VALLEY LAWYER

JUNE 2013 • $4

A Publication of the San Fernando Valley Bar Association

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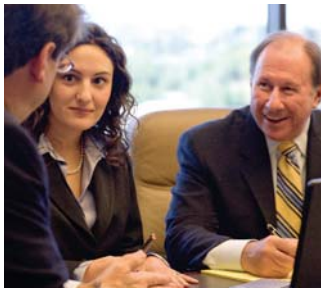

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Contents

VALLEY LAWYER
Bankruptcy and Real Property
A Publication of the San Fernando Valley Bar Association

FEATURES

COLUMN

DEPARTMENTS

VALLEY LAWYER

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Changes

DAVID GURNICK
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EACH OF THE LAST FEW months our Board of Trustees has been treated to remarks from special guests. Retired Supreme Court Justice Armand Arabian, UWLA School of Law President Robert Brown, Valley Community Legal Foundation President Etan Lorant and Neighborhood Legal Services Executive Director Neal Dudowitz graced us with thoughts on law practice in the Valley. In April, distinguished Valley attorney David Fleming reminisced with our board about practicing here over 50 years.

When David was admitted to practice in 1960, the SFVBA had just passed its 30th anniversary as an organization. David recalled that its entire membership, not even 60 lawyers, could meet in one dining room. Everyone knew each other. They were civil and relied on each other's word for a continuance or other professional courtesy.

That got me thinking about other ways our bar and law practice have changed in the last three decades. Because change happens incrementally, we don't notice its small impacts. But as we look back over time, the cumulative effects are easier to see.

In the early 1980s, Federal Express was new and exciting with its superfast delivery. It had just started offering overnight delivery for letters. Telecopies were also possible, if you could bear to touch and tear off the textured paper spat out by fax machines. Today, instantaneous delivery of messages by email is the norm and electronic filing of documents is expanding.

The 1980s started the personal computing era. The first portable computer used by lawyers was from Compaq in 1983. Its 28 pound container, resembling a sewing machine case, was considered portable. Today lawyers hold exponentially more computing power in wallet-sized phones.

Lexis and Westlaw were clunky dial-up research tools. They required special workstations and inputting dots and codes to do basic searches. In the 1980s, Lexis feared the public would confuse it with a new luxury car and sued Lexus. Relief was denied (*Mead Data v. Toyota*, 875 F.2d 1026 (2d Cir. 1989)) but both Lexi have flourished with lawyers. Meanwhile, Westlaw won a suit against Lexis for infringing Westlaw's pagination system (*Westlaw v. Mead Data* 799 F.2d 1219 (8th Cir. 1986)).

We confirmed validity of opinions by "Shepardizing." That was because Shepard's printed lists of cases citing

prior decisions. Later, Lexis (actually Mead) bought Shepard's and now provides the service online. Westlaw calls its version "Key Cite." Today, law schools don't teach it and new lawyers don't know what it means to Shepardize a case.

Mandated continuing education did not exist in the 1980s. Lawyers partook in voluntary continuing education by reading cases and

attending widely available seminars, including those presented by our SFVBA law sections. Nor did the State Bar specify subjects lawyers had to pursue. MCLE was challenged but upheld by the Supreme Court (*Warden v. State Bar* (1999) 21 C4th 628).

Thirty years ago, a firm of fifty lawyers was considered large. Today, some firms with two hundred or more attorneys might be considered boutiques. According to Wikipedia (which along with Google, Yahoo, Facebook and your office's website, also did not exist in the 1980s), just the ten largest firms employ more than 23,000 lawyers.

Jurors used to serve thirty days. Today, they serve one day or one trial. It is easier for them and we get better juries. Lawyers then were routinely excused. Today, to the system's credit, lawyers and judges are often seated as jurors, and our experiences are positive; we learn a new perspective on the courts and take pride in our service.

Law offices had a ratio of one secretary per lawyer. That made sense because voice messaging didn't exist and word processing was new and cumbersome. Secretaries answered the phones, took the messages, made notes in Gregg shorthand and did almost all the typing and document preparation. Today's technology answers our phones, receives and delivers our messages and lawyers do mostly their own typing. In some offices, secretary to lawyer ratios are up to 1:5.

Lawyers dressed in vested suits; a merely coordinated coat, tie and slacks were considered casual. Women's fashion was similarly formal. Today law offices are almost universally casual. This has helped relax the tone and temper in our high pressure, high stakes work.

Some lawyers advertised in phone books and bus benches while others frowned on advertising. Today, lawyer web pages are universal and advertising is common even by the most staid firms.

Courts had no metal detectors but each courtroom had an armed uniformed bailiff. At breaks in court and seminars, lawyers lined up at pay phones to check office messages. Some punched in long codes to qualify for discounted long distance charges. Today, bailiffs in civil courts and pay phones are mere vestiges of history.

The bar, like our society in general, is increasingly tolerant and increasingly embracing of each other. It is affirmatively welcoming, celebrating and pursuing the diversity of our society.

Many things have not changed. Collegial relationships with partners and, where possible, with adversaries still make our profession more fascinating and our work more fun. With powerful technology at hand, lawyers continue dedicating their energies and time to getting the best results for clients and in this way advancing and defending our system of justice under law.

Mostly the changes are good. They have made us more effective for clients and have helped keep our services from being more expensive than they already are. Changes are inevitable. The changes in our profession within David Fleming's long memory, and mine, are vast. I wonder what the coming decades will bring and relish the opportunity to be a part of them.

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Calendar

Employment Law Section
Mixed Motive: Harris v. City of Santa Monica

JUNE 5
12:00 NOON
LEWITT HACKMAN
ENCINO

Attorney Linda Hurevitz discusses mixed motive theory in light of the Supreme Court decision in *Harris v. City of Santa Monica*. Does the ruling change McDonnell-Douglas burden shifting order of proof? What is the effect on jury instructions? What is the effect on motions for summary judgment? (1 MCLE Hour)

Probate & Estate Planning Section
Estate Planning In Regard to Intellectual Property Assets

JUNE 11
12:00 NOON
MONTEREY AT ENCINO RESTAURANT

Attorneys Kira Masteller and Mishawn Nolan will discuss how best to assist your clients who have intellectual property rights. What are the best means to protect these assets and your client's estate? Attend this seminar and find out! (1 MCLE Hour)

Business Law Section
Franchise Law

JUNE 12
12:00 NOON
SFVBA CONFERENCE ROOM

Franchise attorneys David Gurnick and Barry Kurtz will offer the latest regarding franchise law. (1 MCLE Hour)

Intellectual Property, Entertainment & Internet Law
Hot Topics in Trade Secrets: Litigation and Transactional Perspectives

JUNE 14
12:00 NOON
SFVBA CONFERENCE ROOM

Intellectual Property practitioners Mishawn Nolan and Thomas Morrow will review emerging trade secret issues and discuss how they impact your practice. It will be a practical and interactive presentation for intellectual property and business attorneys. (1 MCLE Hour)

Taxation Law Section
How to Defend Taxpayers against IRS Penalties

JUNE 18
12:00 NOON
SFVBA CONFERENCE ROOM

Former Senior IRS attorney David C. Holtz will give the inside scoop regarding how best to defend your client against IRS penalties. (1 MCLE Hour)

Litigation Section
Practical Tips for Securing Preliminary Relief

JUNE 20
6:00 PM
SFVBA CONFERENCE ROOM

Attorney Thomas Morrow discusses applications for preliminary relief in various contexts and will provide practice pointers to smooth what can sometimes be a bumpy ride. (1 MCLE Hour)

Family Law Section
Financial Aspects of Dissolution

JUNE 24
5:30 PM
MONTEREY AT ENCINO RESTAURANT

Judge Harvey Silberman and CPA Ron Anfuso delve into financials regarding dissolution and cover everything you wanted to know about paystubs and support calculations but were afraid to ask. (1 MCLE Hour)

Women Lawyers Section
Challenges Faced by Minorities and Women in the Legal Profession

JUNE 25
12:00 NOON
SFVBA CONFERENCE ROOM

Roundtable discussion led by attorneys Tina Alleguez and Carol Newman. (1 Elimination of Bias MCLE Hour)

Criminal Law Section
Gangs

JUNE 26
6:00 PM
SFVBA CONFERENCE ROOM

Criminal defense attorney Robert Schwartz, an expert on gang evidence, and Detective Matt Harer give the ins and outs of investigating gang activity and the resulting prosecution and defense of alleged gang members. (1 MCLE Hour)

Elder Law Section
Long Term Care Litigation

JUNE 27
6:00 PM
SFVBA CONFERENCE ROOM

Steven Peck continues the discussion on nursing home litigation. (1 MCLE Hour)

The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. Visit www.sfvba.org for seminar pricing and to register online, or contact Linda Temkin at (818) 227-0490, ext. 105 or events@sfvba.org. Pricing discounted for active SFVBA members and early registration.

Emerging Relevance

ELIZABETH POST
Executive Director
epost@sfvba.org

IN APRIL I ATTENDED THE Annual ECLA Retreat held in Santa Rosa, California. ECLA is the acronym for Executives of California Lawyers' Associations. Every spring, about 20 executive directors from local and specialty bar associations from around the state gather for two days in a casual setting to attend presentations on management and leadership, share personal and organizational achievements, talk to each other about the common issues and challenges facing our associations and, of course, socialize.

Overall, I believe the San Fernando Valley Bar Association stands out amongst California's many bar associations. The SFVBA public service programs—Attorney Referral Service and Mandatory Fee Arbitration Program–are self-sustaining, servicing new clients and benefitting more attorney members at a time when other bar associations are cutting back or terminating these programs. The Bar's communications—via *Valley Lawyer* and social media–are professional and viable, and our events and seminars are well attended and on the rise.

The biggest challenge facing the San Fernando Valley Bar Association and the other bar associations statewide (and across the nation) is staying relevant to the many segments of the profession while retaining members. It is a never ending endeavor, but the SFVBA continues to make progress. Earlier this Bar year, we formed new sections on employment law, elder law and taxation to fill the needs of attorneys in these growing practice areas. We also recognized business law, bankruptcy law and real property as three distinct practice areas, and divided the previous large section into three individual and widely popular groups. These six new sections are thriving while another new section—corporate counsel—is being organized.

> "The biggest challenge facing the San Fernando Valley Bar Association and other bar associations statewide (and across the nation) is retaining members while staying relevant to the many segments of the profession."

What else can the SFVBA do to be more relevant? Recently, our Board of Trustees heard from a named partner of a prominent Valley law firm that his firm and a growing segment of the profession are looking beyond the SFVBA and other traditional bar associations to join. These are lawyers who rarely, if ever, see the inside of a courtroom; they are corporate and transactional lawyers, representing technology, emerging growth and startup companies. While these firms and lawyers may think highly of the bar associations' access to justice or public service initiatives, they are looking elsewhere for their professional development and referrals. This was a wakeup call for the Board and me. We still have a lot of work to do, but we are up to the task.

I welcome your views on how the SFVBA can be more relevant to your practice and career.

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The Case of the Contractual Fee vs. Quantum Meruit

By Sean E. Judge

This column summarizes cases that have been resolved through the SFVBA Mandatory Fee Arbitration Program. The goal of this column is to provide brief case studies of fee disputes in the hope that these examples will help Bar members avoid similar situations in their own practice.

THIS MONTH'S ARTICLE DEALS WITH A matter submitted for binding arbitration in which the client paid a flat fee retainer to an attorney for work to be done in conjunction with filing a bankruptcy.

The Facts

Client employed attorney to file a chapter 7 bankruptcy petition on his behalf. Client paid the attorney $3,800 in anticipated fees and costs. The work was to encompass a considerable amount of pre-filing work (all detailed in the retainer agreement), the filing fee and at least one court appearance after the petition was filed.

Attorney prepared the chapter 7 petition, but in the course of reviewing client's unemployment income, advised him that his unemployment checks would preclude a chapter 7 filing and would require a chapter 13. Client then terminated the attorney's services and went ahead and successfully filed a chapter 7 petition despite receiving unemployment.

Client submitted the matter to the SFVBA Mandatory Fee Arbitration Program. Attorney had refunded the unused filing fee check of $300 to the client after the agreement was terminated. The parties stipulated to have the matter heard as a binding arbitration. Attorney elected to waive his appearance pursuant to SFVBA Rule 27.1, which provides:

> Upon advance approval of the Panel Chair, any party may waive personal appearance and submit to the hearing panel testimony and exhibits by written declaration under penalty of perjury.

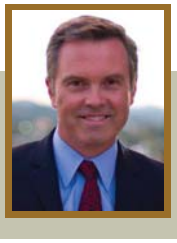
Client claimed that the work performed on his behalf was virtually useless, and that of the $3,500 of the retainer that constituted the fee agreement, $3,000 plus the filing fee should be returned. Attorney claimed that all of the work was useful and valid, and that he actually spent far more time than the agreement allowed him were *quantum meruit* to be applied.

The arbitrator found that the fee agreement did not comply with Business and Professions Code §6147, which states that a retainer must contain a provision that the fees are negotiable and not set by law (subsection (a)(4)). The arbitrator found that this made the agreement unenforceable, and merely a deposit against the value of future work under California Rules of Professional Conduct 3-700(d)(2). (NOTE: This case could well have been decided under Business and Professions Code §6148, which contains no such provision).

The arbitrator found that the agreement was voidable at the request of the client and found that the total reasonable value of the pre-trial services (not including the filing, and any post-filing work) was $1,750 and ordered the client to receive the $1,750 in overpayment plus the filing fee.

The Takeaway

In cases where the agreement in dispute involves a contingency, hourly or flat fee agreement, when it is found to be unenforceable for failure to comply with B&P Sections 6147 or 6148, *quantum meruit* cannot be used as a "sword" to claim more fees than the agreement provided for. *Quantum Meruit* is for the benefit of the client and not the attorney, and should be viewed as such if the fee agreement fails to comply with either code section.



Sean E. Judge is the principal of Judge Mediation in Woodland Hills and a Trustee of the SFVBA. He is currently co-chair of the Mandatory Fee Arbitration Committee. Judge can be reached at sean@judgemediation.com.

This topic is discussed in greater detail by the California State Bar Committee on Mandatory Fee Arbitration in Arbitration Advisory 2012-02 "Voidability of Fee Agreements." The committee's findings are as follows:

> An attorney should not be rewarded for failing to comply with statutes by being awarded a fee in excess of the contract fee. Therefore, a "reasonable fee" under Business and Professions Code Sections 6147 or 6148, should never exceed the contract fee. (*Cazares v. Saenz* (1989) 208 Cal. App.3d 279, 287 [withdrawing attorney entitled to lesser of fair value of lawyer's services or contractual fee prorated for services actually performed].)

Arbitration advisories are provided as guidance for fee arbitrators, attorneys and the public who are navigating the difficult issues arising out of fee disputes. This advisory and others are available for download from the State Bar's website at www.calbar.ca.gov/attorneys/memberservices/feearbitration.aspx.

Bulletin Board

The Bulletin Board is a free forum for members to share trial victories, firm updates and other professional accomplishments. Email your 30-word announcement to editor@sfvba.org by the fifth of every month for inclusion in the following month's issue. Late submissions will be printed in the subsequent issue. Limit one announcement per firm per month.

Parker Milliken, a dedicated supporter of the SFVBA celebrating its 100th anniversary this year, is pleased to announce the election and promotion of **Natasha N. Dawood** as shareholder of the firm as of January 1, 2013. Natasha was a former trustee of the SFVBA and remains active as Chair of the New Lawyers Section. Recently, Natasha's work is focused on complex pharmaceutical products liability matters and business/employment disputes.

Robert A. Weissman presented a program on "The New Normal in Mechanics' Lien Law" at the 2013 California State Bar Real Property Section Annual Retreat in Napa.

Yi Sun Kim, a litigation and bankruptcy associate with **Greenberg & Bass**, recently received the 2013 "Women in Business Rising Star" Award, sponsored by the San Fernando Valley Business Journal.

Real estate and business mediator **David I. Karp** has organized a Mediators' Discussion Group and Open House on June 12, 2013 in Van Nuys for The Mediator Registry and others.

Nicole Kamm, employment law attorney at **Lewitt Hackman**, was recognized as a nominee for the 2013 Women Making a Difference Award by the Los Angeles Business Journal.

Lawyers in the Library

ROSIE SOTO COHEN
Director of Public Services
referrals@sfvba.org

ON APRIL 29 AND MAY 4, 2013, THE ATTORNEY Referral Service of the San Fernando Valley Bar Association collaborated with LA Law Library and the Los Angeles Public Library (LAPL) to bring "Lawyers in the Library" to the San Fernando Valley and celebrate Law Day 2013. For two hours each day, over 50 Valley residents visited the Panorama City Branch of the Los Angeles Public Library to obtain free 20 minute consultations with volunteer attorneys.

The public lined up before the scheduled start time. ARS Consultants Lucia Senda and Aileen Jimenez matched individuals with an appropriate attorney and helped translate for the predominantly Spanish speaking public. Once an individual signed in, there was little wait time before they were able to meet with an attorney, although there were plenty of resources and reading materials available to those who did have to wait for a consultation.

Attorneys Michael L. Cohen, Bahram Madaen, Richard T. Miller, Kian Mottahedeh, Jasmine Ohanian, Bernal Ojeda, Robin E. Paley, Rebecca I. Pathak, Joanna M. Sanchez and John D. Sarai generously provided the public with valuable counsel pertaining to immigration law, employment law, family law, housing, personal injury, small claims matters, consumer debt and bankruptcy.

The consultations with a trusted attorney from the SFVBA, in a safe environment like the public library, were the keys to the program's success. The meetings included review of an issue and/or papers and potential next steps, recommendation regarding viability of a case, referral to arbitration or mediation, etc. The consultations and resources helped individuals evaluate their options and understand their legal rights and responsibilities. Not only was this a good opportunity for the public, it positively enhanced the reputation of the legal profession. Whether it was good or bad news, the public seemed appreciative of the attorneys' assistance.

The collaboration and planning, between Janine Liebert, Librarian, Programs and Partnerships at LA Law Library; Malinda Muller, Interim Senior Director Library Services at LA Law Library; Teri Markson, Senior Librarian, Panorama City Branch; and myself produced additional benefits. Several patrons were referred to the Attorney Referral Service for follow-up. The branch library obtained referral sheets from LA Law Library and the ARS of the SFVBA. Volunteer attorneys have been added to LA Law Library's speakers' bureau for CLE presentations. The Panorama City branch library had a significant number of attendees for an adult program.

Credit is also due to Theresa Hurley, Associate Executive Director of the Contra Costa County Bar Association. Theresa has experience with the Lawyers in the Library program sponsored by the Contra Costa County Law Library and was extremely generous with her resources, allowing the ARS to model their policy and procedures, volunteer agreements and waiver forms for SFVBA sponsored programs.

Teri Markson and her library staff were very supportive. The library has a lot of foot traffic and the PA announcements throughout the day created hype for the program. Lawyers in the Library could not have been a success without the program's many publicity sources; visitors learned about the event through prominent postings at the Panorama City and other LAPL branches in the East Valley; flyers posted on community bulletin boards; Los Angeles Daily News; LA Law Library and LAPL websites; LAUSD Education Services Center North Parent & Community Engagement Center; and Los Angeles City Councilmember Paul Krekorian's e-newsletter.

The next step is to consider continuing and expanding the program, determining how often and where the program should be offered and how to regularize each so the public has a routine day and time to remember. Most importantly, would SFVBA attorneys continue to volunteer?

Thanks are due to everyone who participated and worked so hard to make this pilot program such a success for the community.

On April 24, the SFVBA held its second annual Administrative Professionals Day Luncheon. 80 attorneys and their staff joined the Bar in recognizing the contributions of legal secretaries, paralegals and others to the profession and expressing thanks for their hard work. The "Administrative Professional of the Year" was named and door prizes were provided to attendees. The event sponsors included Atkinson Baker Court Reporters, Narver Insurance, Now Messenger, The Matloff Company, LexisNexis and the SFVBA Membership & Marketing Committee.

On April 26, the SFVBA, the Attorney Referral Service and the University of West Los Angeles School of Law sponsored a debate between the two candidates for Los Angeles City Attorney, Mark Feuer and Carmen Trutanich. About 75 people were in attendance and heard the candidates answer questions on issues ranging from gun violence to city budget cuts. The event was unique for the Bar in that it was only publicized digitally, via email and social networks. It was also the first Bar event to be live-tweeted. Members who were not able to attend in person were able to follow the debate live at twitter.com/sfvba. Debate questions, answers and photographs were posted online as the event was taking place. The success of this event was made possible by the hard work of SFVBA Treasurer Carol Newman, UWLA President Robert Brown and the students of the Law Post Program.

LA Law Library Is Much Closer Than You Think:

Update on Services for San Fernando Valley Lawyers

By Malinda Muller

DO YOU EVER NEED SOMETHING FOR YOUR law practice that you don't have in your office or is outside the scope of your online research plan? What about boilerplate language for that contract you're drafting, or a sample complaint for that new case you just took? How about a private space downtown to meet a client or hold a deposition? If you answered yes to any of these questions, LA Law Library can help.

LA Law Library is the second largest public law library in the United States, second only to the Law Library of Congress and it serves all of Los Angeles County, not just downtown. The collection is both current and historical, covering all areas of law, including an extensive foreign and international law collection, with materials from more than 200 countries. San Fernando Valley lawyers can access this unique collection in several ways.

Van Nuys Branch

LA Law Library maintains a print collection at the Van Nuys branch of the Los Angeles Public Library, directly across the plaza from the courthouses. The collection includes the West Annotated California Codes, Rutter and CEB practice guides and the full set of California Forms of Pleading and Practice, just to name a few. This spring, LA Law Library also added online access to legal databases at the Van Nuys branch. These new services replicate the robust online subscriptions available at the main library downtown and include:

- *Westlaw.* Coverage of state and federal statutes and case opinions; selected California secondary sources, dockets, jury verdicts, judgments and settlements; as well as selected motions, pleading and other civil trial filings form the California state and federal courts. This service also contains the entire Rutter Group practice library, adding new titles to the service as they are published. Also included is the full Witkin series, Miller & Starr Real Estate and Cal Jur.

- *CEB Onlaw.* Complete access to CEB California's full practice area libraries covering estate planning, business law, real property, litigation, family and employment law. The libraries have full-text search capabilities, citation links to primary law and contain downloadable forms. New titles added in print are added online as well.
- *HeinOnline.* Often a useful place to begin research on an issue, HeinOnline houses the largest collection of full text law journal and bar association magazines and journals in one searchable location. The service also contains current and historical access to the Federal Register, CFR, U.S. Code and U.S. Treaties.
- *Legal Information Resource Center.* More than 300 full text publications and thousands of legal forms provided, primarily, through Nolo: "How-to" instructions addressing a wide-range of legal issues, including business law, intellectual property, family law, property and real estate rights and disputes, foreclosure and bankruptcy, immigration, wills and estate planning.
- *LegalTrac.* Indexing for more than 1,500 law reviews, legal newspapers and international law journals. Selected titles and years are full text. (*Valley Lawyer* is not included, however.)

Using a thumb drive, cases, forms and practice material text, contents and chapters can be saved for later use or transferred to pleadings and other documents. For your convenience, Los Angeles Public Library allows users to reserve a computer up to nine days in advance on their website (www.lapl.org) with a (free) LAPL library card. The branch library also has two 15 minute walk-up computer stations available as well, which are useful for quick case or statute look-ups during a lunch break.

Delivery and E-Delivery

Beyond Van Nuys, there is also a mother ship of legal resources located downtown. Most of these materials can be checked out and delivered to borrowers via the library's messenger service. Delivery fees are competitive and provide a convenient alternative to traveling downtown.

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If you need research materials, but aren't sure what the library has, try emailing the reference desk (express@lawlawlibrary.org) for assistance or searching the library's catalog online (www.lalawlibrary.org).

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Visit the library's website to access the largest repository of the California Supreme Court and appellate courts of appeal starting in 2008 to the present. The library has digitized up to 75,000 briefs and continues to add more daily. Download a legislative history checklist or retrieve California ballot propositions since 1980. Also available is full text access to all publications and forms contained in the nuts and bolts suite of Nolo publications published by EBSCO.

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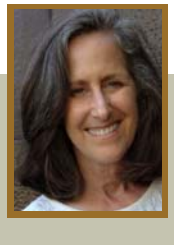


Malinda Muller is Interim Sr. Director Library Services of LA Law Library. She can be contacted at mmuller@lalawlibrary.org. To learn more, be added to the speakers' bureau, get on the Law Library mailing list or order a day pass and try out the Members Program, please visit www.lalawlibrary.org.

Give Motions to Dismiss in Bankruptcy Court a Second Thought

By Stella A. Havkin

MOTIONS TO DISMISS ARE TYPICALLY brought in adversary proceedings which are lawsuits adjudicated in bankruptcy courts that involve debtors versus creditors, creditors versus debtors or trustees versus either debtors, creditors or third parties. They are governed by Federal Rules of Bankruptcy Procedure Rule 7000 et al. Most frequently, such proceedings involve nondischargeability complaints pursuant to 11 U.S.C. §523 for claims of fraud, breach of fiduciary duty and willful conduct by the debtor in which a creditor seeks to have its debt excepted from the debtor's bankruptcy discharge.

Often, such complaints involve objections to discharge where a creditor or the chapter 7 trustee appointed in the bankruptcy case seeks to block the debtor's discharge as to his or her entire debt pursuant to 11 U.S.C. §727 because of the debtor's failure to disclose assets or other misconduct which has taken place within a year prior to the filing of or during the bankruptcy case.

Federal Rules of Civil Procedure (F.R.C.P.) Rule 12(b)(6) empowers federal courts to dismiss a complaint "for failure to state a claim upon which relief can be granted." Federal Rules of Bankruptcy Procedure (F.R.B.P.) Rule 7012(b) provides that F.R.C.P. Rule 12 applies in adversary proceedings.

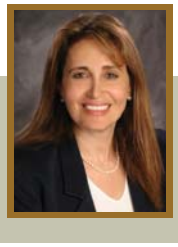
A motion to dismiss pursuant to F.R.C.P. Rule 12(b)(6) may be based on the grounds of either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory."[1] "In resolving a Civil Rule 12(b)(6) motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff, and accept all well-pleaded factual allegations as true."[2]

Historically, motions to dismiss were difficult to win. Complaints were rarely dismissed for failure to state a claim unless it appeared "beyond doubt" that the plaintiff could prove no set of facts in support of its claims.[3] The standard for pleading in a complaint was sufficient notice of the claims asserted. *Conley* controlled for nearly 50 years. Educating the opposition of the problems with their complaint through a motion to dismiss was not worth the risk and the effort. It was best to have the arguments and expense saved for a motion for summary judgment or trial.

In 2007 and 2009, the Supreme Court in *Bell Atlantic Corp. v. Twombly*[4] and *Ashcroft v. Iqbal*,[5] respectively, ended notice pleading and upgraded the standard of pleading to a much higher standard of plausibility which is essentially a fact pleading standard. As a result, winning a motion to dismiss for failure to state a claim in a bankruptcy case became a real possibility, worth the effort and the expense.

Specifically, the Supreme Court in *Bell Atlantic Corp. v. Twombly* stated that the standard applicable to motions to dismiss is that a complaint has to contain "more than labels and conclusions" and more than a "formulaic recitation of the elements of a cause of action."[6] The complaint must indicate more than a mere speculation of a right to relief. Conclusory statements, statements of law and unwarranted inferences cast as factual allegations will not suffice.[7]

In 2009, the Supreme Court issued the decision of *Ashcroft v. Iqbal* in which it elaborated on the *Twombly* standard by stating that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face …. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct



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alleged …. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[8]

In light of that standard, the Supreme Court stated that courts considering a motion to dismiss should use a two pronged approach. First, "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."[9] Second, the court reviewing the complaint should then consider the factual allegations in the "complaint to determine if they plausibly suggest an entitlement to relief."[10] This is still assuming the veracity of the well-pled factual allegations.[11] Practically, this means that the bankruptcy court must carefully separate the factual assertions from cursory recitation of legal conclusions set forth in a complaint.

In adversary cases involving 11 U.S.C. §523 and §727 discharge complaints, the allegations typically center on fraud allegedly perpetrated by the debtor. In such cases, in addition to having to overcome the *Twombly* plausibility standard, the plaintiff must comply with F.R.C.P. Rule 9(b) which imposes a heightened pleading requirement of facts constituting the debtor's fraud.[12]

Even though *Twombly* permits a plaintiff to generally allege malice, intent or other mental states of the debtor's mind, the plaintiff must create an inference of fraud in the court's mind to overcome a motion to dismiss.[13]

Several law school professors have conducted studies of federal cases and analyzed the effect on the rates of dismissal of cases in motions to dismiss under Rule 12(b)(6) since *Twombly* and *Igbal*. Patricia Hatamayar Moore, a professor at St. Thomas University in Florida, analyzed randomly selected 500 post-*Twombly* and 180 post-*Igbal* cases versus 500 cases under *Conley*. She found a statistically significant increase in the granting of motions to dismiss. She also found that while rates of dismissal with leave to amend had increased, the rates for dismissal without leave to amend had also significantly increased.[14]

While courts still afford plaintiffs the opportunity to amend at least once, getting a case dismissed without the expense of a trial is now a real possibility. This of course is aided by the fact that the statute of limitations for filing a complaint for nondischargeability pursuant to 11 U.S.C. §523 or objection to discharge case pursuant to 11 U.S.C. §727 is sixty days from the first meeting of creditors.[15] This does not allow a lot of time for discovery and as such, complaints for nondischargeability and objection to discharge are fraught with formulaic recitations of the elements of a claim without a lot of facts to support the elements.

The hope of a plaintiff in such a case is that he or she will be able to conduct discovery and fill in the factual gaps in the complaint. However, in light of *Twombly* and *Igbal*, such a strategy may prove to be fatal. A defense attorney can file a motion to dismiss the complaint and will most likely prevail if the complaint fails to present sufficient facts.

If the plaintiff argues that it has additional facts and could amend, most judges will allow the plaintiff to amend the complaint pursuant to F.R.C.P. Rule 15(a) at least one time unless it is obvious that the amendment to the complaint would be futile.[16] If the complaint can be amended, the amendment will relate back to the date of the filing and the complaint will survive.[17]

Despite the opportunity to amend, motions to dismiss are still worth the effort because unless the plaintiff is able to present sufficient facts in the amended complaint to comply with the "plausibility standard", the motion to dismiss the amended complaint is likely to be granted with the case being over. This is all without the expense of discovery, motion for summary judgment or a trial. Thus, when faced with a complaint which does not pass the rigorous plausibility standard, a motion to dismiss may be in the best interests of a plaintiff to file.

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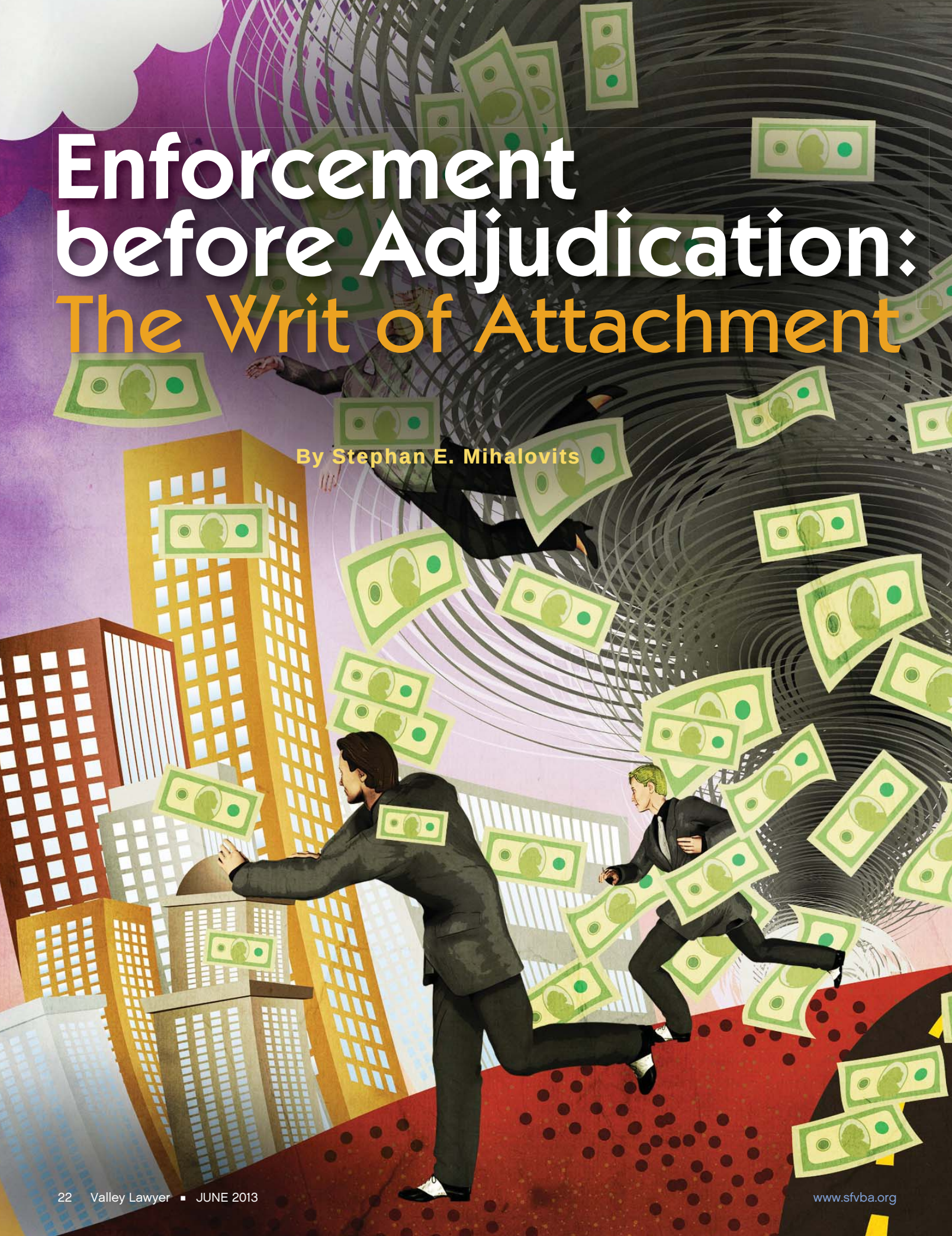
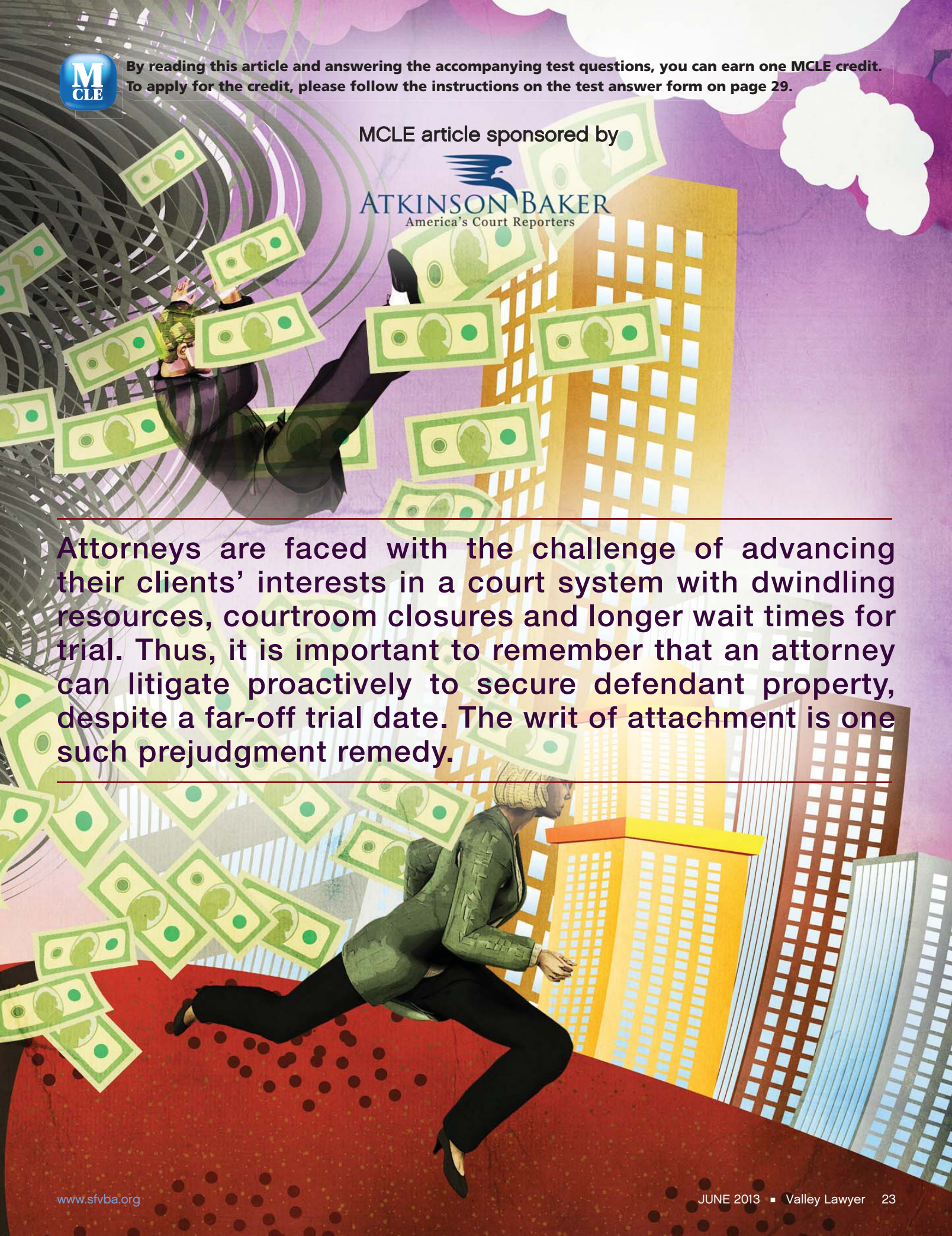
1 *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990)).
2 Johnson, 534 F.3d 1116, 1122; *Knox v. Davis*, 260 F.3d 1009, 1012 (9th Cir. 2001).
3 *Conley v. Gibson*, 355 U.S. 41, 45-46 (1958).
4 127 S.Ct., 1955, 1964-65 (2007).
5 U.S 129 S.Ct. 1937, 1940 (2009).
6 *Sadler v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 2778257 (quoting *Twombly*, 127 S.Ct. at 164-65.)
7 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57.
8 *Ashcroft v. Iqbal*, U.S 129 S.Ct. 1937, 1940.
9 *Iqbal* at page 1951.
10 Idem.
11 Idem.
12 *Swartz v. KPMG LLP,* 476 F3rd 756 (9th Cir. 2007).
13 *Twombly*, 550 U.S. at 559.
14 Patricia Hatamayar Moore, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 Am. U. L. Rev. Vol. 553 (2010).
15 FRBP Rule 4004(a).
16 *Vasquez v. L.A. County*, 487 F3rd 1246, 1258 (9th Cir. 2007).
17 F.R.C.P. Rule 15(c).

Enforcement before Adjudication: The Writ of Attachment

By Stephan E. Mihalovits





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Attorneys are faced with the challenge of advancing their clients' interests in a court system with dwindling resources, courtroom closures and longer wait times for trial. Thus, it is important to remember that an attorney can litigate proactively to secure defendant property, despite a far-off trial date. The writ of attachment is one such prejudgment remedy.

ALTHOUGH IT MAY SEEM LIKE A burdensome statutory framework used only by high-stakes collection attorneys, any commercial creditor can learn to use the writ of attachment to attach and levy defendant property before trial.

Attachment Law Basics

Attachment is a prejudgment remedy that allows creditors holding unsecured commercial claims (or claims secured only by personal property) to levy on property and create a judicial lien. The plaintiff must first obtain a Right to Attach Order (RTAO or Order), which authorizes the clerk to issue a Writ of Attachment. The purpose of the writ of attachment is to secure property before final adjudication of a claim and to secure plaintiff's position vis-à-vis other creditors.

A writ of attachment levied on property creates a judicial lien that protects plaintiff's priority, allowing for the plaintiff to levy on the property attached, usually by the sheriff. The statutory framework, beginning at C.C.P. §481.010, provides the rules of engagement. The statutes are construed strictly, so attorneys must take care to diligently follow the law's procedures.

Attachment may only issue if there is a lawsuit on file or arbitration proceedings have begun. The claim must be for money based on an express or implied contract; of a fixed amount more than $500, excluding costs, interest and attorney's fees; either unsecured or secured by personal property; and a commercial claim.[1]

The claim can either be on a written or oral contract, or an implied contract, which could include a quasi-contract action like fraud or conversion. The most common underlying claims are common counts such as open book account and account stated. Attachment may issue on a contract claim even if the plaintiff is also separately seeking equitable relief. The claim (or aggregated claims) has to be for money of at least $500, excluding any fees and costs.

Recoverable costs include attorney's fees where authorized, costs of service and expenses of attachment such as keeper fees or bank levy fees. Prejudgment interest may also be attached. If the contract specifies a legal interest rate, that rate may be used for calculating the attachment until a judgment supersedes the previous rate. To obtain allowable attorney's fees and court costs, the writ application should specifically include an estimate for both.

The amount sought to be attached must be measurable from the contract itself, meaning the debt should have resulted from the conduct that was the basis of the contract. For instance, in the case of a common count, a claim may lie after a debtor breaks a contractual promise to pay for goods or services previously received. The amount claimed must be fixed or readily attainable; it cannot be for an unliquidated amount.

Limitations

The claim must be unsecured or secured by personal property, and attachment cannot issue on claims secured by real property, except for some limited exceptions. For example, attachment may issue even if the claim is secured by real property, if through no fault of the creditor, the real property security has either become valueless or decreased in value to less than the amount owed.

These restrictions on securing real property stem from the fact that property will not be available for attachment and/or seizure if another creditor already has a pre-existing interest. Thus, attachment is most likely not available if the property is already subject to judicial or tax liens. Attachment is not available in small claims court.

Before obtaining a writ of attachment, plaintiff must post an undertaking (bond). The bond secures an amount for potential damages defendant may obtain if the attachment is later found to be wrongful. The statutory minimum amount for the bond is $10,000 but may be increased by a court upon a showing by the defendant that $10,000 is inadequate.

A writ of attachment has an effective life for levying purposes of 60 days. If the plaintiff wishes to continue levying on the defendant's property, the plaintiff must obtain an additional writ. Multiple writs may be issued by the court to affect property in different counties or different types of property. Separate from the levying aspect of the writ, the lien aspect of the writ lasts three years after issuance of the writ, and this term can be tolled by a defendant's bankruptcy.

A number of exemptions apply that may prevent a plaintiff from attaching property belonging to individual defendants. These stem from the inherent conflict between due process concerns (attaching or seizing someone's property without sufficient due process) and the writ as an effective tool to secure a plaintiff's future recovery. Notably, business defendants do not enjoy these exemptions. Nearly all business property is subject to attachment as long as a method of levy exists as to that type of property.

Commercial Claims and Protections for Individual Debtors

A writ of attachment is an effective litigation tool by professionals against commercial clients. The claim must be either against a business, or if the claim is against a natural person, the claim must have arisen out of the person's conduct of a "trade, business or profession."[2] For example, a lawyer who represented a business against a competitor can most likely seek a writ of attachment against that business. However, family law attorneys are often precluded from seeking writs of attachment against former clients for unpaid fees because dissolution of marriage is usually not a matter an individual undertakes as part of his or her trade, business or profession.

Most significantly for claims against an individual, a personal use exception applies. Attachment may not issue on a claim against an individual for the furnishing of services or a money loan, if the money, goods or services were used primarily for personal, family or household purposes. This personal use exception applies to individuals and not to corporations or partnerships.

Before obtaining the writ, the plaintiff must first post an undertaking to cover damages in the event of a wrongful attachment. The flat amount for undertakings to obtain

a writ of attachment or temporary protective order (see below) is $10,000 per C.C.P. §489.220(a). Within 10 days of receiving service of a copy of the bond, a defendant may move the court for an order increasing the bond if the defendant can show its damages would be larger than the amount posted.

Practice Tip: For attorneys who plan ahead, the initial engagement agreement can provide evidence to substantiate a later writ of attachment application should a fee dispute arise. Where an attorney engages to represent both an individual and the individual's business, the attorney should have the client sign both on behalf of himself and the business. If a collection action is later necessary, the signature on behalf of the company may help show attachment should issue, because the company engaged an attorney for a commercial matter. The individual's signature and personal liability may not be helpful during attachment procedure if the services were for personal use, but during judgment collection, any property still owing could be levied and seized by enforcement against the individual's assets.

Ex Parte Writ of Attachment and Temporary Protective Order

If the plaintiff can show "great or irreparable injury" would result if issuance of the RTAO and writ of attachment was postponed until a noticed hearing, the writ can issue on an ex parte basis. A showing of great or irreparable injury means the plaintiff has shown "there is a danger that the property sought to be attached would be concealed, substantively impaired in value or otherwise made unavailable to levy" if attachment and/or levy was delayed until after a noticed hearing.[3] Evidence could be deemed sufficient by showing proof of past concealment, dishonesty or failure to meet previous obligations. A plaintiff could also succeed by showing the defendant is insolvent and generally has failed to pay his undisputed debts as they become due.[4] To provide notice, the plaintiff must notify the defendant at least before 10:00 a.m. the day preceding the *ex parte* hearing date.

When filing *ex parte*, consider also applying for a temporary protective order (TPO) at the same time. A TPO is an immediate means of relief, similar to a temporary restraining order. Where the writ of attachment seeks to attach property so it can be seized by the sheriff or encumbered by a judicial lien, the TPO commands the defendant not to dispose of or alter the property until there is a noticed hearing on the writ application. An *ex parte* writ is preferable, because a sheriff holding property is more preferable than the defendant promising not to get rid of it. But a TPO has a higher chance of success.

Practice Tip: Applying for a TPO at the same time as any writ of attachment application is a good idea, whether noticed or *ex parte*. The TPO commands the defendant not to dispose of property that the plaintiff will likely seek to attach. Due to the judicial preference of prohibitory versus mandatory injunctions, a court will more likely grant a TPO than an *ex parte* writ of attachment. The TPO commands the defendant not to dispose of property before the writ hearing.

Support the Application with Detailed Declarations

To succeed on the writ application, the plaintiff has the burden to show the "probable validity" of its underlying claim, i.e., the plaintiff must show it is more likely than not that the plaintiff will obtain judgment against the defendant.[5] It is imperative for the plaintiff's attorney to act promptly, beginning with marshaling documents and witness statements.

The most effective way for a plaintiff to prove his or her case is to support the writ application with detailed declarations from all individuals with personal knowledge. For professionals seeking writs against former clients, this means having the responsible accountant or attorney declare in detail the circumstances and formation of the underlying agreement; the conduct underlying the breach by the debtor; and subsequent damages suffered by the plaintiff creditor.

Detailed declarations will not only satisfy the statute by showing probable validity of the claim, but will also show the court the justice of the plaintiff's claim. A declaration gives the plaintiff a chance to show the court he or she worked hard to deserve the amounts sued upon.

Although professionals often bristle at having to explain the legitimacy of their bills, the information in

the declaration can be the linchpin for a successful writ application.

For example, if an accountant sues for $200,000+ in unpaid bills, the court will want to see detailed descriptions of the work. The declaration(s) should display personal knowledge showing a familiarity with any background information or small problems that arose and were addressed. The declaration should be well-supported with non-privileged documents. The court will not be satisfied with conclusory statements without supporting facts.

Privilege Alert: Where an attorney brings a claim against a former client for unpaid fees, the attorney must remember not to unnecessarily divulge confidential attorney-client communications when describing the detailed work performed. No matter the fee dispute, the attorney still has an ongoing duty not to violate the privilege, unless waived by the client or unless the communications directly concern the attorney's claim for fees. To fall within the exception, the attorney should only divulge the communications necessary to prove its case, e.g., it may be appropriate to divulge an email from the client where the only communication is an acknowledgment of the debt and promise to pay.

The application need not specify the exact property the plaintiff will seek to attach. Rather, it is sufficient to seek to attach "all property that is subject to attachment, where a method of levy is available." The following methods of levy are explicitly allowed by the Code of Civil Procedure: levying against real property, personal property, money, personal property in the possession of third parties, business equipment, vehicles and vessels, title documents, deposit accounts and accounts receivable (referred to as general intangibles).[6]

Beneficial For Professionals

The attachment law is a benefit for attorneys, accountants and other professionals who service businesses. A claim for unpaid fees against a commercial client is a claim upon which a writ of attachment may issue. However, the filing of a complaint is a prerequisite to seeking attachment. If an attorney litigates a fee dispute in arbitration, attachment is not available.[7]

The case of *Loeb and Loeb v. Beverly Glen Music, Inc.* is instructive.[8] An attorney sought a writ of attachment against a former client who failed to pay legal bills. The court found the application provided sufficient evidence for the writ because it included a declaration by the responsible attorney about the legal services performed and copies of the bills.[9] The attorney declared sending monthly bills per their agreement, with each bill containing detailed descriptions of the services. The client did not dispute the bills. The court affirmed that the attorney was entitled to a writ of attachment against the former client.[10]

Weighing the Risks

Before embarking on a potentially costly writ application, a creditor should first carefully weigh the risks. First, consider whether the defendant has any attachable assets. Corporate

property is the most simple to attach. If the defendant is a corporation, virtually all its property is subject to attachment and not exempt.

Once the writ is obtained, a plaintiff can use civil discovery procedures to search for defendant's assets. Attaching property will show the defendant the plaintiff has the power to literally take away his personal property. A plaintiff can attach ubiquitous business property, such as computers, furniture, artwork, even office supplies and plants.

Still, attaching personal property can also have the drawback of incurring fees and costs for levy and storage. Plaintiff's attorney's fees will likely be larger due to the writ litigation. The levying officer must be compensated in order to seize and hold property. Depending on how long the attachment occurs before trial, holding fees can be significant.

Liability Considerations

Due to narrow statutory requirements, a writ of attachment is only suitable for some causes of action. A plaintiff may be liable to the defending party for wrongful attachment where the plaintiff actually levies on defendant's property under a writ of attachment, and attachment is not authorized in the situation.[11]

For example, although the defendant may be a commercial entity, attachment is not authorized if the defendant used the goods or services for personal or family use. This is a potentially devastating exception that could chill plaintiffs from proceeding for fear of liability. Where a defendant uses goods for personal use, and the plaintiff attaches defendant's property, plaintiff would be liable for wrongful attachment.

One can imagine the potentially silencing effect of this possible liability. Wherever a plaintiff sues a defendant as an individual and alter ego of a business, a plaintiff may be hesitant to proceed for fear the defendant was actually purchasing the goods or services for personal or family use. However, the law also provides a necessary exception. Plaintiffs who reasonably believe the goods were provided for a commercial purpose will not be liable for wrongful attachment.[12]

For example, suppose an attorney has a potential client business owner who is faced with defending a lawsuit. A competitor sues the client and the corporation. Allegations are against both the corporation and the individual. The business owner enters into a retainer agreement with an attorney to represent her company and herself. The attorney represents both and provides good service. Later on, there is a fee dispute. The attorney should argue services were provided in a commercial context to qualify for a writ of attachment.

Similarly, it is wrongful to attach pursuant to an *ex parte* writ of attachment property that is exempt from attachment. However, the attachment is not wrongful if the plaintiff reasonably believed the property was not exempt. One protection from liability is to emphasize the direct connection between the goods provided and the defendant's business. Since virtually none of a business' property is exempt, a plaintiff acts reasonably when she seeks to attach any business property.

Wrongful attachment may cause a plaintiff to be liable for all damages proximately caused by the wrongful attachment (including loss of credit and business losses), and all costs and expenses (including attorney's fees) reasonably expended in defeating the attachment.[13] No separate lawsuit is necessary; rather, defendant can proceed by a Motion to Enforce Liability. But if the defendant proceeds by motion, the defendant will be limited only to the amount of the undertaking plaintiff has posted, likely $10,000. A successful defendant could recover an amount up to and including this bond.

Potential plaintiffs should also consider that a defendant who files for bankruptcy or makes a general assignment for the benefit of creditors may be immune from attachment. If the attachment lien was obtained within 90 days of the bankruptcy filing or assignment, the attachment is automatically terminated.[14] Still, the extinguishing is not automatic. The trustee must take steps to quash the lien by filing a motion. Thus, if a plaintiff believes a bankruptcy filing is imminent, the plaintiff should act promptly to attach property and oppose any motion to extinguish the writ.

For all the risks and concerns, the writ of attachment is an effective prejudgment remedy, because it allows a creditor a prompt way to seize property or create liens long before final adjudication of the merits. Where appropriate, the writ can provide an avenue by which a litigating plaintiff can start enforcing its future judgment immediately. This can provide leverage to break litigation cases wide open and settle on advantageous terms for the plaintiff.

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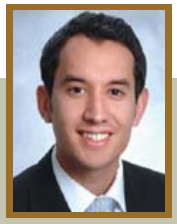
[1] Cal. Civ. Proc. sec. 483.010.
[2] C.C.P. 483.010(c).
[3] C.C.P. sec 485.010(b).
[4] Idem.
[5] C.C.P. sec. 481.090.
[6] See sections 481.225 – 488.470. To learn more about methods of levy and fee deposits required for each in Los Angeles County, visit the L.A. County Sheriff's Department website at civil.lasd.org and click "Civil Process."
[7] C.C.P. §484.010.
[8] *Loeb and Loeb v. Beverly Glen Music, Inc.* (1985) 166 C.A.3d 1110.
[9] Idem at 1118-1119.
[10] Idem.
[11] C.C.P. sec. 490.010(a).
[12] C.C.P. sec. 490.010(a)(1)-(2).
[13] C.C.P. sec. 490.020(a).
[14] C.C.P. sec. 493.030(a)(b).



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Test No. 57

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. A writ of attachment is used to recover property after a judgment has been entered.
   ❑ True ❑ False

2. Attachment is a prejudgment remedy that allows creditors holding unsecured commercial claims or claims secured only by personal property to levy on defendant debtor property.
   ❑ True ❑ False

3. A plaintiff can seek a writ of attachment even before filing a lawsuit or commencing arbitration.
   ❑ True ❑ False

4. A writ of attachment may issue if the claim is for exactly $500, excluding fees and costs.
   ❑ True ❑ False

5. A plaintiff can typically attach any property belonging to an individual.
   ❑ True ❑ False

6. If the plaintiff can show "great or irreparable injury" would result if issuance of the writ of attachment was postponed until a noticed hearing, the writ can issue on an *ex parte* basis.
   ❑ True ❑ False

7. A writ of attachment has an effective life for levying purposes of 90 days.
   ❑ True ❑ False

8. Evidence in support of an *ex parte* writ application could be deemed sufficient by showing proof of past concealment, dishonesty or failure to meet previous obligations.
   ❑ True ❑ False

9. A plaintiff may only seek a temporary protective order on a noticed hearing.
   ❑ True ❑ False

10. "Probable validity" means the plaintiff must show it is *more likely than not* that the plaintiff will obtain judgment against the defendant.
    ❑ True ❑ False

11. If the claim is against a natural person, in order to qualify for a writ of attachment, the claim must have arisen out of the defendant person's conduct of a "trade, business or profession."
    ❑ True ❑ False

12. A former client waives the attorney-client privilege once the client breaches his or her agreement to pay the attorney's unpaid bills.
    ❑ True ❑ False

13. The writ application need not specify the exact property the plaintiff will seek to attach.
    ❑ True ❑ False

14. After seizing property pursuant to a writ of attachment, the sheriff will deliver the property to the plaintiff.
    ❑ True ❑ False

15. A plaintiff who reasonably believes he provided goods to the defendant for a commercial purpose will not be liable for wrongful attachment.
    ❑ True ❑ False

16. A plaintiff may be liable to the defendant for wrongful attachment where the plaintiff actually levies on defendant's property under a writ of attachment and attachment is not authorized in the situation.
    ❑ True ❑ False

17. Wrongful attachment may cause a plaintiff to be liable for all damages proximately caused by the wrongful attachment (including loss of credit and business losses), and all costs and expenses (including attorney's fees) reasonably expended in defeating the attachment.
    ❑ True ❑ False

18. If an attachment lien was obtained within 30 days of a defendant's bankruptcy filing or assignment for the benefit of creditors, the attachment is automatically terminated.
    ❑ True ❑ False

19. A claim by an accountant against a business client for unpaid fees would be a claim for which a writ of attachment is likely available.
    ❑ True ❑ False

20. It may be appropriate for an attorney to divulge an email from the defendant client where the only communication is an acknowledgment of the debt and promise to pay.
    ❑ True ❑ False

MCLE Answer Sheet No. 57

INSTRUCTIONS:
1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the $15 testing fee for SFVBA members (or $25 for non-SFVBA members) to:

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   5567 Reseda Boulevard, Suite 200
   Tarzana, CA 91356

METHOD OF PAYMENT:
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❒ Please charge my credit card for $_____.

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5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0490, ext. 105.

Name_____
Law Firm/Organization_____
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Address_____
City_____
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Email_____
Phone_____
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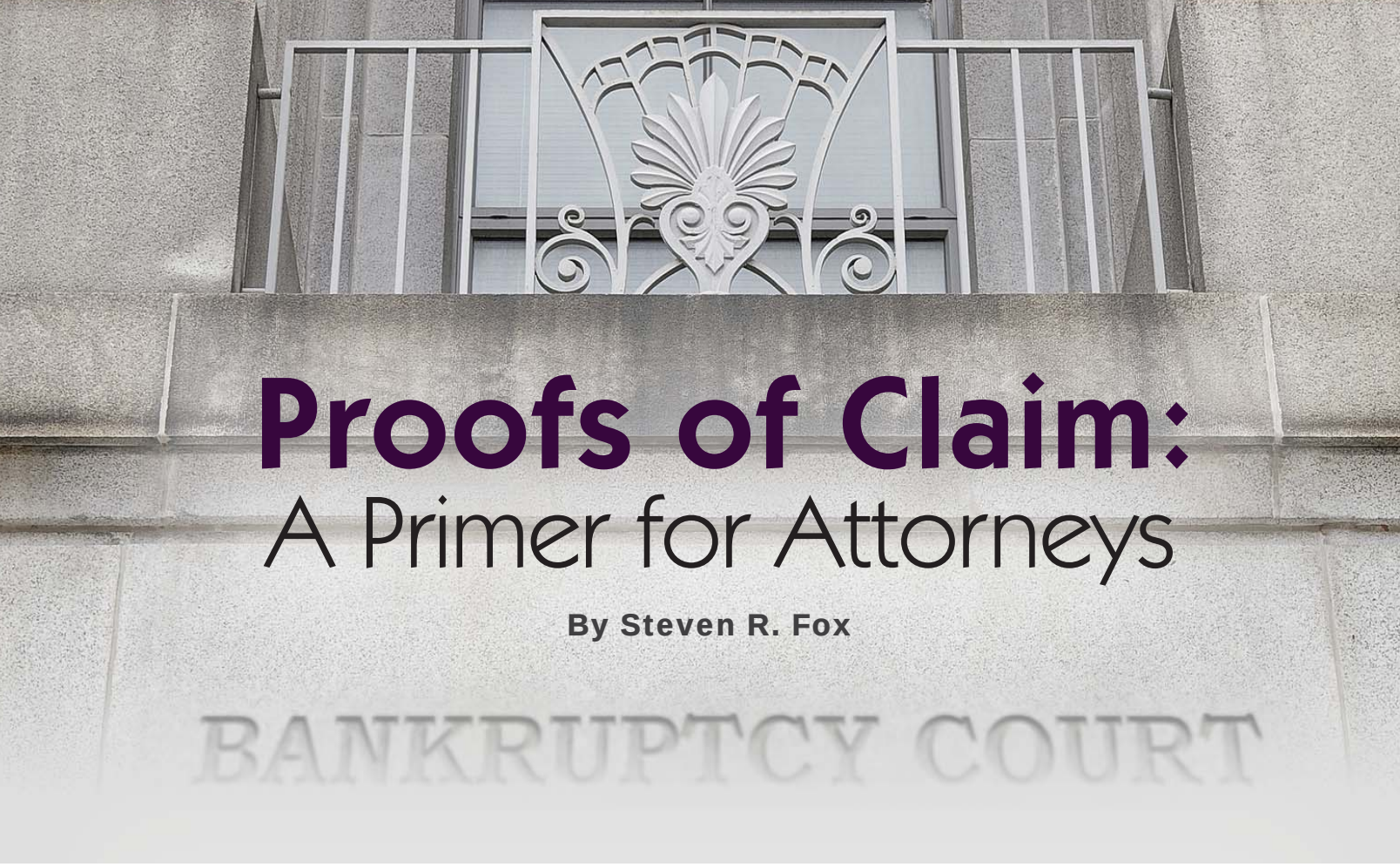
ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
10.	❑ True	❑ False
11.	❑ True	❑ False
12.	❑ True	❑ False
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False



Proofs of Claim: A Primer for Attorneys

By Steven R. Fox

ONE OF THE FUNDAMENTAL rights creditors have in a bankruptcy case is to file a proof of claim. A proof of claim, which generally must be filed by a set deadline (called the "claims bar date"), states what each creditor believes its claim or debt amount is. Once a proof of claim is filed with the bankruptcy court, the proof of claim is deemed allowed. This means that the amount of the claim stated in the proof of claim form is the amount which controls unless a party in interest objects to the proof of claim.

While preparing and filing a proof of claim form may seem easy, the bankruptcy case law is replete with sad stories of creditors filing incomplete proofs of claim, serving but not filing proofs of claims and filing late filed proofs of claim. This article will look at a few basic issues that come up in connection with filing a proof of claim and objecting to a proof of claim.

The court provides a model form proof of claim which all creditors should use. The form is easy, self explanatory, requesting basic information such as the name of the creditor, one or more addresses, a brief description of the claim, the amount of the claim, the type of claim (e.g., secured, priority, general unsecured) and a signature stating under penalty of perjury that the information provided is true and correct. The form can be downloaded at the bankruptcy court's website for free. The failure to include the required information and supporting documents can mean the claim lacks prima facie validity.

Deadlines

The deadlines vary by which bankruptcy chapter the debtor has selected. If the debtor is a debtor in chapter 7 (liquidation bankruptcy), then the deadline to file claims is not set unless the chapter 7 trustee notifies the bankruptcy court that there are assets (or may be assets) available from which dividends can be paid to creditors. The bankruptcy court then sends a notice to creditors of possible assets and a possible dividend and directs creditors to file their proofs of claim by a deadline stated in the notice. The deadline is at least 90 days from the date the notice is served.[1]

In chapter 11, the claims bar date is generally set early in the case and notice is sent to creditors advising them of the claims bar date. The number of days permitted for filing a proof of claim may be as little as 30 days, though typically the deadline to file proofs of claim is set at least 60 days from the date notice is sent out.[2]

In chapter 13, the court's initial notice telling creditors a bankruptcy case has commenced, includes the claims bar date pursuant to Federal Rules of Bankruptcy Procedure (F.R.B.P.) Rule 3002. The claims bar date in a chapter 13 case comes very quickly, some 90 days after the date set for the meeting of creditors. As a practical matter, in the Central District of California, this means creditors have perhaps 150 days to file proofs of claim in chapter 13 cases.

Consequence of a Late Filed Proof of Claim

A late filed proof of claim can be objected to on the common sense basis it was filed late. Creditors are given notice of the deadline to file a proof of claim, and debtors or trustees will argue that, with notice and with the need to quickly move administration of bankruptcy estates, the estate and other creditors will be prejudiced if a late filed proof of claim is allowed.

The creditor who has filed the late filed proof of claim can raise a defense—the excusable neglect standard. Many years ago, the circuits were split whether a late filed proof of claim should be allowed (if objected to after its filing) on the basis it was late filed. In one seminal case, the creditor's attorney was active in the chapter 11 proceedings in the bankruptcy court, knew of the claims bar date and filed his client's proof of claim a couple of weeks late. The attorney asserted he had withdrawn from his prior law firm days before the claims bar date, did not have the case file for a period of time and filed the proof of claim once he obtained possession of the case files. The bankruptcy court sustained the objection to the proof of claim and did not accept the argument made, under F.R.B.P. Rule 9006, that the time for filing a proof of claim should be extended for cause—excusable neglect.

The district court remanded with instructions the bankruptcy court evaluate the creditor's conduct against these factors: whether granting the delay will prejudice the debtor; the length of the delay and its impact on efficient court administration; whether the delay was beyond the reasonable control of the person whose duty it was to perform; whether the creditor acted in good faith; and whether clients should be penalized for their counsel's mistake or neglect.[3] The district court also suggested the bankruptcy court consider whether the failure resulted from negligence, indifference or culpable conduct on the part of the creditor or its counsel.

On remand, the bankruptcy court again denied the creditor's motion to permit the late filed proof of claim based primarily on two factors: the delay was not beyond the reasonable control of the attorney (the attorney was found to be indifferent to the deadline) and the client not only had actual knowledge of the claims bar date, but was a highly sophisticated businessperson.

The matter was appealed from the Sixth Circuit and heard by the U.S. Supreme Court.[4] The Court considered the impact of F.R.B.P. Rule 9006(b), which provides a court has the discretion to enlarge the period of time within which a task is to be accomplished, e.g., file a late filed proof of claim, where the out of time filing was delayed by excusable neglect. The Court considered neglect to mean "to give little attention or respect to a matter" or "to leave undone or unattended to especially through carelessness." The Court noted both neglect and neglect which was excusable needed to be present. The Court agreed a client could be held liable for its attorney's negligence, meaning a late filed proof of claim could be struck if the attorney's negligence was not excusable.

The four part standard to determine if excusable neglect is present is: (1) the danger of prejudice to the non-moving party; (2) the length of the delay and its potential impact on court proceedings; (3) the reason for the delay, including whether it was within the movant's reasonable control; and (4) whether the movant acted in good faith.

The first factor refers to the debtor, the bankruptcy estate and to other creditors. If the claim is very late filed or if other parties in the case have made

agreements or filed pleadings based on a non-failure to file a proof of claim, prejudice exists. The third factor's reference to "reasonable control" always creates a problem for the late filer. If a disaster occurs the day of the deadline, the court is entitled to inquire why counsel did not file the proof of claim days before the deadline. The fourth factor, good faith, seems to be an easy factor for creditors to meet but the courts look at all of the factors and not just one factor. The courts will find good faith but then find against the creditor on two or three other factors. The courts will then sustain the objection and the late filed proof of claim is struck.

Crucially, the Court stated excusable neglect is an equitable standard. This means courts must consider "all relevant circumstances" concerning the creditors' or its counsel's omission. There are many lower court opinions dissecting *Pioneer*. These opinions can be very fact specific.

Remember, the excusable neglect standard applies not just to late filed proofs of claim, but also to other late filed matters, including answers to complaints. In one case, the bankruptcy trustee brought suit against a corporation and served its agent for service of process with the complaint, summons, request for entry of default and a request for judgment. The Seventh Circuit affirmed the lower court, which found affidavits from employees of a defendant who failed to respond to the summons, complaint and the other items, had not met its burden to show excusable neglect. The affidavits stated the employees lacked any recollection of receiving the complaint and summons and the other papers.

The lower court concluded the affidavits were insufficient to show neglect which was excusable. The employees could have received the complaint, the summons and the other papers and have simply taken no action. That would be neglect, not excusable neglect. The Seventh Circuit noted that there was no evidence the agent for service of process had erred. Crucially, one must show something more than negligence, here some excusable negligence supported with competent evidence. As a side note, the defendant took no action to move to set aside the judgment until after the judgment plaintiff began to seize the defendant's assets.[5]

Be aware. You must convince the lower court that on the four part test, on the facts and on equity, the lower court should exercise its discretion to enlarge the time for the filing of the late filed claim and to excuse the excusable neglect. On appeal, the standard is an abuse of discretion.

Standard for Objecting to a Proof of Claim.

When objecting to a proof of claim, oft times the prevailing party is the one who better manages the shifting burdens of proof. 11 U.S.C. §502(a) provides that a proof of claim is deemed allowed unless a party in interest objects. The relevant rule provides that a proof of claim executed and filed pursuant with the F.R.B.P. constitutes prima facie evidence as to the validity and amount of the claim. This means the proof of claim must be supported by evidence.[6] At the first level, a creditor with a properly prepared and filed proof of claim has satisfied its evidentiary burden.

When parties in interest file objections to claim, Local Bankruptcy Rule 3007-1(c) provides that objections "must be supported by admissible evidence sufficient to overcome the evidentiary effect of a properly documented proof of claim."[7] This is crucial. This is where objectors must meet their evidentiary burden. The objecting parties must have admissible evidence.

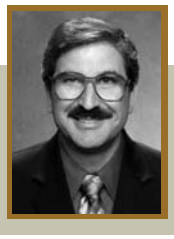
A perusal of tentative rulings by the bankruptcy judges in the bankruptcy courts for the Central District of California reflects many objections are overruled because they lack admissible evidence overcoming the evidentiary effect of a properly supported proof of claim. Case law speaks in terms of an objection having "sufficient evidence" and "show[ing] facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves."[8] To summarize, the objecting party must meet its burden. Otherwise, the filed proof of claim is deemed allowed and the objection will be overruled.

The *Lundell* court also stated: "If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. The ultimate burden of persuasion remains at all times upon the claimant."[9] For purposes of the burden shift, if the objector's evidence is sufficient, the burden of proof switches back to the creditor.

In re Campbell[10] is an instructive case where the appellate court held where an objection which lacked "substance" is not sufficient to disallow a proof of claim, even where the proof of claim lacked proper documentation.

A proof of claim is entitled to prima facie validity because it is properly filed and has the proper evidentiary support. A proof of claim filed without proper evidentiary support will still be an allowed claim. However, in the event of an objection to the proof of claim, the proof of claim will not enjoy that prima facie validity. From the perspective of the evidentiary burdens, this is important.

[1] See Federal Rules of Bankruptcy Procedure, Rule 3002.
[2] See F.R.B.P. Rule 3003.
[3] quoting In re Dix, 95 B.R. 134, 138 (9th Cir. B.A.P. 1988).
[4] *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489 (1993).
[5] *In the Matter of Canopy Financial, Inc.*, No. 12-3239 (7th Cir. February 28, 2013).
[6] F.R.B.P. 3001(f).
[7] See also F.R.B.P. Rule 3007.
[8] *Lundell v. Anchor Const. Specialists, Inc.*, 223 F.3d 1035, 1039 (9th Cir. 2000).
[9] Idem.
[10] 336 B.R. 430 (B.A.P. 9th Cir. 2005).



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Assignment for the Benefit of Creditors:

Effective Tool for Selling and Winding Up Distressed Businesses

By David S. Kupetz

XYZ CORP (XYZ) IS A wireless technology company which was formed four years ago. Since that time, more than $25,000,000 in equity investments has poured into XYZ. Additionally, XYZ has incurred more than $5,000,000 in unsecured debt that it is now unable to pay. While XYZ has developed some exciting products, it continues to operate on a negative cash flow basis, and is unable to obtain further funding through either equity investment or debt placement. The Board of Directors of XYZ has considered the realistic alternatives available to XYZ. At this point, XYZ is insolvent (XYZ's debts exceed the value of its assets). The board recognizes that, under the circumstances, it has fiduciary obligations running to XYZ's creditors and that it is required to act in a manner reasonably designed to maximize creditor recovery.

Among the alternatives considered by the board are the following: (1) merging with, or being acquired by, a qualified candidate; (2) commencing a formal bankruptcy proceeding (chapter 11 reorganization or a chapter 7 liquidation); (3) engaging in an out-of-court debt restructuring or workout; (4) shutting down the business and simply closing the doors (an informal death); (5) streamlining the company and focusing on a core business or technology; or (6) making an assignment for the benefit of creditors.

The board has determined that a going concern sale of XYZ's business is in the best interests of the company and its creditors and has identified two potential purchasers who have expressed interest in the acquisition. However, neither purchaser will acquire the business if the assumption of XYZ's unsecured debt is involved. Further, the situation is deteriorating rapidly. XYZ is burning through its cash reserves. XYZ's key employees are aware of its financial difficulties and creditors of XYZ are pressing for payment. XYZ's board has been advised and has now concluded that an assignment for the benefit of creditors (ABC) may be the most appropriate course of action.

In many instances, where the goal is to transfer the assets of the troubled business to an acquiring entity free of the unsecured debt incurred by the transferor and wind down the company in a manner designed to minimize negative publicity and potential liability for directors and management, the most advantageous and graceful exit strategy can be an ABC.

An assignment for the benefit of creditors can serve as a very useful and efficient means of accomplishing a wind down and the liquidation or going concern sale of a troubled business unable to reorganize, maximizing a secured creditor's recovery from the assets of a distressed debtor and/or facilitating a buyer's acquisition of a troubled business or assets from an entity burdened with unsecured debt (and, with the cooperation of secured creditors, secured debt).

The process of an ABC is commenced by the distressed entity (the "assignor") entering an agreement with the party which will be responsible for conducting the wind down and/or liquidation or going concern sale (the "assignee") in a fiduciary capacity for the benefit of the assignor's creditors. The assignment agreement is a contract under which the assignor transfers all of its right, title, interest in, and custody and control of its property to the third-party assignee in trust.

The assignee liquidates the property and distributes the proceeds

to the assignor's creditors. In an ABC (as in a formal federal bankruptcy proceeding), unsecured creditors of the assignor have no right to pursue the assets assigned to the assignee, but rather must submit a proof of claim to the assignee and, if the claim is allowed, will ultimately participate in the assignee's distribution of funds from the assignment estate.

The option of making an assignment for the benefit of creditors is available on a state-by-state basis. During the meltdown suffered in the dot-com and technology business sectors in the early 2000s, California became the capital of ABCs. In discussing assignments for the benefit of creditors, this article will focus primarily on California ABC law.

Assignment for the Benefit of Creditors

As the court has explained, "an assignment for the benefit of creditors is a business liquidation device available to an insolvent debtor as an alternative to bankruptcy proceedings."[1] Unlike federal bankruptcy proceedings, assignments for the benefit of creditors are governed by state law.

In order to commence the ABC process, a distressed corporation will generally need to obtain both board of director authorization and shareholder approval. While this requirement is dictated by applicable state law, the ABC constitutes a transfer of all of the assignor's assets to the assignee and the law of many states provides that the transfer of all of a corporation's assets is subject to shareholder approval (although this approval may be obtained, in some instances, retroactively).[2]

Assignments for the benefit of creditors in California are governed by common law and are subject to various specific statutory provisions. In states, like California, where common law (with specific statutory supplements) governs the ABC process, the process is non-judicial. The basis for applicability of common law in California is set forth in California Civil Code §22.2 which provides that "[t]he common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State."

An assignee in an assignment for the benefit of creditors serves in a capacity that is analogous to a bankruptcy trustee and is responsible for liquidating the assets of the assignment estate and distributing the net proceeds, if any, to the assignor's creditors.[3]

Among the statutory provisions under California law applicable to assignments for the benefit of creditors are the following: (1) Cal. Code Civ. P. §493.010 defining a "general assignment for the benefit of creditors"; (2) Cal. Code Civ. P. §1802 requiring a notice to creditors of the assignment, the setting of a deadline—on 150 to 180 days notice—for submission of claims to the assignee, and setting forth the assignor's obligation to provide the assignee with a list of creditors, shareholders and other parties in interest; (3) Cal. Code Civ. P. §493.030 providing for termination of attachment and temporary protective order liens obtained within 90 days prior to the making of the assignment for the benefit of creditors; (4) Cal. Code Civ. P. §1204 providing for priority treatment of claims for wages, salaries, commissions and employee benefit contributions; (5) Cal. Code Civ. P. §1204.5 providing priority for consumer deposit claims; (6) Cal. Code Civ. P. §1800 which states the right of assignee to recover preferential transfers—the statute parallels Bankruptcy Code §547 and allows assignee to bring a preference action within one year of the date of the assignment; (7) Cal. Civ. Code §1954.1 establishing the right of assignee to occupy business premises; (8) Cal. Civ. Code §3439.07(d) authorizing assignee to exercise any and all of the rights and remedies available to any one or more creditors of the assignor in connection with bringing a fraudulent transfer action; (9) Cal. Com. Code §6103(c)(6) providing that bulk sales laws do not apply to sales by an assignee for the benefit of creditors; and (10) Cal. Com. Code §§9102(a)(52)(A)(ii) and 9317(a)(2) providing that an assignee for the benefit of creditors and a bankruptcy trustee are each a lien creditor who has priority over an unperfected security interest.

Advantages of an ABC

Compared to bankruptcy liquidation, assignments may involve less

administrative expense and can be a substantially faster and more flexible liquidation process. In addition, unlike a chapter 7 liquidation, where generally an unknown trustee will be appointed to administer the liquidation process, in an assignment for the benefit of creditors, the assignor can select an assignee with appropriate experience and expertise to conduct the wind down of its business and liquidation of its assets. In prepackaged ABCs, where an immediate going concern sale will be implemented, the assignee will be involved prior to the ABC going effective.

In situations where a company is burdened with debt that makes a merger or acquisition infeasible, an ABC can be the most efficient, effective and desirable means of effectuating a favorable transaction and addressing the debt. The assignment process enables the assignee to sell the assignor's assets free of the unsecured debt that burdened the company.

Unlike bankruptcy, where the publicity for the company and its officers and directors will be negative, in an assignment, the press generally reads "assets of Oldco acquired by Newco," instead of "Oldco files bankruptcy" or "Oldco shuts its doors." Moreover, the assignment process removes from the board of directors and management of the troubled company the responsibility for and burden of winding down the business and disposing of the assets.

From a buyer's perspective, acquiring a going concern business or the specific assets of a distressed entity from an assignee, in an ABC sale transaction, provides some important advantages. Most sophisticated buyers will not acquire an ongoing business or substantial assets from a financially distressed entity with outstanding unsecured debt, unless the assets are cleansed either through an ABC or bankruptcy process. Such buyers are generally simply unwilling to subject themselves to potential contentions that the assets were acquired as part of a fraudulent transfer and/or that they are a successor to or subject to successor liability for claims against the distressed entity. Buying a going concern or specified assets from an assignee allows the purchaser to avoid these types of contentions and issues and to obtain the assets free of the assignor's unsecured debt.

From the perspective of a secured creditor, in certain circumstances, instead of being responsible for conducting a foreclosure proceeding, the secured creditor may prefer to have an independent, objective third party with expertise and experience liquidating businesses acting as an assignee. There is nothing wrong with an assignee entering into appropriate subordination agreements with the secured creditor and liquidating the assignor's assets and turning the proceeds over to the secured creditor to the extent that the secured creditor holds valid, perfected liens on the assets that are sold.

In many instances involving distressed enterprises, an assignment for the benefit of creditors may be the best means for exiting a business that has reached the end of its lifecycle by minimizing negative publicity, limiting the potential liability of officers and directors and relieving the officers and directors of responsibility for winding down the business and disposing of its assets by entrusting that responsibility to qualified, independent professionals.

Additionally, the ABC process allows buyers of going concerns and specific assets to acquire those assets in an expeditious and efficient manner and at the same time minimize risks associated with the acquisition. Finally, in certain circumstances, the secured creditors may determine that using the ABC process provides advantages compared to pursuing a foreclosure.

Disadvantages of an ABC

Unlike in a bankruptcy case, because the ABC process in California is non-judicial, there is no court order approving a sale by the assignee. As a result, a buyer who requires the clarity of an actual court order approving the sale will not be able to satisfy that desire through an ABC transaction. That being said, the assignee is an independent, third party fiduciary who must agree to the transaction and is responsible for the ABC process. The buyer in an ABC transaction will have an asset purchase agreement and other appropriate ancillary documents that have been executed by the assignee.

Executory contracts and leases cannot be assigned in an ABC without the consent of the other party to the contract (there is no state law equivalent of Bankruptcy Code Section 365). Accordingly, if the assignment of executory contracts and/or leases is a necessary part of the transaction and, if the consent of the other parties to the contracts and leases cannot be obtained, an ABC transaction may not be the appropriate approach. Further, *ipso facto* default provisions (allowing for termination, forfeiture or modification of contract rights) based on insolvency or commencement of the ABC are not unenforceable as they are in a federal bankruptcy case.

Secured creditor consent is generally required in the context of an ABC. There is no ability to sell free clear of liens, as there is in some circumstances in a federal bankruptcy case, without secured creditor consent (unless the secured creditor will be paid in full from sale proceeds). Moreover, there is no automatic stay to prevent secured creditors from foreclosing on their collateral if they are not in support of the ABC.

Distribution Scheme in ABCs

Under California law, an assignee for the benefit of creditors must set

a deadline for the submission of claims. Notice of the deadline must be disseminated within 30 days of the commencement of the assignment and must provide not less than 150 and not more than 180 days notice of the bar date.[4] Once the assignee has liquidated the assets, evaluated the claims submitted, resolved any pending litigation to the extent necessary prior to making distribution and is otherwise ready to make distribution to creditors, pertinent statutory provisions must be followed in the distribution process. Generally, California law ensures that taxes (both state and municipal), certain unpaid wages and other employee benefits, and customer deposits are paid before general unsecured claims.[5]

Particular care must be taken by assignees in dealing with claims of the federal government. These claims are entitled to priority by reason of a catchall type statute, which entitles any agency of the federal government to enjoy a priority status for its claims over the claims of general unsecured creditors.[6] In fact, the federal statute provides that an assignee "paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government."[7] As a practical result, these payments must be prioritized above those owed to all state and local taxing agencies.

In California, there is no comprehensive priority scheme for distributions from an assignment estate like the priority scheme in bankruptcy or priority schemes under assignment laws in certain other states. Instead, California has various statutes which provide that certain claims should receive priority status over general unsecured claims, such as taxes, priority labor wages, lease deposits, etc. (discussed below). However, the order of priority amongst the various priority claims is not clear. Of course, determining the order of priority amongst priority claims becomes merely an academic exercise if there are sufficient funds to pay all priority claims.

Secured creditors retain their liens on the collateral and are entitled to receive the proceeds from the sale of their collateral up to the extent of the amount of their claim. Thereafter, distribution in California assignments for the benefit of creditors is generally made in accordance with the following priorities: the costs and expenses of the assignment, including the assignee's fees, legal expenses and costs of administration; obligations owing to the United States (31 U.S.C. §3713); priority wage and benefit claims[8] (Cal. Code Civ. P. §1204); state tax claims, including interest and penalties for sales and use taxes, income taxes and bank and corporate taxes (Cal. Rev. & Tax Code §§19253 and 26312)[9]; security deposits up to $900 for the lease or rental of property, or purchase of services not provided (Cal. Code Civ. P. §1204.5); unpaid unemployment insurance contribution, including interest and penalties (Cal. Unemp. Ins. Code §1701); State of California, Department of Fish and Game, for all monies owing the State for the sale of licenses and license tags (Cal. Fish & Game Code §1058); and general unsecured claims.[10]

No distribution to general unsecured creditors should take place until the assignee is satisfied that all priority claims have been paid in full. If there are insufficient funds to pay the unsecured claims in full, then these claims will be paid pro rata. Interest is paid on general unsecured claims only after the principal is paid for all unsecured claims submitted and allowed and only to the extent that a particular creditor is entitled to interest under contract or judgment. If unsecured claims are paid in full, equity holders will receive distribution in accordance with their liquidation rights.

Assignments for the benefit of creditors can be particularly useful when fast action and distressed transaction and/or industry expertise is needed in order to capture value from the liquidation of the assets of a troubled enterprise. The ABC process may allow the parties to avoid the delay and uncertainty of formal federal bankruptcy court proceedings.

In many instances involving deteriorating businesses, management engages in last-ditch efforts to sell the business in the face of mounting debt. However, frequently the value of the business is diminishing rapidly as, among other things, key employees leave. Moreover, the parties interested in acquiring the business and/or assets will only move forward under circumstances where they will not be taking on the unsecured debt of the distressed entity along with its assets. In such instances, especially when the expense of a chapter 11 bankruptcy case may be unsustainable, an assignment for the benefit of creditors can be a viable solution.

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1 Credit Managers Assn. v. National Independent Business Alliance, 162 Cal. App. 3d 1166, 1169, 209 Cal. Rptr. 119 (2d Dist. 1984).

2 *See, e.g.*, California Corporations Code §§1001, 151 and 152.

3 *See* Credit Managers Association of Southern California v. National Independent Business Alliance, 162 Cal. App. 3d at 1170-72. ("Under the common law of assignment, the assignee stands in the place of the assignor.. . . [A]s trustee for all the creditors, [assignee] was charged with the duty to defend the property in its hands against all unjust adverse claims."); *see also* In re AB Liquidating, Inc., 18 B.R. 922, 924-26 (Bankr. E.D. Va. 1982).

4 Cal. Code Civ. P. §1802.

5 *See* §§1204 and 1204.5; *see also* Cal. Rev. & Tax Code §6756.

6 31 U.S.C. §3713.

7 Idem.

8 This section includes all of the following, only to the extent of $4,300, earned within 90 days before the making of the assignment: Wages, salaries, or commissions, including vacation, severance and sick leave pay earned by an individual, sales commissions, unsecured claims for contributions to employee benefit plans. Cal. Code Civ. P. §1204.

9 These tax code sections specifically state that they do not give a preference over any recorded lien which attached prior to the date when the state records or files its lien.

10 The claim of a tenant to any payment or deposit of money the primary function of which is to secure the performance of a rental agreement for other than residential property shall be prior to the claim of any creditor of the landlord, except a trustee in bankruptcy. Cal. Civ. Code §1950.7.

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Obtaining an Abstract of Judgment from a Nondischargeability Judgment

By David B. Lally

MUST A CREDITOR WHO OBTAINS A nondischargeability judgment and records the judgment in the county recorder's office re-record the judgment at a later date? Is the judgment recorded pursuant to California law or federal law? For how long of a time frame is a nondischargeability judgment valid and enforceable? If the judgment is not re-recorded in a timely manner, is the judgment enforceable?

Consider the following case study. A debtor files a chapter 7 petition under the Bankruptcy Code. A creditor timely files a complaint to determine the dischargeability of debt pursuant to 11 U.S.C. Section 523(a)(2), (4) and/or (6). These are the three most common bases upon which to object to the dischargeability of a debt. The creditor is successful and obtains a judgment determining that the debt is nondischargeable. The judgment will oftentimes have language similar to the following: "Plaintiff shall have a nondischargeable judgment against Defendant for a total of $$$$. This debt is nondischargeable pursuant to 11 U.S.C. Section 523(a)(2)(A)."

The analysis starts with the following issue: For how long is this nondischargeability judgment valid and enforceable? Under Ninth Circuit law, if a debt is not discharged, it is never discharged. In *In re Moncur* 328 B.R. 183 (9th Cir. BAP 2005), the Bankruptcy Appellate Panel (BAP) held, inter alia, that pursuant to the doctrines of claim and issue preclusion, a debt which is excepted from discharge in a chapter 7 case does not become dischargeable in a second chapter 7 case. And this is true even if the judgment creditor fails to file a second dischargeability action in the subsequent bankruptcy case. In short, once not discharged, forever not discharged.[1]

In *Moncur*, the debtors filed a chapter 12 petition (family farmer case) in 1998, and then filed a chapter 7 petition in 2001. In the chapter 12 case (the first case), the Moncurs stipulated to a nondischargeability judgment in favor of AgriCredit.

In the second bankruptcy case, AgriCredit did not file another nondischargeability complaint.[2] Two years after the second case, AgriCredit sought to renew the judgment it had obtained in the chapter 12 case.[3] The Moncurs objected, claiming that the judgment debt was discharged because AgriCredit failed to file a dischargeability complaint in the second case.[4] The court overruled their objection and held that a second nondischargeability complaint was not required.

The Moncurs appealed to the BAP.[5] At the BAP, the debtors argued that the nondischargeability judgment from their first case was no longer enforceable when AgriCredit did not file another nondischargeability complaint in their second case.[6] AgriCredit argued that the issue was precluded and that the nondischargeability judgment from the first case was and remained enforceable and valid, so AgCredit did not need to file another nondischargeability complaint in the subsequent case.[7]

The BAP concluded that "the judgment creditor is entitled to assert claim and issue preclusion in the judgment renewal proceeding to preclude the judgment debtors from contending that their debt was discharged in the second bankruptcy case."[8] In *In re George* (9th Cir. BAP 2004), the issue before the BAP was whether either of two bankruptcy court judgments triggered the res judicata doctrines of claim and issue preclusion, which apply in bankruptcy.[9] The res judicata doctrines regarding judgments of federal courts are a matter of federal common law.[10]

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In short, it is well established that issues of claim and issue preclusion do apply in bankruptcy court proceedings if the elements are met.[11] The BAP in *Moncur* affirmed the holding of the bankruptcy court that the judgment entered in the first bankruptcy case remained effective in the second bankruptcy. Thus, the personal liability under the judgment is never discharged, so enforceability cannot expire.

Judgment Liens

The federal statute with respect to recording a judgment to obtain a lien, 28 USC Section 3201[12] entitled "Judgment Liens", provides that the judgment is good for 20 years. This statute provides:

> (1) Except as provided in paragraph (2), a lien created under subsection (a) is effective, unless satisfied, for a period of 20 years.
> (2) Such lien may be renewed for one additional period of 20 years upon filing a notice of renewal in the same manner as the judgment is filed and shall relate back to the date the judgment is filed if (A) the notice of renewal is filed before the expiration of the 20-year period to prevent the expiration of the lien; and (B) the court approves the renewal of such lien under this paragraph.

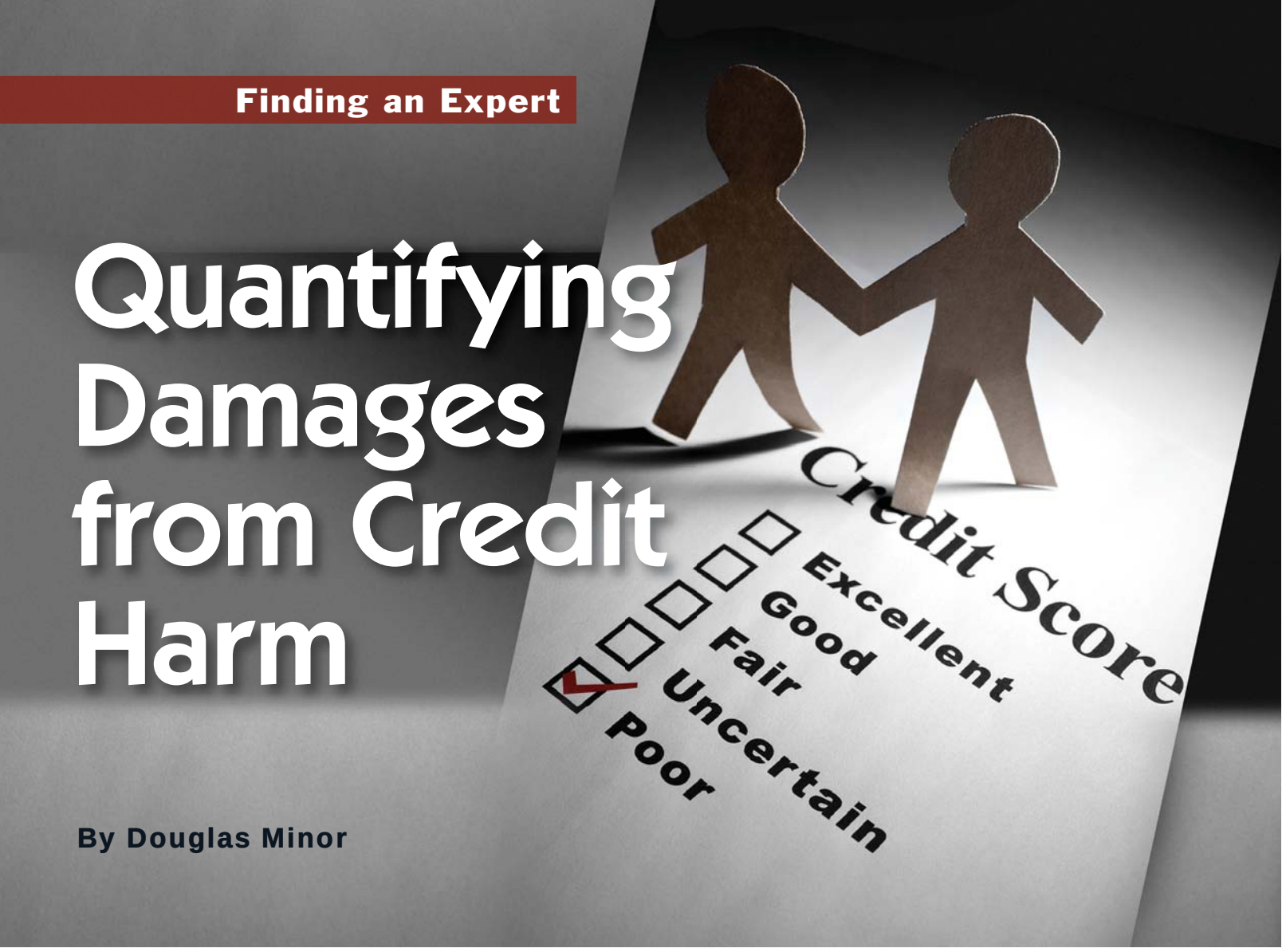
At first blush, it would appear that this statute applies for a regular, district court judgment, not a dischargeability judgment. However, a dischargeability judgment is in fact a federal court judgment. Accordingly, it seems rather clear that 28 USC Section 3201 applies in this instance.

Consequently, if the dischargeability judgment is recorded, and an abstract of judgment is obtained, and 20 years later the abstract expires under 28 USC 3201, the judgment becomes unsecured, but it is still enforceable. It is enforceable because a dischargeability judgment is effective forever; the debt does not go away until the judgment debtor dies. The judgment and abstract can simply be recorded again since the judgment itself never expires.

Another good approach is to look at Rule 69 of the Federal Rules of Civil Procedure (Rule 7069 of the Federal Rules of Bankruptcy Procedure) regarding execution of judgments. There, one must look to the law of the state in which the district court is located. In California, one would need to renew the judgment every ten years (both judgment and lien, if there is one). It may appear that there is a conflict between the California statute and the federal statute. From a practical approach, one should err on the side of caution and record the judgment every ten years under California law just to be safe.

1 *In re Paine* 283 B.R. 33 (9th Cir. BAP 2002).
2 Idem.
3 Idem.
4 Idem.
5 Idem at 186.
6 Idem at 185.
7 Idem
8 Idem at 191.
9 *Brown v. Felsen*, 442 U.S. 127, 134-39 (1979); *Paine v. Griffin (In re Paine)*, 283 B.R. 33, 39 (9th Cir. BAP 2002); *Alary Corp.*, 283 B.R. at 554-55.
10 *W. Sys. Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir. 1992); *Robi*, 838 F.2d at 322.
11 See *Grogan v. Garner*, 498 U. S. 279, 290 (1991).
12 28 USC Section 3201c.

Quantifying Damages from Credit Harm



By Douglas Minor

WHEN THE CREDIT PROFILE OF A PERSON or business is harmed through the malicious or negligent actions of others, there is no question that economic damage is incurred. But can such damages be accurately quantified? The answer is yes.

Assessing credit damage is a challenging task, but contrary to widely-held belief, it is not speculative. Tools exist to accurately measure the effects of harmful credit events both in the present and the future. These include out-of-pocket expenses, current credit capacity and expectation of future capacity.

The starting point for this endeavor is the credit score itself, which is actually not one, but a set of numbers, obtained from each of the three major credit bureaus (TransUnion, Equifax and Experian). Lenders may average these numbers to determine a person's creditworthiness, or focus on just one. In some cases, as in the mortgage industry, they pick the middle of the three scores. These numbers reflect the credit-related events in the life of an individual going back several years. Each of those events can ultimately be assigned a value, positive or negative, that contributes to the overall score.

The reports that credit issuers use to determine creditworthiness can be more detailed than the consumer reports that are easily obtained by individuals. In assessing the credit impact of specific events, experts consult these more complete reports which are sold to lenders (B2B). These can reveal relevant information that might have been missed in a consumer (B2C) credit report.

In assessing credit damage, the first task is to establish the subject's credit and economic status before the harmful event, and compare it to the status afterward. When a person experiences a foreclosure or bankruptcy, their credit score might drop between 105 and 240 points. That can cause serious, measurable financial injury. But the worst impact may occur over years. If the proximate cause of that harm was another party, the victim deserves to be compensated.

The next task is projecting the magnitude of that impact, both now and over time. Out-of-pocket expenses are relatively easy to calculate. Measuring the changes in current credit capacity and expectation of future credit requires more in-depth analysis. And projecting the real financial costs of those changes requires the involvement of a true expert in credit damages; they are not always obvious. The difference between a client's financial prospects before and after the event is a legitimate starting point for assessing damages.

A lower credit score typically means higher interest rates for the consumer. Amortized monthly payments are correspondingly higher than they would have been otherwise. Beyond the obvious hardship, this inflicts an opportunity cost; cash that would have been available for other productive purposes is now lost to unnecessary debt service. But the real damage occurs over the long term. The total amount of interest paid over the life of a loan increases, often dramatically. When the item being purchased on credit is a car, that cost can be considered significant. When it is a house or a piece of business equipment—it can be enormous. When credit is denied altogether, the real costs can skyrocket—especially in the case of businesses that rely on credit to operate.

A calculation of these costs will begin with simulations of the credit report using different time frames. It will incorporate the differences in interest rates and increased out-of-pocket expenses that result from a lower credit score. These increased interest rates will affect mortgages, car loans, credit cards and lines of credit for business. An accurate assessment will include the impact of a reduction in available credit or denial of credit, and less obvious expenses such as the increased cost of insurance premiums. A lower credit score also causes emotional distress and reputational harm. In some cases it can lead to lost job opportunities and lower wages. These must be included in any thorough cost analysis.

Case Study

The cases that people may be familiar with are those involving individuals. As an example, let's presume that Mary and Jim are married, but Jim's substance abuse problem leads to a divorce. In their divorce settlement, they agree that Jim will continue making the mortgage payments. But he does not and the house is lost to foreclosure. Mary was a signer on the mortgage note, so as a result her middle credit score dropped 135 points, from 720 to 585.

As Mary begins rebuilding her life, she decides to buy a modest home for $200,000. To her dismay, she discovers that her low credit score has put her in the subprime category. Now the only loan she can qualify for has an interest rate two to six percentage points above the prevailing rate for a prime loan. Over the life of a 30-year loan, Mary will have paid $87,000 to $288,000 more than she would have without the damage to her credit. To mitigate this long-term expense, Mary could post a larger down payment, or buy down the rate by paying points upfront. But this will damage her current financial status with a larger out of pocket expense—money she may not have.

These are obvious examples of the type of harm Mary might experience. But what if she can't get a home loan at all? She'll then be left to a life of renting—at least for some period of time. That means she'll be deprived of the tax advantages of homeownership. Based on her income, that loss can be calculated.

She'll also lose the appreciation that might have accrued to her newly-purchased property. In a normal market, home prices might increase by two to five percent per year. At that rate, after ten years, Mary's home would be worth $244,000 to $330,000. So over that period, Jim's misbehavior would have cost her between $44,000 and $130,000—just in lost asset appreciation.

With hard work and wise management, Mary's credit might recover more quickly. Let's presume that it rebounded enough to allow a home purchase after just four years; her lost appreciation would still be a significant quantifiable financial damage.

Of course, home prices never appreciate in a straight line. As we've seen in recent years, they can rise and fall dramatically over relatively short periods. But these fluctuations are cyclical, and somewhat predictable. Historically, they trend upward over the long term. So it is possible to calculate how much Mary's $200,000 home would have appreciated over several years with a reasonable degree of accuracy.

If Mary wasn't able to purchase a home, she'll need to begin searching for a rental. Landlords routinely run credit reports on their prospective renters, so Mary might have to pay unnecessarily high rent because of her low credit scores. She would almost certainly be required to provide a large deposit.

The same effects would apply if Mary chose to buy a car on credit; she would likely pay a higher interest rate than she otherwise would have, with the corresponding impact on her monthly payments and total interest paid over the life of her car loan. Or, she might not be able to get a car loan at all. If she was thus deprived of transportation, that could affect her employment opportunities and many other aspects of her life.

Mary might also feel the impact of her misfortune on the credit she already has. Credit card companies often run account reviews on their existing customers. When a borrower's credit scores have dropped dramatically, the creditors may lower the borrower's credit limit, and/or raise the interest rates. Were that to happen in Mary's case, it would constitute real, quantifiable damage that could be recoverable in a lawsuit.

What about Mary's job prospects? Like landlords, employers sometimes run credit reports on job applicants. If Mary's low credit scores prevented her from getting a particular job, that loss would represent a quantifiable financial injury resulting directly from her husband's negligence.

Mary's trouble might be so severe that she could be forced to file for bankruptcy. In that case, her existing debts would probably be wiped out, but she could also find that she is ineligible for credit at prevailing or competitive rates for an extended period of time. So all the negative effects we've described above would apply—but to a much greater degree. The bankruptcy would remain as a derogatory item on her credit profile for ten years.

A Growing Field

Mary's situation is just one of many possible scenarios in which significant credit injury can be calculated.

Consequences will vary according to a person's financial position and existing credit profile. The impact of negative events is usually far greater on a person who had good credit beforehand. Unfortunately for some, a genuine credit injury may have no quantifiable impact—because their scores were already so low that no credit would have been available anyway.

The task of a credit damages expert is to apply the known factors to each individual case and extrapolate the likely results over specific periods of time. The calculations are usually expressed in a range, based on the variability of those factors.

As a relatively new field of expertise, credit damage is not universally understood by attorneys. Even in cases where significant economic damages are being considered, this area is often ignored. That represents unclaimed money for many plaintiffs. But as this field has gained recognition, credit damages are increasingly being factored into award amounts in courtrooms nationwide. Credit damages experts are retained by plaintiffs' and defendants' counsel to present contrasting views in high-stakes cases. The number of cases in which these calculations would apply is large: breach of contract, fraud, personal injury, identity theft and medical malpractice are just a few categories that warrant consideration of credit damage.

The effects we have described are significant when they apply to individuals; they are magnified when the credit damage involves a business. Businesses have credit profiles just as individuals do and often rely on credit even more than consumers. Business owners—especially new ones—often finance their ventures with personal assets and credit. When the interest rate on a $5,000 credit card increases, the effect can be harmful. But when it occurs on a million-dollar credit line that supports a business, it can be catastrophic. Worse yet, if the credit line is cancelled, entire enterprises may collapse, with far-reaching ramifications that involve many parties. In these cases, the ability to calculate the damage accurately is vital.

Mortgage Malfeasance

Another facet of credit damage litigation has appeared in recent years with the revelation of improper foreclosures. As mortgage defaults multiplied toward the end of the last decade, thousands of homeowners were foreclosed on. Some of these foreclosures occurred while borrowers were pursuing loan modifications; others were based on faulty documents. And some were simply mistakes resulting from the unprecedented volume of defaults.

Needless to say, since the beginning of the mortgage crisis, many lawsuits have been brought against mortgage servicers alleging specific financial harm. But the long-term credit damage that accompanies foreclosure is sometimes overlooked.

One case in which the harm was quantified and compensated was *Reed & Mary Ann Fisher v. Wells Fargo Bank*.[1] The Fishers' home in San Clemente had been red-tagged due to land instability, and they obtained a loan forbearance agreement from Wells Fargo, their mortgage servicer, while they dealt with the problem. In the meantime, servicing of the mortgage was reassigned to its investor, Freddie Mac. But Wells Fargo continued reporting late payments to the credit bureaus for two years, and even instituted foreclosure proceedings—on a loan it no longer serviced.

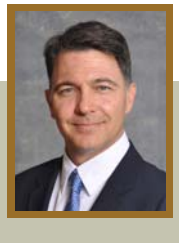
The Fishers filed suit. After a seven-day trial, a jury awarded the Fishers $765,000 in actual and punitive damages; $283,594 in attorney's fees and costs were added, bringing the total judgment to $1,045,594. Punitive damages were later lowered on appeal but the court maintained that credit harm was committed and that proper compensation was owed.[2]

It Wasn't Me!

Sometimes credit harm is the result of mistaken identity. That was the case with Angela Williams, who found herself being blamed for financial misconduct she had never engaged in. After disputing numerous derogatory entries on her Equifax report, Williams discovered that they actually represented the activities of a person with a similar name—and a nearly-identical Social Security number. On confronting the evidence, Equifax agreed to rectify the situation—but continued reporting the activities of the other person on Williams' credit file over a period of years. In 2007, a jury awarded Ms. Williams $219,000 in actual damages and $2.7 million in punitive damages for negligent and willful violations of the Fair Credit Reporting Act.[3]

As with any innovative specialty, the credit damages field has taken time to gain traction in the legal community. When it is demonstrated that such damage can be quantified with accuracy, attorneys will immediately see its utility. As a result, many have been able to pursue their client's interests with greater vigor—and success.

[1] Case No. RCV 074 822, San Bernardino Superior Court, Rancho Cucamonga Courthouse. California, 2007.
[2] *Fisher v. Wells Fargo Bank*, E043771 (Cal. App., 2009).
[3] *Angela Williams v. Equifax Information Solutions, LLC*: Circuit Ct. or 9th Judicial Circuit, Orange County, Florida—No. 48-2003-CA-9035-O; order dated Nov. 17, 2007; jury verdict, Nov. 30, 2007.



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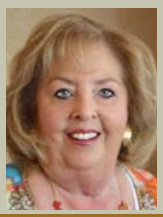

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Many Bar members are familiar with the Foundation and know the various good works it does, but they might be surprised to know that all of the Foundation's work is conducted by its volunteer Board of Directors. One third of volunteers are bench officers, one third are community leaders and one third are Bar members. There is no overhead and nearly all the funds collected by the Foundation are used to support its scholarship and grant programs. While other charities have to pay for staff, rent and other expenses, the VCLF dedicates the majority of its funds to support its charitable mission.

There are forty directors and they are a wonderful philanthropic group to work with. I have been a member of the Board of Directors for well over ten years. I was President for two years and am currently Vice President of Fundraising, as well as a member of the Nominating Committee.

I have thoroughly enjoyed working with members of this Board, including current President Etan Lorant, Immediate Past President Michael Hoff and past President Steve Holzer; Judges Susan Speer and Michelle Rosenblatt; and SFVBA past Presidents Alan Sedley, Patti McCabe and Seymour Amster.

We are a very compatible group and hardworking, too. I am proud to say that our efforts have brought us good results and, as a Board member, one can look in the mirror and feel good about one's endeavors.

If you are interested in advancing the work of the Foundation, please consider joining our Board. Directors are expected to attend a monthly board meeting on the third Wednesday of the month at the Bar offices and participate on a fundraising or charitable distributions committees.

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Please help by joining our Board. You will feel better about yourself and your community!

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