collective wisdom®

SZABO ASSOCIATES, INC. VOLUME 13, ISSUE 2, JUNE 30, 1998

Dear Friends:

Hope you're all having a terrific summer so far. We've had a very busy spring season, which included our participation in the Broadcast Cable Financial Management Association convention in May. It was great to see so many of you in the Big Easy, and particularly at the Credit Management session, at which I was a speaker. Things got pretty lively, particularly when the subject of liability issues came up!

Speaking of conventions, the Cable Advertising Bureau will present the Local Cable Sales Management Conference in Denver, Colorado on July 11th through 14th. Hope to see many of you there.

And finally, we're so pleased to report that so many of our clients are checking out our new Web site and finding it to be a fast and easy way to place business with us. If you haven't yet visited us there, please give it a try at www.szaboassoc.com.

Best wishes for a wonderful summer,

Pete Szabo, President
Szabo Associates, Inc.

Victory at the Courthouse! Now What?

The lawsuit your company filed against a debtor was successful. The court granted judgment in your favor. The nightmare is finally over. Or is it?

Unfortunately, getting a judgment is only the beginning of the collection process. The debtor rarely writes you a check at the courthouse. The more common scenario is that you must continue to use the judicial system to enforce your hard-won judgment. For that reason, anyone entertaining the idea of filing a lawsuit should consider the likelihood not only of receiving a favorable judgment but also of receiving the *money* once judgment is granted. The second process involves determining the debtor's ability to pay (through information contained in credit reports, the credit application, and public records), determining the likelihood he will choose to pay after judgment, and evaluating the cost vs. benefit of using post-judgment remedies to collect the money if he does not pay.

Szabo Associates explored the subject of post-judgment remedies with attorneys Dana Casher and Leonard Krulewich, partners in the law firm of Krulewich, Casher in Boston, Massachusetts, and Anthony Hoefer, partner with the law firm of Levi, Wittenberg, Harritt, Hoefer & Davis in Sumter, South Carolina. *NOTE: Because these remedies vary from state to state, we strongly suggest thoroughly researching those available in the state where the lawsuit is filed.*

S.A.: How should one decide which post-judgment remedy to implement when the judgment debtor fails to pay?

D.C.: Several factors should determine the selection: the size of the judgment, the nature of the debtor, the nature of the debtor's business, the debtor's assets, and how much the creditor is willing to invest in the matter. Each option—supplementary process, discovery, seizure, receivership—is designed to elicit some response from the debtor, voluntarily or otherwise, and the creditor's attorney should be able to advise as to which might be the wisest option under the particular circumstances.

L.K.: Even though our discussion is about post-judgment remedies, I think we need to say something here about some pre-judgment activities, specifically attachments, because they can affect what happens after judgment enters. Of course, the kinds of attachments allowed and the conditions of attachment vary among states.

In a number of states, including Massachusetts and some other New England states (New Hampshire, Maine, and Rhode Island), the court may allow you to attach bank accounts on an "ex parte" basis; that is, *without* notice to the defendant *prior* to judgment being entered. This may happen if a creditor is owed money either for goods sold or delivered or for personal services (such as advertising), and the court decides that judgment in

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the creditor's favor is likely, there is no insurance available to pay the creditor, and the defendant would likely either remove or secrete the money if given notice of the attachment. If the claim is against an agency, money owed to the agency by the advertiser can also be attached. This is called a "Reach and Apply" action if it is an unliquidated amount or it is not yet due and payable. For example, an ad campaign is in progress, and the money isn't due the agency until the campaign ends. In this case, the order would prevent the agency from transferring money and restrain the advertiser from paying the agency the money. If the money is due and payable, then a "trustee attachment" can be used to attach funds being held for the debtor. If the debtor is a retail business, we can use a "keeper attachment," which allows the "keeper," usually the Sheriff, to take money from the company's cash register while the company continues to conduct business. The Sheriff receives his fee first and keeps the remainder until judgment enters, at which time he hands it over to the creditor's attorney. Another type of attachment is the "real estate attachment," which is usually not applicable in cases involving corporations.

The reason pre-judgment attachments are relevant to this discussion is that they expedite some post-judgment options. For example, after judgment enters, you cannot ordinarily ask the debtor's bank to turn over the money to you. You have to go back into court to get permission to attach the bank account. If, however, the account is already attached, the court would issue a "trustee execution," directing the bank to pay the money initially attached to the creditor's attorney.

S.A.: Let's discuss some post-judgment remedies.

A.H.: Proceedings for enforcement of a judgment are governed by the law of the jurisdiction in which they are brought. For example, South Carolina has no garnishment statute.

Under South Carolina law, the Execution, which is defined as putting into effect the final judgment of a court, is issued through the Sheriff's department in the county in which the debtor resides and requires the Sheriff to satisfy the judgment out of the personal property of the debtor. If sufficient personal property cannot be found, then it is to be satisfied out of real property belonging to the debtor, although this is not usually applicable when the debtor is a corporation. A lien on personal property does not automatically arise as a result of the recordation of judgment. A levy must be made by the Sheriff on specifically identified personal property. A judgment lien can attach only to non-exempt property. State statutes provide for certain property and/or equity value to be exempt from a judgment lien. These exemptions vary widely from state to state.

If the Sheriff is unable to locate property of the judgment debtor, he will return the Execution unsatisfied *(nulla bona)*. Anytime after such return is made, a judgment creditor is entitled to obtain an order from a Circuit Court Judge requiring the debtor to appear in court and answer, under oath, questions about his property. The judgment creditor may also require the debtor to produce financial records at the time of the hearing. The creditor may also seek to have the court order non-exempt property that is discovered sold, or alternatively, to have a receiver appointed. A receiver may be appointed where there is a question as to value or equity in property, or the asset of the debtor is an intangible asset, such as an account receivable. Generally, the appointment of a receiver will entail posting of a bond, and may or may not require advance costs to be paid to the receiver for his services.

S.A.: How does one go about finding the debtor's assets?

D.C.: One way to do this would be through post-judgment discovery. Inquiries into assets are very limited, if not forbidden, in the course of a lawsuit (as they are not relevant at the time); however, once judgment has entered they are fair game. Interrogatories, Requests for Production of Documents, Requests for Admissions and Depositions specifically focussed on discovery of assets are permissible. Provided that the amount of the judgment warrants the time and money involved in these procedures, these can be extremely helpful since they are all sworn (thereby subject to the penalties of perjury) and make available tax returns and other documents which may provide your best evidence of the true financial condition of the debtor. That information arms you to proceed with other post-judgment options.

A.H.: In South Carolina, the post-judgment asset examination, or "supplementary proceeding," is the principal method by which judgments that are not voluntarily paid by the judgment debtor are carried into effect. In most cases, it is the *first* proceeding in which a debtor is required to actually appear in court. Generally, prior to obtaining judgment, a creditor does not have the ability through discovery to obtain financial information on a defendant debtor. It is only through the post-judgment asset examination that creditors can ascertain a judgment debtor's financial holdings. This proceeding also provides a vehicle to effect a sale of discovered assets to satisfy a judgment.

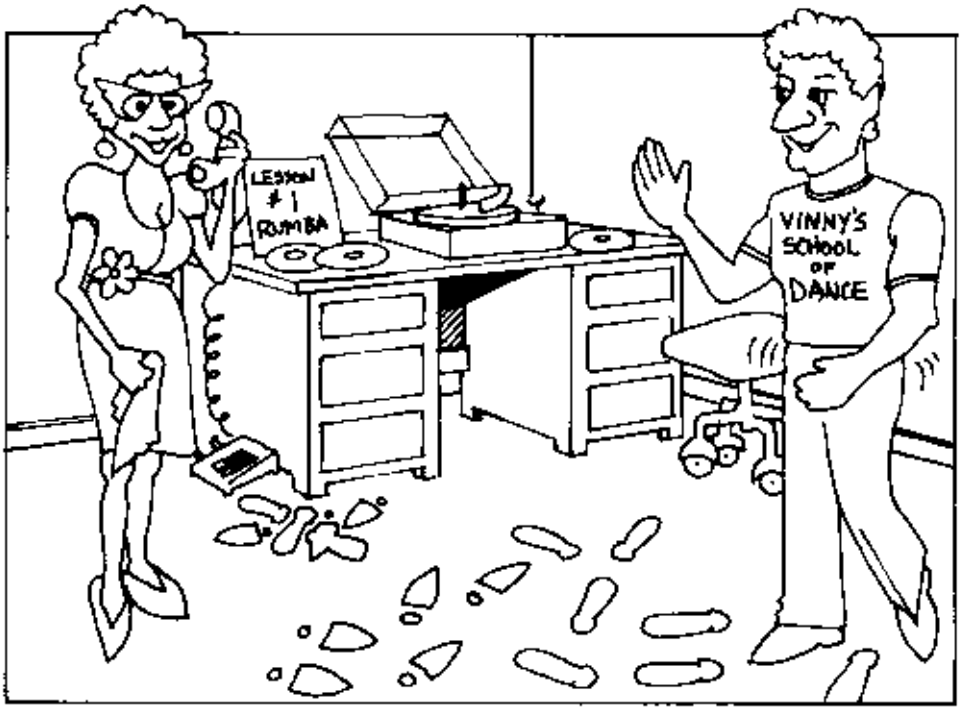
D.C.: In Massachusetts, supplementary process is the most common, least expensive, and,

in my opinion, least effective option. An application to the state district court where the debtor is located (the *only* court with jurisdiction) with a filing fee will result in the court's issuing a summons to the debtor setting forth a date for examination. The summons must be served by the Sheriff or Constable. At the hearing, provided that the debtor appears, you have the opportunity to examine the debtor under oath regarding his assets and liabilities, in detail. After the examination, which may take place before a judge or magistrate, you may request that the court order a payment schedule for satisfaction of the debt. The court has broad discretion in its ruling, from ordering payment in full right away to finding that the debtor has no present ability to make payment and continuing the hearing, or worse, dismissing the matter. Once a supplementary process is dismissed, you cannot file another on that judgment for at least one year. Should you feel that the information given by the debtor may be incorrect or incomplete, you may seek an order that the debtor produce books and records and adjourn to a later date to give time for that production.

The more common result of a supplementary process action is that the debtor fails to appear at the initial hearing. In that event a "capias" will issue for his arrest, which grants the Sheriff the right to physically arrest the debtor and bring him to court to submit to the examination. Sheriffs, however, do not make capiases their top priority, they may require prepayment of $250-$300 in order to make a physical arrest, and finally, the result of the arrest is merely that the debtor appears in court and not necessarily remuneration to the creditor.

In most instances, even after the examination, the debtor will fail to make the payments. When you report the contempt to the court, it will issue a "Notice to Show Cause," so-called because the debtor is supposed to appear to show cause why he should not be held in contempt of the court's order. This document has more bark than bite. If the debtor appears at the hearing date specified on the notice, he will be asked why he failed to make the payment, reexamined, and ordered to make payments. If he does not appear, a capias issues. Around and around you go, until either the debt gets paid or you tire of paying the expenses of the pursuit. Unfortunately, if the debtor is an individual with no assets, supplementary process may be the only option available.

"Receivership" as a post-judgment remedy does offer some advantages. Where there are assets and there is reason to believe they are being depleted or hidden, a receivership provides quick intervention, moves faster, is generally less costly than involuntary bankruptcy, and only requires one creditor. Also, a receivership is often an effective bluff, although you must be prepared to proceed if the debtor calls you on it. I see, however, three problems with receiverships: 1) Once appointed, the receiver is bound to the interest of all the debtor's creditors. He takes possession of the assets of the company for the purpose of orderly liquidation and disbursement to creditors, which generally takes place in the same priority as that of a bankruptcy court dividend: administrative claims, priority claims, secured creditors, unsecured creditors, etc. after the express approval of the court. 2) Receiverships are costly. 3) A receivership may take a long time to resolve—usually at least a year, and often several. In my opinion, receiverships are useful only in cases when your debtor is in business or has assets of sufficient value that he can't really hide them effectively.



"LET'S SEE IF I UNDERSTAND THIS, LORETTA. WILLIS SAYS HE CAN'T TAKE YOU OUT DANCING BECAUSE ALL HIS ASSETS ARE ATTACHED. DID YOU ASK HIM JUST WHO THEY'RE ATTACHED TO?"

S.A. What are the risks involved in post-judgment remedies?

L.K.: The costs involved, of course—sheriff's fees, court costs, filing costs, receiver's fees. Secondly, there is the risk of "abuse of process," which usually means that assets were attached in excess. Here's an example: The judgment is in the amount

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of $2500. You go into court to get a bank account attached. Before the bank responds with how much money it is holding, you get a keeper attachment. Then it turns out that the bank has more than sufficient money to satisfy the judgment. Meanwhile, you've effectively closed down the defendant's business for three days. Courts have awarded damages to debtors in such cases on the basis that such actions are an abuse of process.

D.C.: It is always wise to remember that the court does not care if you get paid, but every post-judgment remedy requires the court's intervention. The court will take no action without your requesting action, and that request must be in the proper form. ♦

Szabo Associates would like to thank Dana Casher, Leonard Krulewich, and Anthony Hoefer for their valuable contributions to this article.

The Szabo Difference: Your Legal Advantage

We know that taking a case to court is not one of your favorite activities.

So at Szabo Associates, we're organized to take the pain out of litigation.

When it's necessary to go to court to collect a claim, our Litigation Department takes charge. That's our in-house team of paralegals—skilled specialists who average close to 10 years of experience with Szabo working on media litigation.

Our paralegals handle every aspect of your court case; you don't have to do a thing.

They select the most appropriate attorney from our Legal Network of over 400 attorneys located throughout the U.S. and many foreign countries. These are attorneys our paralegals have pre-screened and worked with. We choose them for their skills in the unique field of media law.

Because these attorneys get many of their cases through Szabo Associates, they give close attention to our clients' needs.

They also work under our rate agreements. That means you don't have to pay any up-front suit fees. You don't pay anthing until money is collected, except when court costs are involved.

Our paralegals monitor each court case, contact you if evidence is needed, and report the results to you.

Day after day of court experience like this gives Szabo's Litigation Department experience and expertise you won't find in most other collection services. We have comprehensive information on media/advertising law, court cases affecting the industry, debtor-creditor rights, bankruptcy proceedings—and we're constantly updating our case files from virtually every state and many foreign countries.

Going to court will never be one of your favorite activities—but it's nice to know you've got a powerful team on your side. ♦

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