



garnishment paperwork. You just have to know who those people are. You can also issue “shotgun garnishments” by sending garnishments to the various banks in the area where your defendant is located. This works sometimes, but with the overabundance of banks it is financially burdensome to send a garnishment to every single financial institution.

Post-Judgment Discovery: Finding Out Where The Money Is

To get the money, you have got to know where it is. You are allowed to initiate post-judgment discovery of the defendant to find out what his assets are and where they are. This discovery can take the form of written questions to the defendant or written requests for documents evidencing any assets the defendant has. You can also require the defendant to sit for a deposition. If the defendant refuses to answer the questions or fully respond to the discovery, you can have the defendant held in contempt and possibly brought into court to answer your questions. Post-judgment discovery, however, can be expensive and is usually cost-prohibitive unless your judgment is for a substantial amount and the prospects of collection are promising. It is a cost benefit analysis that must be undertaken by you with the input and advice of your lawyer.

Fraudulent conveyance issues and bankruptcy issues


Alabama, like most states, has a fraudulent conveyances statute providing that if the defendant conveys property (real or personal) without satisfying your judgment and does so in an attempt to avoid you as a credi-

tor, then you can have the conveyance set aside for your benefit. There are various statutory elements that must be met; you essentially have to prove that the defendant knew that you were a creditor and conveyed the property in order to avoid the debt. This intent can be shown if the property was sold to an insider, such as a family member, or sold for an amount not reasonably equivalent to the value of the property. This information can often only be obtained in post-judgment discovery.

If the defendant declares bankruptcy, all collection efforts, such as garnishments and executions, are stayed immediately upon the filing of the bankruptcy petition. Your recordings in probate are still valid and operate as a lien on the defendant's property, but you are required to release any garnishments or executions that are pending. Your judgment may also be in danger of being wiped out if the defendant has filed a Chapter 7 “no asset” bankruptcy and obtains a discharge. If the defendant has filed a Chapter 13 repayment plan, then you may be paid something under the plan over time if you file a claim. If your judgment was obtained and recorded more than 90 days prior to the defendant filing for bankruptcy, then your judg-

ment has secured status, giving you a far more advantageous position in bankruptcy court. Some judgments are not dischargeable, such as those based on embezzlement or fraud, so it is necessary to file a motion in the bankruptcy proceeding asking to have your judgment declared non-dischargeable. Consult your attorney as soon as you become aware of a bankruptcy to determine what your options are in a bankruptcy situation.

Conclusion

It is, of course, frustrating to endure the rigors of litigation and obtaining a judgment, only to find that your legal proceedings may not be over. Even though one may incur substantial additional effort and expense to recover a judgment, it may well be possible to be paid in full through various resources available through the courts. Your judgment continues to accrue interest at 12 percent per year once granted (or your contract rate, whichever is greater), and you are entitled to recover that interest as you recover the judgment amount. Working closely with your attorney to locate and execute on various assets to satisfy the judgment can be effective in finally obtaining what you always wanted in the first place: not just a judgment, but recovery of what is owed to you. 



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United States Supreme Court: Everything You Thought You Knew About Superfund Is Wrong

On May 4, 2009, the U.S. Supreme Court issued an extraordinary 8-1 decision with enormous ramifications for all persons involved, to any extent, in cleanups at sites under the nation's Superfund law. In issuing this ruling, the Supreme Court effectively overturned more than 20 years of accepted Superfund tax procedure and authorities.

The Court's ruling established the following dramatically new rules:

1. EPA cannot hold parties liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as “arrangers” for disposal of hazardous substances unless they intended their wastes to be disposed of;
2. Liable parties at multi-party Superfund sites cannot be held or presumed to be “jointly and severally liable” if a reasonable basis exists to apportion liability.

What is the practical impact of this decision? It will take some time before the effect of the new rules are clear, but it seems clear that the landscape of Superfund liability has been drastically changed, particularly for Potentially Responsible Parties (PRPs) negotiating settlements with the EPA concerning Superfund sites.


“Joint and several liability” in the Superfund context has historically meant that, in the context of a Superfund site where numerous parties had contributed to the site (such as, for example, a permitted hazardous waste disposal facility to which hundreds, or thousands, of businesses and individuals had sent hazardous waste through the years), each entity sending any amount to the site was, technically, considered wholly responsible for the cleanup costs. Thus, the large manufacturer that had sent enormous quantities of hazardous waste to the site was just as liable — no more and no less — than the company that sent only a small amount.

Interestingly, the “joint and several liability” concept is not found in the Superfund statute itself, and earlier lower court cases (as early as 1983 in the seminal decision of *United States v. Chem-Dyne Corp.*, 572 F.

Supp. 802) repeatedly stated so. Nonetheless, due to the difficulty in many cases of establishing a reasonable basis of apportioning liability (and the burden on defendants to obtain and produce evidence to do so), the concept was frequently used in CERCLA cases.

Although EPA negotiating procedures normally provided an opportunity for the PRPs to try to work out a division or apportionment of the liability among themselves based in part upon the amount and type of hazardous substance disposed of at the site, this rule gave the agency enormous leverage in bringing all PRPs to the table to agree to pay some amount. Up until now, EPA has been able to use the “big stick” of joint and several liability to persuade most PRPs at any specific site to agree to pay, irrespective of the small impact on the site one particular PRP may have had.

The Supreme Court decision turns the procedure whereby EPA has negotiated with PRPs for cleanup funds on its head. Now, if a PRP can prove that there is a “reasonable basis for apportionment,” EPA no longer has that big stick; instead, PRPs have a newly strong argument that if a reasonable basis exists, the liability must be apportioned.

While it is difficult to foresee at this time all aspects of the impact this decision will have in the real world, it is clear that the decision amounts to a dramatic change in the Superfund law and the manner in which negotiations between PRPs and EPA (and PRPs and each other) are conducted. *The Counselor* will present a thorough analysis of this decision and its practical import in the Fall 2009 issue, but for the time being, all persons involved in Superfund liability situations need to be aware of this decision. 



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