

# Practical Considerations When Enforcing Judgments

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This article addresses practical considerations involved in the enforcement of judgments and identifies common traps that could land lawyers and their clients in hot water. We begin with pre-suit considerations for evaluating a party's ultimate ability to pay, identify ongoing considerations for evaluating the defendant's assets, and review post-judgment considerations that frequently arise these days. Finally, we conclude with practice pointers for complying with that nemesis of all judgment creditors, the Fair Debt Collection Practices Act.

Any representation must begin with an engagement letter that carefully defines counsel's role in post-judgment collection efforts. Silence can lead to client dissatisfaction or counsel finding that the scope of the job is much broader than anticipated. A well-crafted engagement letter should state whether the representation includes post-judgment enforcement work and the exact nature of it.

For example, assume an engagement letter says nothing about enforcement of the judgment. Then, after obtaining a judgment, counsel records it in a city or county where the debtor may have property. Thereafter, counsel does no further work on the matter, as the client seems uninterested in throwing good money after bad to pursue collection. Counsel then sends a termination letter to the client noting that the representation has concluded and that no further work will be performed.

What happens if the judgment needs to be renewed several years later and counsel fails to do so? For example, some states require a judgment to be renewed after a certain period of time or it may be deemed unenforceable. *See, e.g.*, CAL. CIV. PROC. CODE § 683.020 (California judgment may become unenforceable after 10 years if not renewed). Is this malpractice? Does it matter that counsel sent a termination letter explaining that the representation had concluded? An argument can be made that, by recording the judgment, counsel undertook efforts to enforce it, thereby placing enforcement within the scope of representation. This same scenario can be played out in connection with writs of execution, writs of garnishment, and so on.

Thus, adequately explaining the scope of representation with respect to post-judgment enforcement work in an engagement letter can help to avoid allegations of malpractice. For example, in *Wise v. DLA Piper, LLP (US)*, the Wises were represented by a predecessor law firm to DLA Piper, LLC (US), which aided them in obtaining a judgment in 1994. 220 Cal. App. 4th 1180 (Cal. Ct. App. 2013). But the firm "did not advise the Wises of the necessity to renew the judgment, and after 2004 the judgment became unenforceable." *Id.* at 1183. A jury found that failure to renew the judgment constituted malpractice, though the court of appeals reversed the Wises' award because it concluded that the judgment was uncollectable.

not be possible without subpoena power and other compulsion allowed a judgment creditor. The pre-suit investigation should merely provide both lawyer and client with sufficient information about the defendant's financial condition to evaluate whether it likely can pay a judgment or whether there are any third parties obligated to do so, such as an insurer.

The pre-suit investigation should always begin with the client because, depending on the type of case, the client may have the information needed, such as the defendant's financial statements, tax returns, and information on the defendant's real and personal property holdings. This can be supplemented by online databases that may provide general information on the defendant, including aliases or a d/b/a, and information concerning the defendant's real property holdings found at the county assessor and recorder's office. The secretary of state's office may have information on the defendant's other businesses; Uniform Commercial Code filings naming the defendant as a creditor or debtor may provide information on his or her personal property, any debts owed, or any secured loans the defendant might have made; and the department of motor vehicles may provide information about ownership of cars and the like. Litigators should also use their familiarity with both state and federal court filing systems to see if the defendant is or has been involved in other cases.

Defendants rarely just pay a judgment after entry, so another consideration every practitioner should evaluate at the outset of the case is the possible cost and time necessary to collect. As important as the defendant's ability to pay a judgment is the plaintiff's ability to enforce one. If the plaintiff can't, the judgment is just a piece of paper. Evaluating the costs associated with enforcing a judgment may be difficult for practitioners who do not regularly perform collection work, but in some cases, it requires as much if not more time and money to collect a judgment than achieve one. Providing an estimate of the cost of collection at the outset of the case is difficult, but the client should appreciate that expending time and money on collection is the norm. Having this discussion early on puts the client in the best position to evaluate whether filing a lawsuit is in the client's best interest.

Last, knowing the client's actual litigation goal is critical to any pre-suit evaluation. More often than one would expect, a client's interest in obtaining a money judgment has nothing to do with actually collecting and everything to do with righting a wrong or entering a judgment on the public records. In these circumstances, enforcement issues should still be discussed with the client, but to a lesser degree. Still, practitioners are well advised to consider the impact of a client who, fresh off a victory, changes his mind and decides it really *is* about the money.

Once a lawsuit is filed, don't place enforcement and collection on the back burner. Instead, include it in the continuous

This unpleasant fate can be avoided if the engagement letter clearly notes things such as representation ceases after trial and does not include post-trial matters, such as post-judgment enforcement work; or representation is limited to renewing the judgment on one occasion but not thereafter; or representation is limited to obtaining and serving writs of garnishment but not recording or renewing the judgment.

Beyond the engagement letter, talk to the client. All too often, litigators haul off and file suit without first fully considering collection and discussing with the client whether a judgment will ultimately be enforceable. A frank conversation about whether a defendant can actually pay a judgment, if one can be obtained, sometimes falls by the wayside. Failing to investigate collectability issues as well as the defendant's assets and to cover the issue with a client at the outset of a case may well have serious and costly consequences for the case and even destroy an otherwise good attorney-client relationship and the potential for future work.

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## Pre-Suit Investigation

Any pre-suit investigation is unlikely to be a comprehensive examination of the defendant's financial condition. That may

Illustration by Phil Foster

evaluation and assessment of the case. Indeed, discovery is an excellent tool to investigate the defendant's ability to pay, monitor its assets for transfers that may be subject to the Fraudulent Conveyance Act, and set the client up for successful post-judgment collection proceedings. Under the broad parameters of Federal Rule of Civil Procedure 26, a party can get at a multitude of information on the defendant's financial condition—and not just in commercial cases. For example, a claim for punitive damages essentially puts the defendant's financial records and condition directly in the crosshairs of Rule 26 relevance. And remember that many states' discovery rules are broader than the federal rules and allow discovery on any matter relevant to the subject matter of the pending action, not just claims or defenses.

Prejudgment remedies should also be considered. The defendant's assets can be attached, garnished, or subject to lien prejudgment. In other words, upon a showing of good cause, the plaintiff is given the right to take immediate possession of or immediately lien the defendant's property prior to full adjudication of the claims and defenses or entry of a judgment. Most states have comprehensive statutory schemes concerning prejudgment remedies, and Rule 64 of the Federal Rules of Civil Procedure permits federal courts to follow their state's prejudgment remedy statutes.

Generally, to obtain one of the prejudgment remedies, the plaintiff must demonstrate a valid claim and likelihood of success; describe in detail the property sought, its location, and estimated value; and post a security bond in an amount equal to the property plus any costs and attorney fees the defendant may incur if the defendant ultimately prevails. The burden to obtain prejudgment remedies is often extremely high, and the required security may be cost-prohibitive. Notwithstanding, there are circumstances where prejudgment remedies are essential to protect a client's ability to collect later on, such as when the defendant is threatening to transfer property that is the subject of the suit.

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## After the Judgment

Once a judgment has finally been secured, the real work begins. Start by taking stock of whether enforcement can proceed or would be premature. Some states require that the defendant receive notice of a judgment before execution. Many have an "automatic stay," which is a preliminary period of time in which judgments cannot be enforced, such as 10 days after entry. Judgments on appeal may also be subject to a stay of execution. Thus, if asked to enforce a judgment, first consider its status.

In cases where the defendant holds property in a state other than where the judgment was entered, counsel may need to domesticate a judgment in that state (commonly referred to as "foreign judgments"). Closely consider the laws in each jurisdiction

relating to domestication. Many states have adopted the Uniform Enforcement of Foreign Judgments Act. *See, e.g.*, N.J. STAT. ANN. § 2A:49A-25 *et seq.*; NEV. REV. STAT. § 17.330; COLO. REV. STAT. § 13-53-101 *et seq.* This law requires that foreign judgments first be "exemplified" by the clerk of the court in the jurisdiction in which the judgment was obtained. An exemplified copy is usually different from a certified copy. To avoid delays in domesticating a judgment, ensure that the correct form of judgment is obtained from the court where the judgment originates.

Furthermore, many states have a preliminary time period, usually 30 days, during which a foreign judgment may not be enforced. And it is important to keep in mind that a foreign judgment is valid in the state of domestication only so long as the original judgment remains valid in the original jurisdiction. Thus, if a judgment in the original jurisdiction is not timely renewed, a foreign judgment may become useless. Moreover, if a judgment in the original jurisdiction is set aside for any reason, the foreign judgment may cease to be valid.

Familiarity with the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, and any applicable state law or regulation concerning actions to collect on a judgment is also a must. The purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collector abuses." *Id.* § 1692(e).

The FDCPA only applies to consumer debts, not commercial debts, which are incurred by a natural person in transactions involving money, property, insurance, or services used primarily for personal, family, or household purposes. *Id.* § 1692a(5). A "debt collector" is defined under the FDCPA as "any person who . . . [operates] any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another." *Id.* § 1692a(6).

The FDCPA "applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation." *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995). Thus, an attorney trying to enforce a judgment against a consumer may be liable under the law—the key being whether the attorney "regularly" practices debt collection.

In *Fox v. Citicorp Credit Services, Inc.*, the Ninth Circuit addressed whether a lawyer fell within the definition of "debt collector" under the FDCPA. 15 F.3d 1507 (9th Cir. 1994). Citicorp hired an attorney to sue debtors on an unpaid credit card, and the parties reached a stipulated judgment committing the debtors to make payments. *Id.* at 1510. When the debtors missed payments, Citicorp instructed its attorney to proceed to garnishment if he did not hear from the bank that the debtors had caught

up. Although the debtors did indeed make payments and became current, Citicorp neglected to contact its lawyer, who sent a letter of intent to garnish the debtors' wages. At this point, the debtors told the attorney they were current and he, in turn, contacted the bank to confirm. *See id.* Citicorp then failed to provide the payment history, and the lawyer filed an application for writ of garnishment and served one of the debtors' employers. Later, Citicorp sent the payment history, and the attorney—no doubt exasperated—quashed the writ. *Id.* at 1511. But it was too late.

The Ninth Circuit rejected counsel's contention that he was not subject to the FDCPA because filing an application for a writ of garnishment is a "pure legal action." It held that the FDCPA applies to lawyers who regularly collect or attempt to collect a debt of another and that Citicorp's attorney fell within the definition of "debt collector" because 80–90 percent of his practice consisted of collection. *Id.* at 1513.

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## Failing to investigate collectability issues at the outset of a case may well have serious and costly consequences.

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It is important to note that whether an attorney regularly engages in debt collection involves more than merely the percentage of resources devoted to it, the revenues it generates, and the attorney's marketing of herself as a debt collector. The Fifth Circuit has explained how the distinction between the statutory terms "principal purpose" and "regularly" may become blurred:

[A] person may regularly render debt collection services, even if these services are not a principal purpose of his business. Indeed, if the volume of a person's debt collection services is great enough, it is irrelevant that these services only amount to a small fraction of his total business activity; the person still renders them "regularly."

*Garrett v. Derbes*, 110 F.3d 317, 318 (5th Cir. 1997).

According to the Second Circuit, the analysis should proceed on a case-by-case basis. *See Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*, 374 F.3d 56, 62 (2d Cir. 2004). Several factors are relevant: the number of debt collection

communications and collection cases during a certain period, their frequency, whether the attorney is specifically assigned collection work, whether the attorney uses software or vendors to facilitate collection, and whether the activity is undertaken as part of ongoing client relationships with entities collecting consumer debt obligations. *Id.* at 62–63. The court also considered facts relating to the debt collection work in the attorney's or law firm's practice as a whole. For instance, 1 percent of debt collection work for a large firm may suggest regularity, while 1 percent of an individual attorney's work may not. *Id.* at 63.

The FDCPA circumscribes communications by the debt collector and prohibits harassment or abuse, false or misleading representations, and unfair debt collection practices. *See* 15 U.S.C. § 1692 *et seq.* Thus, even an attorney not regularly rendering debt collection services must avoid collection practices prohibited under the FDCPA, which include the following:

- using deceptive means;
- attempting to collect more than is owed;
- harassing the debtor's employer or communicating with the debtor at the debtor's place of employment if the attorney knows or has reason to know that such communication is prohibited;
- contacting a debtor directly if the debtor is represented by an attorney;
- contacting a debtor before 8:00 a.m. or after 9:00 p.m.;
- threatening the debtor with violence or other criminal means; or
- using obscene or profane language.

Of course, the ethical standards binding all lawyers likewise prohibit most of these.

In sum, enforcing judgments is an issue litigators should consider at each and every stage of a case, not just when the judgment is entered and collection suddenly looms on the horizon. Diligent pre-suit investigation and continuous monitoring of the defendant's financial condition throughout the case ensures that clients are fully informed and benefit from any future judgment enforcement. The scope of representation should be clearly defined, and if you do undertake judgment collection efforts, familiarize yourself with the FDCPA, your state's collection laws, and applicable statutes and rules of any states where the defendant may be holding assets.

And our last piece of advice, without regard to whether you are a debt collection attorney or just an attorney collecting a debt: Be civil. Collection is tough enough without taking on unnecessary, extracurricular battles. ■