] have the purpose and effect of re-ordering the distribution of a debtor's assets, erasing the results of debtor and creditor actions in favor of the collective priorities established by the distribution statute.[2] Avoidance actions typically seek to recover cash and other tangible property transferred by the debtor to creditors and other parties. The laws permit judgment creditors or a trustee in bankruptcy to recover property, or its value, from transferees of that property.

PROVISIONAL REMEDIES

It is important to consider the risks of "defendants" asset dissipation as part of pre-litigation strategy. Provisional remedies are critical tools for preserving the parties' status quo until the court has had an opportunity to decide the case and issue a final judgment. These remedies are particularly relevant when the target of a recovery is a specific item of property. Examples include injunctions, restraining orders, attachments, sequestration, and garnishments. The most common are restraining orders and injunctions. However, before moving for injunctive relief, consider whether a prejudgment writ would be better suited to accomplish the creditor's intended goals. Because prejudgment writs are primarily state law remedies, they vary from state to state, but can also be obtained in federal court.

These writs have distinct advantages over injunctions where the creditor seeks to secure (a) property in which parties have conflicting interests, (b) critical evidence, or (c) funds or property from which a judgment will ultimately be paid from a defendant at risk of dissipating, destroying, or concealing these items. It is worth noting that if the property at issue needs to be actively managed during the litigation rather than seized and held, a receivership may be the best solution.

PREJUDGMENT WRIT OF ATTACHMENT

Prejudgment attachment is a provisional remedy that provides a plaintiff with a statutory mechanism by which he/she can secure a defendant's assets during the pendency of a lawsuit. In effect, an order of attachment is a lien against a defendant's property. As such, a prejudgment order of attachment increases the likelihood of recovery on a later-obtained judgment in the action.

The requirements for obtaining a prejudgment attachment order vary from state to state; there is no federal law or common law right to prejudgment attachment. Generally, the plaintiff (or creditor) must: (1) have a pending lawsuit for damages, (2) identify the property or asset to be attached in detail, (3) claim a legal right to that property or asset, and (4) demonstrate the need to secure the property or asset prior to the conclusion of the lawsuit. Prejudgment attachments are solely the creature of court rule or statute; the common law did not provide such a remedy.[3] The misuse of prejudgment attachments by the consumer finance industry was the subject of a series of US Supreme Court cases in the early 1970s focusing on due process issues.[4] As a result, a prejudgment attachment is generally not available without at least a hearing, and many courts severely restrict its availability. It is generally a disfavored remedy and will generally be strictly construed.[5]

Constitutional due process requirements almost always mandate a notice and a hearing before a writ of attachment will issue. Many courts require the plaintiff to file a bond to protect the person who is property is the subject of the attachment. The amount of a bond is generally left to the discretion of the trial court and is therefore highly dependent on the particular facts of the case.

PREJUDGMENT WRIT OF GARNISHMENT

Another remedy is a prejudgment garnishment which, unlike a writ of attachment, allows a plaintiff to prevent a third party from transferring the defendant's property in its possession (or paying a debt owed) to the defendant. Unlike a post-judgment garnishment, a prejudgment garnishment orders the third party to hold or freeze the defendant's property until final judgment. While garnishments are most commonly used for freezing bank accounts, the remedy could also be used for crypto currency, settlement proceeds, stock

1 For example, the Uniform Voidable Transactions Act (UVTA), formerly named the *Uniform Fraudulent Transfer Act* (UFTA) provide creditor protections by providing remedies to undo certain transactions y a debtor that are unfair to creditors. In addition, the Bankruptcy Code has its own avoidance remedies at 11 U.S.C. sections 547, 548 and 550.

2 *In Re: Condor Insurance Limited* (601 F.3d 319 5th Cir. 2010).

3 3 *Connecticut v. Doehr*, 501 U.S. 1, 16 (1991).

4 *See e.g., Fuentes v. Shevin*, 407 US 67 (1972).

5 *See, e.g., Worchester v. State Farm Mutual Automobile Insurance Co.*, 473 P.2d 711 (Colo. 1970).

certificates, or any other non-exempt property.[6] In situations where a temporary restraining order preventing a sale or transfer seems like a good remedy; instead, a prejudgment garnishment writ may be the better solution, allowing the plaintiff to freeze sale proceeds that could satisfy a judgment. Most jurisdictions have statutory provisions for obtaining a garnishment writ, although the process may have different labels, including "trustee process" or writ of attachment.

PREJUDGMENT WRIT OF SEQUESTRATION

A writ of sequestration allows a party with an existing security interest in property to ask the court to take custody of that property to prevent its disposition, concealment, waste, removal, or destruction pending final judgment. The typical example is an installment sale of the goods to the defendant, the defendant stops paying and the vendor seeks sequestration of the goods sold to enforce a vendor's lien.[7]

RECOVERY OF NON-MONETARY JUDGMENTS

Recovery of money judgments are common but if your judgment against the debtor is for something other than the payment of a lump sum or periodic amounts, how do you recover? For example, what if the court has issued an order and judgment requiring the judgment debtor to convey a particular property, or to perform a specific act? What if the debtor refuses to comply? Many of the remedies relating to execution and garnishment are not relevant to a non-money judgment. Rule 70 of the Federal Civil Rules of Procedure[8] governs how the creditor seeks to enforce that type of judgment. Rule 70 allows the application of what are essentially legal remedies to the enforcement of equitable decrees.

Although many of the remedies available to money-judgment creditors do not apply to a non-money judgment, there are other options available for collection. Rule 70 provides powerful remedies of attachment and execution. With respect to real or personal property within the district, the court can issue remedial orders and direct the clerk to issue a writ of attachment against the property of the judgment debtor to compel obedience to the judgment. Or, the court can find the judgment debtor in contempt and enter a judgment that divests the title from the judgment debtor (or any party holding the judgment debtor's assets), and vests the property in you, as the judgment creditor. This judgment has the effect of a conveyance, executed in "due form of law" and can be recorded with the register of deeds.

This represents two ways of circumventing the problem of a party who refuses to execute a necessary deed, or other title document.

HOW IS RULE 70 APPLIED TO EFFECTUATE THE CONVEYANCE?

Rule 70 provides for two types of remedies to effectuate conveyances under a non-monetary judgment. Remedial Orders and Writ of Attachment

As the judgment creditor, you can begin the enforcement process by filing a "Motion to Compel" or "Motion for Contempt" with the Court and a proposed order for the requested relief. Your motion should (a) describe underlying litigation; (b) include the date on which your original judgment against the judgment debtor was entered; (c) describe specific acts the judgment directed the judgment debtor to complete and the specified period of time; and (d) attach a copy of the judgment. Your motion should then state that the judgment debtor has not completed the specific acts within the specified period of time, and request the court to direct the act to be done at the cost of the judgment debtor, by some other person appointed by the court. If you have a particular person in mind to perform the necessary actions, you should name that person in the motion.

If the court grants the motion, the order should direct the issuance of a "remedial" judgment, and direct the clerk to issue a writ of attachment/garnishment or writ of assistance against the property of the judgment debtor to compel obedience to the judgment.

CONTEMPT REMEDY AND WRIT OF EXECUTION

The court may also, in certain cases, find the judgment debtor in contempt.[9] A civil contempt order may issue upon a court finding: "(1) that a valid order of the court existed; (2) that the defendants had knowledge of the order; and (3) that the defendants disobeyed the order."[10] The Supreme Court succinctly stated: "We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect

6 6 *See e.g. Shandong Airlines, Co., Ltd. v. CAPT, LLC*, 2009 WL 1861997, at *3 (M.D. Fla. June 25, 2009) (prejudgment writ against a third-party auction service garnishing US$4 million from the anticipated sale of the defendant's assets).

7 *See, e.g., Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974).

8 Fed R. Civ. P. 28 U.S.C. . Many states have identical or similar rules based on this federal rule.

9 "There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966).

10 *Marshak v. Treadwell*, 595 F.3d 478, 485 (3d Cir. 2009).

[emphasis added – citations omitted]. The orderly and expeditious administration of justice by the courts requires that 'an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings' [citations omitted] . . . Remedies for judicial error may be cumbersome but the injury flowing from an error generally is not irreparable, and orderly processes are imperative to the operation of the adversary system of justice."[11]

If real or personal property is within the district, the court, in lieu of directing a conveyance of the property at issue, may enter a judgment divesting the title of "any party" in which the property is vested, and order that the property be vested in you as the judgment creditor. This Rule 70 judgment is powerful and has the effect of a legal conveyance of the property. When the court enters an order or judgment for the delivery of possession in your favor, you will be entitled to a writ of execution or assistance, upon application to the clerk.

In certain types of cases, the parties may agree, via a partial settlement agreement or agreement to preserve the status quo pending an appeal, to appoint the clerk of the court, or some other third party, to execute any necessary deeds or other documents, in the event that one of the parties fails to do so. Such an agreement provides additional protection, as it gives the parties additional grounds to seek Rule 70 relief for contempt.

INVOKING THE INVOLVEMENT OF THE US MARSHAL – WRITS

The United States Marshals Service occupies a uniquely central position in the federal justice system. It is the enforcement arm of the federal courts and is involved in virtually every federal law enforcement initiative. For the service of any writ or process, the form "USMS-285" is utilized by the U.S. Marshals Service and Federal Court. One complete set of this form (USM-285) and one copy of each writ for each individual, company, corporation, etc., to be served or property to be seized or condemned must be submitted. The applicable fees for such services[12] may be required prior to said service. Some of the key writs of interest follow.

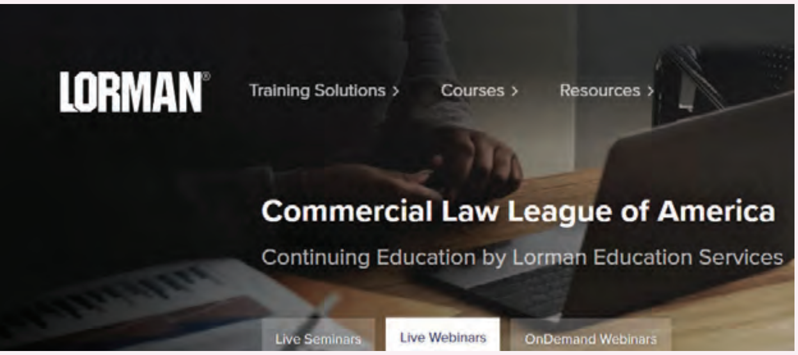
A **writ of assistance** is an order directing that a party convey, deliver, or turn over a deed, document, or right of ownership. This writ, which may also be called a writ of restitution or writ of possession, usually serves as an eviction from real property. In addition, if a judgment directs a party to execute a conveyance of land, to deliver a deed or other document, or to perform any other specific act, and the party fails to comply within the time specified, the court may direct the act to be done by some other person appointed by the court at the cost of the disobedient party. Where so performed, the act has like effect as if done by the party. The writ is normally limited to execution within the state in which the district court is located unless extended by federal statute, rule or court order. The writ is issued by the Clerk of the U.S. District or Bankruptcy Court, at the discretion of the judge, after judgment is rendered. The writ is served by a U.S. Marshal or other person, presumably a law enforcement officer, specially appointed by the court in accordance with Federal Rule of Civil Procedure 4.1(a).

A **writ of execution** is a process issued by the court directing the U.S. Marshal to enforce and satisfy a judgment for payment of money. (Federal Rules of Civil Procedure 69). The writ is served by the U.S. Marshal or other person, presumably a law enforcement officer, specially appointed by the court pursuant to Federal Rule of Civil Procedure 4.1(a). The writ is served according to the instructions contained within the writ and pursuant to state law, which generally governs procedures for levy. The judgment creditor may be required to provide an indemnity bond and an advance deposit to cover the U.S. Marshal's estimated out-of-pocket expenses. The judgment creditor should accompany the U.S. Marshal in executing the writ so that he or she may answer any questions that may arise during execution. Generally, the U.S. Marshal will maintain custody of the attached property, under court supervision. Alternatively, the judgment creditor may be named substitute custodian for the U.S. Marshal and maintain direct responsibility for custody of the attached property, either by court order or by written agreement with the U.S. Marshal. If the requesting party has arranged for moving or storage of the property, he or she must provide the U.S. Marshal with written proof that storage fees have been paid and that adequate insurance against loss or damage has been obtained, as evidenced by an insurance certificate. In addition, if the requesting party is named substitute custodian, he or she must provide the U.S. Marshal with a signed statement holding the U.S. Marshal harmless for any damages incurred as a result of the seizure while the property is in his or her custody. The U.S. Marshal is responsible for advertising and selling the seized property.

A **writ of garnishment** is a process by which the court orders the seizure or attachment of the property of a defendant or judgment debtor in the possession or control of a third party. The garnishee is the person or corporation in possession of the property of the defendant or judgment debtor, typically a bank. In accordance with Rule 64 of the Federal Rules of Civil Procedure, a writ of garnishment may be issued pre- or

11 *Maness v. Meyers*, 419 U.S. 449, 458-59 (1975) accord, e.g., *United States v. United Mine Workers of America,* 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring in affirmance of criminal contempt ruling) ("If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny."). See also, e.g., the Supreme Court's bankruptcy law ruling in *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 129 S.Ct. 2195, 2204-2206 (2009).

12 Title 28, USC Sec. 1921 establishes the fees for service of process by the U.S. Marshal.



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post-judgment, according to state law and practice. The requesting party may be required to provide an indemnity bond and an advance deposit to cover the U.S. Marshal's estimated out-of-pocket expenses. Under Rule 69 of the Federal Rules of Civil Procedure, any process issued to enforce a judgment for the payment of money is called a writ of execution. Consequently, in federal practice, there are no post-judgment writs of attachment or garnishment. Rather, the writ of attachment is denominated a writ of execution. Regardless of this denomination, however, enforcement of the writ is governed by state law as applicable to the analogous state law writ and procedure. Thus, a writ issued by a federal district court in Florida for enforcement of a judgment by garnishment will be called a writ of execution, but the U.S. Marshals Service will enforce the writ according to Florida state procedures for garnishment.

The utilization of any of these writs are unusual and require coordination among the Court, Office of the U.S. Marshal, Counsel and others. The Marshal Service is typically helpful in setting up the event. Counsel may need to coordinate the presence of a locksmith to avoid breaking down doors and to secure the property once the Marshal leaves. The Marshal provides logistics, manpower and protection. The Marshal will not take any chances. Before execution of the writ, they will investigate whether the debtor has any registered firearms, a criminal record or any outstanding warrants. Counsel will be asked to stay clear of the location at the time of execution. Once they clear the location and accomplish the mission, they will turn it over to the creditor as set forth in the order. The Marshal Service has protocols that they will follow to ensure that the job is completed in a safe and efficient manner.

FINAL THOUGHTS

Judgment creditors should not lose hope when a judgment debtor reveals that the assets are gone or observes transfers occurring in public records. Quite often an investigation will demonstrate a pattern of such transfers which may justify prompt and effective demands for the return of the assets from the third-party transferees. The creditor seeking recovery of specific property also has a range of pre and post judgment remedies to ensure the ultimate victory. Each remedy has its specific purpose and provides strategic benefits for a litigator when considering ways to maintain the status quo or secure property pending a final resolution of the litigation. Sometimes, a combination of remedies may be necessary, depending on the unique circumstances. As transactions become more sophisticated, creditors, too, must be vigilant in protecting their rights before, during and after litigation. ■

Our esteemed panelists have shared their expertise on a wide range of topics, and we are confident that you will find their discussions insightful and informative. All recorded sessions are free to view and do not offer CLE or CEU credits.

Additional Presentations Have Been Added!

- Enforcing International, Canadian and Sister-State Judgments and Judgments in Foreign Currency
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EXCEPTIONS TO DISCHARGE IN BANKRUPTCY: RECENT CASE DEVELOPMENTS

One area of bankruptcy law where creditors' attorneys and other credit professionals need to keep abreast of developments in order to better advise our clients in the credit industry relates to dischargeability. Getting a claim excepted from discharge dramatically changes the calculus for bankrupt debtors and is a valuable tool for negotiating some settlement for post-bankruptcy payments or otherwise getting such claims paid. For this reason, it is not surprising that creditors with viable arguments to except their claims are typically quite aggressive about pursuing the exception through an adversary proceeding in the bankruptcy court. As attorneys for these creditors, it is important to know when to encourage that fight and when to suggest that it might be both expensive and fruitless. Several important cases have appeared over the past year or so which might impact creditor claims in bankruptcy cases. The best-known one – *Bartenwerfer v Buckley*, 598 U.S. 69 (2003) – has generated a great deal of scholarly discussion in bankruptcy circles and has already spawned a number of court decisions that should interest credit professionals; however, there are a couple of other dischargeability issues that also merit review.

BARTENWERFER AND LIABILITY FOR "INNOCENT" DEBTORS

The Supreme Court handed down the *Bartenwerfer* decision on February 22, and it has already proven an irresistible lure for creditors trying to prevent debtors from getting a discharge under 11 U.S.C. §523. The issue that the Court was called upon to decide was whether imputed liability for fraud under California law would support an exception to discharge when the evidence showed that the debtor seeking the discharge did not commit the fraudulent acts which gave rise to the creditor's claim. Unfortunately, the facts in *Bartenwerfer* were just convoluted enough to create some confusion regarding its potential application. Specifically, while the debtor, Kate Bartenwerfer, was the wife of the party who did commit the fraud, that status of husband-and-wife was not the relevant question issue before the Court.

Before they got married, Kate and David Bartenwerfer were partners in a joint venture to flip a house. After David's representations to the buyer were determined to be fraudulently false, that creditor in Kate's subsequent bankruptcy case sought to have the debt excepted from discharge under the fraud exception in section 523. In Kate's bankruptcy case, she argued that she should be entitled to a discharge because she did not commit the acts upon which the claims of fraud were based. The Supreme Court held, however, that finding dischargeability does not depend upon the conduct of the debtor but is instead dependent upon the nature of the debt. "[I]t does not matter whether the Defendants committed the specific fraudulent acts. *Bartenwerfer* instructs the Court to look at the debt and ask first: is this a debt for money to the extent obtained by false pretenses, a false representation, or actual fraud?"[1]

After this initial look at whether the creditor's claim is one which may be excepted from discharge, the next question is whether this particular debtor is liable for that claim under state law. "Then *Bartenwerfer* asks if the [specific bankrupt] debtors are liable for this debt under applicable law, without considering whether the debtors themselves actually committed the fraudulent acts. If so, then the debt is not dischargeable."[2] Since individual liability for the fraudulent acts of partners in a general partnership has been in the common law since the late 19th century, liability for that fraud was imputed under California law to Kate as a partner in the business. So while Kate Bartenwerfer was not liable for her husband's fraud under California law, she was liable for her business partner's fraud. This two-step review – (1) is this a proper claim to except from discharge and then (2) is this debtor liable for the claim -- is the analysis that creditor's counsel needs to perform before advising the creditor client.

For instance, in the case of *Panjwani v Khan* quoted above, the bankruptcy court had initially determined that because the debtors had not committed the acts which damaged the creditor claimant, there was no exception to discharge. On reconsideration after *Bartenwerfer* was handed down, the court reversed its prior decision based on the evidence which showed that while the bankrupt debtors didn't commit the specific acts, they were part of the civil conspiracy which actually damaged the claimant. The court applied the two-step analysis described above and decided that the lack of overt actions by the debtors was not the critical inquiry. Instead the court asked whether they would be liable under state law as co-conspirators. The finding that they would be liable resulted in the claim being excepted from discharge.

It would be a mistake to see *Bartenwerfer* as creating a precedent for excepting discharge based upon "imputed bad acts." *City of Zielger v Uhls*[3] provides a clear example. The plaintiff City sought to except from Uhls' discharge its claim for over $300,000 which had been embezzled by the City Treasurer and which Uhls had failed to uncover during an audit which he had performed for the City. Judgment had been entered against Uhls in a state court case but the bankruptcy court reviewed the claim de novo (the law governing the estoppel effect of state court decisions in bankruptcy court is another topic for another day) and concluded that there was no actionable fraud on Uhls' part. The bankruptcy court quoted from *Bartenwerfer* that section 523 of the Bankruptcy Code "take(s) the debt as it finds

1 *Panjwani v. Khan*, Adv. 19-01040-SMG (Bankr. S.D. Fla., July 18, 2023) at page 10.

2 *Id.* At 11

3 Adv. 21 – 04015 (Bankr. S.D. Ill, Jun 29, 2023)

it, so if California law did not extend liability to honest partners, section 523(a)(2)(A) would have no role to play." [*Bartenwerfer* at 675.] The court then found that no Illinois law imposed vicarious liability on an auditor in this situation, and granted judgment to the debtor Uhls.

Similarly, in *Indus. Dev. Authority, etc. v. Poe*[4] the creditor sought to except from discharge its claim for $285,000 which was embezzled by a city employee (not the debtor) on the grounds that the debtor was an active participant in the crime and thus an agent of the embezzler. The bankruptcy court rejected this argument in finding "that Poe was merely a pawn in the scheme ... while he failed to exercise due diligence once he learned that the home had been purchased in his name, his actions did not create an agency relationship with McDonald sufficient to impute her felonious conduct to him."[5] Absent some basis for liability under Virginia law, the court found no basis for excepting the claim from discharge. (Based upon the facts as related by the Court in the opinion, Poe has to be considered a case where the creditor was trying whatever it could; the judge does everything except quote Mr. T by saying "I pity the fool." The caution for counsel is to make sure the creditor understands a long-shot when they are taking it.)

No case shows the potential for confusion sown by *Bartenwerfer* better than *Parr v Rassbach*, 650 B.R. 568 (Bankr. W.D. Wis. 2023). In a decision which seems to give more ammunition to creditors, the bankruptcy court did not reject an exception to Molly Rassbach's discharge under *Bartenwerfer*, despite facts showing that she "was not a party to the state court lawsuit and that the only mention of Molly in the current complaint is that she and Clinton are married and co-owned" the LLC which did home renovation work so poorly that it violated the Wisconsin Home Improvement Practices Act. In allowing the case against Molly to go forward, the court stated that *Bartenwerfer* provided precedent because "the spouse/business co-owner of an entity is liable for fraud committed by their spouse/co-owner." *Parr*, 650 B.R. at 577. The court went on to hold "it's at least plausible that Molly can be held personally liable for the debt of [the LLC], whether as an imputed partner or acting principal...." *Id.* At 578. The opinion does not do the work necessary to determine that under Wisconsin law a spouse can be liable for their spouse's fraud or that the co-owner of an LLC can be liable for the company's fraud based solely upon that ownership interest. While either or both of these theories may be viable under Wisconsin law (this writer has his doubts), it is clear that *Bartenwerfer* contemplates that the bankruptcy court must make that determination.

These early decisions interpreting *Bartenwerfer* suggest that it is not an open invitation to file an objection to discharge. A creditor considering an adversary to challenge the discharge needs to understand that the relevant law is not in the Bankruptcy Code, but in state law. Unless the creditor would have a strong case against the debtor outside the bankruptcy court, the costs of litigation in the bankruptcy court will likely not be rewarded.

SUB-CHAPTER V DISCHARGE EXCEPTIONS

When the provisions for small business cases were inserted as Subchapter V of Chapter 11 of the Bankruptcy Code ("Sub-V") the new statutes created an ambiguity regarding the discharge being granted under Sub-V. Section 1192 of the Bankruptcy Code provides that the debtor gets a discharge "except [for] any debt ... (2) of the kind specified in section 523(a) of this title." Section 523(a) provides "A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge *an individual debtor* from any debt ..." of the type identified in the 19 different subsections which follow. Section 1192, however, does not reference individual debtors in connection with the discharge exceptions. As a result, a number of creditors have pursued actions to except their claim from a business debtor's Sub-V discharge. Of the courts which have published an opinion on the matter, only one has found that a business' discharge can be excepted on section 523 grounds. However, that one outlier is also the only Circuit Court of Appeals decision. In *Cantwell-Cleary Co. v. Cleary Packaging, LLC*, 36 F. 4th 509 (4th Cir. 2022), the Fourth Circuit read the words "of the kind specified in section 523(a)" to merely identify the types of debts that can be excepted from discharge, rather than also incorporating the words "an individual debtor" from that section. *Cleary Packaging* goes on to hold that it is the type of debt and not the identity of the debtor which determines dischargeability under Sub-V, and determined that the claim against the small business debtor was excepted from the 1192 discharge.

Extending the application of section 523 to business debtors is a dramatic expansion of the law and seems inconsistent with the intent of Sub-V, which was meant to provide small business debtors with a less-costly way to reorganize than the traditional Chapter 11 case. However, the textual analysis undertaken by the Fourth Circuit echoes *Bartenwerfer* in focusing on the debt rather than the debtor; the argument that Congress could have inserted the word "individual" into section 1192 to clarify the ambiguity carried some weight with the Fourth Circuit and it may be that the Supreme Court which unanimously found that section 523 deals with the nature of debts rather than the identity of debtors will concur.

4 Adv. 21-01032-KH (Bankr. E.D.Va. Jul 3, 2023)

5 *Id.* At 13

Cleary Packaging continues to be an outlier, as the lower courts which have considered the issue since it was decided all rejected the Fourth Circuit's analysis. A Florida bankruptcy court has also certified the question for a direct appeal to the Eleventh Circuit, so there should be another opinion (and possibly a circuit split) in the coming year. In the Fourth Circuit at least, small business debtors have to make a choice of whether to elect the administrative and legal expense of a regular Chapter 11 or elect the potential for a lengthy and expensive adversary when an angry creditor seeks to except its claim in a Sub-V case. For creditors' attorneys outside the Fourth Circuit, though, this apparent ambiguity looks like a weapon which may gain the client some leverage in trying to avoid losing a claim where there is evidence to support one of the section 532 exceptions.

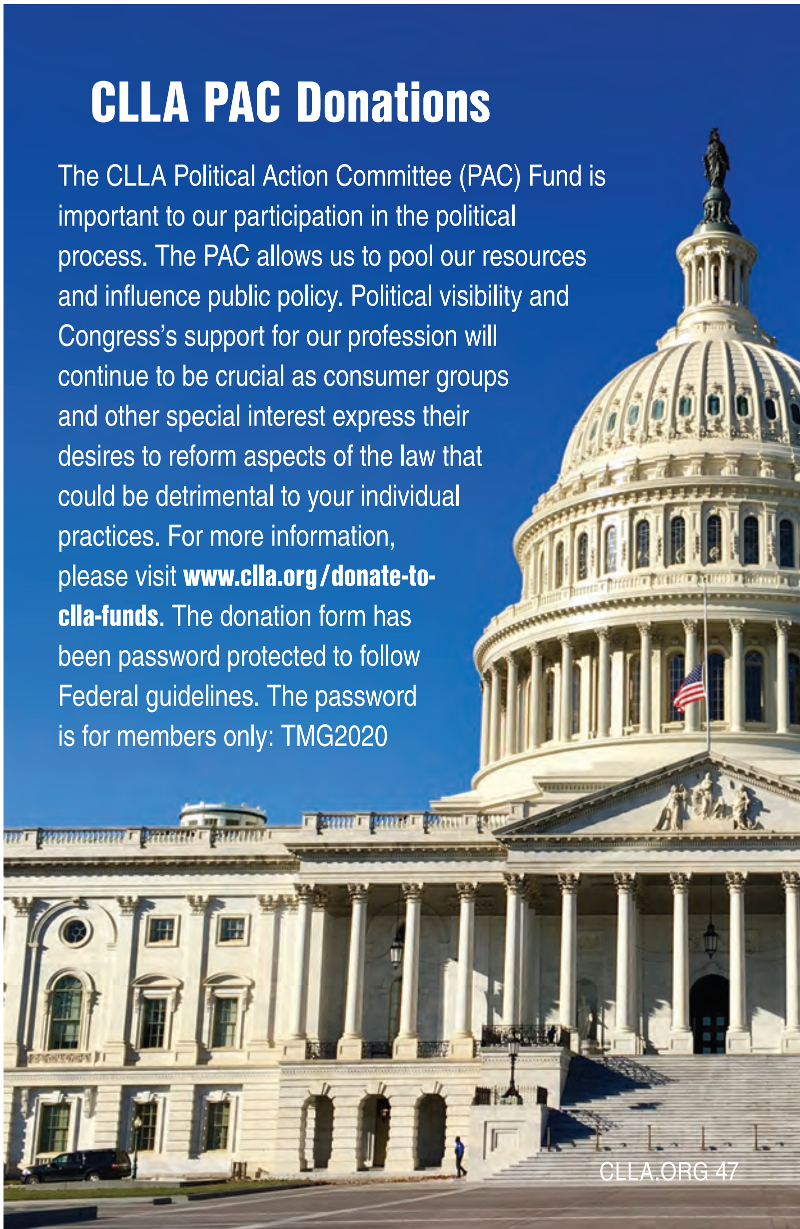
VIOLATION OF THE DISCHARGE INJUNCTION

Finally, after the Fourth Circuit giveth, the Fourth Circuit taketh away. In *Guthrie v. PHH Mortgage*, No. 22-1248 (4th Cir., Aug. 18, 2023), the Court ruled that a creditor's violation of the discharge injunction would support independent damage claims arising under state law. The discharge provisions in the Bankruptcy Code do not have a specific enforcement mechanism and so discharge injunction violations are typically punished by civil contempt and sanctions under the general powers provision of 11 U.S.C. section 105. PHH Mortgage received notice of Guthrie's discharge in bankruptcy but continued to contact him and apparently mis-reported his status to a credit reporting service. Rather than return to the bankruptcy court to address these violations as a contempt action, Guthrie filed suit in the U.S. District Court, alleging claims for the state law torts of negligent infliction of emotional distress and intentional infliction of emotional distress, along with a violation of the North Carolina Collection Practices Act. PHH argued that because the actions cited by Guthrie were wrongful only because of the existence of the discharge injunction, the Bankruptcy Code rather than state law should govern the issue of Guthrie's right to relief. The District Court granted PHH's motion for summary judgment, based in part upon finding that the Bankruptcy Code preempted Guthrie's state law claims.

The Fourth Circuit noted that no other circuit court has addressed this question and that the bankruptcy courts which have considered the issue to date have split. The Fourth Circuit then reviewed and rejected each potential ground to apply pre-emption under the supremacy clause of the Constitution. This thorough analysis of pre-emption is likely to be followed by courts going forward, so the concern for creditors should be that *PHH Mortgage* will open the doors of state courthouses to these claims, where (1) the courts with a bent toward consumer protection may be less forgiving of inadvertent violations and (2) the damages for state law torts are likely to be far more severe (treble damages, etc.) than the bankruptcy court's sanctions.

The obvious practice tip for creditors is "don't violate the discharge injunction." So for attorneys advising creditors, this new risk needs to be highlighted so that creditors take seriously the need to review their procedures to avoid even inadvertent violations or accidental contact with a discharged debtor.

While *Barternwerfer* may expand the pool of debtors whose debts may be excepted from discharge, it does not create liability which does not exist outside of bankruptcy. While *Cleary Packaging* also appears to extend the 523 exceptions to discharge to business debtors, for the time being only the Fourth Circuit seems to think so. For attorneys representing creditors who may be considering an adversary proceeding to challenge a debtor in this newly-expanded pool, the advice to the client needs to be to consider carefully both the likelihood of success based on the facts and state law and the potential costs of pursuing a claim in these uncertain waters. ■



REPORT ON THE UNIFORM LAWS COMMISSION COMMITTEE ON THE DRAFTING OF A UNIFORM ASSIGNMENT FOR THE BENEFIT OF CREDITORS MEETINGS ON NOVEMBER 17TH AND 18TH, 2023

In early 2023, Daniel Kerrick, Chair of the Legislative Committee of the Commercial Law League of America recommended and the League's Board of Governors approved the appointment of Wanda Borges, Joe Peiffer, Austin Peiffer and Lorna Walker as Observers to the Uniform Laws Commission Committee on the drafting a Uniform Assignment for the Benefit of Creditors ("ABC") statutes.

BACKGROUND: The Study Committee on Assignments for the Benefit of Creditors with Dale Higer and Edwin Smith as Co-Chairs has been meeting since 2022, which meetings resulted in an Updated Report and Recommendation dated February 28, 2023.[1] A reference paper was also provided to us regarding "Key Provisions of a Uniform Act on an Assignment for the Benefit of Creditors"[2]

ELIGIBILITY TO BE AN ASSIGNEE: Currently some states require an assignee to file a bond and an appraisal of the business assets, while other states have no such requirement. One of the Judges said that although his state has that requirement, he is often asked to sign an order waiving the requirement. A query was raised asking whether an assignee should be a licensed individual, such as a real estate broker or attorney or accountant. Everyone concurred that the assignee should be a "disinterested" person or entity. And agreement was reached that the assignee must serve as a fiduciary for the benefit of the creditors.

EVIDENCE AND EFFECT OF THE ASSIGNMENT:

The *nemo dat* principle

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The meetings on November 17th and 18th followed a pre-set Agenda and discussions took place on the following topics and subtopics:

ELIGIBILITY TO BE AN ASSIGNOR: Discussion was had on whether there should be debt limits built into the statue. The statement was made that the debt limits in the current chapter 12 statute have already become too low. The question of what constitutes a "small business" was raised. The general consensus is that there should be no mandatory or restrictive debt limits in an ABC uniform statute. Additionally, the issue of venue selection or forum shopping was raised and the CLLA position on venue in bankruptcy was put forth.

Starting the conversation with general consensus that the assignee only gets what the assignor has, ready agreement was reached on the Power of an assignor to operate the business and to sell assets with no exclusions of real or personal property. Discussion was had as to the ability to sell assets free and clear of secured claims. Generally, assignee only has power to transfer assets if reaching an accord with the secured creditor. Concurrence – the assignee can sell subject to whatever liens are there.

There was, however, discussion concerning certain assets which cannot readily be sold or transferred, such as liquor licenses, intellectual property, and cannabis businesses.

Avoidance Powers

Discussion was had regarding the power of the assignee to set aside an unperfected security interest. All concede that the Assignee holds the position as a lien creditor and has superior interest to a secured

1 The Updated Report and Recommendations dated February 28, 2023 can be accessed on the CLLA website Resources page

2 The reference material "Key Provisions of a Uniform Act on an Assignment for the Benefit of Creditors" can be accessed on the CLLA website Resources page

party. The question was raised of whether there is a practical reason to set aside an unperfected security interest. Discussion took place on this issue and whether the ABC statute can be couched so that the assignee does not have to deal with an unperfected secured creditor. Some were hesitant to believe that there are many unperfected lien creditors today but others said there are more of them than you would think. Consensus was sought on whether the effect of assignment is to render an unperfected secured party a general unsecured creditor. There was disagreement on this and some opined that even an unperfected secured party would have priority over general unsecured creditors. There was much discussion that UCC Article 9 provides the ability for the unperfected secured party to have a priority position. One suggested that except for administration fees and expenses, the assignee would be inferior to the unperfected secured creditor. Suggestion is that this dispute cannot be resolved, particularly since different states deal with this issue differently. There was no agreement on this point.

Discussion then moved to preferences and voidable transactions. Discussion was had as to the pros and cons of permitting preference recoveries in assignments. Three distinct positions were posed: 1) there should be no preference recovery ability for an assignee; 2) there should be preference recovery but it should bear some resemblance to the bankruptcy statute; 3) there should be preference recovery and it should copy entirely the bankruptcy statute. With respect to voidable transactions, it was stated that the UVTA is available to assignees with no need to create any more or different statutes. There seems to be more interest in NOT having avoidance powers granted to an assignee. One recommendation was that the draft, however, should grant power to an assignee to recover under the UVTA. Question was raised as to "how do creditors know". Suggestion is that the assignee should be responsible to alert creditors to the fact of potential preferences or voidable transactions. After further discussion, it was decided that the draft will Flag this issue without a recommended solution.

POWERS OF THE ASSIGNEE

Discussion was had regarding whether an assignee has the power to file a bankruptcy proceeding in the name of the assignor. The immediate answer seems to be that the assignee has no such authority to act on behalf of a board of directors of a corporation; and therefore, has no authority to file a bankruptcy on behalf of the assignor. Clear consensus was to leave this alone and NOT to touch this at all in the drafting of the uniform statute.

DUTIES OF THE ASSIGNOR

Discussions were had regarding the duties and responsibilities of the Assignor in making the assignment as well as duties continuing after the assignment is made. A concern was raised that language within the uniform ABC statute might conflict with other existing laws. It was commented that most attorneys will look first at the statute, so it would be helpful for the general basic requirements to be included. Consensus was reached that the assignor must provide a list of assets, liabilities, and creditors. The Assignor must remain available and also provide a list of directors and shareholders. Language should be broad enough to include that the Assignor has a duty to continue in existence to assist the assignee as provided in the assignment agreement – thus signaling to people to include the necessary information in the assignment agreement. Language should be included to insure that the Assignor remains available not just to assist but to cooperate with the Assignee to effectuate any transfer of assets

DUTIES OF THE ASSIGNEE

Everyone agrees that an Assignee is a fiduciary. The question was posed of whether the fiduciary responsibilities of the assignee should be detailed within the assignment agreement. There was hesitancy to making any modification of existing statutory fiduciary responsibilities within that agreement. Discussion was had regarding whether fiduciary duties should be defined at all and whether fiduciary duties are owed to all parties or only to creditors. Generally, it was agreed that fiduciary duties are owed to all constituents. There was a recitation of the Uniform Trust Code which the Uniform Laws compiled which includes 17 specific duties. Suggestion was made that this ABC Committee will look deeper at the Uniform Trust Code for guidance on this issue.

Disposing of the Assets

Do we want to impose on the Assignee a duty to dispose of assets in a commercially reasonable manner? It was stated that such a requirement already exists under UCC. Alternate suggestion, put a commercially reasonable standard into the ABC since not every sale may be covered by the UCC. How much of disposition remedy requirements are being envisioned? Consensus came back to leaving it at "commercially reasonable manner".

Communications to Creditors

There was much discussion regarding when communications to creditors should be made. What should be communicated? Who prepares Schedules? Who makes sure the Schedules are accurate?

Agreement was reached that there needs to be a time deadline built in for when notices must be sent to creditors, and a continuing obligation to advise of continuing activity in the estate. Also there should be an obligation to timely respond to inquiries from creditors.

A query was posed asking whether there should be inspection rights for creditors or shareholders. The consensus was to leave this to the Trust Code for now.

The point was made that some states and/or some courts have notice requirements. Judge Baston will share his form order for all to peruse

CLAIMS RESOLUTION PROCESS

This was one of the lengthier discussions. There was not much discussion of a bar date issue but a lot of discussion on claims resolutions. It was suggested that this area does not need to be over-legislated and it may be simply enough to state that the assignee has the power to examine claims, dispute claims and resolve or settle claims. Some suggested that language concerning claims resolution should be placed directly into the assignment document.

Consensus was reached on the following claims items:

a. A creditor is obligated to provide substantiation for its claim. If the creditor is asked for more information and does not provide it, then the assignee may be in a position to reject the claim

b. All agreed that the assignee has a duty to make sure claims are legitimate and not over-inflated

Discussion was had regarding whether the court should be involved in claims resolution.

DISTRIBUTIONS

Governmental priority claims. Discussion was had that the government will generally allow administrative claims and will honor the secured claims. But, a warning was given that any assignee needs to be sure to deal with the governmental claims lest he/she become personally liable to those claimants.

Other priority claims. Wage claims were discussed. Presently, states are extremely disparate – some allowing a wage priority as high as $4,300.00 and others as low as $50.00. Much discussion was had about creating a prioritization with the uniform ABC. Tax claims were discussed. UCC Article 2 reclamation claims were discussed. The concern was raised that if you are going to have a difference between ABC priority claims schemes and bankruptcy priority schemes, you may be incentivizing some creditors to file an involuntary petition in bankruptcy. Concern was also raised that the more we delve into priority issues, the more likely it is that the proposed uniform law will get caught up in the legislature. Some of the focus was on the prioritization of late file claims as opposed to claims of equity holders. The general consensus was that the equity holders should be the last to be paid.

Another issue discussed and consensus was reached that the assignee should be able to make interim distributions and should be able to reserve for disputed claims.

LIABILITY OF THE ASSIGNEE

The Chair made an opening remark on this topic that there exists a fiduciary standard for an assignee. There was general discussion about claims against assignee, insurance, some discussion about past claims and/or lawsuits. Do we want to include “guardrails” for what the assignee be liable? Not a lot of comments on this question.

The discussion moved to how is a claim brought against the assignee. Comments about historically, the claimant will generally reach out to assignee and if no resolution then a suit will be brought in the state court. Florida has some specific provisions with respect to assignee’s limited liability – gross negligence, willful misconduct, conduct outside their duties. The claim must be brought in the assignment court before the claim is closed. Negligence claims where assignee operates the business were being brought – that is why Florida put in the provision.

REMOVAL OF THE ASSIGNEE

There was some discussion of obscure state laws – no one agreed with these quirky statutes. There was discussion about removal for “cause. And, there was discussion about some more logical laws, such as incapability, incompetence, or mental deficiency.

Comment that the unform ABC law will contain language that statute does not displace other laws that may find assignee who has breached its duties can be removed. Removal provision should include enforcement by removal or imprisonment. E.g. assignee refusing to turnover information relating to assignment to new assignee. That would be contempt. And, provision to go after assignee who embezzled funds. Bond may or may not be sufficient. Most existing ABC statutes require a bond to be posted to cover the value of the assets after appraisal but this may not cover the value completely if assets liquidate at a greater value than that at which they were appraised. The suggestion was made to articulate the standing of who can seek the removal of an assignee. It was also suggested that language be included stating that every creditor has standing to challenge the assignment and/or seek the removal of the assignee. There was again a reference to Uniform Trust Law which includes such language and cites to removal "for cause"

Discussion was had regarding whether a comment to the statute should state that one should follow 3rd party beneficiary law in terms of standing. Concern was raised that if we make specific reference to having a creditor being deemed a 3rd party beneficiary we may open a floodgate of uncertainties. It was suggested that "standing" be defined with a discreet list. Discussion about whether to leave this silent or be specific followed, with no final consensus.

WINDING UP THE ASSIGNMENT

Time Limits

Various committee members and observers addressed each of their specific states with some states having very narrow time limits, which are generally ignored to other states with no time limits at all. It was stated that there are many reasons why an assignment may necessarily be kept open. General consensus was reached not to place in a restrictive time limit to finalize an assignment.

Final Accounting

General discussion regarding what is already generally included in all the existing ABC laws. Basically, an accounting with sufficient explanation of assets received and liabilities discharged. Discussion was had about when should an assignee be discharged from his/her duties. For those states where there is judicial oversight, language should provide for a Final Order that discharges the assignee once the final work is done. That, of course, led to a discussion on the next topic

DEGREE OF COURT INVOLVEMENT

Court-supervised v. non-court supervised ABC. Discussion was had regarding whether the uniform ABC statute should provide for a degree of court involvement. Some states are content with no supervision. Other states require court supervision and it works well. Everyone concurred there is no "one size fits all". The comment was made that if the proposed uniform ABC mandates court supervision or not, the statute will probably fall flat on its face.

Discussion was had about the current practice in various states. It appears there are two options – Option 1: the state has the choice to have court supervision or not – Option 2: the statute lets the assignor or assignee decide whether to have court supervision. Some of the areas where court supervision would be necessary include a) Removal of assignee, b) Final accounting, c) Claim disputes, d)

Sales of property (with a comment that states with court supervision often use negative notice – so if no objection, no hearing), e) status conferences

From a drafting standpoint — perhaps the two options should become:

Part A statute with no court supervision

Part B – here's what you do if you want court supervision for all or certain parts of the ABC

Discussion was had on the pros and cons of having the ABC filed in the court and access to the court when needed with no final consensus

INTRASTATE TRANSACTIONS

Discussion what to do with property located in more than one state. To what extent will assignment from State A be recognized in State B. Can one rely on lien creditor status? Does the assignee have authority to do anything in State B?

Discussion focused on these points:

1. Is the debtor registered to do business in State B. If so, does that registration follow to the assignee. Consensus – "no". If the assignee is going to operate the business or even liquidate the business, does the assignee need to register in State B?

2. Does Assignor in State A have employees in State B?

3. If there is real property, can you register the assignment with real property records?

After discussion, general consensus that the committee will draft a provision that state B will recognize State A's ABC.

The meeting was adjourned with the next meeting to take place in February, 2024 to review a first draft of a proposed Uniform Law for Assignments for the Benefit of Creditors. ■

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ARIZONA'S PROPOSITION 209: THE UNINTENDED CONSEQUENCES OF THE BALLOT INITIATIVE

Arizona voters passed the Healthcare Debt Interest Rate Limit and Debt Collection Exemption Initiative known as Proposition 209 ("Prop 209") through a ballot initiative in November 2022. One initiative of Prop 209 was to cap interest rate on medical debt at 3%, down from a standard statutory rate of 10%. It was also designed to increase the value of certain exempt property and limit earnings exempt from garnishment, attachment, execution and forced sale. However, what Arizona voters were sold in the publicity pamphlet and advertising has greatly impacted creditor's rights and remedies in the state since the measure took effect on December 5, 2022.

THE BALLOT MEASURES AND SUBSEQUENT LITIGATION

A political action committee entitled, Arizonans Fed Up With Failing Healthcare PAC (Healthcare Rising Arizona) (the "PAC") was formed and registered in Arizona. The PAC highlighted its desires to provide relief to Arizona residents from high interest rates on medical debt. Because medical debt is often involuntary in nature, the PAC appealed to potential voters' hearts, logic, and their wallets. The PAC received $12.8 million in contributions, fueled primarily by SEIU United Healthcare Workers, who contributed $8.8 million to the PAC.[1] To get the measure on the ballot in Arizona, the initiative was required to obtain 237,645 valid signatures and submit the signatures to the secretary of state.[2] On July 7, 2022, supporters of the measure submitted 472,296 signatures to qualify the matter for the November 2022 ballot.[3]

On the ballot, the measure was presented as follows:

A "**yes**" vote supported:

- setting a limit on interest rates for debt accrued from receiving healthcare services equal to either the weekly average one-year constant maturity treasury yield or 3%, and
- increasing the amount of value for certain property and earnings exempt from attachment, execution, forced sale, and any other debt collection processes.

A "**no**" vote opposed:

- setting a limit on interest rates for debt accrued from receiving healthcare services equal to either the weekly average one-year constant maturity treasury yield or 3%, and
- increasing the amount of value for certain property and earnings exempt from attachment, execution, forced sale, and any other debt collection processes.[4]

The measure passed with over 72% of Arizona voters supporting the changes.[5] What was buried in the proposed legislative text of the initiative, however, revealed the PAC's true intentions that have ultimately become reality – to make the majority of Arizona's residents judgment proof. It is estimated that approximately 51% of Arizona's population is now judgment proof under these new changes.

Recognizing the far reaching and problematic consequences of the measure, on December 5, 2022, a lawsuit against the State of Arizona was filed by the Arizona Creditors Bar Association, the Protect Our Arizona PAC, and other plaintiffs. The lawsuit questioned the constitutionality of Prop 209, specifically the Savings Clause within the initiative which states that the law applies prospectively only, but that it does not apply to "right and duties that matured" before the effective date of the law.[6] The Plaintiffs alleged that Prop. 209's Savings Clause was unconstitutionally vague and internally inconsistent. Plaintiffs argued that creditors would be subject to strict liability for failing to comply with Prop. 209, but yet the vagueness of the Savings Clause made it impossible to determine if a creditor was in or out of compliance.

On December 7, 2022, Maricopa County Superior Court Judge John Blanchard signed a temporary restraining order preventing the enforcement of Proposition 209. On December 20, 2022, a Maricopa County Superior Court judge denied the lawsuit. The ruling said that, "Prop. 209 should be permitted to take effect, without guidance or restriction from the court," and that "While the scope of the law is wide-ranging and impacts important and long-standing processes for collecting debts, the language at issue is neither vague nor unintelligible.[7]

INCREASED STATUTORY EXEMPTIONS

As of December 5, 2022, Arizona residents received the benefit of signifcantly increased statutory exemptions:

Exemption	Prior to Prop 209	After Prop 209
Homestead exemption	$250,000	$400,000
Household goods, furnishings, and electronic devices	$6,000	$15,000
Equity in motor vehicle	$6,000	$15,000
Equity in motor vehicle if debtor or debtor's dependent has a physical disability	$12,000	$25,000
Money held in a personal bank account	$300	$5,000

In addition to the above changes in personal property exemptions, the standard withholding percentage pursuant to a wage garnishment went from 25% of disposable earnings down to 10% of disposable earnings, or the lesser of 60 times the highest applicable federal, state or local minimum wage. A hardship exception could potentially drop the rate down to 5% of disposable earnings.

1 https://ballotpedia.org/Arizona_Proposition_209,_Healthcare_Debt_Interest_Rate_Limit_and_Debt_Collection_Exemptions_Initiative_(2022)

2 Arizona Proposition 209, Healthcare Debt Interest Rate Limit and Debt Collection Exemptions Initiative (2022) - Ballotpedia

3 *Id.*

4 https://ballotpedia.org/Arizona_Proposition_209,_Healthcare_Debt_Interest_Rate_Limit_and_Debt_Collection_Exemptions_Initiative_(2022)

5 *Id.*

6 2022-1205-Verified-Special-Action-Complaint.pdf (acainternational.org)

7 Arizona Proposition 209 is not unconstitutionally vague, judge rules (azcentral.com)

THE FALLOUT OF PROP 209

There are multiple problems and challenges with these changes ushered in by Prop 209. First, despite immediate and persistent court challenges regarding the unconstitutionality of the ballot initiative and its questionable advertising strategy, Arizona voters were the unknowing victims of a bait and switch scam that that is even worse in execution than it seems on paper. The average consumer may relish the fact that his bank account can no longer be garnished. But what that consumer – and many Arizonans – do not realize is that hindering a creditor's rights to recovering on their judgments comes at a massive cost. Any creditor, whether it be a single home landlord or a mortgage lender giant, knows that some contracts will surely result in debt being owed. Creditors large and small factor in uncollectible accounts receivable and litigation costs that often follow in order to create a portfolio with a reasonable rate of return. Along those lines, the interest rates charged to borrowers on an auto or hard money loan, for example, and the terms offered to customers who apply for something on credit are based on the borrower's present creditworthiness as well as the prospects of future recovery in the event of default. When more than half of Arizonans now fall below the statutory exemption threshold, voter-enacted legislation has retroactively destroyed thousands if not millions of contracts.

The second and as concerning problem with Prop 209 related its savings clause. New law is not allowed to undo the rights someone possessed yesterday, nor may it interfere with a contract already in place. But that is exactly what happened with Prop 209. The Saving Clause dictated that the new exemption amounts and percentages were to apply prospectively only, thereby exempting all pre-existing contracts, the rights and duties that matured for creditors and debtors alike prior to the law's enactment and interest rates already agreed to in contract and on existing judgments.

However, due to heavy litigation on the application of Prop 209 by large banking institutions, the practical application over the last year has shown a completely different interpretation of the new law. Despite words like "prospective" and "pre-existing" appearing the revised statute's text, Arizona courts determined that as of December 5, 2022, every post-judgment enforcement mechanism and remedy is subject to the new increased exemptions. Those courts ignored alternative interpretations that argued one cannot initiate a bank garnishment, for example, without an underlying judgment, and one cannot obtain a judgment but for an underlying complaint and cause of action. Accordingly, creditors' rights and duties may have matured years before Prop 209 took effect, but the law change stripped them of their legal standing to enforce a judgment unless an Arizona resident makes more than approximately $51,000/year or happens to keep more than $5,000 in his bank account. Litigation through Arizona's high courts on this is presently ongoing.

CONCLUSION

What appeared on its face to be a compassionate form of assistance to struggling Arizonans became a creditor's worst nightmare – that the debt owed to him or her will likely never be repaid even despite filing a lawsuit and earning a judgment. Meanwhile, creditors that continue doing business in Arizona must give second thought to whom they lend, at what rate, and the challenges of recovering delinquent debt. That in turn greatly increases the costs of borrowing and extending credit, so in the end it is a lose-lose situation for creditors and debtors in Arizona. ■

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*To qualify for the $500 credit, the referring member agency must contact the prospective member agency. The referring agency must also contact Dawn Federico and provide their contact information for follow up to the prospect agency.

Wishing you health and happiness this Holiday Season and prosperity in the New Year.

The management, staff and Board of Governors of CLLA wish you a joyful holiday season. As we approach the beginning of 2024, we extend our appreciation and look forward to serving you in the coming year. All the best to you, your family, and your organization,

Commercial Law League of America

OFFICE HOLIDAY HOURS: The CLLA office will be closed on

Monday, December 25
Tuesday, December 26
Monday, January 1, 2024
Tuesday, January 2, 2024