

JUDGMENT ENFORCEMENT IN FEDERAL COURTS

The materials in this outline are based upon:

Judgment Enforcement Practice And Litigation

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I. Chapter 1. Basic Aspects of Judgment Enforcement

Highlights:

A. Section 1.8 - Recording the Judgment as a Lien

1. 28 U.S.C. § 1962:

(a) Non-Federal Creditor - Record a federal judgment as lien - in manner of a state judgment.

(b) Federal Creditor - Section 1962 of 28 U.S.C. not apply. Under 28 U.S.C. § 3201(a), United States record judgment lien - same as a tax lien under 26 U.S.C. § 6323(f)(1) and 2.

B. Section 1.9 - Checklist on Recording the Judgment

C. Section 1.10 - Registration of the Judgment

1. 28 U.S.C. § 1963:

(a) Judgment registered in another Federal district.

(b) File certified copy of judgment in the other district by form AO 451 (See Section 1.11, p.23). when final by appeal or when ordered by the court. [prevent transfers.]

(c) United States can register judgment at any time after judgment.

(d) Option of independent action on the judgment

- slower process.

(e) Once registered - judgment can be recorded as a lien against property.

(f) See Practice Tips pp. 20-22.

D. Section 1.12 - 1.13 Registration of Foreign Judgments
Uniform Foreign Money- Judgments
Recognition Act

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1. Comity - Hilton v. Guyot, 159 U.S. 113 (1895).

2. Applicability of State Law - Erie Railroad Co. v. Tompkins, 304 U.S. 64, 67 (1938); Somportex, Limited v. Philadelphia Chewing Gum Corp., 453 F.2d at 435 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972) (cases hold that recognition and enforcement of foreign judgment be determined by state

law.)

3. Uniform Foreign Money - Judgments Recognition Act

E. Section 1.22 - Checklist for Security Pending Appeal - Fed. Rule 62(d).

1. Escrow of corporate stock

2. Escrow of individual's stock or bonds

3. Pledge of dividends and interest on the escrowed security

4. Other methods listed, as well as Checklist for Conditions Regarding Security (pp. 40-42.)

F. Sections 1.29-31 - Prohibited Practices by Attorneys Under
The Fair Debt Collection Practices Act,
15 U.S.C. § 1692.

1. Prohibited Practices and Cases Interpreting.

2. Penalties Applicable and Cases Interpreting.

II. Chapter 2. The Judgment Debtor

Highlights:

A. Section 2.4 - Understanding the Individual Debtor's Habits

Checklist for the Individual Debtor Files

Checklist for Determining the Debtor's Lifestyles, Habits or Hobbies

B. Section 2.5 - Understanding the Business Structure of the Debtor

Checklist for Understanding the Business Structure

C. Section 2.6 - Understanding the Corporation's Routines

Practice Tips for identifying the corporate "grab"

Checklist for Schemes to Denude Corporate Assets

D. Section 2.7 - Locating the Judgment Debtor

E. Sections 2.11-13 - Size of the Judgment in Determining
Judgment Enforcement Strategies vs. Client Expenses

III. Chapter 3. Discovery to Find the Debtor's Assets

Highlights:

A. Section 3.2 Broad Range of Inquiry - Fed. R. Civ. P. 69 - allows broad discovery

B. Sections 3.3 - 3.8 - Application of Privileges in Post Judgment Discovery in Federal Courts

- Spousal Privilege
- Attorney-Client Privilege
- Crime-Fraud Exception to the Attorney-Client Privilege
- Accountant-Client Privilege
- Fifth Amendment Privilege

C. Sections 3.9 & 3.11 - Evidence You Are Looking For

D. Sections 3.10 & 3.12 - Checklists for Individual and Corporate Discovery

1. Partial Checklist for Corporate Transfers

- (a) Payment of dividends
- (b) Repayment of loans
- (c) Repayment of other debts
- (d) Transfers of assets
- (e) Loans to closely related parties

E. Section 3.13 - Discovery Strategy

IV. Chapter 4. Methods of Implementation of Discovery

to Trace Assets

A. Sections 4.1 -4.12 Methods of Discovery and Forms

TARGETS OF DISCOVERY

B. Section 4.13 Examination Process for the Debtor

C. Section 4.14 Examination of the Debtor's Spouse
or Relatives

D. Section 4.15 Examination of the Debtor's Accountant

- There is no accountant- client privilege
in Federal cases

United States v. Arthur Young & Co.,
465 U.S. 805 (1984);

United States v. Arthur Anderson & Co.,
623 F.2d 725 (1st Cir.), cert. denied,
449 U.S. 1021 (1980).

B. Section 4.17 Examination of the Debtor's Attorney

- Practice Tips (p. 150)

United States v. Zolin, 491 U.S. 554 (1989);

Natural Gas Pipeline Co. v. Energy
Gathering Inc., 2 F.3d 1397 (5th Cir. 1993)

C. Section 4.18 Examination of the Debtor's Bank Records

D. Sections 4.23 - 4.35 Handling Unfair Litigation Tactics
in Post Judgment Discovery

- Problems and Transcript Examples
of Handling Unfair Tactics

- Example Form Motions, Memorandum
and Orders

- The Recalcitrant Witness Statute
28 U.S.C. § 1826(a)

E. Sections 4.36 - 4.40 Analyzing Information Obtained
In Post Judgment Discovery

V. Chapter 5. Executing on the Judgment

Highlights:

A. Sections 5.3 - 5.11 - Basic Execution Procedures by the United States
Under the Federal Debt Collection Procedures Act of 1990 -
28 U.S.C. § 3001-3308, for execution, attachment and garnishment

B. Section 5.13 - Writ Ne Exeat Republica

Preventing the debtor from leaving the jurisdiction when:

1. Debt is positively due

2. There is an impending departure of the debtor from jurisdiction

C. Section 5.14 - Form of Writ Ne Exeat Republica

D. Section 5.18 - Execution on an Airplane

49 U.S.C. § 1403 - to create a central clearing house for the

recording of titles to airplanes

1. Recordation of the execution with the Federal Aviation Administration in Oklahoma City, OK.

2. The Federal scheme for recording liens against aircraft has preempted the field of registration and recordation of aircraft. Cf. Philko Aviation, Inc. v. Shacket, 462 U.S. 406, 413 (1983); Sun Bank v. Snell (In re Cone), 11 Bankr. 925, 929-30 (Bankr. M.D. Fla. 1981)

E. Section 5.19- Execution Against State and Local Governments

F. Section 5.20- Execution on Corporate Stock

1. Practice Tips

2. Execution Against Corporate Stock - Principles in various states

G. Section 5.22- Search and Seizure Issues in Post Judgment Process

- the validity of a sheriff's warrantless search on execution on personal property within the debtor's home.

VI. Chapter 6. New Litigation To Enforce Judgments

A. Sections 6.2 - 6.10 Basic Elements in Fraudulent Transfer Claim

Similar basic elements in UFTA, UFCA or FFTA

1. Existence of a creditor

2. Transfer or conveyance of property

3. Actual intent to defraud (or "badges of fraud")
4. Lack of consideration or reasonably equivalent value for the transfer
5. Insolvency of the debtor
6. Time of the transfer

B. Sections 6.4 - 6.10 Fraudulent Transfer Cases in Federal Circuit Courts And Form Complaint

C. Sections 6.11 - 6.12 Basic Elements in a Constructive Trust Fund Claim

1. Existence of a Creditor
2. Dissolution or Substantial Liquidation of the Corporation
3. Transfer of Corporate Assets to Shareholder
4. Insolvency of the Corporation

D. Sections 6.13 - 6.16 Constructive Trust Fund Cases in Federal Circuits And Form of Complaint

E. Sections 6.17 - 6.19 Piercing The Corporate Veil

F. Section 6.18 Basic Factors in Piercing The Corporate Veil

G. Sections 6.20 - 6.22 Basic Elements in a Federal Priority Statute Claim

- 31 U.S.C. § 3713

1. There is a debt due to the United States
2. The debtor is insolvent
3. An events occurs which triggers the priority statute

Acts of Bankruptcy, voluntary assignment,
attachment of absent debtor's property, or
estate of deceased debtor insufficient to pay
all creditors

4. Property of the debtor is distributed by someone
acting on behalf of the debtor (but not bankruptcy
trustee)

VII. Chapter 7. Receivership As A Collection Device

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- A. Sections 7.1 - 7.53 Overview of Federal Receivership
Practice And Extensive Forms
- B. Section 7.2 A Receivership Is an Extraordinary Remedy
Sought in Conjunction with Other Relief
Such as a Money Judgment

I. Extraordinary Equitable Remedy

A. Receivership is an extraordinary equitable
remedy to be granted as a last resort in order

to prevent irreparable harm to a property interest held by a party to litigation.

Burnrite Coal Briquette Company v. Riggs,
274 U.S. 208 (1927).

B. The receivership remedy is by its nature auxiliary to the primary relief requested in the litigation.

Pusey & Jones Co. v. Hanssen,
261 U.S. 491 (1922).

Section 7.3 Grounds for the Appointment of a Receiver Generally

1. Possible existence of fraudulent conduct
2. The danger of property being concealed, lost or diminished in value
3. The adequacy of other remedies
4. The harm to the movant versus harm to opposition
5. The cost effectiveness of the receivership in light of the value of the assets to be protected.
6. The ability of the estate to bear the reasonable costs of a receivership.

Commodity Futures Trading v. Comvest Trading Corp., 481 F. Supp. 438 (D. Mass. 1979)

C. Section 7.5 Judgment Enforcement

1. Creditor should reduce his claim to judgment
2. Exhaust his remedy at law
3. Receiver is necessary to preserve assets or enforce the judgment

- A receiver is frequently used to enforce a judgment where fraud and danger of dissipation of assets is present. Levin v. Garfinkle, 514 F. Supp. 1160 (E.D. Pa. 1981).

- Reference should also be made to state law where the receivership is pending in view of Federal Rule of Civil Procedure 64.

D. Section 7.6 Foreclosure

- A receiver may be appointed during foreclosure to manage property and collect rents where the mortgage provides for such appointment. New York Life Ins. Co. v. Watt West Inv. Corp., 755 F. Supp. 287 (E.D. Cal. 1992).

- The law of the state where the receivership is pending may specifically sanction the appointment of a receiver pursuant to an express provision in a mortgage. See e.g. N.Y. Real Prop. 254(10) (McKinney).

E. Section 7.7 Receiverships under the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. § 3001 et seq.

- provided as both prejudgment and post judgment remedies

- The Small Business Investment Act of 1958
15 U.S.C. § 687c - empowers SBA to seek the appointment of a receiver for an SBIC without the traditional equitable showing.

F. Section 7.9 Blanket Receivership Stay Orders

- The initial court order approving and setting up the receivership should contain a provision for a blanket receivership injunction restraining the initiation or continuation of all legal proceedings involving the receiver and the property of the receivership estate, and preventing creditors or individuals associated with the entity in receivership from taking any action relative to the receivership estate or claims.

Jordan v. Independent Energy Corp.,
446 F. Supp. 516 (N.D. Tex 1978).

- Powers - The receiver shall have all the powers of the former officers and directors of the company.

United States v. Meyers, 308 F. Supp. 859
(D. Md. 1970).

- Books and Records - Power is given to the receiver to obtain possession of all books and records of the company from officers, directors or third parties.

- Assets - The order shall provide that assets in the possession of persons other than the receiver be turned over to the receiver by a time certain.

- Bank Accounts - The receiver is authorized to take over or open such bank accounts as are necessary to conduct its business.

- Subsidiaries - The receiver should be given the power to convene a meeting of the shareholders of any wholly-owned subsidiary and vote all shares at any such meeting.

G. Section 7.10 - Prevention of Bankruptcy Filings

- No petition in bankruptcy can be filed without the express authorization of the receivership court.
United States v. Vulpis, 961 F.2d 368 (2d Cir. 1992)

United States v. Vanguard Inv. Co., Inc. 667 F. Supp. 257 (M.D.N.C. 1988), aff'd 907 F.2d 439 (4th Cir. 1990).

H. Post Appointment Matters

1. Jurisdiction and Control Over Property

Filing within 10 days of the receiver's appointment - copy of order of appt. and complaint.

United States v. Arizona Fuels Corp.,
739 F.2d 455 (9th Cir. 1984)

2. Receiver's Reports

Filing periodic reports to the court under receiver's fiduciary capacity.

3. Prior Court Approval

All actions of any significance should be approved by the court with notice, motion and hearing.

Chicago Deposit Vault Co. v. McNulta,
153 U.S. 554 (1893).

4. Taxes - Receiver must comply with federal, state and local tax obligations 28 U.S.C. § 960.

5. Bar Date for Claims

- The receiver should petition the court at some time in the proceedings for permission to give notice to all claimants of the last day for filing claims in order to share in the distribution of the estate.

S.E.C. v. Hardy, 803 F.2d 1034
(9th Cir. 1986)