

SEIZING ASSETS

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Published: The Network
December 2018

“In God We Trust: All Others Pay Cash”
American Proverb

We've all been there: waiting for that deadbeat tenant, borrower, guarantor, or another debtor to pay up. We send numerous – and often unanswered – demand letters, emails and phone calls to encourage these debtors to do the right thing. But usually, after months of frustration, most real-estate professionals hire a lawyer to chase the deadbeat. Then, after the lawyer sends numerous – and often unanswered – demand letters, emails and phone calls, a lawsuit ensues. If the debtor doesn't respond to the lawsuit, or if they respond but do not have a defense to the creditor's claim, the creditor obtains a judgment against the debtor for the amount owed, plus legal fees, interest, and court costs.

What Is A Judgment?

A judgment is an order (a decision) from a court stating that one party owes another party money. After obtaining a judgment, a lot of people have the mistaken belief that the debtor will finally pay up. But the judgment is just a piece of paper requiring the debtor to pay up – the judgment merely reflects the court's agreement that the debt is valid and the debtor is liable for it. The court cannot force the debtor to pay the judgment, and in the United States, “debtors' prisons” were banned under federal law in 1833. If your debtor is poor, dead, missing, in jail, bankrupt, or deftly hiding their assets, your judgment may be worthless. Also, if the debtor files for bankruptcy, your judgment is probably worthless, or worth just pennies on the dollar. Further, since federal bankruptcy laws require creditors to use the bankruptcy process to collect debts, if the judgment creditor doesn't follow the rules, the judgment creditor can be sanctioned by the bankruptcy court and forced to pay fines.

But First, Find the Non-Exempt Assets!

To collect on the judgment, you have to find the debtor's non-exempt assets. In some states, creditors can garnish an employed debtor's wages. However, except in limited circumstances (such as student loans, taxes, and child support), a commercial creditor cannot garnish a Texas debtor's wages, so your only avenue is to seize their non-exempt assets.

Before you start seizing assets, you have to find the debtor's non-exempt assets. Unfortunately, Texas' very “debtor-friendly” laws afford debtors a lot of protection. The main Texas exemption is the homestead exemption, which prohibits creditors (except your mortgage company and certain vendors that do work on a homestead) from grabbing a debtor's homestead or forcing a sale. Texas recognizes an “urban” and a “rural” homestead. An urban homestead cannot exceed ten contiguous acres of land, and a rural homestead cannot exceed 200 acres of land (or 100 acres for a single person). The homestead exemption protects the land and the structures – and there is no limit to the value. To qualify as a homestead, you must live on the land.

In addition to the generous homestead protection, Texas law exempts a lot of personal property from seizure. Currently, according to Texas Property Code Section 42, certain personal property, listed below,

up to an aggregate value of \$100,000 for a family or \$50,000 for a single person, is exempt from seizure by judgment creditors. The types of property subject to this exemption is listed in the property code, and includes the following long list of items: home furnishings and family heirlooms; provisions for consumption; farming or ranching vehicles, tools, equipment, books, boats and motor vehicles used in a trade or profession; wearing apparel; jewelry not to exceed 25% of the applicable limit; two firearms; athletic and sporting equipment, including bicycles; a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of a family or single adult; certain animals and forage on hand for consumption; household pets; and unpaid commissions for personal services not to exceed 25% of the aggregate limits.

The above list of non-exempt property is abundant, but if you can locate non-exempt property, such as cash, real estate (other than homestead), and other non-exempt valuables, you can seize them. Finding the assets can be a daunting, expensive, frustrating and fruitless task. Some debtors go to great lengths to hide assets. If a debtor hides assets by giving them to family members, friends, third-party trusts or entities after the debt became due, then you may still seize the assets if the debtor transferred them without proper consideration in an attempt to avoid the judgment.

Most creditors turn to the courts to help find assets. Even though the court will not guaranty payment on the judgment, they will stand by the creditor and aide in the collection efforts. The best vehicle for this is through post-judgment discovery. This process involves the judgment creditor sending a request for information and documents to the debtor inquiring about the debtor's non-exempt assets and financial ability to pay the debt. If the debtor does not respond, provides incomplete responses, or is evasive, the creditor can go back to the court and seek sanctions in the form of monetary penalties or even jail time against the debtor. But squeezing information from the debtor can be frustrating, time-consuming, expensive, and sometimes fruitless.

These days, creditors also turn to the Internet to find assets. Even public, governmental websites, like the Texas Secretary of State, Texas Comptroller, appraisal districts, and county clerk's offices, are often vital sources for searching assets. Private online companies, such as TLO, Accurint and Public Data, are also helpful tools for uncovering assets. Another common approach to find non-exempt assets is to hire a private investigator. But you should always be sure to hire an experienced, licensed, and reputable private investigator. However, despite best efforts, you may never find any non-exempt assets that are worth seizing.

Eureka! We've Struck Non-Exempt Assets!

If the non-exempt asset search is successful, creditors can set their sights on seizing those assets. First and foremost, creditors need to record an abstract of judgment in the real-property records of every county where the judgment debtor owns real property. Since the cost to file the abstract is nominal, many creditors will take a "shotgun" approach of filing an abstract of judgment in the obvious counties where they suspect the debtor might own property. Also, one can file an abstract of judgment to attach to future property. For example, if the debtor's parents live in Austin, you can file an abstract of judgment in Travis county in case the debtor inherits their parent's house someday. The abstract of judgment places a lien on any non-exempt real property that the judgment debtor owns in each county where the abstract of judgment is recorded. Caution must be taken to avoid filing an abstract of judgment against the debtor's homestead. Since commercial creditors cannot lien a homestead, the creditor can be liable for "clouding" or "slandering" the debtor's title. If the lien interferes with a debtor's sale or refinance of their homestead, then the creditor may be liable to the debtor for damages. The abstract of judgment is valid for ten years, and it can be extended for additional ten-year periods if it is renewed before the expiration date. The abstract of judgment puts the world on notice that the debtor's property is subject to the lien. The abstract of judgment will show up during a title or lien search and will require the debtor to pay off the

claim before selling the property. Most title companies require the lien to be released before they issue a title policy for the purchaser and lender.

Typically, the abstract of judgment is a “wait and see” approach to collections. However, there are some more proactive approaches. For example, the Texas Civil Practices and Remedies Code Section 31.002 allows creditors to seek a turnover order. A turnover order is a court order requiring the debtor to turn over the non-exempt property to the court to satisfy the judgment. If the debtor fails to turn over the property, they can be held in contempt, which may lead to monetary sanctions and jail time.

Section 31.002 also allows the appointment of a receiver, which is especially common with business debtors. The receiver has the authority to take possession of the non-exempt property, sell it, and pay the proceeds to the judgment creditor to satisfy the judgment. Receivers are court-appointed “watchdogs” that are granted extensive powers over the judgment debtor. Receivers can be expensive, and typically a receivership is akin to a forced liquidation of the debtor’s business.

Additionally, after thirty days have passed since obtaining the judgment, a creditor can obtain a “writ of execution” from the court. The writ permits a Texas constable to seize the judgment debtor's non-exempt property and sell it at auction. The proceeds of the sale are used to satisfy the judgment. This is not a free service, however, and if there are no (or not enough) non-exempt assets, then you could end up paying the constable more for the fees than you collect from the asset sale. Therefore, the writ of execution is usually only conducted if the creditor is aware of specific assets. However, sometimes the presence of a constable searching through a debtor’s stuff motivates them to pay.

Even though Texas does not permit wage garnishment for commercial creditors, a judgment creditor can obtain writ of garnishment to seize the debtor’s property in possession of third-party banks or other entities. Before you can exercise this option, you must locate the debtor’s bank account (and hope there is still money in it). If funds are found, a writ of garnishment can be a simple process, and banks are typically cooperative.

In Texas, the post-judgment collection process can be challenging. This is especially true when dealing with consumer debt collections, which, by the way, are not addressed in this article. Every person or company that acts as a creditor or lender (in some form or fashion) should understand the collection process, as well as your rights and limitations. If you know the collection process, you will be in a better position to underwrite the risk before you agree to it.