

Debt Collection:  
The ABC's of Post-Judgment Enforcement

HARFORD COUNTY BAR ASSOCIATION

**DEBT COLLECTION:  
ABC'S OF POST-JUDGMENT ENFORCEMENT**

Curtis C. Coon, Esq.  
Zachary J. A. Coon, Esq.  
COON & COLE, LLC  
HAVRE DE GRACE, MD  
Main Line: 410-244-8800  
Direct Dial: 410-630-4425

**SESSION OUTLINE**

- Pre-Judgment
- JC's Toolbox
- JD's Toolbox
- Settlement

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**FOR ANOTHER DAY**

- Confessed Judgments
- Foreclosure
- Mechanic's Liens (& Gen'l Construction Law)
- HOA/Land Development Issues
- Government Claims

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**PRE-JUDGMENT POTPOURRI**

- Written Contingency Fee Retainer Agmt
- Federal Fair Debt Collection Practices Act
  - Consumer debts only
  - Violation can make attorney individually liable
  - 15 U.S.C. § 1692, et seq.
- Md. Consumer Debt Collection Act
  - Md. Code Ann. Comm. L. § 14-201, et seq.
- Stay of Enforcement
  - Auto 10-day stay

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## J. CREDITOR'S TOOLBOX

- Discovery in Aid of Enforcement
- Transfer/Enrollment/Domestication
- Foreclosure
- Fraudulent Conveyance Lawsuit
- Property Garnishment
- Wage Garnishment
- Levy
- Charging Order
- Ancillary Relief (including receivership, injunctive relief)
- Involuntary Bankruptcy
- Self Help
- Setoff

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## DISCOVERY

- Md. Rules 2-633 & 3-633
- Similar to pre-trial discovery
- Scope: JD's assets, transfers, debts, etc.
- Available methods:
  - Deposition (one w/out leave of Court) (Cir. Ct. only)
  - Interrogatories (same limit as pre-judgment)
  - Document Requests (no limit) (Cir. Ct. only)
  - Supp. proceeding before Judge or Examiner (personal service)
- "Teeth": Mot. to Compel & Contempt Order
- Ongoing duty to supplement discovery responses
  - Md. Rule 2-401(e)

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## JUDGMENT'S "REACH"

- Automatically
  - All non-T-by-E real property titled in J. Dr.'s name in that county (if properly enrolled)
  - Automatic lien from Balto. City Dist. Ct.
- Only JC (or assignee) can pursue JD
- Only JD's assets can be pursued
  - To extent JD has interest in the property
  - Not spouse's assets (and not T-by-E)
  - Not business' assets

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## RECORDING JUDGMENTS

- Transfer
  - Between District Courts
  - Pre-req to enrollment in a *different* county
- Enrollment
  - Recording the judgment in Circuit Court
  - If from Dist. to Cir., two forms needed
  - Often requires certified copy
  - Becomes a lien on J. Dr.'s real property in county
- Domestication
  - From the county in State A to a county in State B
  - Often requires triple-sealed copy
- Tip: Always call both Courts to confirm procedure & fees
- Tip: Look for counties where no other creditor has yet recorded
- Are you licensed to domesticate the judgment in that state?

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## FRAUDULENT CONVEYANCE

- Md. Code Ann. Comm. L. §§ 15-201 et seq.
- “Classic” F.C.:
  - Actual intent to hinder, delay or defraud present or future creditors
- Alternate F.C. statutes (w/out intent to defraud):
  - Insolvent, no fair consideration
  - No fair consideration & intent/belief of incurring debts beyond ability to pay as they mature
  - Business transaction w/unreasonably small capital
  - Conveyance by insolvent partnership or LLC (to an owner, or without fair consideration)
- Bkcy F.C. Statute: 2 years, but elements are easier
- Monitor SOL deadlines

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## SPOUSAL LIABILITY STATUTE

- Alternative theory to fraudulent conveyance
- Md. Code Ann. Fam. L. § 4-301(d)(2)
  - Transfer between spouses is invalid if made in prejudice of the rights of *present* creditors
  - 3-year SOL from date of transfer
  - All claims are considered due and matured
- Comparatively lower burden of persuasion
  - “Prejudice to creditors” easier to prove than intent, insolvency and/or unfair consideration

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## PROPERTY GARNISHMENT

- Scope: Any non-wage property in hands of a 3<sup>rd</sup> party.
  - More than just bank accounts
  - Includes any debt owed to JD
    - Immediately payable, as well as unmatured
  - Excludes wages and partnership/LLC interest
    - (Attached by Wage Garnishment or Charging Order)
- Writ is not a continuing lien
  - Only “zaps” present holdings, plus w/e Garnishee acquires up to condemnation
  - Excludes property acquired after termination of writ
    - Must re-garnish

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## WAGE GARNISHMENTS

- Separate rule (Md. Rule 2-646)
- Cross-Ref w/Md. Code Ann. Comm. L. §15-605
- Similar to property garnishment, but:
  - Writ served on JD immediately upon issuance
  - Wage garnishee subject to contempt if no Answer
  - Monthly statement disclosing payments received
    - Until writ is terminated
  - Continuing lien
    - No need to re-garnish each pay period, unless job changes
- Priority based on service upon Garnishee

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## GARNISHMENT PROCEDURE

- Garnishee must file Answer/Confession of Assets
- JC must file Reply Contesting Answer
- Interrogatories to Garnishee
- Mot. to release property from garnishment
  - e.g., by claiming exemptions

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## HOW TO CREDIT JUDGMENT

- Law sets order:
  - 1<sup>st</sup>: Interest (post-J and pre-J)
  - 2<sup>nd</sup>: Principal
  - 3<sup>rd</sup>: Attorneys' fees and costs
- 10% post-J interest rate
  - Per diem =  $((\text{Principal} \times 0.1)/365)$
  - Calculated based on outstanding principal only

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## LEVY

- Md. Rules 2-641, 2-642
- Request must include instructions to Sheriff
  - Last known address
  - Outstanding judgment amount
  - Location & description of property
  - Whether Sheriff should remove property
- Sheriff must file Return after levy
- Bond
- Sale under Md. Rule 2-644

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## DEBTOR'S INTEREST IN CHARTERED ORGANIZATIONS

- Limited Liability Shield
- Corporations
  - Levy on Stock Certificates
- Partnerships, LLC's, etc.
  - Charging Orders

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## CHARGING ORDERS

- Md Rule 2-649 (3-649) (partnerships)
- Md. Code Ann. Corps. & Assns. § 4A-607
- Limited caselaw
- Attaches to economic membership interest (distributions)
  - Does not attach to rights of governance
  - Gives creditor right of an Assignee
- Continuing lien
- Foreclosure (right of redemption)
- Receiver
- Accounting
- “Such other relief as [the court] deems necessary and appropriate...”

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## ANCILLARY RELIEF

- Md. Rule 2-651 (personal service req'd)
- Catch-all
- “Necessary and appropriate to aid enforcement” standard
- Injunctive relief
- Disclosure of location of assets for levy
- Order to surrender property

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## JUDGMENT CREDITOR'S DUTIES

- Wage Garnishment
  - Serve monthly statement disclosing payments received and how they were applied to judgment
- General accounting
  - Furnish debt statement upon request
- File Notice of Renewal of Judgment
- Once paid off
  - Mark the judgment as satisfied with every Court is has been recorded in and release all attachments

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## JUDGMENT DEBTOR'S TOOLBOX

- Counterclaim (tort, violation of FDCPA, etc.)
- Exemptions/Exclusions
- Prior attachment/assignment
- Bankruptcy
- Statute of limitations
- Expiration of judgment
- Judgment Creditor's lack of time or money

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## EXEMPTIONS (Md.)

- Tenancy by the entirety
- Joint bank accounts (H-W)
- Trust property (some)
- Delaware consumer bank accounts
- 75% of net wages
- Child support & alimony
- Cash/"Wildcard": \$6,000
- Tools of trade: \$5,000
- Household furnishings, etc.: \$1,000
- IRA's, pensions
- Social Security
- ERISA
- Money payable from any person's injury, sickness, accident; worker's compensation
- Life insurance (death benefits)
- Life insurance cash surrender value (depending on beneficiary)
- Supplemental Bankruptcy Exemptions:
  - Homestead (bankruptcy): \$21,625 (house, not spouse) - **\$22,975 (effective 4/1/13)**
  - 504(f)(1)(i)(I) - **\$5,000 per person bankruptcy**

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## FORFEITURE OF EXEMPTIONS

- Debtor must raise them
- Court can find forfeiture of exemption
  - *Tavener v. Smoot*, 257 F.3d 401 (4<sup>th</sup> Cir. 2001)
- Contamination vs. discreet identification

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## BANKRUPTCY

- Creditor's Concerns
  - Discharge of Debt
  - Preference actions (90 days)
  - Lien avoidance/stripping (Ch. 11 and 13)
    - Cramdown (Ch. 13)
    - Avoid judgment lien to extent unsecured, or exemption is impaired

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## BANKRUPTCY

- Creditor's Benefits
  - Most of the time: None.
  - Consolidated, orderly administration of debts
  - Supervised by the same Judge (A-Z)
  - Stringently enforced accounting requirements
    - Under penalty of perjury
  - Trustee will review and initiate some actions
  - Non-dischargeability of certain debts
  - "Sleeping" creditors may forfeit claims
    - Improve your share of proceeds
  - Liens "ride through" BKCY unless avoided or stripped

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## ANTICIPATING BANKRUPTCY

### Debtor

- Exemption planning
- Pre-bankruptcy fraud concerns

### Creditor

- Perfect all liens immediately
- Find unencumbered assets to lien
  - LLC interests, life insurance, etc.
- Avoid a Preference Action
  - Be careful with lump-sum settlement offers
    - Draft the release in a settlement agreement to only become effective 91 days after payment, if no bankruptcy filed
      - 1 year for "insiders"
    - Otherwise, the payments are merely "credits"

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## WHAT TO DO?

- Monitor case online (CM/ECF, Pacer)
  - Register for auto e-mail alerts
  - Or file Request for All Notices (if not admitted)
- File Proof of Claim
  - Don't need to be admitted to Fed'l/Bkcy Bar
- Attend 341 Meeting of Creditors
- Motions/Opp. (e.g. lift stay, lien enforcement, insur., tax)
- Adversary proceedings
  - For non-dischargeability of debt or fraudulent conveyance
- Object to Plan (Ch. 11 or 13)
- Object to Discharge (after 341)

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## EXPIRATION OF JUDGMENT

- Md.: 12 years
  - Md. Rules 2-625, 3-625

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## LIMITED RESOURCES

- Time
  - If too late, all the easily attachable/most liquid assets will be gone (spent, transferred, assigned or liened)
  - Ordinary docket-related delay (months or years)
- Money
  - Costs & attorneys' fees can rival debt to be collected
    - Even if they're part of judgment
  - Client may run out of cash or decide to cut its losses
- Shrewd J. Drs are banking on these
  - Might drag feet in discovery or contest everything
  - Hoping Creditor will give up

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## SETTLEMENT

- Pros
  - Cash/property likely received sooner
  - Client likely saves collection costs
  - Might come out ahead (over bankruptcy, foreclosure)
  - Starts preference period
- Cons
  - Compromised amount
  - Hidden assets?
  - During installment period, creditors can jump ahead
  - In bankruptcy, judgment may not be preserved

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## SETTLEMENT TIPS

- Determine competing creditors & liens
- Establish all liens before settling
  - Preserves lien priority
  - Gives fallback if breach or bankruptcy
  - Adds negotiation leverage
- Obtain discovery and affidavit of attachable assets
- Balance: What Dr. can afford to pay & what Cr. can attach
- Articulate consideration in settlement agmt
- Agree merely to “forbear” until final payment cleared for 91 days – then “release” is effective
- Use settlement to gain otherwise unobtainable additional collateral and a general release by debtor to your client

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