

SPECIAL REPORT

WOULD YOU PASS YOUR OWN CREDITOR'S EXAM?

(03-02-11)

This Special Report was written by Daniel P. Hale, J.D., CPCU, ARM, CRM, LIC, AIC, AIS, API of Marsh & McLennan Agency LLC. Mr. Dan Hale can be contacted at 734-525-2429 or dhale@mma-mi.com. More Special Reports are available at www.mma-mi.com.

How collectible are you? If a plaintiff received a judgment against you, what portion of your assets would be collectible?

The purpose of this Special Report is to review the procedure by which attorneys attempt to locate and attach personal assets in pursuit of uncollected civil judgments.

A. Introduction

Once a plaintiff obtains a judgment, they have the option to subpoena a number of individuals in order to facilitate the collection of that judgment. Subpoenas are typically issued for the individual against whom the judgment was entered, along with anyone indebted to the debtor and anyone who has money or property of the debtor. The subpoena requires that the individual appear before the court, answer questions under oath regarding their finances and are usually required to produce records that might contain information regarding the debtor's assets. These proceedings are generally referred to as a creditor's exam.

B. Discovery of Assets

In most creditor exams, attorneys will ask the defendant detailed and probing questions in order to determine the full extent of the debtor's assets.

Attached as Appendix A to this document is a sample creditor's exam that contains typically questions an attorney might ask.

In addition to testifying under oath, the debtor will likely be required to produce a slew of financial records, including but not limited to the following:

- Bank records
- Income statements
- Tax returns
- Insurance policies
- Property deeds or titles
- Check registers
- Pay stubs
- Court records
- Balance Sheets

C. Discovery of Fraudulent Conveyances

Some debtors try to hide their assets or “sell” them to an acquaintance. With this in mind attorneys are on the look-out for evidence of fraudulent conveyances. The Uniform Fraudulent Transfer Act, MCL 566.31 *et seq.*, provides that a conveyance is fraudulent if (1) it is made when the debtor is insolvent or the debtor is rendered insolvent by the conveyance and (2) the conveyance is made for inadequate or no consideration.

If the plaintiff can establish those two elements, they can ask the court to allow them to proceed directly against the transferred property. The examining attorney will want to know if you are insolvent. If so, when you became insolvent and whether there were any transfers of assets in exchange for inadequate or nonexistent consideration during the period of insolvency.

D. Garnishment and Execution

Garnishment

Garnishment is the legal process whereby money or property that is owed to the debtor or that is being held by someone (the garnishee) for the debtor, is taken to pay a judgment. Wages and bank accounts are the most commonly garnished property. Once a garnishment has been served, it is virtually unstoppable.

A writ of garnishment directs the garnishee to hold money or property owed to or owned by the debtor, until the court determines whether it should be paid to the debtor or the creditor. If the garnishee has any of the debtor's money or property, the garnishee must hold it in accordance with the law, until the court orders its distribution. Some of the most common sources of garnishment are as follows:

- Bank accounts
- Wages
- Salary
- Commissions
- Bonuses
- Land Contract Payments
- Tax refunds
- Interest earned
- Rent

Property Execution

A writ of property execution is the court's command to the sheriff or bailiff of the court to seize the debtor's property, inventory it, allow the debtor to select exemptions, sell the rest at public sale, pay the expenses of the sale, and then apply the rest to the judgment¹.

A property execution is an instrument used by the sheriff to seize (or "levy" upon), assets of the judgment debtor other than earnings, salary or wages. The type of property targeted will determine the type of execution to be used. For example, if tangible personal property such as a motor vehicle, boat, machinery, and so on is to be levied upon, the "demand" execution may be used. The sheriff will seize the property and liquidate at a public auction, the proceeds paying the expenses associated with the sale (towing, storage, etc.) and the net proceeds applied to the satisfaction of the judgment.

E. Common Misconceptions

It is a common misconception that attorneys will not demand damages in excess of your liability policy limits. Operating under this assumption, liability limits of \$250,000 or \$2,000,000 would essentially offer the same protection. For the reasons set forth below, this is not a supportable argument.

¹ See MCL 600.6001 et seq.

1. Attorneys usually do not have knowledge of a defendant's liability insurance limits at the time a lawsuit is filed. Information regarding insurance limits only becomes available once the lawsuit is underway and the documents have been requested via subpoena or otherwise.
2. The amount of a judgment is usually determined by a jury, not the plaintiff's attorney. Regardless of whether the plaintiff's attorney has gained knowledge of the defendant's liability insurance limits during the course of a lawsuit, this information can not be disclosed to the jurors. There can be no evidence at trial regarding status or limits of the defendant's insurance coverage. Thus, most civil judgments are determined by juries without any information on whether the damages would be covered under the defendant's insurance policy.
3. The plaintiff's attorneys have an ethical obligation to seek the full amount of the damages sustained by the plaintiff. It would be a violation of the rules of professional conduct for an attorney to intentionally limit their client's recovery to the limits available under the defendant's insurance coverage. If attorneys only demanded damages in an amount that was insured, there would no claims against uninsured individuals. This clearly goes against public policy.
4. Once a judgment has been entered, the plaintiff's attorney has an ethical obligation to pursue all assets in order to satisfy the collection of that judgment, unless their client instructs otherwise. Assuming, for example, that \$250,000 of a \$1,000,000 judgment is covered by insurance, the plaintiff's attorney will attempt to garnish or otherwise execute against all other assets owned by the defendant in order to satisfy the uncollected portion.
5. There is also a misconception that civil judgments can only be collected for up to ten years, after which time the judgment is dissolved. This is not true. Under Michigan law, civil judgments are valid for up to years but are renewable in ten year increments, *indefinitely*².

² MCL 600.2903; 600.5809

F. Conclusion

We recommend that individuals remain aware of their personal and corporate collectability and adjust their limit of liability insurance accordingly.

SAMPLE CREDITOR'S EXAM

In General

1. What is your name?
2. What is the date of your birth?
3. What is your social security number?
4. Do you belong to any organizations, clubs, or unions? Give details.

Marriage

1. Are you married?
 - a. What is your spouse's name?
 - b. What was your or your wife's maiden name?
2. Do you have any children?
 - a. What are their names?
 - b. What are their ages?
 - c. What are their addresses?
3. Where does your spouse work? Give details.
4. Where do your children work? Give details.
5. Who supports the family? Give the amount of the contribution of each person who supports the family or contributes to it.
6. What are your average monthly expenses? How are they met?
7. Have you ever been divorced?
 - a. State the name and address of your former spouse.
 - b. State the date and the place of the marriage.
 - c. State the date of the divorce and the court in which it was granted.
[Divorce records usually include valuable leads to income and property.]
 - d. Do you ever pay or receive any alimony?
 - e. Give the details of the property settlement.

Residence

1. What is your telephone number?
2. What is your address?
3. Is that a private home?
 - a. Who owns the home?

- b. Is that person a relative?
 - c. When was the house purchased?
 - d. How much did the house cost?
 - e. Whose money was used to purchase it?
 - f. How many rooms do you occupy?
 - g. Do you have any boarders or subtenants?
 - i. What are their names?
 - ii. How much rent do they pay?
4. Is that an apartment?
- a. How many rooms do you occupy?
 - b. Do you have a lease?
 - c. What is your landlord's name and address?
 - d. How much rent is charged?
 - e. Who pays the rent?
 - f. Is it paid by check or in cash?
 - g. Are you behind on the rent?
 - h. Do you have any boarders or subtenants?
 - i. What are their names?
 - ii. How much rent do they pay?

Business or Employment

- 1. What is your usual occupation?
- 2. Do you have a part-time job?
- 3. What businesses have you conducted in the past five years?
- 4. What jobs and positions have you held in the past five years?
- 5. What is the name and address of your business or employer?
- 6. Give the particulars of any contract of employment:
 - a. salary
 - b. commissions
 - c. whether your employer is in arrears on these
- 7. Are you or any of your relatives proprietors, partial owners, stockholders, directors, or officers of your employer?
- 8. Are you or your spouse an officer, a director, or a stockholder of any corporation? Give the details.

Accounts

- 1. Do you have any of the following types of accounts?

- a. checking
 - b. Christmas club
 - c. savings
 - d. credit union
 - e. mutual fund
 - f. investment club
2. Where is it and what is the balance?
 3. Where did you last have a bank account?
 4. When did you make your last deposit?
 5. When did you last draw a check on that account?
 6. Do you have the power to draw on or sign checks on any bank account?
Give details.
 7. Does your spouse have a bank account?
 8. Do you or your spouse have a safe-deposit box? Give details.
 9. When and where did you last have a safe-deposit box?
 10. Do you have the right of access to any safe-deposit box?
 11. Do you or your spouse have any securities with a brokerage firm?
Give details.
 12. Do you or your spouse have an account with a stockbroker or
commodity broker?
 13. When did either of you last have such an account?
 14. Do either of you have any power of attorney or authority over a stock,
bond, commodity, or other security account?

Insurance

1. Do you have any accident, health, or life insurance?
2. For each, give
 - a. the name of the company;
 - b. the policy numbers;
 - c. the amount, type, and date of insurance for each life insurance
policy;
 - d. the name and address of each beneficiary; and
 - e. the date and particulars of any changes of beneficiary.
3. Have you obtained any loans against any policies? What did you do with
the money?
4. Have you claimed or are you receiving any disability payments? Give
details.

5. Do you have any fire or other insurance on your home or its contents?
Give details.
6. Where do you keep the policies?
7. Will you bring the policies with you at the adjourned date of this examination?
8. What are the names and addresses of your insurance agents?

Property

1. Do you have any hobbies?
2. Do you have a driver's license? What is the number?
3. What car do you drive?
4. Do you or your spouse own any
 - a. antiques;
 - b. boats or motors;
 - c. interests in any business enterprises or joint ventures;
 - d. coin collections;
 - e. stamp collections;
 - f. government bonds;
 - g. jewelry;
 - h. judgments;
 - i. land, including cottages, lots, mineral rights, reversions
 - j. livestock or farm implements;
 - k. mortgages on land or personal property;
 - l. motor vehicles;
 - m. musical instruments;
 - n. negotiable instruments
 - o. patents, inventions, trade names, trade secrets, trademarks, or copyrights;
 - p. stocks, bonds, or other securities;
 - q. warehouse receipts, bills of lading, or other documents of title; or
 - r. any other property?
5. How much cash do you have in your pocket?
6. If any of your property is mortgaged, pledged, encumbered, or bought on a sales contract, give the details.
7. Have you or your spouse pawned any property?

Suits

1. Are you a plaintiff or defendant in any lawsuits? Give details.
2. Have any judgments been taken against you? If so, please state for each
 - a. the date,
 - b. the amount,
 - c. the court, and
 - d. the names and addresses of the judgment creditors.
3. Have you made any payments on any judgments?
4. Have you ever been in bankruptcy court?
 - a. Give the court dates.
 - b. What was the disposition?
5. Have you ever filed a wage-earner's receivership or a wage-earner's plan?
6. Have you ever been garnished?
7. Have you ever made an assignment for the benefit of your creditors? Give details.
8. Have you ever had a receiver appointed for you?

Financial Statements

1. Have you applied for a loan in the last three years?
 - a. Where?
 - b. Did you get it?
 - c. What did you do with the money?
2. In the last three years, have you been a co-maker, endorser, or guarantor on a loan?
3. Have you issued a financial statement in the last three years?
 - a. To whom?
 - b. Personal or business?
4. Are you buying anything on an installment plan? Give details.

Records

1. What records do you keep?
 - a. Where are they?
 - b. Will you bring them next time?
2. What is the name and address of your accountant?
3. Did you file federal or other income tax returns for the last three years?
 - a. Will you bring copies of those next time?

b. Are you expecting a tax refund?

Miscellaneous

1. Are you or any party involved in the military service?
2. Have you ever used an assumed name?
3. Have you ever filed an assumed name certificate?
4. Have you ever obtained a license, permit, franchise, or appointment from a governmental body?
5. Are you a party to any contracts?
6. Have you ever assigned
 - a. a cause of action,
 - b. a judgment,
 - c. your salary, or
 - d. income or disability payments?
7. Have you transferred any other property in the last six years? Give details.
8. Have you made any gifts for more than \$100 to anyone in the last five years?
9. Does any governmental body have any money for you?
10. Does anyone owe you any money?
11. Have you received any money in the past year other than that already mentioned?
 - a. From whom and how much?
 - b. What did you do with it?
12. What are your total liabilities?
13. List all of your creditors, including the basis of each liability.
14. Are you making any payments to any creditors? Give details
15. Are you willing to pay your debts?
16. Are you willing to be adjudged a bankrupt?

This document is not intended to be taken as advice regarding any individual situation and should not be relied upon as such. Marsh & McLennan Agency LLC shall have no obligation to update this publication and shall have no liability to you or any other party arising out of this publication or any matter contained herein. Any statements concerning actuarial, tax, accounting or legal matters are based solely on our experience as consultants and are not to be relied upon as actuarial, accounting, tax or legal advice, for which you should consult your own professional advisors. Any modeling analytics or projections are subject to inherent uncertainty and the analysis could be materially affective if any underlying assumptions, conditions, information or factors are inaccurate or incomplete or should change.