



COLLECTION STRATEGIES FOR THE UNSECURED COMMERCIAL CREDITOR:

A COMPARISON OF COMMON NEVADA AND CALIFORNIA PRE- AND POST-JUDGMENT PROCEDURES

BY JOHN SAMBERG, ESQ. AND RICHARD WILLIAMSON, ESQ.

As the saying goes, the law favors the diligent creditor. This is particularly true when dealing with an interstate commercial creditor's rights. Given the level of commerce between Nevada and California, it is quite common to represent or oppose California entities doing business in Nevada.

The basic procedures involved in collecting an unsecured commercial debt are conceptually consistent in both states, but particularly as it pertains to pre-judgment remedies, the procedures in California vary quite a bit from those in Nevada.

Nevada lawyers may need to enforce a Nevada judgment in California or domesticate a California judgment here. Nevada counsel may also want to prosecute an unsecured commercial creditor's rights in California against a California debtor in order to take advantage of California's more liberal pre-judgment attachment procedures. Therefore, it is important to understand some of the differences and subtle nuances affecting common collection procedures.

A word of caution: this article presents a general overview of what is a very complicated process, both procedurally and substantively. This article is not comprehensive; it discusses only a few of the many rights and remedies available to unsecured commercial creditors, and it is not a substitute for thorough research and understanding of the applicable law.

Nevada Pre-judgment Remedies

A writ of attachment can be very useful to enforce a final judgment. Both Nevada and California allow a pre-judgment writ of attachment in certain circumstances, including many obligations for the direct payment of money, conversion of personal property, embezzlement, a defendant who is about to abscond with property and leave the state, and other extraordinary circumstances. Generally, creditors must strictly follow the statutory procedures for obtaining a pre-judgment writ of attachment. *See, e.g., In re Loer*, 68 Nev. 1, 5, 226 P.2d 272, 274 (1951). In Nevada, a writ of attachment is one of the "extraordinary remedies" provided under Nev. Rev. Stat. chapter 31.

Chapter 31 contains other powerful remedies that can provide creditors with a great deal of leverage early in a case. Attachment, garnishment, delivery and even arrest

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may be available before a judgment is even entered. In Nevada, however, these extreme remedies call for extreme circumstances. Very few cases, for instance, justify a civil arrest. But, such remedies can be critically important in the right setting. If a defendant has absconded with money or property and is about to leave the state, the victimized plaintiff cannot wait for a judgment. Therefore, at the outset of any case, the creditor should carefully assess the likelihood of its success and the availability of any appropriate pre-judgment remedies.

California Pre-judgment Remedies

The starkest difference between the Nevada and California statutory structures is in the context of pre-judgment writs of attachment and related procedures. Generally speaking, after the filing of an action, a right to attach order (RTAO) is available on ordinary notice to an unsecured commercial creditor owed more than \$500 on an undisputed debt. Motion practice in California, however, varies greatly from that in Nevada. The setting of a hearing, the timing of pleadings and the related procedures must be understood and followed.

Once obtained and perfected, a pre-judgment writ of attachment triggers a panoply of rights that give a diligent creditor a significant leg up, not just against the commercial debtor, but also against competing unsecured creditors.

California Code of Civil Procedure, sections 484.010, *et seq.*, provides in essence that upon ordinary notice, a court will issue a RTAO to an unsecured commercial creditor owed at least \$500 on a contract, express or implied. The applicant will need to establish by competent evidence that the claim is probably valid.

Generally, evidence is received in written form, but the court has the discretion to hold a full evidentiary hearing. The applicant will also need to post an undertaking, which is set by statute at \$10,000, although the court can order a higher amount under appropriate circumstances.

The issuance of a RTAO is not dispositive on the merits at subsequent trial. Likewise, the failure of a debtor to oppose an application for RTAO is not a waiver of defenses.

Upon presentation of the RTAO, the court clerk will issue a writ of attachment, which can be levied against the debtor's non-exempt assets. All real and personal property statewide is subject to lien perfection and writ execution.¹ If the debtor is a corporation, the applicant need not specify in the application which assets it seeks to levy. By contrast, if the debtor is a natural person, the applicant will need to specify which assets it seeks to attach. This requirement gives an individual debtor the opportunity to assert exemptions not available to a corporate debtor.

Under exigent circumstances, a court may issue a RTAO on ex parte notice. Although ex parte RTAOs are difficult to obtain, if the applicant can establish that it will suffer "great or irreparable injury" pending the hearing on regular notice, a court is authorized to issue a temporary protective order (TPO) to preserve the status quo pending

the hearing on the application for RTAO.² Usually the TPO will prohibit the debtor from disposing of assets outside the ordinary course of business pending the RTAO hearing.

Subsequent attachment liens will relate back to the date of lien perfection created by the TPO, and perfected liens remain on encumbered or transferred property. *See, e.g.*, CCP § 486.110.

A significant benefit of obtaining a RTAO is that it gives the plaintiff/creditor the right to conduct formal discovery into the assets of the defendant/debtor without having to wait for the entry of judgment.

Using the foregoing procedures, a diligent plaintiff/creditor could literally file suit on Monday get a TPO by Wednesday or Thursday, and have a RTAO within a few weeks thereafter. You will then have the immediate and undivided attention of your client's debtor. If the residency and logistics merit doing so, deciding whether to file in California should be on the pre-filing checklist.

Nevada Post-Judgment Procedures

Once a creditor actually obtains a judgment in Nevada, the creditor has more options at its disposal than while the case was pending. The creditor can record the judgment

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with a county recorder's office, or file it with the Nevada Secretary of State. If property was attached by pre-judgment writ, and the creditor ultimately prevails, then the creditor may execute upon the writ of attachment.

In general, a writ of execution is the normal process for enforcing a monetary judgment. NRCP 69(a). Once the court issues a writ of execution, the creditor is entitled to use some of the same remedies that were available in the pre-judgment context, but with much more ease and authority. Thus, the creditor can obtain writs of attachment, garnishment or possession.

One of the most common ways to enforce a money judgment is by garnishing bank accounts, wages and debts. In the post-judgment context, most Nevada courts are very familiar with the garnishment process and prepared to issue the appropriate paperwork. The creditor must also be prepared to coordinate with a sheriff or constable. Many jurisdictions have their own forms and procedures. Respectful coordination and attention to each venue's procedures are critically important. If the creditor politely complies with that location's procedures, court and law enforcement personnel will usually help expedite the garnishment process.

In Nevada, the major hurdle in enforcing post-judgment writs of attachment and garnishment are the state's exemption

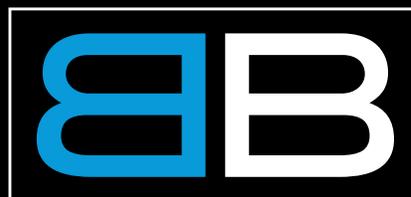
statutes. Before levying a judgment debtor's property, the creditor must serve a notice of execution. *See, e.g.*, Nev. Rev. Stat. 21.075; Nev. Rev. Stat. 31.045. The notice of execution provides the judgment debtor with information on how to assert an exemption from collection for the property being levied. Nev. Rev. Stat. 21.090 lays out the categories of property that are exempt from execution in Nevada. The debtor has the burden of filing a claim of exemption, but, litigating an exemption can be a costly and time-consuming process. Therefore, to the extent possible, creditors should investigate the exemptions that may apply before seeking to levy any property. That process will help minimize the likelihood that a debtor will file a claim of exemption and will also help prepare the creditor to challenge any claim that the debtor does file.

California Post-Judgment Procedures

Post-judgment practice in California is essentially the same as that in Nevada. The core mission is to levy on assets as soon as possible and to perfect the judgment lien even sooner.

A California judgment is perfected against real property generally by recording an abstract of judgment in every county in which the judgment debtor owns real estate. If you have already identified specific real estate assets, you can record a lien against

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the specific property. Once a judgment lien attaches to a specific parcel, you can commence an action for judicial foreclosure.

A California judgment is perfected statewide against certain personal property by filing a notice of judgment with the Secretary of State. The lien attaches to, among other personal property, inventory, equipment and accounts receivable.⁴

If you have already identified specific personal property assets, you can have the clerk of the court issue a writ of execution, which you then deliver to the sheriff of the county in which the assets are located. The sheriff will execute on the specified assets. If the debtor operates a retail location, you can also instruct the sheriff to install a “keeper” to collect directly from the cash register during business hours.

Finally, upon application, the court will issue an order for appearance and examination of judgment debtor (ORAP). The court will set a date, time and department for the debtor to appear and submit to questioning under oath as to the location of assets. If the debtor is a corporation, you must specify the name of the person to appear on behalf of the corporation.

While truthful testimony is required, it may not be full or accurate. Yet, one of the main benefits is that personal service of the ORAP creates a lien on all the debtor’s non-exempt personal property for one year from the date of the issuance of the ORAP.⁵ Therefore, if a debtor encumbers or transfers assets after personal service of the ORAP but before the examination, the debtor has encumbered or transferred property subject to the lien.

Given the differences between Nevada and California pre-judgment remedies, determining where to file is as important as what pre-and post-judgment remedies to employ once an action is commenced. Once a creditor has obtained a judgment, both states provide a wide array of tools for the judgment creditor to

use in enforcing that judgment. The rights and procedures vary from state to state. So, when attempting to pursue or enforce a judgment, the creditor should carefully investigate its options and select those most appropriate to the particular circumstances. **NL**

1. Writ perfection and execution is a complicated process not covered here. Please see the applicable sections of CCP tit. 6.5, and related authority.
2. See CCP §§ 485.010, *et seq.*, and 486.010, *et seq.*
3. See CCP § 697.530.
4. See CCP § 708.110.
5. See CCP § 708.110.



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