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Beyond The Red Cover – A Writ Petition Primer

By Alan M. Mansfield, Editor, ABTL Report

The Fourth District Court of Appeal, Division One, in San Diego receives an average of 60 writ petitions each month. There are three full-time staff attorneys at the Court of Appeal reviewing writs, led by supervising appellate attorney Cheryl Shensa. As a result, each staff attorney on average processes one writ petition per court day

Presiding Justice Judith McConnell

Cheryl Shensa

While at the current time the majority of writ proceedings involve either criminal, family law or dependency matters, about 25 percent involve civil proceedings at every stage of the litigation process – from demurrers to motions *in limine* at trial.

The Court of Appeal issues Orders to Show Cause or alternative writs for less than 10 percent of all writ petitions filed. Significantly fewer result in issuance of a peremptory writ in the first instance reversing the trial court. This is in part because the Court receives Petitions on issues that are not likely to meet the stringent standard for obtaining interlocutory review.

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Judgment Collection: Making Sure Your Judgment Is Worth The Paper On Which It Is Written

By Thomas Snyder, Esq. of Sheppard, Mullin, Richter and Hampton LLP

Countless long nights and weekends preparing for trial or briefing a summary judgment motion have finally paid off. You have a judgment in hand and proudly call your client to tell them the good news. After congratulating you on a job well done, your client invariably asks you the next question: "When do I get my money?" Hopefully, you have thought about collecting your judgment long before obtaining your judgment. If not, you may be in trouble.

Thomas Snyder

For most practitioners, the topic of collecting judgments is not part of everyday practice.

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Inside

President's Message

By Charles Berwanger, Esq. of Gordon & Rees LLP

This is my last president's message. The Association of Business Trial Lawyers represents the highest of ethical, professionalism and civility values and I have been honored to have been associated with the ABTL for the prior year as its President. The judges and attorneys with whom I have had the privilege of working and associating are of the highest caliber and I am honored that many of them are my good friends.

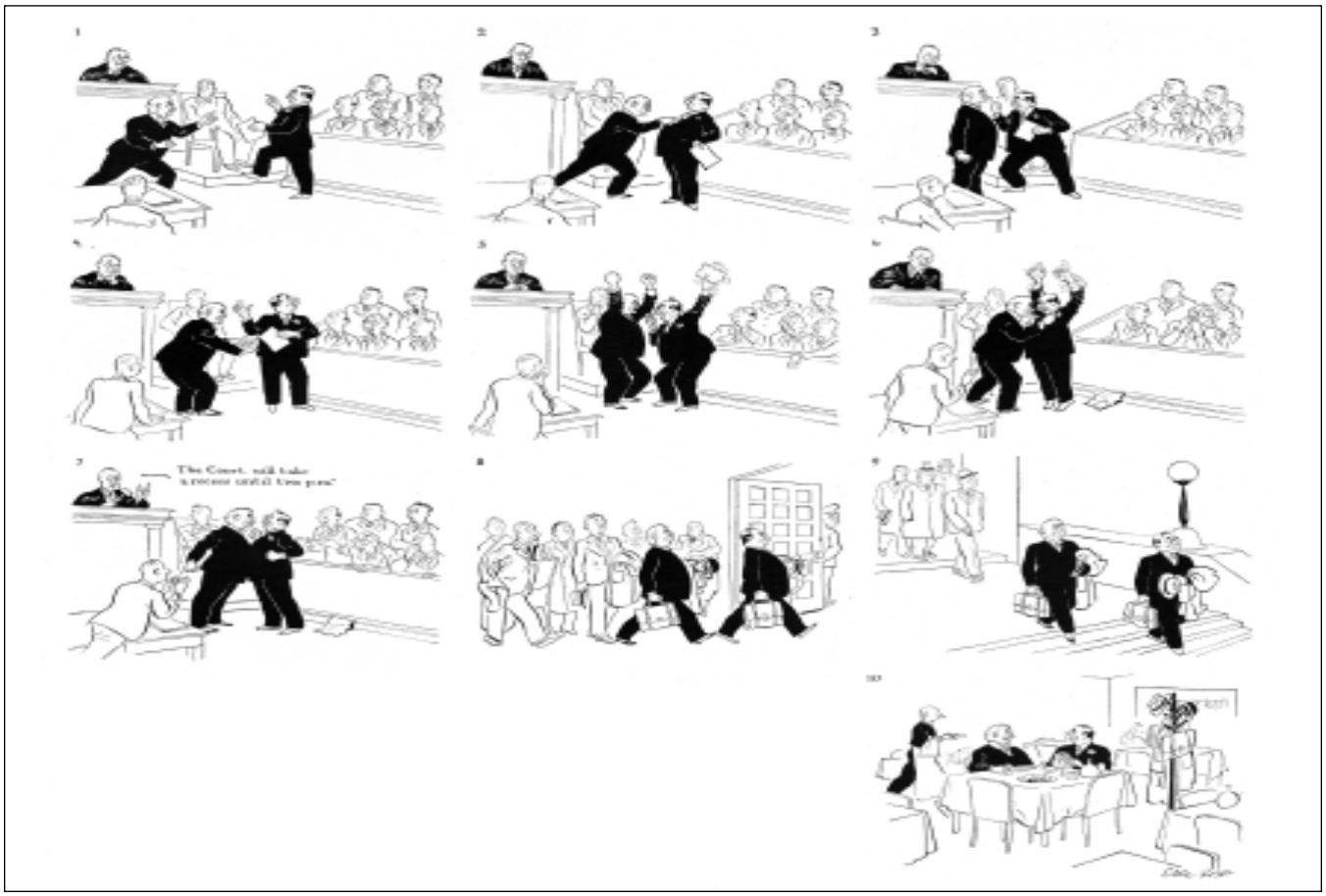
Charles Berwanger

I want to thank our ABTL committees for their contributions. The ABTL Report continues to be informative, timely and of the highest quality under the editorial leadership of Alan Mansfield; ABTL's programs continue to be uniformly stellar under the leadership of Tom Egler; this year's ABTL seminar at the Ventana Resort in Arizona, under the leadership of Ed Gergosian (with the assistance of a state-wide committee including our Mike Riney and Marisa Janine-Page), was excellent and very well received by the seminar's many attendees; and ABTL's membership has continued to grow under Bill Calderelli's Membership Committee leadership.

Next year will continue this tradition of excellence and I look forward to working with the new officers to continue to improve the excellent programming, publication and other member services. In 2006, we will put on our local one day seminar providing members with a cost-effective means of attending an ABTL seminar without travel and lodging expenses.

Capturing the civility which the ABTL both exemplifies and encourages is a cartoon from the New Yorker Book of Lawyer Cartoons by Carl Rose.

Thank you.



Discover Bank and Its Aftermath: What's Left of "No Class Action Arbitration Clauses" in Consumer Contracts?

By John W. Hanson, JD, LLM of Rosner, Law & Mansfield

The California Supreme Court has begun to rain on the great parade of arbitration clauses in consumer contracts.

In this summer's 4-3 decision in *Discover Bank v. Superior Court* (Boehr) 36 Cal.4th 148 (June 27, 2005), the California Supreme Court held that where form contracts are used for consumer transactions, and potentially small claims of damages may be involved, businesses as a general rule cannot include an arbitration clause that waives the consumer's right to proceed by way of a class action where the business is alleged to have engaged in deceptive conduct. The Court also rejected Discover Bank's argument that the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* ("FAA") preempted the application of state law principles, finding the FAA only prohibits discriminatory treatment of arbitration agreements and does not exempt them from non-discriminatory state laws.

John W. Hanson

The question for both business litigators and in-house counsel is how many types of contracts will be affected by *Discover Bank*, as many consumer financial services (including the ten largest credit-card issuers), most telecommunications companies (including all the major cellular service providers), and even the majority of car deal-

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erships use such clauses. To quote Bob Dylan, "it's a hard, hard, hard, hard rain a gonna' fall" in terms of trying to enforce such clauses in the future. The many businesses that employ such clauses and fit the *Discover Bank* holding, or its potentially even more expansive *dicta*, must now decide whether the "quick, cheap and final" decisions of arbitrators, often trumpeted as beneficial to all sides in individual consumer cases, look quite so good when the stakes relative to businesses are higher in terms of being potentially subject to class-wide relief.

"Just the Facts, Ma'am" (and a Little Procedure):

Plaintiff, Christopher Boehr, obtained a Discover Bank credit card in 1986. When he signed up for the credit card, there was no arbitration clause in the form contract sent to him. However, the contract contained a choice-of-law clause providing for the application of Delaware and federal law.

A few years later, Discover Bank included an insert in his monthly bill announcing: "your Account involves interstate commerce" and "we are adding a new arbitration section," and the legalistic phrase "neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other cardmembers with respect to other accounts, or arbitrate any claim as a representative or member of a class or in a private attorney general capacity." If he didn't like the changes, the papers stated, Mr. Boehr had to close his account.

Mr. Boehr later decided to sue Discover Bank for its policy of assessing a $29 late fee and disallowing grace periods on new purchases where payments were in fact received on the due date, but after an undisclosed 1:00 p.m. cut-off time. He sued Discover Bank in a nationwide class action, asserting violations of Delaware law and the Delaware Consumer Fraud Act.

Discover Bank moved to compel arbitration of Mr. Boehr's individual claims and to dismiss the class action claims as a result of these "bill stuffer" amendments. The trial court initially applied Delaware law and granted Discover Bank's motion. However, on reconsideration the trial court found California law applied and that the class action waiver clause was unconscionable, but found the overall arbitration clause survived and gave Mr. Boehr the right to seek classwide arbitration. Discover Bank then filed a writ petition challenging the amended ruling. The Court of Appeal reversed the trial court and held the FAA preempted any California state law rule that similar clauses would be unconscionable, but did not decide which state law (California or Delaware) applied.

The Criteria for Unconscionability

The Court's holding lays out a multi-part test for assessing the whether a class action waiver clause was unconscionable: 1) is there a consumer contract of adhesion, 2) does the relationship between the business and consumer predictably involve small amounts of damages, 3) does the Complaint allege a scheme to cheat large numbers of consumers out of small sums of money, and 4) does California law apply.

> "We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced."

The following addresses these four factors.

1. Form Consumer Contracts of Adhesion

The Court had no trouble finding procedural

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unconscionability in a form, "take it or leave it" adhesion contract. The Court did note that the waiver clause was in a "bill stuffer," but was not clear whether this fact created additional oppression, surprise, or both to the usual form contract scenario. One might assume that closing an account, which was the only way to refuse the amendment, makes the contract unavoidable and therefore oppressive, or that bill stuffers are usually overlooked or steeped in legalese and therefore surprising, but the Court did not specifically focus on these points. The Court left procedural unconscionability to some safe, common-sense assumptions. Based on this analysis, most businesses will face an uphill battle to argue their form contracts do not present at least some degree of procedural unconscionability.

2. Predictably Small Damages

Turning to a "substantive unconscionability" analysis, the Court next referred to contracts "in a setting in which disputes between the contracting parties predictably involve small amounts of damages." What does this mean? First, usually unconscionability is determined from the circumstances existing at the time of contracting, not by subsequent events. The key question is what is the "predictable" amount at issue if and when a controversy arises between the business and its consumers? The Court did not address this issue in detail, but a credit card company such as Discover Bank would seem predictably to have a large number of potential disputes regarding such small amounts as late fees, or at most for amounts up to the balance limit on cards, which for most consumers would be at or below $10,000. Most consumer purchases or claims for damages would be similarly limited. Telecommunications companies, for example, usually face consumer claims that rarely exceed a couple hundred dollars. Even vehicle cases would be limited by the purchase price of the car or some level of diminished value or out-of-pocket loss.

The Court does not set out exact parameters about what is "small." The key point for the Court is that the characterization of size is related to whether it will attract attorney representation for the consumer. This inquiry appears also to be independent of whether there may be statutes or contractual provisions for cost or fee-shifting. For the majority, neither the potential for arbitration cost shifting nor for attorney-fee shifting solely in favor of consumers was sufficient to overcome the reality that small damage cases never will see the light of either the judicial or arbitral system. *Discover Bank*, 36 Cal.4th at 162.

The Court provided one example, although not in the consumer context, where a claim would not be predictably too small to be viable on its own. The majority pointed out that employment discrimination claims under the ADEA have been reported to have median awards of $269,000, presenting this as an example of potentially viable individual claims. *Id.* at 168. Several sources have also indicated that the plaintiff's consumer bar will generally refuse to take on individual cases with damages less than $5,000. Past decisions regarding when consumer class actions were necessary for individuals to have viable claims also might also provide some guidance as to what is "small." See *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 805 (claims regarding overpriced freezers and food worth a couple thousand dollars); *West Corp. v. Superior Court* (2004) 116 Cal.App.4th 1167, 1180 (claims ranging from $60 - $150 per year for several years); *Frank v. Eastman Kodak* (W.D.N.Y. 2005)(claims of $1,000 or more); *In re Copley Pharm, Inc.* (D.Wyo. 1998) 1 F.Supp.2d 1407, 1418 (claims of up to $20,000). Thus, the range of "small" claims that may be covered is quite large.

3. Allegations of Cheating and Fraud

The Court decided substantive unconscionability based largely on Cal.Civ.Code §1668 and its prohibition against contracting one's way out of fraud. The Court did not address whether a Complaint would need to assert fraud in the common law sense or the much broader consumer law sense of "fraudulent conduct." However, the full text of §1668 is not limited to fraud and includes negligent violations of law. It is hard to imagine in any consumer case not being able to assert allegations satisfying such a

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"knew or reasonably should have known" standard.

4. Application of California Law

Discover Bank recognized a "fundamental" protection for California consumers in the right to utilize class procedures and, therefore, gives new strength to Californians to fight form choice-of-law clauses imposing non-California law. As the Court points out, where California has a greater interest in the issue than the forum state, and where a fundamental policy of California would be violated by imposing the chosen state's laws, courts will not enforce even an express choice-of-law clause. Out-of-state businesses who wish to contract with California consumers may thus need to reassess whether non-California law applies or risk facing class-wide arbitration or, alternatively, invalidation of their arbitration clauses altogether.

The CLRA Trump Card

No discussion of *Discover Bank* would be complete without discussing what the Court did not decide: the effect of the CLRA's express right to class actions and its express "no waiver" clause. Certain *dicta* in *Discover Bank* in both the majority and dissent referred to the Consumers Legal Remedies Act and its anti-waiver policy set forth in Cal. Civ. Code Section 1751. *See* 36 Cal.4th at 158, 160, 174 (majority opinion); 36 Cal.4th at 178 (dissent). Thus, even a clause that might be enforceable under the unconscionability analysis and holding of *Discover Bank* could still fail where the CLRA is applicable.

Although Mr. Boehr did not assert a CLRA cause of action, the Court on several occasions reaffirmed its own and a lower court's decision that CLRA rights are non-waivable as a matter of express, fundamental public policy and that

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the right to class proceedings is one such right. *Discover Bank*, 36 Cal.4th at 158, 160, 174 (discussing *Armendariz v. Foundation Health Psychcare Serv. Inc.* (2000) 24 Cal.4th 83; *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1). Application of this analysis is potentially quite expansive, as the CLRA covers a comprehensive array of unfair and fraudulent business practices.

The effect of applying the CLRA's non-waivability provision in play is two-fold. First, it could end the need for any inquiry into "procedural" unconscionability. After all, one cannot waive a non-waivable right, no matter how well-disclosed and freely chosen. See *Benyon v. Garden Grove Medical Group* (1980) 100 Cal.App.3d 698, 713 ("[A] contractual provision which is void against public policy cannot be validated by estoppel or waiver."). Second, as there is no dollar amount limit for CLRA causes of action and no need to show superiority of the class action mechanism for class certification, the right to bring class proceedings for consumer claims that are not "small" would arguably not be affected. Other general contract prohibitions such as Cal.Civ.Code §3513, which states public rights cannot be waived by private agreement, might face a similar analysis in combination with class action rights in other contexts, such as the new, post-Prop. 64 UCL, which defendants are asserting now requires class actions.

What About FAA Preemption?

Despite Discover Bank's successful argument to the Court of Appeal that the FAA preempts state law prohibitions of class action waivers in arbitration clauses, the Court found against pre-

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emption. Given the "CLRA Trump Card" and other possible avenues for striking down "no class action arbitration agreements"discussed above, the question of FAA preemption addressed by the Court may arise again and deserves a closer look. In addition, there is always the chance the federal courts may come to a different conclusion. As none of these other avenues explicitly discriminate against arbitration agreements, and as the U.S. Supreme Court has not addressed the issue even given the opportunity, however, FAA preemption does not appear likely.

Discover Bank's basic line of attack involved two claims. First, that the FAA acts as a shield to protect the content arbitration clauses from any unconscionablility or illegality analysis. Second, that the very notion of conducting class actions in an arbitration was anathema to the FAA purpose to foster arbitration. The Court rejected both approaches.

The Court found "puzzling" the Court of Appeal's acceptance of the idea that state prohibitions against the waiver of statutory remedies such as class actions were to be disregarded if such a waiver was included in an arbitration clause. In its review of U.S. Supreme Court precedent, the Court found only state law prohibitions that specifically singled-out arbitration clauses for special scrutiny had been preempted. 36 Cal.4th at 165-66. Furthermore, nothing in the FAA's requirements that the letter of the arbitration agreement itself must control, should be interpreted as a shield to protect otherwise illegal or unconscionable terms. 36 Cal.4th at 166-67.

Neither did the Court accept the notion that class actions and arbitrations are somehow fundamentally opposed. 36 Cal.4th at 172. The Court noted, in this regard, that it has held to the contrary for over 20 years, citing to Keating v. Superior Court (1982) 31 Cal.3d 584. Notably, the U.S. Supreme Court passed on that issue in overruling other portions of the Keating decision many years ago. See Southland Corp. v. Keating (1984) 465 U.S. 1, 17. All subsequent evidence and commentary, the Court felt, has only validated its prior judgment. Class action arbitrations are here to stay.

Post *Discover Bank* Decisions

Since *Discover Bank* was decided, cases on the California Supreme Court docket where similar clauses were enforced by the Courts of Appeal have been remanded for reconsideration. Those Courts of Appeal have now reversed field. These are cases where no "bill stuffer" was used or additional measures were taken to make individual arbitration ostensibly cost free for consumers, including attorney fee shifting in favor of plaintiffs. *See, e.g., Parrish v. Cingular Wireless, LLC*, 2005 Cal.App.Unpub. LEXIS 9021 (October 3, 2005); *Meoli v. AT&T Wireless Serv., Inc.*, 2005 Cal.App.Unpub. LEXIS 8994 (September 30, 2005).

In short, most businesses that have arbitration clauses in their consumer contracts will need to consider removing such clauses unless they want to brave the waters of a class-wide arbitration. To the extent any business is constrained by California law and is thinking it will float over the floodwaters of the holding or facts of *Discover Bank*, it should think again before weighing anchor. ▲

Beyond the Red Cover

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ABTL recently sat down with Court of Appeal Presiding Justice Judith McConnell and Ms. Shensa to discuss writ procedures at the Court, what the Court considers relevant in reviewing such Petitions, and guidelines to consider in determining what is and is not likely to result in a successful writ proceeding. The following is intended to provide practical information and suggestions that hopefully will benefit both practitioners and the Court. Using this information, both practitioners and in-house counsel can hopefully make informed decisions whether they can satisfy the rigorous standard of review that would justify filing a writ petition, since such Petitions are time-consuming and expensive to prepare and review, with little likelihood of success.

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The Writ Review Process

Upon filing, the petition and accompanying exhibits are forwarded by the Clerk's Office to Ms. Shensa, who reviews the contents to determine urgency. The first question the staff attorneys review is whether a stay or other immediate action is required and, if so, the basis therefor and the time frame in which the Court needs to act. Rule 1 of the Local Rules for the Fourth District and Rule 49.5 of the California Rules of Court require that the cover page of the Petition prominently state "Stay Requested" or "Immediate Relief Requested" and identify the nature and date of the proceeding or act sought to be stayed. The Petition must also state clearly and up front the trial court and department involved, the name and telephone number of the trial judge, why a stay is required and the time frame at issue (e.g., the party must comply with the trial court's order within 10 days).

The party seeking a stay or immediate action must personally serve the Petition on opposing counsel or use another expeditious method of service agreed to in advance by the opposing party. If the Petition is not filed and served in this manner, the Court will not issue a stay or take any other action for five days, except that it may summarily deny the Petition.

If the proceeding legitimately requires immediate action, the writ attorney will orally present the Petition to the sitting writ panel (a monthly rotating panel consisting of three of the appellate justices). The Court may issue a stay without receiving opposition if necessary to preserve the *status quo* or the Court's jurisdiction.

There are two important guidelines for counsel to consider relating to stays. First, one should only request a stay if it is truly necessary to preserve the issue being raised in the Petition and will result in severe prejudice if denied. Otherwise the request will be rejected. Second, if petitioner requests a stay, the attorney for the other party should consider filing an Opposition to the stay as soon as the Petition is served, or at a minimum advise the Clerk's Office that counsel will promptly submit an Opposition to the request.

If a stay request is granted, the writ panel that issued the stay will handle the entire writ proceeding, even if panel members are not sitting on the writ panel at the time the Petition is fully briefed or set for oral argument.

One of the issues counsel typically consider when faced with a Petition is whether to file an unsolicited Opposition to a Petition. Under California Rule of Court 56(g), within 10 days after a Petition is filed a party may serve and file a preliminary Opposition. However, as a general guideline, there is no need to file an informal response unless requested to do so. Petitions are processed in the order received by the Court, with adjustments for impending trial dates or other deadlines. The writ staff attorney reviews the Petition and the supporting documents and prepares a memorandum to the writ panel containing a summary of the facts and issues, an analysis and an initial recommendation. If staff attorneys desire a response prior to circulating the memorandum to the panel, they will request a response from opposing counsel within a short time period after the Petition is filed.

The writ panel will consider the staff memorandum along with the Petition and exhibits either by informal exchange between the justices or, in some instances, by convening a panel meeting. The panel may also request an informal response. If the opposing party has not filed an unsolicited response, the Court may not issue a peremptory writ in the first instance without first requesting an informal response. Similarly, as a matter of policy, the Court will not issue an Order to Show Cause or alternative writ unless it requests an informal response. If the Court issues an Order to Show Cause or alternative writ, it will also give the opposing party an opportunity to file a formal response to the Petition and allow the petitioner to file a reply. Once the briefing is complete, the Petition will be placed on the next available calendar for argument and consideration by the panel that initially reviewed the Petition. Depending on the situation, the Court may send out notice of oral argument before the formal response and reply are filed.

Writ petitions are ruled upon quite expeditiously – less than 60 days in almost all

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instances and many within a week, according to Presiding Justice McConnell. There is therefore no advantage to filing an unsolicited Opposition, and doing so may slow down the writ review process.

The Relevant Standard of Review

Because of the expeditious nature of such proceedings and the resources expended by the Court and its staff to fully evaluate a Petition, one of the key questions both counsel and clients need to seriously evaluate is whether the Petition has a reasonable probability of success. The overarching rule stressed by both Presiding Justice McConnell and Ms. Shensa is that a party must be able to establish that the issue raised by the Petition has no adequate appellate remedy and will result in material and irreparable harm if denied. Examples of such situations include a challenge to personal jurisdiction or venue that if not reviewed immediately may improperly subject a party to suit in an improper forum, a *lis pendens* proceeding, an order disqualifying counsel or an improper peremptory challenge that affects who will be counsel or the judge during the case, or a confidentiality or privilege issue that if left uncorrected could not be later resolved because the information is now publicly available.

Importantly, Presiding Justice McConnell cautioned that "avoiding a three month trial or having to respond to significant discovery is not irreparable harm." Thus, trial court rulings that overrule demurrers or motions for judgment on the pleadings, sustain demurrers with leave to amend, dispose of routine discovery matters, deny summary judgment or summary adjudication motions or decide motions *in limine* right before or during trial are unlikely to be reviewed. "The Court will simply not become involved in day-in, day-out discovery disputes," according to Presiding Justice McConnell. The one possible exception is if counsel can make a showing that the issue raised is an important, recurring issue that the Court may deem appropriate to address now rather than await a trial.

As Ms. Shensa explained, "sometimes an issue is presented to us by writ and later comes to us on appeal after trial, and the factual record is entirely different." Thus, in many instances, resolution of an issue may benefit from the development of a full record at trial. Such issues are not likely candidates for writ review.

Important Guidelines for Preparing Petitions

Both Presiding Justice McConnell and Ms. Shensa listed important guidelines to consider in deciding whether and what to include in a Petition. First is to ask a simple but important question – can this issue wait for review until after trial, or must it be reviewed now or be lost or frustrated in a manner that cannot be effectively corrected on appeal? If the answer is not clear, pursuing such a Petition will likely result in a waste of time and resources for both the parties and the Court, considering the small likelihood of the Court issuing the writ.

Second, even if the ruling challenged by the Petition can meet this standard, Ms Shensa suggested focusing only on one or two key issues. "For example, we see Petitions requesting review of a ruling denying summary adjudication that presents six or more issues. Such a Petition is not likely to be granted. Focus on the one or two issues that are most likely to grab the Court's attention and write concisely," advised Ms. Shensa.

Third, submit as exhibits file-stamped copies of the documents relevant to the issue presented to show such documents were filed with the trial court – do not submit the entire trial court record. Both Presiding Justice McConnell and Ms. Shensa talked about receiving Petitions accompanied by bankers' boxes of exhibits or where the issue was a matter relevant to the Fifth Amended Complaint and Petitioner submitted all iterations of the Complaints. If a relevant document appears to be missing, the Clerk will call counsel and ask for it. As Ms. Shensa observed, "it seems that the smaller writ petitions are the ones that are more likely to be granted." Considering the limited review standard and the resources that must be devoted to fully brief and consider a Petition, the adage "less is more" is sound advice to follow.

Finally, pick your battles. The Court takes notice of repetitive writs in the same case. If the

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Judgment Collection

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Rather, the focus is on the day-to-day strategy and issues that surround obtaining the judgment in the first instance. The focus on the collectability of the judgment is usually a secondary or tertiary consideration. For many judgments, it makes more sense to hire a specialist to collect the judgment rather than trying to collect it yourself. The attorney who specializes in collecting judgments often has the statutes and forms involved in garnishing wages and the like down to a science and can collect the judgment far more efficiently.

That does not mean, however, that you are off the hook as trial counsel. As effective as collection attorneys can be in the process of collecting the judgment, there are numerous opportunities for trial counsel to substantially increase the likelihood that the ultimate judgment can be collected. The purpose of this article is to discuss some of those opportunities and one of the major pre-judgment remedies that can aid in collecting judgments.

1. Start Thinking About Collection As Soon As The File Hits Your Desk

Planning collection of a judgment is something that you should start the moment you receive the file from your client. Imagine you deliver on all the promises you made to the client. You litigate the case successfully, under budget, and obtain a judgment that meets your client's expectations. Now imagine having to explain to your client why that judgment is worthless because it is not collectible.

This is a hard discussion under any circumstance. But, if you have been discussing collection issues with your client from the beginning it is at least a conversation that is not unexpected. In some ways, discussing the prospects of collection is every bit as important as discussing the likelihood of success on the merits. It is not necessarily bad news that upsets a client. Bad news is part of life and litigation. It is unexpected and unanticipated bad news that is difficult to accept. While it is not possible to anticipate all of the possible adverse outcomes in a case, the prospects of collection is an issue that can be and should be anticipated.

The prospects of collecting a judgment may also dramatically impact how you prepare a case. In many cases, it will not be a critical issue. If the other side is a Fortune 100 company, chances are they will be able to pay the judgment (although certainly that is not always the case). Evaluating the other side and whether they are likely to be able to pay an award may dictate how aggressively the case is prepared. If the other side looks judgment-proof, the wiser course of action may be to not file the case at all. The real risk for the practitioner is not letting your client know they may be throwing good money after bad, before the money is spent.

2. Think About Enforcement During Discovery

Conducting discovery solely to obtain information necessary to collect a judgment is outside the permissible scope of discovery under the California Code of Civil Procedure. However, that does not mean discovery on the merits will not generate information that can be helpful to enforcing the judgment. In the documents produced and information provided, the opposing party may reveal bank accounts, investment information, real estate holdings and other such information that would show a potential source of assets for collection. That same information may also reveal an absence of any assets, ren-

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Court sees that a case is generating a series of filings, it may be less likely to grant a Petition.

There are not many resources for practitioners to review for guidance on writ practice, aside from *Witkin* California Procedure and The Rutter Group Guide on Civil Writs and Appeals. However, the Court of Appeal has developed a free self-help guide for *pro se* litigants that contains a number of helpful guides and instructions for practitioners who may not be familiar with appellate procedures. The Court's website:

www.courtinfo.ca.gov/courts/courtsofappeal

also has helpful Operating Practice Guidelines for practitioners, including a section on writ procedures. ▲

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dering it important to reevaluate the prospects of collection, since the initial impression of the other side as asset rich may have been incorrect.

Further, if there is a potential for alter ego liability to be passed through to another person or entity, underlying discovery on the merits may reveal evidence that establishes some of the elements necessary to prove such a claim. In many cases, a corporate party may be part of a complex web of other limited partnerships, limited liability companies, corporations and individuals. Assets may have been transferred between and among those other entities, revealing not only potential additional parties and providing evidence of alter ego relationships, but also revealing the source of other assets which may be subject to collection.

3. Consider Attachment Early and Often

One of the most powerful tools that can be employed before judgment is a writ of attachment. If for example, the other party is a single project entity that was established to develop a particular piece of real property, that property may be the only tangible asset owned by the defendant. At the usual pace of litigation, it is possible that the property would be gone long before the judgment arrives. Depending upon the type of litigation involved there may be other remedies available to create a lien on the property pending judgment (*e.g.* a mechanics' lien or *lis pendens*), but an attachment lien can achieve the same purpose.

Writs of attachment are governed by a lengthy set of statutes that must be followed with precision. It is well beyond the scope of this article to discuss all of the details involving attachment applications. It is sufficient to point out that the attachment process is one that is filled with traps for the unwary. Before applying for a writ of attachment, it is critical to familiarize yourself with the statutes and what they require. While there are Judicial Council forms that help guide you through the process, they are no substitute for careful examination of the statutes themselves.

Generally, C.C.P. § 484.090 requires the applicant to prove: (1) that the claim upon which the attachment is based is one upon which an attachment may be issued; (2) that the plaintiff has established the "probable validity" of his claim; (3) that the attachment is not sought for any other purpose than for recovery of the plaintiff's claim; and (4) that the property sought to be attached is not exempt from attachment. C.C.P. § 483.010(a) in turn defines the types of claims "upon which an attachment may issue" as: (1) an action based on a claim or claims for money; (2) each of which is based upon a contract, express or implied; (3) where the total amount of the claim or claims is fixed or is a readily ascertainable amount; and (4) which is not less than $500 exclusive of costs, interest and attorneys' fees. Most of these elements are further defined in the statutes and you should consider whether you can satisfy each requirement before proceeding. In particular, if the person from whom you want to collect is a natural person, be aware of the statutory exemptions to attachment.

A writ of attachment is not an easy remedy to obtain. First, establishing the probable validity of a claim at the beginning of a case, before discovery has begun, can be a challenge. Moreover, many cases do not lend themselves to the requirement that the amount of the claim be readily ascertainable. See C.C.P. § 483.010(a). While the amount in controversy does not need to be fixed, it must be ascertainable from the face of the complaint. See *e.g., CIT Group/Equipment Financing, Inc. v. Super DVD, Inc.* (2004) 115 Cal.App.4th 600. That type of precision does not lend itself to most damage claims.

However, in the appropriate case, attachment can be an invaluable tool to bringing litigation to a speedy end. Once a writ of attachment is levied upon, it becomes a lien against the property and a cloud on title. Such a lien can substantially impair the owner's ability to sell or refinance the property and may cause other difficulties with the owner's financing. It is not uncommon for a writ of attachment to be a catalyst for an early resolution of the case.

Moreover, the writ process can lead to collateral benefits for your case that can also encourage early resolution. For example, a party oppos-

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ing attachment is likely to respond with documents and declarations explaining their side of the case. Those evidentiary materials may have to be prepared in a relatively short period of time, forcing the opposing party to take definitive positions about the merits of the case without having a full opportunity to review all of the evidence, documents and witnesses. The opposing side may commit themselves to a position or an argument that subsequently proves untenable. The damage to the other side's case and/or to the credibility of their witnesses can be substantial. It should go without saying that this is a double-edged sword. If your clients have been less than candid with you and/or failed to disclose all of the pertinent evidence surrounding the dispute, you could end up committing your own clients to positions which later become untenable.

Another potential advantage (and disadvantage) arises from the fact that the judge who hears the writ application may also be the judge who ultimately hears the case. The law clearly provides that any findings made in that process are not binding on the remainder of the case, have no *res judicata* effect and cannot be offered into evidence. See C.C.P. § 484.100 and § 484.110. However, as a practical matter, if you can make a strong showing to your ultimate trial judge that your case is "more likely than not" to succeed at trial, you may be able to lay the groundwork for a future issues, such as a motion for summary judgment. If your case falls flat on its face during the writ process, you may have done damage to your case and given yourself an uphill battle for the remainder of the litigation.

There are other drawbacks and dangers to writs of attachment. First, the application process can be expensive. Second, the attachment lien is automatically terminated if the other side files for bankruptcy or makes a general assignment to its creditors within 90 days of the attachment lien. See C.C.P. § 493.010 and §

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493.030. Third, if attachment is wrongful (*e.g.* you do not ultimately recover judgment in the action), your client may be liable for the damages caused by the attachment plus reasonable costs and expenses, including attorneys' fees, incurred in defeating the attachment. See C.C.P. § 490.010 et seq. Finally, obtaining a writ against unpledged collateral to enforce a debt secured by real property may violate the "one action rule" under C.C.P. § 726 and forfeit your rights in the real property collateral. See, *e.g., Shin v. Superior Court* (1994) 26 Cal.App.4th 542, 544.

4. A Settlement Agreement Is a Perfect Time to Consider Enforcement

For the vast majority of settlements, every lawyer has a more or less standard form that serves as the starting point for the agreement. For most cases, particularly where a lump sum payment is anticipated and there is a reasonable assurance that the payment will be made, the standard agreement is all that is needed. However, where there are payments to be made over time or there is any uncertainty as to whether the payment will be made as promised, the settlement agreement provides opportunities to lay the ground work for collecting the judgment if there is a default.

For example, if the defendant has a piece of real property, have them stipulate to the entry of a writ of attachment as part of the settlement agreement. While it will not necessarily make the attachment process a *fait accompli*, it will go a long way to establishing an attachment lien if the defendant subsequently fails to make the required payments. In addition, consider demanding that the defendant stipulate to a judgment as part of the settlement agreement that can be immediately entered by the Court pursuant to C.C.P. § 664.6 upon a missed payment.

Most of all, be creative. For example, in a case where there was substantial uncertainty as to whether the defendants would make the required payments over a period of five years, plaintiffs demanded a stipulated judgment that was negotiated and entered by the court as part of the settlement agreement. The plaintiffs executed a covenant not to enforce the settlement agreement, but were entitled to record an abstract of judgment in the county where the defendants' real property was located. When the defendants subsequently defaulted after only a few payments, releasing plaintiffs from the covenant not to execute, the existence of the judgment and corresponding abstract put the plaintiffs substantially higher in terms of priority when the defendants filed for bankruptcy. If the judgment had not been entered or the abstract had not been recorded, the settlement agreement and subsequent judgment would have been very difficult to collect. The plaintiffs would have been unsecured creditors with little hope of recovery more than pennies on the dollar. However, a little foresight about potential collection problems before they arose was critical to dramatically improving the client's position.

In every case, due consideration must be given from the inception whether a judgment would be collectible and what, if anything, can be done to secure collection. While a judgment obtained after a hard-fought litigation can be satisfying for an attorney, a client is likely to find little satisfaction if that judgment cannot be collected. With advance planning and some creativity, there are opportunities throughout a case to increase the likelihood that the ultimate judgment you obtain may be well worth the paper it is written on. ▲

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P.O. Box 16946, San Diego, CA 92176-6946

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