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## I've Got a Judgment! Now What? Collecting Judgments Under Alabama Law

Congratulations! You have now been through the entire litigation process and have obtained a money judgment in your favor. Someone owed you money — perhaps on an account, perhaps because of negligence in driving a car or for any number of other reasons — and did not want to pay you.

You may have sent a demand letter first, but eventually you had to involve the courts to issue a judgment declaring that the defendant owes you some sum of money. Now, all the appeal times and periods of stay have passed and you are left with the piece of paper saying that the defendant owes you money. The problem is the defendant still won't pay. Obtaining the judgment is often only half the battle when it comes to collecting the judgment amount from the defendant. If the defendant does not voluntarily pay the judgment, you must avail yourself of the procedures that exist to enforce your judgment and actually get your money.

### First Step: Recording Your Judgment

The first thing you need to do is to obtain a Certificate of Judgment from the Circuit Clerk's office and have it recorded in any probate court where the defendant owns real property. You are stayed by operation of law (that is, delayed) from executing on the judgment for a period of 30 days from the entry of the judgment for circuit court judgments and 14 days for district court judgments, but you can record the Certificate of Judgment in probate any time after obtaining the judgment. The Certificate of Judgment must meet the requirements of Ala. Code § 6-9-210 in order to be effective.

A Certificate of Judgment, once recorded, operates as an encumbrance on any real property the defendant owns in the county where your judgment is recorded. If the defendant owns property in a number of counties, then it is necessary to file the certificate in all of those counties. Upon the filing of the certificate, if the defendant tries to sell property, the prospective purchaser is presumed to have knowledge of your judgment. If the defendant tries to refinance a mortgage, your judgment becomes an issue. The judgment, however, becomes an immediate issue only if the transaction is being researched by a title company that is retained to provide title insurance on the property. Otherwise, the judgment may not be discovered, unless the defendant discloses it.

Nonetheless, even though the defendant can still transfer the real property where no title insurance is obtained or attempted (assuming anyone is willing to purchase the property in such circumstances), any person who purchases the defendant's property takes the property subject to your judgment. You can then enforce your judgment against that person to the extent of that specific property because it was purchased with constructive notice of your judgment; recording the judgment in probate court has the effect of putting the entire

world on notice of your judgment. You must record the judgment in every county where the real property is located for it to have the desired effect. Once recorded, it operates as an encumbrance for 10 years. It can then be renewed for another 10 years. While a foreclosure of any prior recorded mortgage will cut off your judgment with regard to the foreclosed real property, the judgment remains effective as to any other real property in the county in which the certificate is recorded.

### Second step: Execution and Garnishment Executing on Real Property

Once you record the judgment, you can execute and levy on the defendant's real property; that is, you have the sheriff sell the property on the courthouse steps to satisfy your judgment. Here's how it works: Assume your judgment is for \$50,000, and the defendant owns property that is worth \$150,000 and has no mortgage on it. You can have the sheriff auction the property, and if some third party buys it, you get the money to the extent of your judgment (the defendant gets any surplus). If there is no third party bidding on the property, then you can "bid in" your judgment amount. You will have to pay some fees to the sheriff for performing the auction, but you now own the property free and clear. The sheriff gives you a sheriff's deed

to evidence your ownership. Your ownership is subject to the defendant's one-year right of redemption, during which the defendant can, by paying the judgment, interest and any appropriate fees and taxes, regain ownership of the property.

A problem arises when there is a prior recorded mortgage on the property (for example, one that was recorded before you recorded your judgment). If you have the sheriff sell the property in this situation and you bid in your judgment, then you take the property "subject to" that mortgage, meaning that if the mortgage is not paid, then the mortgagee can foreclose on the property and take it from you. It has been held by the courts that taking title to a property at an execution sale and intentionally not paying the mortgage afterward is an act committed in bad faith. As a practical matter, only if there is substantial equity in the property would you want to execute on your judgment in this scenario. Take this example: Your judgment is for \$50,000, the defendant owns property that is worth \$150,000 and has a mortgage for \$50,000. You can execute on the property, bid in your judgment of \$50,000, pay off the mortgage, and still have \$50,000 of equity in the property.

### Executing on Personal Property

It was once a frequent practice in Alabama to execute on the personal property of a defendant (particularly automobiles). That is no longer the case. Presently, sheriffs are hesitant to take such actions due to the possible liability they will incur if the execution is improperly performed. For this reason, sheriffs now typically require that the judgment creditor take out a bond to protect them in the event of a lawsuit based on the execution. If the judgment is large enough or there are other factors making it worthwhile to purchase this bond, then this option is available for collection efforts. Any execution on the personal property will be subject to the limitations of any prior attached security interests in the property, similar to the real property situation described above (meaning, you must pay any prior attached car loans on the vehicle once you take it or the lender can repossess the car from you) and certain statutory exemptions for certain types of personal property.

### Garnishments

You should always look for accounts, employers or other sources of money to garnish. If the defendant has a bank account, any money in that account must be paid to you

once the bank receives your garnishment paperwork, which must be filed through the court. This includes any account held in the name of the defendant, with some limitations such as spendthrift trust accounts or exempt funds such as Social Security.

You can also garnish the defendant's employer. Once the employer receives your garnishment paperwork, it must pay into court up to 25 percent of the employee's weekly wages. The garnishment stays in place until your judgment is satisfied or the defendant changes jobs. If the defendant changes jobs, then you have to identify the defendant's new employer and send a new garnishment to that employer.

You can also garnish almost anyone who owes your defendant money. If the defendant is due to receive money from the distribution of an estate, you can garnish the estate. If the defendant is selling property and you did not have your judgment recorded in time to get paid off out of the closing, you should garnish the closing agent for the money that is due to be distributed to the defendant from the closing. Essentially anyone holding money that is due to be paid to the defendant must pay it to you if they are served with your





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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