

Collecting a Judgment Against the Fiduciary:  
Is it Paper or is it Gold

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### I. INTRODUCTION

After valiantly pursuing the fiduciary to the ends of the earth, what did the aggrieved party end up with, a judgment worth millions or a piece of paper not worth much more than framing as a memento? The judgment itself was obviously not the ultimate reward in pursuing the fiduciary, the goal was to recover those amounts the fiduciary lost or failed to protect. This article will explore the collection of the judgment including focusing on what happens in the event of bankruptcy, the appropriateness of requesting the appointment of a receiver, and general collection practices.

### II. BANKRUPTCY

As the plaintiff dreams of collecting on its newly received judgment or settlement, the nightmare begins with an innocuous document titled "Notice of Bankruptcy." The fiduciary has, once again, either delayed or defeated the plaintiff's ability to recover the funds that were previously squandered away.

#### A. Bankruptcy: Generally

The filing of a petition in bankruptcy creates an estate that consists of all the debtor's legal or equitable interests in property. 11 U.S.C. § 541(a)(1). These are the assets of the estate, which may ultimately be the only means for payment of the judgment. The assets of the estate, however, do not include any power that the debtor may exercise solely for the benefit of another. 11 U.S.C. 541(b)(1). An example of property that a debtor may hold legal title to, but not equitable title, is employee withholding taxes. *Begier v. IRS*, 496 U.S. 53, 60-62 (1990). Furthermore, if the debtor holds only legal title to property and not an equitable interest, then such property only becomes property of the estate to the extent of the

legal title. 11 U.S.C. § 541(d). Another example of assets that are not considered property of the estate is any property subject to a constructive trust. *Haber Oil v. Swinehart (In re Haber Oil)*, 12 F.3d 426, 435-37 (5<sup>th</sup> Cir. 1994). For the purpose of this article, we will assume that the Plaintiff cannot demonstrate a constructive trust, since such assets would not be property of the estate. *In re Morris*, 260 F.3d 654, 670 (6<sup>th</sup> Cir. 2001).

In addition to creating a bankruptcy estate, the petition also institutes an automatic stay against collection or recovery of any claim against the debtor that arose prior to the bankruptcy case. 11 U.S.C. § 362(a)(1). A claim is defined under the Bankruptcy Code as any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5). Thus a claim arose against the debtor when the fiduciary committed the breach of his fiduciary duty, even if such claim had not yet been reduced to judgment. For the purpose of this article, we will assume that the claim has been reduced to either a judgment or settlement agreement, whereby the debtor cannot assert that the claim has not been liquidated. If the defendant were to file for bankruptcy prior to judgment, the plaintiff would have a claim, which could be liquidated during the bankruptcy case. 11 U.S.C. § 502.

A judgment creditor is generally an unsecured creditor. *Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794, 799 (7<sup>th</sup> Cir. 1986). Unless the plaintiff has been able to obtain a lien on property of the estate, the claim held by the plaintiff will be an unsecured claim. 11 U.S.C. § 506(a).

**B. Dischargeability of Claims**

(1) Chapter 7 Claims

Under Chapter 7 of the Bankruptcy Code a trustee is appointed to collect all of the non-exempt assets of the estate, liquidate such assets, and distribute the proceeds to the creditors of the estate. 11 U.S.C. § 704. Upon completion of this process, the debtor may be granted a discharge, that "except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title." 11 U.S.C. § 727(b).

(2) Chapter 11 Claims

Chapter 11 of the Bankruptcy Code provides an opportunity for a debtor to reorganize its business or financial affairs or to engage in an orderly liquidation of its property. 15 *Collier on Bankruptcy* P. 1100.01 (15<sup>th</sup> ed.). It is fashioned primarily for business debtors, although individuals who are not engaged in businesses can also qualify for relief under Chapter 11. *Id.* Following confirmation of a plan, the debtor receives a discharge of debts, except that confirmation of a plan does not discharge an individual debtor from a debt excepted from discharge under Section 523. 11 U.S.C. § 1141(d)(1-2).

(3) Chapter 13 Claims

Chapter 13 is intended to allow individuals to make payments to creditors over time pursuant to a plan. 11 U.S.C. § 1325. Upon completion of the plan payments, the debtor receives a discharge of all debts provided for under the plan. 11 U.S.C. § 1328(a). Certain debts that are excepted from discharge under 523(a) are automatically excepted from discharge under

Chapter 13, including student loans and certain tax obligations. 11 U.S.C. § 1328(a)(2).

Chapter 13, however, does not generally except from discharge all debts that could be held non-dischargeable under 523(a). *Id.* Prior to the completion of plan payments, the debtor may seek a discharge of debts based on "hardship." 11 U.S.C. § 1328(b). In addition to the debts that are excepted from discharge under Section 1328(a)(2), additional debts excepted from discharge under Section 523(a) would be excepted from the early discharge under Section 1328(b). 11 U.S.C. § 1328(c)(2).

If the fiduciary were to file a Chapter 13 bankruptcy petition, then the debt would be dischargeable, so long as the debtor did not seek a "hardship discharge" prior to completing plan payments. As a word of caution to practitioners, generally to have a claim held non-dischargeable for fraud or defalcation while acting as a fiduciary the claimant must file an adversary proceeding, which will be discussed later in more detail. 11 U.S.C. § 523(c)(1). The case law is not clear as to whether a claimant must also file an adversary proceeding to have a debt excepted from a "hardship discharge" under Section 523(c)(2). *Anderson v. IRS (In re Anderson)*, 228 B.R. 844, 847 (Bankr. W.D. Va. 1998) (holding tax debt non-dischargeable under Section 1328(c) based on being a debt of a kind specified under Section 523(a)); *In re Jalufka*, 184 B.R. 562, 568 (Bankr. E.D. Ark. 1995) (Similar holding).

(4) Section 523: Exceptions to Discharge

The Bankruptcy Code provides that certain debts are excepted from discharge. 11 U.S.C. § 523(a). In the event that the debt is held to be non-dischargeable, then the creditor may continue collecting its judgment against the debtor after the bankruptcy case. *Smith v. Bandy (In re Bandy)*, 237 B.R. 661, 668-69 (Bankr. E.D. Tenn. 1999). Depending on the actions, or lack thereof, undertaken by a fiduciary, liability could be established under Section 523 on several bases' including having the debt found to be

non-dischargeable for fraud or willful or malicious injury to the property of another. 11 U.S.C. § 523 (a)(2) and (6). For the purposes of this article, we will focus on demonstrating that the judgment or settlement was based on acts that constitute "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523 (a)(4).

### **C. Non-dischargeability of a Fiduciary**

#### **(1) 11 U.S.C. § 523(a)(4)**

The exceptions to dischargeability of debts under Section 523(a) are narrowly defined to promote the fresh start policy of the Bankruptcy Code, while preventing the dishonest debtor from avoiding the consequences of his wrongful conduct. *In re Ellison*, 296 F.3d 266, 271-72 (4<sup>th</sup> Cir. 2002). As noted above, Section 523(a)(4) excepts from discharge those debts that were incurred by way of fraud or defalcation by someone acting in a fiduciary capacity, embezzlement or larceny. 11 U.S.C. § 523(a)(4). Under Section 523(a)(4), liability for embezzlement or larceny may be established without the necessity of demonstrating that the defendant was acting in a fiduciary capacity. *In re Hayden*, 248 B.R. 519, 525 (Bankr. N.D. Tex. 2000). Given the topic of this article, we will not explore either embezzlement or larceny, instead we will focus on the acts undertaken by the defendant that may constitute fraud or defalcation while acting as a fiduciary.

In order to establish fraud or defalcation by someone acting in a fiduciary capacity, the plaintiff must demonstrate (1) an express or technical trust existed, (2) the debt was caused by fraud or defalcation, and (3) the debtor acted as a fiduciary to the creditor at the time the debt was created. *In re Banks*, 263 F.3d 862, 870 (9<sup>th</sup> Cir. 2001); *In re Rea*, 245 B.R. 77, 87 (Bankr. N.D. Tex. 2000).

#### **a. Express or Technical Trust**

A fiduciary under Section 523(a)(4) does not refer to just any relationship involving confidence, trust or any good faith,

instead Section 523(a)(4) concerns a relationship arising out of a technical or express trust. *In re Rea*, 245 B.R. at 87 (citing *In re Tran*, 151 F.3d 339, 342 (5<sup>th</sup> Cir. 1998); *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934)). An express trust traditionally includes (1) an explicit declaration of a trust, (2) a defined trust res, and (3) an intent to create a trust relationship. *In re Chavez*, 140 B.R. 413, 423 (Bankr. W.D. Tex. 1992). To create an express trust, the legal and equitable title to the trust res must be separate, the former being vested in the trustee and the latter in the beneficiary. *In re Rea*, 245 B.R. at 87. The express trust may be created by an agreement, the direct acts of the parties or a written instrument. *In re Berry*, 174 B.R. 449, 454 (Bankr. N.D. Tex. 1994). On the other hand, a technical trust may be imposed by law. *In re Angelle*, 610 F.2d 1335, 1341 (5<sup>th</sup> Cir. 1980). The trust giving rise to the fiduciary relationship must be in existence prior to any wrong doing. *In re Bennett*, 989 F.2d 779, 784 (5<sup>th</sup> Cir. 1993). Thus, constructive trusts or trusts *ex malificio* are insufficient to create a fiduciary relationship under Section 523 (a)(4). *In re Tran*, 151 F.3d at 342.

*In re Rea* demonstrates the establishment of a trust relationship under Section 523(a)(4). The debtor was a licensed securities broker, who would solicit funds from investors. Upon receipt of funds from an investor, the debtor had discretion to actively trade on behalf of the investor. After the debtor incurred several losses on behalf of the plaintiff, and others, the debtor filed for bankruptcy seeking to discharge those amounts that the debtor believed he owed to plaintiff's based on the losses. The plaintiff sought to have the losses held non-dischargeable based on Section 523(a)(4). The bankruptcy court explored the creation of the trust relationship between the parties to determine the existence of either an express or technical trust. *In re Rea*, 254 B.R. at 88. The court found that even though the parties had undertaken direct acts to establish a trust, the plaintiff's continued to retain both legal and equitable title in the property such that Texas law would not recognize an express

trust. *Id.* The court did find that "[a] statute may impose a technical trust on a relationship providing it includes a res and trust-like duties." *Id.* (quoting *In re Tran*, 151 F.3d at 342-43). After exploring several prior decisions relating to the fiduciary relationship between a broker and a customer, the court held that the law imposed a technical trust on behalf of brokers. *In re Rea*, 245 B.R. at 89.

b. Defalcation or Fraud

(i) Defalcation

Defalcation is defined as "the failure to meet an obligation" or "a non-fraudulent default." *In re Uwimana*, 274 F.3d 806, 811 (4<sup>th</sup> Cir. 2001). Among the courts that have considered defalcation, there is no general consensus in interpreting defalcation. *In re Baylis*, 313 F.3d 9, 18-19 (1<sup>st</sup> Cir. 2002). Several circuits have found that an innocent mistake can constitute defalcation. *In re Uwimana*, 274 F.3d at 811; *In re Cochrane*, 124 F.3d 978, 984 (8<sup>th</sup> Cir. 1997); *In re Lewis*, 97 F.3d 1182, 1186 (9<sup>th</sup> Cir. 1996). Some courts have required simple negligence on behalf of the fiduciary. *In re Storie*, 216 B.R. 283, 288 (B.A.P. 10<sup>th</sup> Cir. 1997). Other courts have required recklessness on the part of the fiduciary. *In re Schwager*, 121 F.3d 177, 185 (5<sup>th</sup> Cir. 1997); *Meyer v. Rigdon*, 36 F.3d 1375, 1384-85 (7<sup>th</sup> Cir. 1994). Furthermore, some courts require extreme recklessness. *In re Baylis*, 313 F.3d at 20.

Based on these standards for defalcation, courts generally do not require a creditor to prove that the fiduciary acted knowingly or willfully. *Id.* The Fifth Circuit has placed a higher burden on the creditor by requiring a showing that the fiduciary willfully neglected their duty. *In re Schwager*, 121 F.3d at 184; *In re Wang*, 247 B.R. 211, 219 (Bankr. E.D. Tex. 2000).

(ii) Fraud

"Actual fraud, by definition, consists of any deceit, artifice, trick or design involving direct and active operation of the mind, used

to circumvent and cheat another--something said, done or omitted with the design of perpetrating what is known to be a cheat or deception." *Recoveredge L.P. v. Pentecost*, 44 F.3d 1284, 1293 (5<sup>th</sup> Cir. 1995). In order to prove nondischargeability under an "actual fraud" theory, the objecting creditor must prove that: "(1) the debtor made representations; (2) at the time they were made the debtor knew they were false; (3) the debtor made the representations with the intention and purpose to deceive the creditor; (4) that the creditor relied on such representations; and (5) that the creditor sustained losses as a proximate result of the representations." *Recoveredge*, 44 F.3d at 1293. It is not clear whether a different standard of proof applies for demonstrating that a person committed fraud while acting as a fiduciary when compared to the fraud standard applied under Section 523(a)(2)(A).

c. Fiduciary

As stated previously, courts have adopted a narrow definition of fiduciary. "The broad, general definition of fiduciary-a relationship involving confidence, trust and good faith- is inapplicable in the dischargeability context." *In re Cantrell*, 329 F.3d 1119, 1125 (9<sup>th</sup> Cir. 2002). "[T]he fiduciary relationship must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt." *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182, 1185 (9<sup>th</sup> Cir. 1996). This distinction of what constitutes a fiduciary relationship under Section 523(a), may often lead to a judgment based on breach of a duty such as breach of confidence or breach of the duty of good faith, being discharged by the debtor.

When dealing with the attorney client relationship, the breach of duty must involve the misappropriation of trust funds or money held in any fiduciary capacity. *In re Banks*, 263 F.3d 862, 870 (9<sup>th</sup> Cir. 2001). An attorney's breach of duty as to maintain confidence, will not create the requisite fiduciary relationship. *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1371

(10<sup>th</sup> Cir. 1996). *In re Banks* demonstrates the type of fiduciary relationship that must exist between an attorney and client in order for a court to hold that a debt attorney, non-dischargeable. The debtor, an attorney, received proceeds from a judgment, which he did not properly allocate and pay. After the debtor filed for bankruptcy, several creditors sought to have the debt owed by the attorney held non-dischargeable. The debtor asserted that there was no express trust between himself and the client. *In re Banks*, 263 F.3d at 871. The court noted that the attorney had indicated depositing and withdrawing the funds from his client trust account. *Id.* The court held that when the attorney place his client's funds into his client trust account, the attorney "became his client's fiduciary." *Id.*

Distinctions have also been made between stock brokers based on their discretion to determine when purchases and sales are made. *In re Rea*, 245 B.R. at 88. Some jurisdictions have held that brokers without discretion do not have a fiduciary duty under Section 523(a). *Id.*

Additional fiduciary obligations have also been found non-dischargeable under different trust relationships. Under the laws of several states the trustee of a probate estate has a fiduciary duty that has been recognized under Section 523(a). *In re Baylis*, 313 F.3d at 23. *In re Tomlin*, 266 B.R. 350, 355 (N.D. Tex. 2001). Finally, even ambassadors have been held fiduciaries for the country they represent. *In re Uwimana*, 274 F.3d 311. On the other hand, there have been certain relationships defined under state law as fiduciary relationships that courts have found not subject to Section 523(a). *In re Tram*, 151 F.3d 339, 346 (5<sup>th</sup> Cir. 1998); *In re Marchiando*, 13 F.3d 1111, 1117 (7<sup>th</sup> Cir. 1994).

#### (2) Collateral Estoppel

Given the standards that a plaintiff must meet to establish liability under Section 523(a), the judgment or agreement obtained against the fiduciary may not per se create a non-dischargeable debt. The Supreme Court has recently reiterated the role bankruptcy

courts play in considering non-dischargeability issues, "Congress also intended to allow the relevant determination (whether a debt arises out of fraud) to take place in bankruptcy court, not to force it to occur earlier in state court at a time when non-dischargeability concerns are not directly an issue and neither party has a full incentive to litigate them." *Archer v. Warner*, 538 U.S. 314, 321 (2003) (citing *Brown v. Felsen*, 442 U.S. 127, 134 (1979)). Any ambiguity in how the judgment was reached could foreclose the use of collateral estoppel. *In re Schwager*, 121 F.3d 177, 183-84 (5<sup>th</sup> Cir. 1997).

#### (3) Procedure

In order to have a debt determined non-dischargeable, the creditor will need to file an adversary proceeding under Rule 7001(4) of the Federal Rules of Bankruptcy Procedure. 11 U.S.C. 523(c)(1). As stated previously, a plaintiff may initiate the suit for non-dischargeability either prior to or subsequent to obtaining a judgment on the actual claim. *In re Bandy*, 237 B.R. 661 (Bank. E.D. Tenn 1999). By filing a cause of action to determine dischargeability, the plaintiff loses the right to request a jury trial. *Id.*

### **III. RECEIVERSHIP**

Absent Bankruptcy, the plaintiff may still find it difficult to recover on the judgment. Both Federal and State laws provide assistance in these attempts to recover, including the appointment of a receiver. A receiver is an "officer of the court, the medium through which the court acts. He is a disinterested party, the representative and protector of the interests of all persons, including creditors, shareholders and others, in the property in receivership." *Security Trust Co. of Austin v. Lipscomb County*, 180 S.W.2d 151, 158 (Tex. 1944). The appointment of a receiver is an extraordinary remedy that should only be utilized where there is a clear necessity to protect a party's interest in property. *Gordon v. Washington*, 295 U.S. 30, 37-38 (1935); *Rosen v. Siegel*, 106 F.3d 28, 34 (2<sup>nd</sup> Cir. 1997). Receivership is a "drastic remedy" to

be imposed "only where no lesser relief will be effective." *Ferguson v. Tabah*, 288 F.2d 665, 674 (2<sup>nd</sup> Cir. 1961).

#### **A. Federal Receiver**

A federal court has power in equity to appoint a receiver. *Gilchrist v. General Electric Capital Corp.*, 262 F.3d 295, 302 (4<sup>th</sup> Cir. 2001). Rule 66 of the Federal Rules of Civil Procedure provides for the appointment of a receiver under federal law. It is within the court's discretion to appoint a receiver. *Santibanez v. Wier McMahon & Co.*, 105 F.3d 234, 241 (5<sup>th</sup> Cir. 1997). Several courts have held that a receiver may be appointed "to preserve property pending final determination of its distribution in supplementary proceedings in aid of execution." *Id.* Several factors are considered by courts when determining whether to appoint a receiver, including "a valid claim by the party seeking the appointment; the probability that fraudulent conduct has occurred or will occur to frustrate that claim; imminent danger that property will be concealed, lost, or diminished in value; inadequacy of legal remedies; lack of a less drastic equitable remedy; and likelihood that appointing the receiver will do more good than harm." *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 316-317 (8<sup>th</sup> Cir. 1993); *Santibanez*, 105 F.3d at 241-42.

#### **B. State Receiver**

Several provisions of Texas Law provide for the appointment of a receiver. A judgment creditor may seek the appointment of a receiver to aid in the liquidation of assets to satisfy the judgment. Tex. Civ. Prac. & Rem. Code Ann. § 31.002(b)(3) (2005). Furthermore, a creditor may seek the appointment of a receiver to assist in securing recovery of assets prior to obtaining a judgment. Tex. Civ. Prac. & Rem. Code Ann. § 64.001 (a) (2005).

As with Federal courts, the Texas State courts consider the imposition of a receivership an extraordinary remedy. *Independent American Savings Assoc. v. Preston 117 Joint Venture*, 753 S.W.2d 749,

750 (Tex. App.—Dallas 1998, no writ). Under Texas law, the party seeking the appointment of a receiver must demonstrate that it has "a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured." Tex. Civ. Prac. & Rem. Code Ann. § 64.001(b). In contrast to Federal law, a party seeking the appointment of a receiver under Sections 64.001 (a) and (b) of Texas Civil Practices and Remedies Code "need not show that no other adequate remedy exists." *Akin, Gump, Strauss, Hauer, and Feld, L.L.P. v. E-Court, Inc.*, No. 03-02-00714-CV, 2003 Tex. App. Lexis 3966, 11 (Tex. App.—Austin May 8, 2003).

### **IV. COLLECTING**

#### **A. Introduction**

As the familiar saying goes, a judgment is not worth the paper it is printed on unless you can collect from the judgment debtor. Faced with this reality, clients and their attorneys are often forced to make critical strategic decisions based solely on the solvency of the defendant. Proceedings against fiduciaries are no exception. Hence, the smart plaintiff will pay at least some attention to the likelihood of collecting on a potential judgment against a fiduciary early in the litigation, or, indeed, before litigation is commenced.

"Collecting" on a judgment, which is the subject of this section of the paper, is a topic worthy of a paper unto itself. Fortunately for practitioners, it is. The State Bar of Texas publishes a two volume series aptly titled Texas Collections Manual which covers the subject in detail. This work is an invaluable tool to the practitioner who is attempting to collect on a judgment or other debt. The series also provides many forms and practical pointers. Thus, rather than attempt to cover this topic in the limited space available, we have chosen to highlight several topics and issues that a judgment creditor should consider when attempting to collect against a fiduciary or other judgment debtor. Of course, a judgment debtor should be aware of

these issues as well. For more detailed information on the subject, this work should be at the top of the reading list.

**B. The Judgment**

Even before one begins to focus on how to collect on the judgment, some attention should be given to the judgment itself. Issues to consider include whether the judgment is a final judgment (disposing of all issues and all parties), what rate should be used for determining pre-judgment and/or post-judgment interest and whether the judgment debtor is correctly named. It goes without saying that these examples are not exclusive. In short, do not lose sight of the judgment itself.

**C. Postjudgment Discovery**

The Texas Rules of Civil Procedure expressly provides for post-judgment discovery. This is a great tool for the judgment creditor for it allows the creditor an opportunity to determine what assets, if any, the debtor has which may be subject to collection. This discovery tools available to the judgment creditor include depositions, interrogatories and requests for production of documents. Moreover, a creditor may even seek documents from a debtor's bank or financial institution.

**D. Postjudgment Procedures**

(1) Liens and Abstracts

Judgment does not create a lien against the judgment debtor's property. To create a judgment lien, the judgment creditor must file an abstract of judgment in the county records. To abstract a judgment and create a lien, the judgment must be final. However, an abstract can be filed even if the judgment is being appealed.

When properly recorded and indexed, an abstract of judgment creates a lien on the judgment debtor's nonexempt real property in the county in which the abstract is recorded. The lien does not attach to the debtor's homestead. However, a recorded judgment lien will attach to homestead property when the property ceases to be the

debtor's homestead if it is still owed by the judgment debtor.

Chapter 52 of the Texas Property Code sets forth the requirements for the contents of the abstract of judgment.

(2) Execution

A writ of execution is a judicial writ directing the enforcement of a judgment. Generally, a writ of execution will instruct a sheriff or constable to levy upon a judgment debtor's nonexempt property, sell the property and deliver the proceeds from the sale to the judgment creditor. The proceeds from the sale will then be applied to the satisfaction of the judgment. A judgment creditor may seek a writ of execution unless and until a defendant files a proper supersedeas bond. The requirements for the writ of execution are set forth in rule 629 of the Texas Rules of Civil Procedure. Additional requirements and nuances regarding execution are detailed in the Texas Rules of Civil Procedure.

A judgment debtor may suspend execution by posting the appropriate supersedeas bond. Moreover, a judgment creditor should pay careful attention to the requirements of a proper execution so as to avoid a claim for wrongful execution. Examples of conduct that can give rise to a claim for wrongful execution include execution of exempt property, execution of property that is not owned by the judgment debtor or execution on property after the judgment has been suspended by a perfected appeal.

Unless exempted by a statute, constitution or other law, the judgment debtor's property is subject to execution.

(3) Garnishment

Garnishment is a remedial procedure allowing a judgment creditor the ability to recover property of the judgment debtor which is in the possession of a third party, referred to as the garnishee. Post-judgment garnishment is governed by Chapter 63 of the Texas Civil Practice and Remedies Code and Rules 657 through 679 of the Texas Rules of Civil Procedure. Post-judgment garnishment

can be a very valuable tool to the judgment creditor and is often the best means of collecting.

A judgment creditor is entitled to a writ of garnishment when he can establish:

- a. that he has a valid and final judgment against the defendant;
- b. that the defendant has not filed a supersedeas bond; and
- c. the judgment creditor swears that the defendant does not possess property in Texas sufficient to satisfy the judgment.

Like execution, there is property that is exempt from garnishment, including for example real property, wages, workers' compensation benefits. This list is far from exhaustive and because of the potential for a claim of wrongful garnishment, careful attention should be paid to ensuring that the judgment creditor satisfies the garnishment requirements and only seeks to garnish property subject to garnishment.

To seek a writ of garnishment, the judgment debtor must initiate a separate garnishment action. The defendant in a garnishment action is the garnishee who holds the property of the judgment debtor. Prior to instituting a garnishment action, the practitioner should review Rules 657 through 679 of the Texas Rules of Civil Procedure for the details associated with the proceeding.

Often, a judgment creditor will seek to garnish an account of a judgment debtor. There are additional requirements that the judgment creditor must be aware of when the garnishee is a financial institution. Most of these requirements are located in the Texas Finance Code.