THE DEFENDANT HAS NOT WRITTEN YOU THE CHECK NOW WHAT?

BY DAVID J. COOK

You're making your closing statement. Twelve sets of eyes are looking at you—intently. No one breathes, not even you. You look at your notes and start—yes—at the beginning. The plaintiff met the defendant. The plaintiff and the defendant entered into the business deal. The defendant is obligated to ship the products, render the services, or fulfill the contract. Fueled by insane greed, the defendant and his conspirators stonewall the plaintiff. Why? Because the defendant is a mean, rotten person. He is going to pay for his apocalyptic breach and compensate the plaintiff for the enormous losses. No amount of money could compensate the plaintiff, but—if you please—let's start with something a little more than $10 million. That number looks about right.

Your closing is flowing elegantly. The charts, the diagrams, the experts, the cutting-edge calculations of damages, the contradictions, the forged letters, and the defendant's heinous lies and the hideous misstatements all flood the courtroom. Now comes the pièce de résistance: the defendant's secret felony conviction from long ago for fraud. Zeus' thunderbolts scar the courtroom walls. Even the judge ducks. You say, "Justice exacts its price and today is the day to pay."

You have delivered a 12-cylinder closing, which is greeted with spontaneous combustion. You are finished and you look over at the defendant's table. Everyone around it is huddled up. Hmm? Let's see. Something is new here. You see the defendant—OK. There's the defendant's first chair counsel—OK, you've seen her before. There's the Second chair counsel—you've seen her too. You don't notice anything new. But wait! Who's the new guy huddled with the defendant? You remember him. Oh, no! He's the author of the best-selling book, *Offshore Trusts,* 3rd ed. He's the 13th juror, and he's here, and the defendant is taking a lot of notes. Houston, we have a problem.

What do we do? Well, you can do a lot. These are your options for what to do before the 13th juror shows up.

Once you have finished making your closing statement, and you are faced with waiting for a decision from the trier of fact—be it a judge or a jury. For a jury, we're talking about hours, days, or maybe even a week. For a judge, the wait can be days, weeks, or even months. Federal Rule of Civil Procedure 64 can provide some guidance. Because judgment has not been entered, you are entitled to all prejudgment remedies even though the case is nearing the end. At the end of the case, the defendant is highly motivated to fraudulently convey everything of value that he or she owns.

Can you get a writ of attachment under Fed. R. Civ. P. 64? Most states demand proof of exigency, such as the

threat of a fraudulent conveyance, dissipation of assets, or leaving the state. Other states, such as California, have a reduced standard and, depending upon timing, you might be able to secure an attachment based on the fact that the claim is based on a contract—express or implied—in which the amount is fixed, is readily ascertainable, and arises out of a commercial setting. Getting the attachment prior to judgment and encumbering the defendant's assets becomes the intense, if not determinative, focal point of your case when you face off on the upcoming stay motion under Fed. R. Civ. P. 62(d).

Can you get a general equitable restraining order outside the parameters of Fed. R. Civ. P. 64? You probably cannot, because federal equity does not grant federal courts the inherent equitable power to impound the defendant's assets unless the complaint has a statutory claim allowing an asset to be frozen or a similar equitable remedy—such as a constructive, resulting, or actual trust, or a state law—provides for a prejudgment restraining order.[1]

Do you have a tort claim but want a writ of attachment? At the outset, you can waive the tort, sue on the contract claim, and attach the defendant's assets. Try assumpsit. The

bunny that comes out of the federal judge's hat is the lien on the defendant's assets.[2]

In the banking industry they say that you should know you customer. In enforcement, you should know your debtor but expect the worst. If your action might prompt the debtor to fraudulently convey or re-title assets in a successor corporate shell, or if the assets might be dissipated, rethink your venue and select a district where the local law is creditor-friendly and where the debtor's assets are located in order to enable the U.S. marshal to execute the judgment under your writ of attachment and ensuing judgment. Venue is the yellow brick road.

Where do you look for a fraudulent conveyance? There are a number of ways to do this:

- Check the recorder's office for the fraudulent conveyance of the defendant's real property or the recording of a bogus deed of trust, grant deed, or any other conveyance.
- Run the Uniform Commercial Code (UCC) search to locate a bogus financing statement.
- Run the name of the defendants and all family members through the secretary of state to see if any member is now the president of a new corporation or limited liability company.
- If the defendant is a male, use his wife's maiden name to find out if she is the officer, director, or shareholder of any corporation or limited liability company.
- Go to the city, county, or other taxing authority with a subpoena in hand to see if the defendant took out a city business permit.
- Run a search through the county recorder to find any bulk transfer notices.
- Send someone to the defendant's premises to see if a "FOR SALE" sign is posted and find the name of the broker. Check with multiple listing services, call a local broker, and search for the property on the Internet. Most homes are now listed on Web sites.
- Send someone down to the defendant's business to see if any moving trucks have pulled up and, if so, find out the name of the moving company.

You really have to take one or several of these steps. The defendant is not going to write you a check after you have destroyed his or her business and engaged in vitriolic character assassination.

Where do you start?[3] You have many tasks ahead of you and each is important. Under Fed. R. Civ. P. 62(a), the defendant gets an automatic 10-day stay of enforcement of the judgment when enforcement flows from Fed. R. Civ. P. 69 (not from Fed. R. Civ. P. 64). However, the recording of the judgment or abstract with the county recorder does not contravene Fed R. Civ. P. 62(a). As soon as the judgment is entered, you should go to court yourself and obtain an abstract, certified copy, and record in every probable and possible county.[4] It is important not to make the mistake of mailing the abstract to the court and letting the legal assistant or secretary record it after issuance. Doing this can cause you to lose a month because of delays, and the defendant can exploit this delay and escape the judgment by refinancing his or her real property and waltzing off with millions of dollars of real estate equity squirreled away in some offshore account. Just because you are prompt does not guarantee that you are secure. Moreover, the 90-day clock to file for bankruptcy preference has started running.

After the judgment or abstract has been recorded, you should purchase a litigation guaranty—others call it a "lot book guaranty"—to confirm your position and your recording and ask the title company to "date down" the report to the current date. Most title companies sell you reports that represent the title as it was recorded two weeks prior to a request. The day that the judgment is uploaded might be the day that the debtor's house is blanketed with a suspicious deed of trust, but your title report might miss that information. Horrors lurk in those two weeks.

Stays are prospective only and cannot release a prior perfected lien or levy. Absent a statutory error, the court cannot unwind a consummated lien or levy.[5] Stays seek to prevent liens or levies and, if completed before the court issues a stay, any relief becomes irrelevant. Article III of the U.S. Constitution prevents the federal courts from issuing advisory opinions and limits courts' jurisdiction to "cases and controversies."[6] Once the 10 days under Rule 62(a) have elapsed, you should levy every asset of the debtor as soon as you can.

Let's talk about the intersection of attachments under Fed R. Civ. P. 64 and stays under Fed. R. Civ. P. 62(d). Rule 62(d) authorizes the court to impose a stay of execution under a judgment on appeal. Rule 64 incorporates the law of the domicile state authorizing a prejudgment attachment. If you can attach the debtor's assets as they were before the judgment, a Rule 62(d) stay would be blunted considerably, because you would have security and a hope of potential payment. Of course, the judgment debtor's argument is that the Rule 62(d) stay should not be bonded, because you have an attachment and an alleged expectation of payment.

As a practical matter, upon judgment or even earlier, you should work up the entire enforcement package, such as filing a Fed. R. Civ. P. 4.1(a) application and order, the writ of execution, post-judgment subpoenas upon third parties, and the U.S. Marshal (USM) 285 forms. You *do* have a slight advantage. Judgment creditors can levy assets quicker than judgment debtors can file motions for a Rule 62(d) stay. The process is reminiscent of the shoot-out at the OK Corral: Executed levies trump ensuing stays. Getting out of the starting gate first means getting paid.

What about an eternal unbonded stay on appeal? Unlike state law, Fed. R. Civ. P. 62(d) provides the defendant with a possible perpetual unbonded stay pending appeal. An individual or small corporate defendant faces an uphill battle, particularly if the judgment is large and must provide a plan that will make the plaintiff secure.[7] Larger corporate entities and governments—such as cities, municipalities, counties, and police departments—have an easier burden. In opposing an unbonded stay, defendants tend to have a slight edge because they can make representations about

their financial condition that are difficult to rebut early in the game.

The best defense to fend off a stay is to argue that any stay be limited to 30 days, during which the defendants will voluntarily do the following:

- make themselves available for a debtor's examination,
- produce all financial and banking records requested,
- stipulate to a restraining order,
- represent that they have not previously consummated a fraudulent conveyance and will not do so in the future, and
- produce the accountant and records.

If defendants balk at taking these steps, few judges will grant them a stay, particularly when they decline to provide financial information that would assure that the plaintiff will be paid at the end of the appeal.

What is the heart of a Rule 62(d) stay? It depends on whether the defendant can pay the judgment at the end of the appeal, what the plan is, and the likelihood that the defendant's appeal will be successful.[8] A stay motion is tougher than you think, because opposition to the motion for a stay becomes a glorified opposition to the JNOV, motion for a new trial, or the answering brief itself. You really have to work at the merits of the potential appeal and convince the trial judge that you are going to win based on what the circuit court might do. Think of this as the rehearsal for the appeal.[9]

Stay orders are not monolithic; you have a little wiggle room.[10] The court has enormous discretion in ordering a stay even if the appeal is likely to be unsuccessful. If the court is going to stay enforcement of the judgment, you should ask the court to set several conditions before the stay is granted: (1) that the debtor provide periodic financial statements; (2) that the debtor be restrained from disposing of assets outside the ordinary course of business; (3) that the debtor maintain assets, cash, and a balance sheet; and (4) that the debtor's financial condition remain unimpaired during the appeal process.[11] Be prepared to bargain. Unless the following has already been done, you should bargain to record and file liens that protect against competing creditors and looming bankruptcy. Be more prepared to execute upon the debtor's assets if the debtor defaults.

Who is going to enforce this judgment? Although it is sometimes understaffed and subject to policy pressures in the deployment of personnel, the U.S. Marshals Service—bless its heart and zeal—is responsible for enforcing the judgment. Chasing felons who are on the run has higher priority than chasing deadbeats on the lam. Tommy Lee Jones didn't win an Academy Award® for "The Fugitive" by serving subpoenas. The FBI's Most Wanted List will never feature your debtor. Many marshals will not serve basic process such as garnishments, and the process server may be your only remedy. Whether you can get the marshal or a private process server to serve enforcement order, you are responsible for the preparation of virtually all enforcement paperwork. The gatekeeper is the USM 285 form—a five-part carbon-paper-backed form that requires that the judgment creditor use a *typewriter* to complete the form properly. (For those of you who are less than 35 years old, the terms "carbon paper" and "typewriter" conjure up images of black-and-white television sets, rotary-dial telephones, and music one could understand.) However, check with your marshal to see if electronically produced forms will suffice.

Does this crisis make you long for your old law firm: Smith and Corona? Is your former partner Jacob Marley? Does the name "Remington" ring a bell? Have heart, if you can beat Perry Mason in court, you can master this challenge. Lexmark offers a wide selection of memory typewriters that cost between about $800 and $1,200. Why a memory typewriter and what is that? Let's say that you do not know where the judgment debtor does his or her banking, but you have the debtor's list of customers. You have the writ of execution in hand along with the process server's order under Rule 4.1(a), and the automatic 10-day stay of enforcement of the judgment under Fed. R. Civ. P. 62(a) has passed. If you proceed to levy the judgment debtor's customer base, you will need to type up potentially hundreds of USM 285 forms. That's a lot of typing, and that's why you need a high-speed memory typewriter. Remember to order spare ribbons.

How do you find the debtor's bank account? Ethan Hawke is not going to steal this information for you and money might be at hand. Here is a better approach: If you reach a bank account close to employees' payday, the judgment debtor's payroll check will bounce, prompting a mass migration of the debtor's employees to go to the local labor commissioner, who might take swift—and very painful—action against the employer. The place to start looking is with your own client, who might have banking information, Dun & Bradstreet rating (available online), or even the client's own check, which might have endorsement information. Another option is to run a UCC search. Many lenders, old or new, will demand that their borrower—your debtor—bank with them as a condition of the loan.

If all this fails, depending on your state, you can proceed with a blanket levy of every bank within one mile—less or more. In my firm's experience in this area, the record was about 65 banks in which we found the payroll account, leading to zillion payroll checks bouncing, which compelled the judgment debtor to post a $6.7 million bond to cover a $4.5 million judgment. If you want to levy every bank in town, typically you will need one USM 285 form for each bank. And don't forget the typewriter service contract: typewriters are mechanical and need maintenance.

Did you know that the venue might effectively give the judgment a stay under 28 U.S.C. § 1963? Typically, most plaintiffs select a venue after assessing the plaintiff's convenience, the defendant's inconvenience and expense, access to witnesses, and physical evidence. However, after judgement, you look around for assets that can be levied in the district and find none, because you sued the defendant where the incident occurred not where the defendant is located. Can you levy the defendant's assets outside the

state? If the defendant is located in another state or district, you need to register the judgment in the other district under 28 U.S.C. § 1963. Why is this a problem? You won the case, and you want to collect your judgment, but on appeal the debtor has not moved for a stay and has not posted a bond. What is wrong? Section 1963 will only let you register a judgment that is final, meaning that all appeals have been exhausted or the time to file an appeal has expired. However, § 1963 gives the court the discretion to permit you to register the judgment in another district if you have good cause for doing so.

This is another teachable moment, because the trial court has wide discretion to let you "get out of Dodge" and enforce your judgment in another district. The court may view your motion as a surrogate stay motion under Rule 62(d), in which you are now the moving party, as opposed to the judgment debtor's seeking a stay. If the court wasn't thrilled with your case and sees the appellate court riding to the defendant's rescue, you might never leave Dodge, and you are left with a perfect unbonded stay on appeal. You might eke out an evergreen restraining order from a district court that prohibits the judgment debtor from disposing of his or her assets. However, clever defense counsel might demand that the restraining order be supported by a large dollar bond, thereby turning the tables on you and placing the judgment creditor at risk in the event of a loss. Restraining orders that are dissolved involuntarily entitle the party suffering the constraint to file a potential claim for damages and attorneys' fees, including fees incurred in lifting the restraining order or perhaps the entire appeal. This scenario sounds like a scene in "My Cousin Vinny."

However, if you're faced with this problem, all is not lost. You have a remedy, and § 1963 provides a cumulative one. You can bring an independent action on the judgment. You are free to pursue an independent action in a different jurisdiction, even though the judgment is on appeal but has been not stayed. Filing suit is a remedy in such cases, but better yet, you should seek immediate relief in the state court in order to prevent the judgment debtor from dissipating assets;[12] and, if in federal court, you should seek to attach the assets under Rule 64. A judgment, even if based on a tort, will support an attachment. Facing a Rule 62(d) unbonded stay motion, pending appeal, or suit on the judgment in other district or state, pending appeal, you must not fail to attach the assets under Rule 64.

What can you do? Let's take this problem from the top. You are litigating a major and difficult case, and the defendant didn't jump over the net to shake your hand. You can recalibrate your venue selection to ensure that the defendant's assets are located in the venue you have selected. You should sue where you can collect if the risk of collection outweighs the tactical (or even strategic) advantage of a venue that is distant to the defendant.

Let's try a little heresy now—talking about fleeing from the federal court. (After all, this article appears in *The Federal Lawyer*.) Your judgment is final and the judgment debtor is not paying. Why are you still in federal court? That's a valid question that should be examined. In short, you should leave the federal court and go to state court. As Ray Charles sang so many years ago, "Hit the road, Jack, and don't you come back no more.

You can file suit in state court and reduce your federal judgment to a state court's judgment. Don't leave too fast, though. You might want to stick around if you are contemplating a post-judgment motion to amend the judgment to add alter egos or pursue post-judgment injunctive relief. After all, state law imbues the court with broad post-judgment equitable powers.

Is taking your case to a state court a smart move? Yes, it is. Federal judgments today accrue interest at a rate that is lower than 1 percent, whereas state judgments charge interest somewhere between 8 percent and 10 percent. California provides 10 percent interest per annum on judgments, and New York provides 9 percent—and these two states are on the lower end of the spectrum. Alabama, Georgia, Kansas, Kentucky, Massachusetts, North Dakota, Rhode Island, South Carolina, Vermont, Washington (state), and Wisconsin all provide 12 percent interest per annum on judgments. Consider this example: a $10 million judgment made by a California state court accrues interest of $1 million a year, whereas a $10 million judgment by a federal court accrues interest of $100,000 a year. The California state court judgment doubles every 10 years—totaling $20 million in interest in this example—whereas, for the same period, federal court judgments (assuming interest rates do not change) would lead to only $11 million. Most states provide for simple interest. Kentucky compounds 12 percent interest annually;[13] thus, after 10 years, a $10 million judgment reached by a Kentucky state court judgment becomes an award that totals more than $31 million. The difference is eye-popping.

State courts also provide for a law and motion calendar on a daily basis. Some larger courts (those located in Los Angeles and San Francisco, for example) have designated court commissioners who handle all post-judgment matters daily and who are extremely proficient and experienced. Most counties provide for a sheriff's civil department, each of which has a large and specialized staff that handles civil enforcement as a routine matter and regularly installs keepers (to take money out of the till); seizes autos, boats, planes, inventory, and machinery; sells real property; and serves garnishments (some of which, but not all, demand that you have a private process server). Sheriffs do not require a typewritten form, such as the USM 285 form, so you don't need to type.

Why stay in federal court when "Collection Valhalla" is so close by? That's a good question. Federal judgments can be recycled in another district through the simple registration process under 28 U.S.C. § 1963, and you are free of compliance with the requirements of the Sister State Judgment Act, which can be cumbersome and time-consuming. Federal courts have potentially nationwide jurisdiction over the defendant. But the best reason is that you have a federal judge who believes that the defendant will continue to victimize the plaintiff through an asset protection scheme and who can motivate the defendant to pay you. Understanding what the court might do for you requires a little hunting through local state post-judgment remedies.

Buried near the statutory section authorizing "supplemental" proceedings (as opposed to enforcement through direct execution), most states authorize the state court judgment to "order the sheriff to take any action. ... If the court determines ... the interest of the parties will be best served by order"[14] or by any other relief in the interest of justice. With the right remedy, you might achieve the right result.

One of my favorite quotes from Shakespeare is from "Henry V": "We few, we happy few, we band of brothers" (Act 4, Scene 3). However, for this article, a more fitting quote is from "Romeo and Juliet": "What's in a name/That which we call a rose by any name would smell as sweet" (Act 2, Scene 2). Let's say you have a default judgment. You sued Pamela Black but her real name is Paula J. Black. You served the right person, and the facts are generally correct. But you just got the defendant's first name wrong. After the judgment has been reached and some time elapses, you apply ex parte to the court to amend the judgment to show the true and correct name, and you have abstracts of the judgment issued and recorded. Years pass and you earn interest at 0.9 percent per year (about 10 percent, if the case was heard in a state court). The real Paula Black seeks to set aside the judgment. In a case heard by the California Court of Appeal, Fifth District—*Manson, Iver & York v. Paula J. Black*, 176 Cal. App. 4th 36, WL 2280179 (5th Dist. July 30, 2009)—the court held that the complaint against Pamela Black did not impart notice, ruled that the subsequent effort to amend the judgment was without notice and opportunity to be heard, and affirmed the trial court's vacatur of the judgment based on extrinsic fraud. This case truly was a teachable moment, which clearly demonstrates that you need to name the defendants *carefully and accurately*, taking great pains to ensure that you include their original native or ethnic names.

Remember that this is 2010 and you are in America, the "great melting pot." Chances are that a defendant whose first name is Joe" and whose surname has, say, 10 to 15 letters was not originally named Joe. Some cultures—such as Chinese, Japanese, and Korean—invert surnames and first names. Other cultures have a string of middle and last names. In addition, John Jones and John Jones II are not the same person, and chances are that "Freddie Schnookerdooker" was probably born "Alfred Von Schnookerdooker III." Names emanating from countries with non-Western alphabets can be very perplexing. "Farad" becomes "Fred," and "Ali" becomes "Allen." At one time Barack was called Barry—but not for long. On this point, the bard is wrong: If you want to sue Rose, you need to spell her name correctly.

This battleground over names is epic. To ensure that you have the name right, the first task is to obtain deeds of trust in favor of any lenders, who typically work very hard at spelling their customers' names correctly—or at least, one hopes the lenders get the names right. If you have sued Allen Jones but find that he executed a deed of trust in the name of Robert Allen Jones, you either have an incomplete name and need to correct it, or his property is in the name of someone else, leading to an enforcement crisis down the line. Searches through the secretary of state's office are equally helpful, as are commercial searches.

Movie buffs say that 1939 was the greatest year in movies—after all, "Gone With the Wind," "The Wizard of Oz," and "Young Mr. Lincoln" all came out during that year. But what was the greatest year for the U.S. Supreme Court? Starting with *Brown v. Board of Education*, every year has been a banner year for the Court. For me, the Court's best year was 1909, because that was the year the Supreme Court decided *Fall v. Eastin*, 215 U.S. 1 (1909). To be sure, *Fall* doesn't have the same pizzazz that *Miranda*, *Escobedo*, and *Loving* enjoy, but *Fall* stands for the proposition that a court having in personam jurisdiction over a defendant can compel the defendant to transfer property (real estate in that case), even though the court may not have jurisdiction over the property itself. As a result of this ruling, absent compliance, the defendant stares down the barrel of contempt.

In an enforcing a judgment, why is *Fall* your savior? Most states—California, for example—provide the judgment creditor with the remedy of an assignment, turnover, and restraining order, compelling the judgment debtor to assign or turn over property either to the judgment creditor or to a U.S. marshal and restraining the defendant from any other disposition of the property.[15] Assuming that the defendant is located out of state and assuming that the receivables that are due to the defendant are sited in a third-party jurisdiction, an assignment, turnover, and restraining order (in California, this is an assignment order, as is common in many states) entered against the judgment debtor in federal court becomes your most powerful weapon, because you can compel the judgment debtor to turn over the receivables, revenue stream, and cash receipts to you or to the U.S. marshal. If you have a true assignment order, you can serve the judgment debtor's customers and really create havoc. Investing in a 44-cent stamp might yield millions of dollars.

You probably have a list of your top 10 favorite movies, and it probably includes "Casablanca," "Citizen Kane," "Singing in the Rain," "The Godfather," "The Godfather, 2," "The Bridge Over the River Kwai," and "The Wizard of Oz." But my favorite movies are "The Towering Inferno," "The Naked Gun" and its sequels, "Capricorn One," and "Frogman." You may think this is a strange list, but these are my favorites for one simple reason: My firm obtained an order assigning the movie residuals due from O.J. Simpson's movies to be paid to Fred Goldman. Every quarter, we receive a nice, crisp check for the "Naked Gun" movies from Paramount Pictures; not that much, though, for Capricorn One.

I'm willing to bet that "Lawrence of Arabia" is one of your favorites, it certainly is one of mine. Not long ago, in a drunken rage, Omar Sharif punched a parking lot valet who had refused to accept a 5-euro note to release the actor's car. The district attorney prosecuted Omar Sharif on battery charges, and Sharif plead guilty. The lawyers in the civil case won a judgment in excess of $300,000. My firm got the case and ended up securing an assignment order for Omar Sharif's movie residuals.

If the judgment debtor violates the assignment, turnover, and restraining order, you have the power of con-

tempt, which, if teed up properly, will focus the judgment debtor's attention on the issue at hand—that is, paying the judgment. 28 U.S.C. §§ 1963.

Do you get junk faxes? My favorites are from the bank account locators. For $100, they guarantee to locate your judgment debtor's bank and bank account number. But this is not a very good way to find information. The more effective way is to pursue post-judgment discovery under Fed. R. Civ. P. 69(a)(2), which provides dual remedies. You can proceed under local state law that allows you to hale the debtor and third party into court for a detailed "debtor's examination and production of records" or you can turn to Fed. R. Civ. P. 26 to 37 et seq. Which rule should you look at and where should you start? The answers depend on where your debtor is and how amenable he or she is to service of an order to appear in court.

If your debtor is domiciled in the district and reasonably susceptible to being served with an order to appear in court and produce documents, you should proceed with your state court remedies, which are regimented and well-understood by district court personnel—particularly by the magistrate judge who typically supervises the examination. Getting the judgment debtor in front of the district court or magistrate judge for an examination serves as the platform for post-judgment supplemental orders, such as restraining the debtor from selling or disposing of property, directing the debtor to disclose assets and turn over assets that have been transferred or secreted, compelling the assignment of a receivable due the judgment, and retaining continuing jurisdiction to ensure enforcement of the judgment. The court can also compel the judgment debtor or a third party to turn over to the U.S. marshal the assets that were discovered during the examination. Local state law also provides for post-judgment interrogatories and document requests.

At the debtor's examinations, you can also subpoena third parties to turn over a wide assortment of financial records. If you find that the judgment debtor has gone through any loan transactions, which is usually evidenced by a deed of trust or a filed financing statement, the judgment debtor has usually provided the lender with vast financial information—probably more than you would have obtained through a debtor's examination.

Your other option is federal post-judgment discovery, particularly if the judgment debtor and third parties are not susceptible to post-judgment service of an order to appear or to a subpoena or another process. Fed. R. Civ. P. 69(a)(2) gives you the option of post-judgment discovery through Fed. R. Civ. P. 26 to 37.[16] Post-judgment discovery might get you some information, but the object sometimes is the debtor's default, leading to a motion to compel and contempt, which per se is your best vehicle to compel the debtor to post a full bond, face dismissal of the appeal, or even pay the judgment.[17]

These suggestions should get you started. Winning is great, but collecting is better, and from the day of the disaster befalling the plaintiff, the defendant seeks to shield the assets to impede collection. If you embrace this mantra from the outset, you will recast your entire litigation strategy from venue, pleadings, any prejudgement remedies, the stay motion, and post-judgement remedies.

The punchline in this article is the following: Unless the defendant is going to write you a check after the appellate judge slams down the gavel, recalibrate venue to the locale where you can readily attach and execute upon the defendant's assets. Be Admiral Horatio Nelson: "Engage the enemy more closely." **TFL**

Since 1975, David J. Cook has maintained Cook Collection Attorneys PLC in San Francisco, a practice in the enforcement of judgments, collection of debts, and insolvency. Currently, Cook represents Fred Goldman in his historic quest to recover from O.J. Simpson and is part of the team representing Marine families seeking to recover a $2.7 billion judgment against Iran. *The author wishes to thank Robert J. Perkiss and Nathaniel Dunn of the California bar and Matthew Baron of the New York bar for their insight, scholarly research, and editing.* *© 2010 David J. Cook. All rights reserved.*

Endnotes

[1]In *Grupo Mexicano De DeSarrollo v. A.V. Alliance Bond Fund Inc.*, 327 U.S. 308, 338–39 (1999), Justice Ruth Bader Ginsburg stated the following in her dissent: "But as the facts of this case so plainly show, for creditors situated as Alliance is, the remedy at law is worthless absent the provisional relief in equity's arsenal. Moreover, increasingly sophisticated foreign-haven judgment proofing strategies, coupled with technology that permits the nearly instantaneous transfer of assets abroad, suggests that defendants may succeed in avoiding meritorious claims in ways unimaginable before the merger of law and equity." *See* Lynn M. LoPucki, *The Death of Liability*, 106 YALE L. J. 1, 32–38 (1996). Had *Grupo* been decided in 2009, Justice Ginsburg might have remarked that a ne'er-do-well debtor could transfer millions through a cell phone in the courthouse elevator.

[2]Prejudgment attachments sometimes require large bonds, making this remedy virtually inaccessible. In picking a venue, you should consider the state's prejudgment attachment as the key consideration. Florida Civil Practice and Procedure § 76.12 requires a bond that is twice the amount of the claim. California Code of Civil Procedure § 489.220(a) sets the bond amount at $10,000 regardless of the amount of the claim. The amount of the bond can be case determinative. What Justice Scalia meant to say is that the venue is determinative. Attachments might arise from a mixed bag of contract and tort claims, and framing the claim as a contract claim serves as a platform for an attachment. *See Arcturus Mfg. Corp. v. Rork* 198 Cal. App. 2d 908 (2d App. Dist. 1961) and *Rosenberg v. Bullard* 127 Cal. App. 315 (2d App. Dist. 1932).

[3]As far as the steps you need to take in this situation, you are in good hands. The federal court has jurisdiction to enforce its own judgment, and this includes a broad range of supplemental proceedings involving third parties to assist in the protection and enforcement of a federal judg-

ment but linked to local state law remedies. *See Peacock v. Thomas*, 516 U.S. 349, 356 (1996).

[4]Racing to the courthouse is what you should do despite what Justice Scalia says. *Grupo, supra* note 1, at 331. My advice is to run faster. Rule 62(a) does not prohibit the recording of an abstract of judgment. *Yusov v. Yusuf* 892 F.2d 784, 785, note 1 (9th Cir. 1989).

[5]*See Gencorp v. Olin Corp.*, 477 F.3d 368 at 376 (6th Cir. 2007). This case shows that promptness pays.

[6]*See* U.S. Const., Art. III, § 1.

[7]*See Miami Int'l Realty Co. v. Richard Paynter and Paynter & Hensick P.C.*, 807 F.2d 871 (10th Cir. 1986); *see also Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794 (7th Cir. 1986); 4 Fed. R. Serv. 3d 708; *Advanced Estimating Sys. Inc. v. Riney*, 171 F.R.D. 327, 328 (S.D. Fla. 1997).

[8]*See Barber v. State of Hawaii* 42 F.3d 1185, 1199 (9th Cir. 1994). *See also Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685, 686 (5th Cir. 1968). This is a very illustrative case.

[9]The last stay my firm opposed was heard by the magistrate judge, which indicated that the Article III judge who had heard the case had not commited reversible error in various evidentiary rulings, and the ruling was upheld. *Boyd vs. City and County of San Francisco*, 576 F.3d 938 (9th Cir. Aug. 7, 2009).

[10]For collection of cases, *see Fed. Prescription Serv. Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 758–59 (D.C. Cir. 1980).

[11]*See Poplar Grove Planting and Refinery Co. Inc. v. Bache Halsey Stuart Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979); *see also C. Albert Sauter Co v. Richard S. Sauter Co.*, 368 F. Supp. 501, 520–21 (E.D. Pa. 1973). District courts have inherent discretionary authority in setting supersedeas bonds. In *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154–55 (2d Cir. 1986) the court stated the following:

> A judgment creditor's primary concern when a judgment in his favor is stayed pending appeal is that he be "secure ... from loss resulting from the stay of execution..." In making that determination we look to general equitable principles. Accordingly, when setting supersedeas bonds courts seek to protect judgment creditors as fully as possible without irreparably injuring judgment debtors.... A full supersedeas bond may be required "where there is some reasonable likelihood of Defendant's inability or unwillingness to satisfy the judgment in full upon ultimate disposition of the case and where posting adequate security is practicable," whereas no bond or a reduced bond would suffice when the creditor's interest, due to unusual circumstances, would not be unduly endangered. ...

[12]*Urban Indus. Inc. of Kentucky v. Thevis*, 670 F. 2d 981, 985 (11th Cir. 1982). A more illustrative case is *Meridian Investing & Dev. Corp. v. Suncoast Highland Corp.*, 628 F. 2d 370, 373 (5th Cir. 1980). A judgment might support an attachment. *Grotheer vs. Meyer Rosenberg Inc.* 11 Cal. App. 2d 268 (1st App. Dist. 1932); *see also* Halsey, William Frederick Jr., *Dispatch, Battle of Santa Cruz* (Oct. 26, 1942) (My apologies for the slight changes, but the message is the same.)

[13]Kentucky Rev'd Stat. 360.040, which makes it clear that money is money, courts render justice, and you render recompense—the combination is vindication.

[14]Cal. C. Civ. Proc. 699.070(a). In *Fred Goldman v. O.J. Simpson*, the court ordered the Sacramento County sheriff to auction Simpson's rights to his book entitled *If I Did It* on Tuesday, April 17, 2007. On Friday, April 13, 2007, the attorneys for Nicole Brown Simpson's estate sought to enjoin the sale, claiming an interest in the book and seeking to split the proceeds. At about 10:40 a.m., the court denied the estate's request and, about 10 minutes later, Lorraine Brooks Associates Inc., the titular owner of the rights to the book, filed for Chapter 7 bankruptcy in the U.S. Bankruptcy Court, Southern District of Florida. My firm put a levy on the book's rights on Jan. 8, 2007, by serving HarperCollins, who held the rights to the book under the publishing contract. The levy sought to gain O.J. Simpson's rights under the publishing contract, even though the contract was in the name of his surrogate corporation, which was named after his children with Nicole Brown Simpson. After exhaustive post-judgment proceedings, the trial court held that Lorraine Brooke Associates Inc. was O.J. Simpson's surrogate and substitute and authorized the sheriff to sell the rights to the book. The bankruptcy trustee sold the rights to Fred Goldman and retained a 10 percent interest on the proceeds because, among other things, the levy was consummated 95 days prior to the bankruptcy and beyond the reach of a preference under Bankruptcy Code § 547(b). Fred Goldman published the book, the sale of which was launched on the "Oprah Winfrey Show" at 4 p.m. on Sept. 13, 2007. *If I Did It* hit #2 on the *New York Times* Best-seller List®, beating out a book about Mother Teresa.

[15]*See UMG v. BCD Music Group*, Case No. CV 07-05808 SJO (FFMx), 2009 WL 2213678 (C.D. Cal. July 9, 2009). The judgment debtor is located in Texas and the obligors are in other states. The court applied *Fall v. Eastin*, 215 U.S. 1 (1909), in ordering the assignment. The relief included a restraining order, stopping the debtor from interfering with the assignment, and an order to turn over the property to the U.S. marshal.

[16]*See Fuddruckers Inc. v. KCOB I LLC*, 31 F. Supp. 2d 1274, 1277 (D. Kan. 1998); *see also Blaw Knox Corp. v. AMR Indus.*, 130 F.R.D. 400, 402 (E.D. Wisc. 1990).

[17]*Fed. Deposit Ins. Co. v. LeGrand*, 43 F.3d 163 (5th Cir. 1995); *see also TMS Inc. v. Aihara*, 83 Cal. Rptr. 2d 834 (2d Dist. 1999) (holding that the judgment debtor's willful failure to answer post-judgment interrogatories in contravention of a court order was punishable by dismissal of the appeal). *See also Empire Blue Cross and Blue Shield v. Finkelstein*, 111 F.3d 1278 (2nd Cir. 1997) (The judgement debtors ignored post-judgement process, dodged the process servers, and absconded themselves from the jurisdiction; the court applied the fugitive disentitlement doctrine in civil proceedings and dismissed the appeal based on *Degen v. United States*, 517 U.S. 820 (1996)).