

High-Hanging Fruit: Unusual and Out of the Ordinary Levies



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Remedies Section**

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Speakers

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Overview

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- B. Turnover Orders
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- N. State Controller's Office
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A. General Levy Terms and Requirements

- Generally, all personal property is subject to enforcement of money judgment by Writ of Execution
- “Excepted” property cannot be levied by Writ of Execution
- “Exempted” property cannot be used to satisfy judgment
- Writ must be issued to each County where property will be levied
- Writ is issued in judgment debtor’s name and aliases
- Writ authorizes levying officer (e.g. Sheriff) to levy, but sometimes registered process servers can act as agent of officer
- Writ expires in 180 days after which Clerk may issue more writs
- Writ and Notice of Levy must be served on judgment debtor
- Levying officer must return the Writ to the Clerk within 2 years after levy, or if no levy is made, within 180 days of issuance
- California judgment can reach tangible personal property located in California only.

B. Turnover Orders

- Turnover orders are issued “in aid of execution”
- Court may issue turnover order on a “showing of need”
- Can seek order by noticed motion, or ex parte
- Order directs JD to turn over possession of property and/or document of title
- Order must be personally served on JD, and must contain a notice that failure to comply may subject JD to arrest for punishment for contempt
- At the time of ORAP, court can order JD to turnover specific assets unless a third party claims an interest in those assets; the order creates a lien on the property

C. Interest in Securities

- “Security” is defined in UCC Article 8
- To levy on certificated securities, the levying officer takes possession of the certificates; if certificate has been returned, levying officer must serve writ on issuer’s CEO
- To levy on uncertificated securities, levying officer serves writ on issuer’s CEO
- For security entitlement, must levy on securities intermediary where JD maintains security account
- When levying on publicly traded stocks held by a broker, sheriff will instruct the broker to liquidate and turn over net proceeds
- Sheriff can levy on third party in possession of security

D. Interest in Trusts

- JC can reach JD's interest as a beneficiary of a written, voluntary, express trust. Need copy of trust to formulate levy instructions.
- Court has discretion to enter an order applying JD's interest in trust to satisfaction of judgment, such as placement of lien, sale of interest, collection of trust income, and liquidation and transfer of property.
- JC needs to petition the Court having jurisdiction over the trust administration for an order to pay JC the amounts owed JD.
- Petition must show petitioner's status as JC, identify respondent as JD, describe underlying judgment and amounts due, provide trust terms which entitle JD to income, list names and addresses of all vested and contingent trust beneficiaries.
- California Probate Code provides that if trust settlor retains right to revoke the trust, then trust property is subject to claims of settlor's creditors.

E. Guardianship or Conservatorship Property

- If guardian/conservators fails, neglects or refuses to pay judgment against the estate, JC may apply to a Court having jurisdiction over guardianship/conservatorship proceeding to obtain order for payment.
- Property of such estate is not subject to general enforcement procedures, even where the judgment enforcement began before the guardianship or conservatorship arose.
- Petition must contain Petitioner's standing to file petition, name of the guardian/conservator, nature of debt the guardian failed to pay, whether request for special notice has been filed, and if so, that proper notice has been given or will be waived.

F. Charging Order Against JD's Interest in Partnership or LLC

- Money judgment against partner or LLC member
- Bring motion for charging order:
 - Noticed motion required unless grounds exist for ex parte
 - Should be personally served on JD
 - Service on partnership/LLC and all members creates lien
- Order must be served on the partnership/LLC and all members
- May apply for order to foreclose on partnership interest based on lien created by charging order:
 - Foreclosure permissive, not mandatory
- Charging order does not apply to JD's interest in a corporation, except where the corporation is a successor to a partnership interest

G. Order Applying Public Franchise to Satisfaction of Judgment

- “Public franchise” is a franchise granted by a public entity
- Does not apply to private franchises
- Subject to all necessary approvals for sale and transfer
- Notice of motion must be served on JD and entity that granted the franchise
- Court may issue order if it determines that applying franchise to satisfaction of judgment is proper.
- May be by sale, assignment or appointment of receiver
- Although JC cannot obtain lien on certain public franchise licenses (e.g. FCC broadcast licenses), it can obtain lien on proceeds of sale.

H. Assignment of Right to Payment

- An alternative to post-judgment receivership.
- Can be used to reach assignable forms of property that are subject to levy, such as accounts receivable, general intangibles, judgments, and instruments
- Can be used with annuities, insurance payments, rents, commissions, and royalties.
- Employer/payor is subject to sanctions and contempt after service of order
- Court's ability to assign is limited:
 - Only to the extent necessary to satisfy judgment
 - Pension limited to amount subject to wage garnishment
- Court can restrain JD from assigning or hypothecating right to pmt.
- JD may bring motion to claim exemption

I. Paypal Funds and Lottery Prizes

- Levy on Paypal is normal service of Writ of Execution
- Paypal's agent for service is in Orange County, not Santa Clara County
- Levy on lottery prizes is done pursuant to CCP 708.730

J. Appointment of Receiver

- “Catch all” remedy for unusual situations, e.g., sale of specialized property, need to insulate against toxic issues, potential title issues, need to collect from a pending sale, need to sell IP
- Costly, but costs can be added to judgment
- JC must bring motion and show the receivership is justified
- JC’ should spell out powers of receiver in the motion and proposed order
- Receiver necessary to transfer interest in liquor license
 - Receiver can exercise powers of licensee
 - Must file application with Alcoholic Beverage Control
 - Transfer not allowed unless all taxes paid

K. Patents, Copyrights and Trademarks

- Easy to search for them at USPTO web site
- Defunct entities may still have IP registered under their name
- Can record a lien against them with USPTO
- The only way to levy on patent is by a written assignment
 - At ORAP, court can order JD to assign patent to a receiver
 - If JD does not appear at ORAP, or fails to cooperate, court can appoint a “trustee” to execute assignment
 - Can get a turn-over order for payments due from licensee
- Lanham Act covers trademarks and trade dress, even though you may have ownership of patent and copyright
- Trademark is properly assigned along with goodwill; an assignment and sale of trademark by itself is invalid.

L. Domain Names

- Must value and sell domain name, apply proceeds to satisfy jdmt.:
 - No monetary value – cannot turn over to JC
 - Intangible – sheriff can auction it under court direction
- If domain name is “due” from third party who issued the name to debtor (e.g., Network Solutions, GoDaddy), you can instruct sheriff to levy writ of execution directly to the third party.
 - Under most service agreements registrar can revoke name registration
 - If registrar revokes registration, re-register under JC’s name
- Alternatively, levy writ of execution on general intangibles of domain name owed by registrar to the debtor.
 - This will work only if registrar does not revoke name registration, and court does not require appraisal or other measure to supervise sale, etc.
 - Property description for levy and auction notice should be broad

M. Bankruptcy Issues and Section 363 Sales

- Under BK Code, debtor may use, sell or lease its assets in ordinary course of business without need for court approval.
- “Section 363 sale” – sale of assets by a Chapter 7 Trustee or Chapter 11 DIP, not in the ordinary course of debtor’s business:
 - Purpose is to maximize the value of BK estate
 - Assets may be transferred free and clear of liens and liabilities, including liens by secured creditors
 - Judgment lien holders may “credit bid” up to the amount of debt
- Con:
 - 363 sale is expensive, process is subject to competing bids
 - Cannot transfer IP, liquor license, mineral rights, websites
- Two-step process:
 - Court approves procedures,
 - Auction takes place and Court holds hearing to evaluate and approve

[Section 363 Continued]

- Debtor may sell assets subject to secured party liens; secured party is paid from sale proceeds.
- Under certain circumstances, 363 sale allows sale free and clear:
 - Secured party consents to 363 sale
 - Sale price exceeds sum of all liens encumbering the asset
 - The lien or dispute is in bona fide dispute
 - Whether security interest was perfected before BK
 - Secured party could be forced to accept money to satisfy lien
 - Secured party could be forced to accept Chapter 11 plan
- “Stalking Horse Buyer”
 - Ideally, debtor has an initial offer from a particular buyer and presents it to BK Court to be accepted subject to overbids
 - The stalking horse buyer typically negotiates and receives certain protections and benefits that reimburse her/him of certain expenses for making the initial offer, and may reduce risk of competition and overbids.

N. State Controller's Office

- California Unclaimed Property Law requires businesses, associations, corporations, financial institutions, insurance companies to annually report and deliver property to State Controller if account has been inactive, or no contact with owner for 3 years.
- Currently holding \$6.4 Billion in unclaimed property, such as:
 - Bank accounts, safe deposit boxes, CD's
 - Stocks, mutual funds, bonds, dividend, royalty payments
 - Uncashed cashier's checks and money orders
 - Estates
 - Trust funds and escrow funds
 - Matured or terminated insurance policies
- State Controller's website allows you to search by name or individual or business entity
- If you find unclaimed property of a JD, instruct Sacramento County Sheriff to levy with a writ of execution.

O. Executing on Real Property

- Record abstract of judgment
- Sale of a “dwelling” requires a formal appraisal
- Deliver writ of execution, notice of levy and levy fee to the Sheriff, along with instructions:
 - Description of property
 - Whether property is “dwelling” and if so if it’s personalty or realty
 - Name of JD, including entity type
- Sheriff records writ and notice of levy; serves copies of JD, other interest holders, and occupants
- Deadlines for sale of a dwelling:
 - Within 20 days after notice of levy, JC must apply for Order of Sale;
 - Within 45 days of the filing of application, Court determines if dwelling is exempt;
 - Within 30 days before the hearing, JC must serve application for Order of Sale, Notice of OSC and OSC on the JD and all occupants

[Real Property Cont'd]

- At hearing Court determines if dwelling is exempt
 - if not exempt, Court will order sale and there is no need to pay senior lienholders;
 - If exempt but there is insufficient value to cover liens, court will not order sale;
 - If exempt and sufficient value, court orders sale subject to homestead exemption and payment of senior liens
 - The order may be appealed by JC can require a bond to be posted
- Homestead exemption
 - may be formally declared, or imputed by law if debtor continuously resided from date execution lien or abstract attached
 - Amounts: \$75,000, \$100,000, or \$175,000
 - Applies to one dwelling for husband and wife
 - Not apply to judicial foreclosure judgment
 - Note applicable to property acquired after abstract recorded

[Real Property Cont'd]

- JC prepares and serves Notice of Sale
 - Notice must be served within 20 days (if not dwelling) or 120 days after notice of levy served on debtor
 - Interested third parties must be served with notice
 - Sheriff serves notice of sale on real property at least 20 days before intended sale; must publish notice for three successive weeks; must post notice in a public place in the judicial district
- JC may also advertise sale, and recover cost of that
- Sale conducted via public auction; JC's attorney should be present
- Minimum bids:
 - For non-dwelling, bid must exceed tax liens
 - For dwelling, bid must exceed senior liens and homestead amount
 - If bids insufficient, property released from execution sale
- If JC makes a creditor's bid, must still pay liens, homestead and costs of sale in cash.

[Real Property Cont'd]

- Priorities of lien payments out of proceeds:
 - Labor, tax, and other special lienholders
 - Deposit by creditor
 - Junior consensual and junior state tax liens
 - Homestead
 - Enforcement officer's costs
 - Creditor's judgment
 - Anyone who has delivered a writ or other lien