



Online CLE

Show Me the Money—Obtaining and Collecting Your Client’s Judgment

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Chapter 8

Show Me the Money—Obtaining and Collecting Your Client’s Judgment

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I. OBTAINING A JUDGMENT

A. *Pre-Suit Considerations*

1. **Cost Benefit Analysis, including recovery of legal costs and fees.**
2. **Risk of Counterclaim.**
3. **Jurisdiction and forum.**
 - (a) State Court
 - (b) Federal Court
 - (c) Bankruptcy Court. An unsecured creditor should consider filing an involuntary petition.
4. **Proper Parties.**
 - (a) Partnership
 - (b) Limited Liability Company
 - (c) Spouses
 - (d) Community Property
5. **NEW UTCR 5.180 Consumer Debt Collection Requirement.**

In 2019, the Uniform Trial Court Rules Committee added UTCR 5.180, which places additional obligations in Oregon State court actions to collect a debt.

- (a) Any action for collection of a debt under ORS 646A.670, when the plaintiff is either a debt-buyer or is a debt collector as defined in ORS 646.639 bringing the action on a debt-buyer’s behalf must include in the title: “SUBJECT TO ORS 646A.670(1) and UTCR 5.180(2)”
- (b) In the body (presumably the complaint), include a statement to the effect: “See the Oregon Judicial Department’s website for information about debt-collection cases”
- (c) Attach and incorporate by reference in the Complaint a completed Consumer Debt Collection Disclosure Statement in substantially

the same form as set forth in <http://www.courts.oregon.gov/Pages/default.aspx>), including a statement that the plaintiff has complied with ORS 646A.670(1).

- (d) If the pleading does not comply with the rule, written notice is given to the plaintiff that the case will be dismissed 30 days from the date of mailing the notice unless the plaintiff has complied with the rule by that time.
- (e) If the plaintiff moves for entry of a judgment of default, the motion must include a declaration, under penalty of perjury, that the initial pleading complied with ORS 646.670(1).

PRACTICE TIP: Some courts are rejecting complaints for collection of non-consumer debts as non-compliant with UTCR 5.180. If you are filing a non-consumer case to which UTCR 5.180 does not apply, consider including language in the title similar to the following: “Consumer Collection – Not Subject to ORS 646A.670(1) or UTCRT 5.180(2).” IN that manner, a clerk may be less inclined to send a notice.

NOTE: The Federal Servicemembers Civil Relief Act, 50 USC §3901 *et seq.* (“SCRA”) is intended to protect members of the armed forces who are on active duty and can have significant effect on the availability of default judgments, other judicial proceedings, and even interest rates. In 2009, the Oregon legislature enacted HB 2303 (codified in ORS 30.136 – 30.138), which enhanced the SCRA to:

- 1) Exclude applicable persons from court-ordered arbitration unless stipulated to after the action is commenced;
- 2) Make forum selection clauses designating a forum other than Oregon voidable by servicemembers who are residents of or reside in Oregon;
- 3) Expand remedies available to servicemembers for violations of the SCRA;
- 4) Apply the SCRA to Oregon’s Unlawful Trade Practices Act in ORS 646.605 – 646.652, thereby creating a private cause of action for violation of the SCRA; and
- 5) Extend certain protections under the SCRA to disabled veterans, disabled service members, and their spouses.

In 2019, legislature amended the statute to reflect federal code reorganization that changed the SCRA to 50 USC §3901. To determine whether a person or their spouse is active military, consult one of many websites that provide that information. The Department of Defense provides that information free of charge at: https://www.dmdc.osd.mil/appj/dwp/status_finder.jsp.

6. Merits of Case:

- (a) Summary Judgment
- (b) Sanctions

7. Alternatives to Litigation:

- (a) Negotiation (confession of judgment, stipulated judgment or other agreement)
- (b) Alternative Dispute Resolution (arbitration and mediation)

B. Remedies Available

- (a) Account stated. An account stated is an agreement between parties that a certain amount is owing and will be paid.
- (b) Accounts. An action on account is an action of assumption for a debt for the recovery of money for services performed, property sold and delivered, money loaned, or damages for the nonperformance of a simple contract, express or implied, when the rights of the parties will be adequately conserved by the payment and receipt of money.
- (c) Goods Sold and Delivered
- (d) Breach of Contract

2. Equitable Remedy.

- (a) Quantum Merit or restitution
- (b) Avoidance

3. Other Remedies.

- (a) Reclamation

C. Discovery

- 1. When?** Discovery should be conducted as soon as possible. It allows the plaintiff to evaluate the case and determine the resolve of the defendant. Moreover, sometimes discovery can lead to settlement.

2. What type of Discovery?

- (a) Documents Needed
- (b) Depositions
- (c) Other Discovery

D. Defenses/Counterclaims

1. Statute of Limitations and Statute of Repose.

- (a) Contract Claims: Six years.
 - (i) Account Stated
 - (ii) Accounts
 - (iii) Goods Sold and Delivered
 - (iv) Breach of Contract
- (b) Torts: Two years.
 - (i) Misrepresentation
 - (ii) Intentional Interference with a business or contractual relationship
 - (iii) Holder and in due course

2. Breach of Warranties.

- (a) Express Warranty
- (b) Implied warranty of merchantability
- (c) Implied warranty for particular purpose

E. Judgment - Forms of Judgment created in 2003 (ORS 18.005 et. seq.)

1. Definitions (ORS 18.005).

- **Judgment document** – a writing in the form provided by ORS 18.038 that incorporates a court’s judgment.

- **Judgment** – the concluding decision of a court on one or more requests for relief in one or more actions, as reflected in a judgment document. The term “Decree” is largely obsolete.
- **General judgment** – the judgment entered by a court that decides all requests for relief in the action except: (1) a request for relief previously decided by a limited judgment; and (2) a request for relief that may be decided by a supplemental judgment.
- **Limited judgment** – a judgment rendered before entry of a general judgment in an action that disposes of at least one entire request for relief, but fewer than all requests for relief in the action, and that is rendered pursuant to a statute or other source of law that specifically authorizes disposition of fewer than all requests for relief in the action. The term limited judgment includes:
 1. A judgment entered under ORCP 67 B or ORCP 67 G;
 2. A judgment entered before the conclusion of an action in a circuit court for the partition of real property, defining the rights of the parties to the action and directing sale or partition; and
 3. An interlocutory judgment foreclosing an interest in real property.
- **Supplemental Judgment** – a judgment that by law may be rendered after a general judgment has been entered in the action and that affects a substantial right of a party. It may only contain provisions that were not included in the general judgment. ORS 18.031.
- **Corrected Judgment** – ORS 18.107 provides the mechanism for correcting a judgment. If the corrected judgment affects the substantial rights of a party, a new appeal period commences. Under this provision, corrections made to a judgment after the appeal period has expired on the original judgment gives the other party another full 30-day appeal period. However, the new appeal period applies only to the corrected provisions of the judgment and any portions affected by the correction.
- **Money Award** – the term “money award” replaces what previously was called a “money judgment.” A money award is a judgment, or portion of a judgment, that requires the payment of money and may only constitute part of the judgment. A “support

award” is a specific type of money award and includes child and spousal support.

- **Execution** – execution is now defined to include only the enforcement of money awards or judgments for delivery of specific real or personal property by writs and other remedies.
- **Civil Action** – a civil action is a proceeding in which a judgment can be rendered that is not a criminal action.
- **Claim** – this term formerly applied to judgments in both criminal and civil actions. In 2006, it was replaced by the phrase “request for relief.”
- **Request for Relief** – this phrase replaces the former term “claim.” It refers to a claim, a charge in a criminal action, or any other request for a determination of the rights and liability of one or more parties in an action that a legal authority allows the court to decide by a judgment.

2. Requirements for Different Types of Judgments

(a) For All Judgments (ORS Ch. 18, ORCP 70A)

1. A Judgment Document must be “plainly titled as a judgment.”
2. The title must indicate whether the Judgment Document is a Limited Judgment, a General Judgment, or a Supplemental Judgment.
3. The Judgment Document must be separate from any other document in the action, but you may attach to the Judgment Document affidavits, certificates, motions, stipulations, and exhibits “as necessary or proper in support of the judgment.”
4. The Judgment Document must include:
 - a. The name of the court rendering the judgment and the case number or other identifiers used by the court for the action;
 - b. The names of any parties in whose favor the judgment is given and the names of any parties against whom the judgment is given;

- c. The signature of the judge rendering the judgment (or of the court administrator if the administrator is authorized by law to sign the judgment document), and the date the judgment document is signed.

5. If the Judgment awards money, it must include a “Money Award” section. See Section (e) below.
6. All Judgments and Orders submitted must also include a Certificate of Readiness. UTCR 5.100.

(b) Limited Judgments

1. Must include all elements in section (a) above;
2. Must be titled “Limited Judgment”; and
3. Must clearly state which claim(s) is(are) being resolved.
4. It is no longer necessary to include language in a Limited Judgment stating that the Judge has determined that there is no just reason for delay, as long as the Judgment Document is titled “Limited Judgment” (This is a change from former ORCP 67B, which required the magic language to be included in order for a judgment on fewer than all claims against all parties to be final. A judgment titled “Limited Judgment” is, by definition, a determination by the court that it has been determined that there is no just reason for delay.)
5. If a Limited Judgment includes a Money Award, it must include the elements in section (e) below.

(c) General Judgments

1. Must include all elements in section (a) above; and
2. Must be titled “General Judgment.”
3. A General Judgment need not recite what happened to claims resolved by a prior Limited Judgment.
4. If a General Judgment includes a Money Award, it must include the elements in section (e) below.

(d) Supplemental Judgments

1. Must include all elements in section (a) above; and
2. Must be titled “Supplemental Judgment.”
3. If a Supplemental Judgment includes a Money Award, it must include the elements in section (e) below.

(e) Money Awards in Judgment Documents

1. A Judgment Document that includes an award of money but does not include a “MONEY AWARD” section is enforceable, but it does not create an automatic judgment lien.
2. To create a judgment lien, a Judgment Document must include a section titled “MONEY AWARD” immediately above the Judge’s signature. This section is loosely styled after ORCP 70A. Failure to include “MONEY AWARD” does not render the judgment unenforceable, it only precludes the lien effect.
3. The “MONEY AWARD” section of a Judgment Document must include all of the following information, in the following order pursuant to ORS 18.042. That statute was amended by 2015 Oregon Laws Ch. 298 §82 to exempt foreign judgments and support orders from such requirements. Applicable MONEY AWARDS should provide:
 - a. The name and address of each judgment creditor and the name, address, and telephone number of any attorney who represents one or more of the judgment creditors
 - b. The name of each judgment debtor and, to the extent known by the judgment creditor, the address, year of birth, last four digits of the social security or tax identification number, last four digits of the drivers license number and state of issuance, and name of any attorney for each judgment debtor – but note that if we represent a public body, we cannot include the social security number or drivers license number of a judgment debtor if disclosure would violate state or federal law. (Also note that privacy issues with regard to use of social security numbers may affect this provision.) *See* SB 240, Oregon Laws 2009, Ch 230,

regarding limitations on personal identification information in judgments.

- c. ORS 18.042 requires that a Judgment *only include* the year of the judgment debtor(s)’ birth, instead of the birth date, and list only the last four digits of the judgment debtor(s)’ social security number, and last four digits of the drivers’ license number.
- d. The name of any person or public body other than the judgment creditor’s attorney that is known by the judgment creditor to be entitled to any portion of the money award
- e. The amount of the money award (stated separately from amounts of interest and other payments owed)
- f. Any interest owed as of the date the judgment is entered in the register, either as a specific amount or as accrual information, including the rate or rates of interest, the balance or balances on which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded, at what intervals
- g. Information about interest that accrues on the judgment after entry in the register, including the rate or rates of interest, the balance or balances on which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded, at what intervals
- h. For monetary obligations payable on a periodic basis, any accrued arrearages, required further payments per period, and payment dates
- i. If the judgment requires payment of costs and disbursements or attorney fees, a statement indicating that the award is made, any specific amounts awarded, a clear identification of the specific claims for which any attorney fees are awarded and the amount of attorney fees awarded for each claim

(f) Responsibility for Preparing a Judgment Document (ORS 18.035)

1. The Judge is supposed to designate the party who should prepare the Judgment Document.
2. If the Judge fails to designate a party, the prevailing party must prepare the proposed Judgment Document; if there is more than one prevailing party, the prevailing parties must reach an agreement as to who will prepare the Judgment Document.
3. Nothing in the first two rules is intended to prevent any party from preparing and submitting a proposed Judgment Document. ***Be certain to comply with UTCR 5.100*** regarding notice!
4. **Certificate of Readiness.** With the implementation of electronic filing, UTCR 5.100 was amended to include new provisions for Notice and to require that a Certificate of Readiness be attached to any order or Judgment.

One example of a Certificate of Readiness is as follows:

CERTIFICATE OF READINESS – COMPLIANCE WITH UTCR 5.100

I certify that I have complied with UTCR 5.100, and the submission of this Proposed [Order/Judgment] is ready for judicial signature because: (check all that apply):

- I served on opposing counsel not less than three 3 days prior to submission to the court, a true copy of the attached [Order/Judgment]; or
- I mailed to a self-represented party at the party's last known address not less than 7 days prior to submission to the court a true copy of the attached [Order/Judgment], accompanied by notice of the time period to object.

This proposed order or judgment is ready for judicial signature because:

- Each party affected by this proposed [Order/Judgment] has stipulated to [Order/Judgment] as shown by their signature on the document being submitted.
- Each party affected by this proposed [Order/Judgment] has approved its form as shown by their signature on the document being submitted or by an oral or written confirmation of approval sent to me.
- I have served a copy of this proposed [Order/Judgment] on all parties entitled to service as required by UTCR 5.100 and:
 - a. No objection has been served on me.

- b. I received objections that I could not resolve with the opposing party despite reasonable efforts to do so. I have filed a copy of the objections I received and indicated which objections remain unresolved.
 - c. After conferring about objections, [role and name of opposing party] agreed to independently file any remaining objection.
- The relief sought is against an opposing party who has been found in default.
- An order of default is being requested with this proposed judgment.
- Service is not required pursuant to subsection (3) of this rule, or by statute, rule, or otherwise.
- This is a proposed judgment that includes an award of punitive damages and notice has been served on the Director of the Crime Victims’ Assistance Section as required by subsection (4) of this rule.

By: _____
John R. Bachofner, OSB # 881524

Failure to include a Certificate of Readiness will result in the Order or Judgment being rejected.

3. Effect of Entry of a Judgment and of Using the Wrong Kind of Judgment

(a) Effect of Entry of a Judgment

1. When a Judgment is entered, it becomes “the exclusive statement of the court’s decision” and governs the rights and obligations of the parties.
2. A General Judgment incorporates a previous written decision of the court that decides one or more claims and that (1) is not a judgment; (2) is consistent with the terms of the General Judgment and any Limited Judgments in the case; and (3) reflects an express determination by the court that the decision be final as to the claim or claims resolved.

(b) Effect of Using the Wrong Kind of Judgment

1. If a Judgment Document is filed with the Court Administrator and does not state whether it is a Limited Judgment, a General Judgment, or a Supplemental Judgment, and the Court Administrator fails to comply with the requirement that he or she return it to the Judge and instead, makes an entry in the register that a Judgment Document was filed, the Judgment Document has the effect of a General Judgment.
2. When a General Judgment is entered, any claim in the action that is not decided by the General Judgment, or by a previous Limited Judgment, and cannot be decided by a Supplemental Judgment, is dismissed with prejudice unless the judgment document provides that the dismissal is without prejudice.
3. This result does not apply to a general judgment of dismissal – a general judgment of dismissal is without prejudice as to any claim, unless it specifies that it is with prejudice.

4. Judgment Liens

- As discussed above, in order to create a judgment lien, the Judgment Document must include a “MONEY AWARD.” Assuming there is a MONEY AWARD, and the court administrator notes the information in the register, then the judgment creates a judgment lien. ORS 18.042. The effect of the lien is substantially the same as under former law – *see former* ORS 18.350. The lien attaches to “all real property” of the debtor in the county in which the judgment is entered. Unlike other jurisdictions, Oregon continues to maintain that judgment liens do not attach to equitable interests in property.
- The statutes also distinguish between support awards and money awards that are not support awards. Support awards typically are obligations that occur in the future. The law makes clear that a lien for a support award is not an actual lien, but merely exists a cloud on the title to property owned by the judgment debtor. Until the judgment debtor misses a payment on a support award, no judgment amount exists for which a lien may attach. Accordingly, for priority purposes, or otherwise, no actual lien exists.

5. Res judicata effect of Judgment

6. Bankruptcy issues related to judgment

- (a) Nondischargeability
- (b) Avoidance Concerns

F. Attorney Fees

1. Damage Limit

- (a) Torts: Increased to \$10,000 effective January 1, 2012. ORS 20.080. Note: Includes 30 day notice and substantiation requirements for pre-suit demands.
- (b) Contracts without Attorney Fee provision: Increased to \$10,000 effective January 1, 2010. ORS 20.082. Note: Includes 20 days notice for pre-suit demand.
- (c) Washington: \$10,000. RCW 4.84.250.

2. Contract

- (a) Evaluate the scope of attorney fee provision

G. Practical Approach to Problems

- 1. Temper overzealous clients.** Resist the temptation of a client to throw good money after bad money. In other words, assess the likelihood of recovery and advise client accordingly.
- 2. Thorough analysis of the claim.** Often when a client comes to a lawyer, the client wants immediate action. You should resist the urgency created by a client and spend the necessary time to complete a thorough analysis of the client’s claim.
- 3. Develop a budget.** Identify what needs to be done and costs of accomplishing those tasks. You can share this strategy and budget with a client.
- 4. Keep the pressure on.** A creditor who pressures a debtor usually gets paid before other creditors.
- 5. Send confirmation letter to clients regarding risks and costs.**

6. Consider resources from clients.

- What is in file?
 - Credit Application
 - Account information
 - Contact information
- What learn through drive by?
- Brainstorm various methods of gaining information
- Purchase product
 - letter with forwarding address
 - Internet searches
- Ask: Where does debtor get paid and who owes them money?

H. *Stay of Enforcement*

- The filing of an appeal does not automatically stay a Judgment that is the subject of the appeal. In order to stay enforcement of the Judgment absent bankruptcy, a party must generally seek a stay through the filing of a supersedeas undertaking or bond. ORS 19.330; 19.335. See also ORS 19.340 [waiver of undertaking]; ORS 19.345 [Enforcement in contract action]; ORS 19.350 [Discretionary stay by court].
- Supersedeas undertaking for transfer of real property requires payment for use and occupation of property.
- Supersedeas undertaking for transfer of personal property requires compliance upon affirmation of Judgment or payment of amount stated.
- Judgment for transfer of personal property can be stayed by delivery to court or officer or receiver appointed by court.

I. *Correcting a Judgment*

- See I.E.1 above. ORS 18.107 controls, but provides for commencement of a new appeal period if substantive rights are changed.

J. *Securing a Judgment*

- ORS 18.150 provides that, except as provided by law, a Judgment Lien is created automatically in the county in which a Judgment is filed if the document includes a “money award” and complies with ORS 18.042 and 18.048. However, a small claims award of less than \$3,000 requires the creditor to create a Judgment Lien under ORS 46.488.

1. County of filing

- In county of filing, Judgment Lien attaches to all real property of Judgment debtor in county, and that they acquire afterward in that county. ORS 18.150.

2. Other Counties

- In other counties, creditor must record the Judgment in the County Clerk Lien Records for each other county in which a lien is sought. Recording is accomplished through recording a certified copy of the Judgment document or a lien record abstract for the Judgment. ORS 18.152. Note: If certificate of extension of Judgment (extending beyond 10 years) is filed after recording, then the certificate must also be recorded in the other counties. See ORS 18.182.

K. *Effects of an Appeal*

- The filing of an appeal does not stay a Judgment appealed and the creditor may proceed in collection of the Judgment accordingly absent the filing of a supersedeas undertaking or other relief. ORS 19.330.
- ORS 18.154 provides that a debtor who appeals a Judgment may move the trial court for elimination of a Judgment lien upon filing of a supersedeas undertaking and providing for such additional security as the court requires to ensure satisfaction of the Judgment if affirmed on appeal. See also Stay of Enforcement above.

Note: ORS 19.270 clarifies that appeal from a limited or supplemental Judgment applies only to those matters, and not those from the previous Judgment. The trial court retains jurisdiction over other matters.

II. COLLECTING A JUDGMENT

CAUTION: Collection of debts typically requires compliance with the Fair Debt Collection Practices Act, 15 USC §1692 *et seq.* (“FDCPA”), and/or the Oregon Unlawful Debt Collection Practices Act, ORS 646,639 *et seq.* (“OUDCPA”), and attorneys do qualify as debt collectors subject to those Acts. The requirements for compliance with the FDCPA and OUDCPA are the subject of entire CLE presentations and beyond the scope of this presentation. Be certain to comply with those Acts if you intend to do any collection work.

A. *Notice of Demand to Pay Judgment*

- Before a Judgment Debtor Examination can be obtained, ORS 18.265 requires that it be supported by one of the following:
 - 1) Return of a writ of execution showing the Judgment has not been satisfied;
 - 2) Garnishee response to writ of garnishment that does not fully satisfy the Judgment; or
 - 3) Proof of Service of a Notice of Demand to Pay Judgment
 - Notice of Demand must give 10 days to pay Judgment
 - Must be served in same manner as summons or by any form of mail addressed to the debtor and requesting a receipt.
 - Service by mail effective on mailing

B. Sample Forms

- As part of a comprehensive re-working of the Judgments chapter in 2003, the Oregon legislature codified several forms to be used in Garnishments. See ORS 18.830 [Writ of Garnishment]; 18.832 [Debt Calculation]; 18.835 [Garnishee Response]; 18.838 [Instructions to Garnishee]; 18.840 [Wage Exemption Calculation]; 18.842 [Release of Garnishment]; 18.845 [Notice of Exemptions; Instructions for Challenge to Garnishment]. **BEWARE: Some forms and instructions were modified effective June 4, 2009**, to comply with new privacy requirements under Oregon Laws 2009, Ch. 230. Make certain you are using the most recent version of the forms.

Notice of Demand to Pay Judgment Form:

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASHINGTON

Joe Creditor,

 Plaintiff,

v.

Flakey Debtor, an individual,

 Defendant.

No.

NOTICE OF DEMAND TO PAY
JUDGMENT

TO: Defendant Flakey Debtor

DEMAND IS HEREBY MADE upon you, pursuant to Oregon Revised Statutes section 18.265(1)(a), for payment within ten (10) days of your receipt of this Notice, of that certain judgment entered against you in the above Court.

Payment may be made to Plaintiff through the undersigned attorney for Plaintiff.

PLEASE TAKE NOTICE that your failure to pay may result in further court proceedings.

TOTAL AMOUNT DUE: Judgment in the amount of \$1,000,000.00 plus all accrued interest at the rate of nine percent (9%) from the date of entry of Judgment until paid, plus attorney fees in the amount of \$37,803.50 and costs in the amount of \$670.51.

By _____
John R. Bachofner, OSB No. 88152
Of Attorneys for Plaintiff Joe Creditor

C. IDENTIFYING SPECIFIC RECORDS AND SOURCES OF INFORMATION

1. Motor Vehicle Records – Oregon Department of Transportation – Division of Motor Vehicles

Online: <http://www.oregon.gov/ODOT/Get-Involved/Pages/Public-Records.aspx>

- Locate vehicles, drivers, residences and insurance
- Account can be established to allow for rapid discovery over phone

BEWARE: ORS 802.179 & 802.181 restrict disclosure & re-disclosure of info

2. Financial Institution Records

- Subpoena typically required
- If business, what about ordering product?
Pay by check and determine where check was deposited.

3. Real Estate Records

- Open to public – many counties online
- Title Search
- Skip Trace

4. UCC Records

Online Search: <https://secure.sos.state.or.us/ucc/searchHome.action>
(Allows search for information on UCC secured transactions, as well as Farm Product notices, IRS Tax Liens, Agricultural Liens, Agricultural Produce Liens, Grain Producer's Liens, Revenue Warrants and Employment Warrants. Search by debtor name (business or individual) or filing number).

- Very effective to determine other liens
- Check to see position and whether worth pursuing

5. Credit Bureau Reports

Online: www.Equifax.com
www.Experian.com
www.TransUnion.com

- If accessible, very good information

- Beware of Fair Credit Reporting Restrictions (FCRA) 15 USC §1681a *et seq.*

6. Newspapers

- Search for Debtors in database

- Residence

- Notices

- Articles – sales, purchases, etc.

7. Corporation Division – Business Name Search

Online: <http://www.filinginoregon.com/>

- Available in nearly every state

- Use pre-suit to make certain pursuing correct debtor and name correctly

8. UTILIZING INTERNET RESOURCES

- Social Media Networks (i.e. Facebook, Linked in, etc.)

- Accurint through LEXIS

9. USING INVESTIGATORS

- Check costs

- Make certain accurate info though

- Are they going to indemnify you for FDCPA issues?

D. Identifying Fraudulent Conveyances of Assets

- Traditional approach – Badges of Fraud

- Modern approach:
 - UFTA ORS 95.200 *et. seq.*
 - Bankruptcy 11 USC §548

- Present and Future creditors - ORS 95.230: Transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- a) actual intent to hinder, delay or defraud creditor

b) without receiving reasonably equivalent value in exchange, and the debtor: 1) About to engage in transaction with unreasonably small assets; or 2) Intended to incur, or reasonably should have believed would incur debts beyond ability to pay

- Multiple factors to consider intent (i.e. insider, control, concealment, threatened suit, etc.).

- Present Creditors – ORS 95.240: Transfer without reasonably equivalent value and insolvent.

E. WHEN TO INVOLVE THE COURT

- No Luck Locating Assets

- No Cooperation

- Complete Dead-End, But Probable assets.

- See Preliminary Concerns and Practical Considerations above.

F. JUDICIAL ASSISTED DISCOVERY. Judicial assistance can be obtained in Supplementary Proceedings in aid of execution.

1. **POST-JUDGMENT INTERROGATORIES.** ORS 18.270 provides that written interrogatories concerning the judgment debtor's property and financial affairs may be served, in the same manner as the summons, or by any form of mail, return receipt requested. The interrogatories must notify the judgment debtor that the judgment debtor's failure to answer the interrogatories truthfully shall subject the judgment debtor to penalties for false swearing and contempt.

The judgment debtor must answer the interrogatories and return them to the judgment creditor or the judgment creditor's attorney within 20 days after receipt. Should the judgment debtor fail to comply with the interrogatory process, the judgment creditor can file a motion, affidavit and order for the judgment debtor to show cause why he/she should not be held in contempt. ORS 18.270(3). In Washington, *See* RCW 6.32.015 (order required).

2. JUDGMENT DEBTOR EXAMINATIONS. Once a judgment is entered, the judgment creditor may file a motion for a "Judgment Debtor Examination" under ORS 18.265. In Washington, See RCW 6.32 et seq. The motion must be supported by either: a) Proof of service (in manner of summons or by mail with return receipt requested) of a notice of demand to pay the judgment within 10 days; b) A return of a writ of execution showing that the Judgment remains unsatisfied; or c) A garnishee response to a writ of garnishment that does not fully satisfy the judgment. (In Washington notice or execution is not required.) Note that ORS 18.265 now clarifies that garnishments and executions are separate and that either will support a Judgment Debtor Exam. The order requiring the judgment debtor to appear may also contain a restraining order pursuant to ORS 18.265(7). RCW 6.32.120.

Under ORS 18.265 a judgment debtor may be required to attend a Judgment Debtor Examination over 100 miles from the debtor's residence under certain circumstances. See ORS 18.265(4) and (5). RCW 6.32.190. (In Washington, only within the county where they work/reside.) ORS 18.265(2) provides that the only courts that may issue an order requiring the judgment debtor to appear are:

- a. The original court in which the judgment was entered;
- b. Any Circuit or District Court for the county in which the judgment debtor resides and in which a certified copy of the original judgment or lien record abstract has been recorded pursuant to ORS 18.152; or
- c. Any Circuit or District Court for the county in which the principal place of employment of the judgment debtor is located and in which a certified copy of the original judgment or lien record abstract has been recorded pursuant to ORS 18.152. In order to require the appearance of a judgment debtor in any county other than the county in which the original judgment was entered, ORS 18.265

requires, in addition to the motion, a certified copy of the original judgment or the county clerk lien record, an unsatisfied execution or unsatisfied demand for the payment of the judgment following ten days’ notice, or any form of mail demand addressed to the judgment debtor return receipt requested. See also RCW 6.32.240. ORS 18.265 does not expressly require the judgment debtor to produce requested documents at the time of the hearing for examination. Despite the lack of express authority for production of documents in ORS 18.265, ORCP 36, 43 and 39C(5) are not restricted to prejudgment discovery. *See also* ORS 18.268 and CR 69.

ORS 18.268(1) provides that both the judgment creditor and judgment debtor may subpoena and examine witnesses. Accordingly, ORS 18.268(1) expressly allows a judgment creditor to subpoena witnesses to testify concerning the judgment debtor’s property or interest in property. *See also* RCW 6.32.030.

The witnesses may also be required to produce documents pursuant to a subpoena duces tecum. ORCP 55B (subpoena) also allows for the creditors to require witnesses to produce documents. Document requests should include all documents associated with the debtor’s financial affairs including tax returns, check registers, financial records, financial statements, stock certificates, brokerage account summaries, corporate minute books and stock ledgers for those debtors who are sole shareholders of corporations. Also request copies of any documents associate with any transfers of any assets within the previous 12 months.

G. USING MOTIONS TO COMPEL COMPLIANCE WITH POST-JUDGMENT DISCOVERY

- ORS 18.775 Liability of Garnishee.
 - Arises from failure to timely respond to garnishment. Liable for lesser of Garnishment satisfaction or value of garnishable property, and costs (even if no property)

- ORS 18.268(2) Seizure of Property Identified in JDE
 - If appears property at JDE, then court may seize. Bring blank order for use if property identified
 - Non-Compliance with ORS 18.270 Interrogatories
 - Contempt ORS 33.015 – ORS 33.155 Corporate & Individual fines & jail
Remedial = future & Punitive = past
 - Contempt can also be used as basis for Restraining Order pending JDE

H. GARNISHMENTS: WHEN TO USE WRIT OF GARNISHMENT AND PROPERTY SUBJECT TO WRIT

1. Garnishment is a procedure which enables a creditor to receive tangible or intangible personal property of a debtor in the possession, custody or control of a third-party. The property includes debts, wages or other monetary obligations owing by the third-party. ORS 18.602; ORS 18.615 (post judgment writs).

2. In 2001, the Oregon Legislature substantially revised the garnishment provisions of *former* ORS 29.125-29.415. Although substantive law was not changed, many of the forms are entirely different and the changes in procedure are worth noting. All of the statutory garnishment forms have been extensively modified. The entire statutory scheme was moved to ORS 18.600 to ORS 18.845.

3. In 2009, the Oregon Legislature changed the law regarding what information is contained on judgments, lien abstracts, and garnishments. For garnishments only the last four digits of the Social Security Number are listed on the garnishment. If a garnishee requests the full SSN for purposes of identifying the correct individual, then the garnishor or garnishor’s attorney may disclose the full SSN. *See* Oregon Laws 2009, Ch. 230.

4. Debt subject to garnishment:
- (i) judgment requiring payment of money, after the judgment is entered and the register of the court or docketed into the court’s docket;

- (ii) a support arrearage shown on support records of the Department of Justice;
- (iii) monetary obligations imposed under agency orders or warrants recorded in the County Clerk Lien Record;
- (iv) a provisional process order under ORCP 83 or 84.

5. **Limitations on garnishments.** Generally, the garnishee is liable only for the amount of the debt up to the limit of the judgment or the value of the property, whichever is less. The debtor's obligation need not be presently due or owing, but the debt must be in existence. A debtor/defendant’s prior assignment of an interest is *effective* against a later garnishment. *Weyerhaeuser v. Lynch*, 268 Or. 142, 520 P.2d 351 (1974). Equitable interests, property in the custody of the law, conservator, or personal representative and the debtor’s exempt property are not subject to garnishment. ORS 18.618.

6. **Procedure.** Writs are issued either by the court clerk or by an attorney. Under *former* ORS 29, two forms of writ existed: a wage writ and a non-wage writ. Under ORS 18.607 and 18.830, only one form of writ exists and that writ can be issued either by an attorney or by a court clerk and includes pre-judgment writs. ORS 18.635(2). Attorney issued writs are only issued pursuant to a money judgment entered in the court register. ORS 18.635(3).

7. **Duration of the Writ.** Writs are valid for 60 days after the date of *issuance*. ORS 18.609(1). A writ is issued when it is signed.

8. **Delivery of the Writ.** Writs are delivered, not served, pursuant to the terms of the statute. An original writ and one certified true copy (or alternatively two certified true copies of the original writ) must be delivered to the garnishee together with the instructions, response form, wage explanation form and search fee. ORS 18.790.

Delivery can occur either in person, by the sheriff or by any other person who carries errors and omissions insurance with at least \$100,000 worth of coverage. If the writ is personally delivered by the sheriff, or by another person, as opposed to certified mail, the person delivering the writ must note the date of delivery on the writ actually delivered to the garnishee. ORS 18.652.

Alternatively, and more inexpensively, writs can be delivered by placing the writ in the mail, certified mail, return receipt requested. ORS 18.652 (notice that the garnishee is not obligated to accept the writ delivered through the mail). If the garnishee is a financial institution, the statutory fee must be paid.

The writ is delivered to the following individuals or entities depending upon the type of property levied upon:

- a. The individual who holds the property. Either delivered personally to the individual or to the person’s office if they maintain an office.
- b. Partnerships. The writ is delivered to the person designated by the partnership to receive service of process, to any general partner or, as of 2006, by office service.
- c. Corporations. Any person designated by the corporation to receive service of process (registered agent) may receive the writ. Alternatively, an officer or managing agent may receive the writ.
- d. Financial institutions. Writs must be delivered either to the manager, assistant manager, or any other person designated by the financial institution at any office or branch where deposits are received, or at any place where the financial institution is designated a specific place for receiving writs of garnishment. Contrary to some states, delivery of the writ effectively levies upon all property at every branch of the

financial institution located within the State of Oregon upon delivery to a single proper location and person.

- e. Sole Proprietors. As of 2006, a sole proprietor may now designate a person to accept service of writs of garnishment.

9. **Notice of Delivery to Judgment Debtor Following Delivery of the Writ.** The person or sheriff who delivered the writ must promptly deliver to the defendant the following information and items:

- a. A copy of the writ;
- b. The original debt calculation form;
- c. A statutory form of “Notice of Exemption” (ORS 18.845); and
- d. A statutory form of “Challenge to Garnishment” (ORS 18.850). If someone other than the attorney who issues the writ, actually delivers the writ, that person (sheriff or other person) responsible for delivering the writ must be provided, by the judgment creditor, with the current address of the debtor or a statement that reasonable efforts have been made to locate the debtor and the debtor’s whereabouts are unknown.

ORS 18.715.

In the event that the garnishor/creditor fails to comply with the foregoing section under ORS 18.715, statutory penalties, costs and attorney fees may be recoverable by the debtor recovering any garnished property. ORS 18.715.

10. **Garnishee’s Responsibilities Upon Receipt of Writ.** The garnishee has a duty to search his/her/its records under ORS 18.665. Generally, the writ of garnishment includes the debtor’s social security number, and other identifying information that would allow the garnishee to locate the debtor’s identity. If the garnishee is a financial institution, the garnishee needs to check to see if the \$15.00 search fee (\$10 if Garnishor is Dept. of Revenue) was paid and

delivered with the writ. If the search fee is not paid to the financial institution upon delivery of the writ, the garnishee does not need to respond to the writ. ORS 18.790(3).

- a. Garnishees have a number of options at their disposal. Nevertheless, the garnishee must use the statutory form for the garnishee response found at ORS 18.835.
- b. The response must be returned within seven (7) calendar days of delivery of the writ. ORS 18.680.
- c. The original Response must be returned to the garnishor. A copy must be mailed to the debtor and to the court clerk. ORS 18.690.
- d. In the response form, the garnishee should indicate if the writ does not comply with ORS 18 or the garnishee has no property of the debtor/defendant at this time or due in the future.
- e. If the garnishee discovers that a bankruptcy was actually filed, or if the garnishee is not the employer and holds no property of the debtors, the garnishee need not file the response with the clerk.

11. **Wages.** If the garnished property is wages, the garnishment is valid for a period of 90 days after the writ is received. ORS 18.625(2)(a). The garnishee should note the date and time of delivery and notify the central payroll department immediately upon receipt. If the payroll department has accrued but *undelivered* wages, the payroll department should recalculate the debtor’s wages and subtract the garnished funds. Issues typically arise where the checks have been cut days in advance of the payday but have not yet been delivered by the time the writ is delivered to the garnishee/employer.

Garnishable wages, subject to the writ, are calculated using the statutory form and the “wage exemption calculation” at ORS 18.840. However, there is an interesting inconsistency between the Oregon statutory form listing exemptions and the limitations imposed by federal

law. *See* 15 USC §1673.¹ Generally, garnishable wages include gross weekly earnings minus amounts required to be withheld by law. Because many of the debtor’s voluntary payments, including 401K contributions, charitable contributions, dues and wage deductions for payments of other creditors, are not required to be withheld by law, they are not considered in the wage exemption calculation form. The wage exemption calculation form does take into consideration exemptions for wages.

At the end of each pay period, the employer/garnishee should send the garnished funds to the clerk (clerk issued writ) or the creditor’s attorney (attorney issued writ) until the 90 days expires.

12. **Issues:**

- a. Multiple writs/priority;

¹ 15 USC §1673 provides:

(a) Maximum allowable garnishment

Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of Title 29 in effect at the time the earnings are payable, whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

(b) Exceptions

(1) The restrictions of subsection (a) of this section do not apply in the case of

(A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review.

(B) any order of any court of the United States having jurisdiction over cases under chapter 13 of Title 11.

(C) any debt due for any State or Federal tax.

(2) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed--

(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and

(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;

except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.

(c) Execution or enforcement of garnishment order or process prohibited

- b. Expiration of writs during the middle of the pay period;
- c. Partial releases and releases. ORS 18.842.

13. **Non –Wage Writs.** If the garnishee holds money or property, other than wages, and the property or money is due within 45 days from the date of the delivery of the writ, the garnishee must deliver the property to the plaintiff or the plaintiff’s attorney (unless a claim of exemption has been received) or to the court clerk if the clerk issued the writ. If the property held by the garnishee is not payable in money, but instead is physical property, the garnishee must hold the property pending instructions from the sheriff. ORS 18.685. In such a case, the garnishor must notify the sheriff within 20 days of receiving the garnishee’s response that property must be sold. The garnishor must pay the sheriff and garnishee’s fees immediately. If the garnishee has properly and timely notified the garnishor of the need for sale and has not received instructions from the sheriff on or within 30 days, the garnishee need not turn over the property. ORS 18.685.

14. **Property due outside 45 days after delivery of the writ.** If the garnishee owes a debt or other property that is not yet payable or due until the expiration of 45 days, the garnishee must notify the garnishor who may request a sheriff to sell the property or debt pursuant to ORS 18.755. If the debt or property is due within 45 days after the writ is delivered, the garnishee must pay the funds to the plaintiff’s attorney within five (5) days after it becomes due. ORS 18.732.

Note: Employers are prohibited from terminating employment of employees as a consequence of garnishments or child support withholding. ORS 18.385(9); ORS 25.424(3)(a).

No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section.

I. EXEMPTIONS

ORS 18.345 and ORS 18.618 provide the debtor with certain exemptions. Oregon residents are required to use the state exemptions and are not allowed to choose the federal bankruptcy exemptions when they file bankruptcy except as provided by 11 USC §522 relating to choice of exemptions based upon domicile.

Typically, a judgment debtor claims that the property is exempt. ORS 18.322 provides that, except as it relates to sales of residential property subject to a homestead exemption, a debtor's claim of exemption shall be adjudicated in a "summary manner at a hearing" before the court out of which the writ of execution was issued or where the judgment was originally entered or filed (in the case of a foreign judgment) involving a writ of garnishment. ORS 18.345 – 18.362 set forth the majority of the exemptions as to personal property. Some of the more common exemptions include:

1. \$5,000 value exemption for tools of the trade; ORS 18.345(1)(c);
2. \$3,000 value exemption upon one motor vehicle; ORS 18.345(1)(d);
3. \$3,000 for value of household goods and furniture held primarily for personal, family or household use; ORS 18.345(1)(f);
4. Spousal and child support or separate maintenance to the extent necessary for support of debtor and dependants. ORS 18.345(1)(i).
5. ORS 18.345(1)(k) provides a debtor with an exemption of \$10,000 of cash or property traceable to a payment or payments on account of personal bodily injury of the debtor or a person on whom the debtor depends; and a payment to compensate the debtor’s loss of future earnings, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. The prior exclusion of pain and suffering or compensation for actual pecuniary loss was replaced with a simple \$10,000 sum. Under *former* ORS 23.160(1)(j)(B)

compensation for mental anguish was not exempt while compensation for muscular pain arising from physical injury in an automobile was exempt. *In re Bowen*, No. 390-36505-S7 (Bankr. D. Or. July 19, 1991).

6. \$400 “...in value in any personal property.” This is typically referred to as the "wild card" exception. However, this exemption may not be used to increase the amount of any other exemption,...” ORS 18.345(1)(p). It is this exemption that is typically used to exempt funds in bank accounts not traceable to any other specific exemption.

7. Homestead. Exemptions concerning the debtor's real estate held primarily for use as the debtor's own residence typically fall within the homestead exemption. Under ORS 18.395, the homestead exemptions (including proceeds from the sale for one (1) year) are \$40,000 for a Single debtor, and \$50,000 for married debtors. Mobile Home and Real Property exemptions are the same. The amount of exemption for floating homes and manufactured homes changed significantly in 2009 by the Legislature so that those dwelling types have the same exemptions as dwellings on real property regardless of the ownership of the property where the dwelling is located.

8. Prepaid Rent, Security Deposits required on residential lease. ORS 18.395. *See In re Cassarino*, 379 Fed 1069 (9th Cir 2004); *see also In re Schuhman*, 2010 WL 5125321 (Bkcy D Or 12/19/10). Prepaid rent not exempt when not required by lease. Security deposits, prepaid rent under a residential tenancy, and any payments under a land sale contract that become due more than 45 days after service of the writ are not garnishable.

To the extent that the debtor may claim an exemption on the challenge to garnishment form, garnishees must hold property received for at least 10 days in an account separate from the funds used for personal or business expenses. If a challenge to the garnishment is filed within that time, the funds must be delivered to the court clerk immediately. The court clerk will set a

hearing, notify the parties, and the court will entertain the claim, of the debtor, that the funds garnished were exempt. Alternatively, third parties who claim a right to the funds may also use the challenge to garnishment form on the same basis.

J. GARNISHEE LIABILITY

Garnishees are personally liable to the plaintiff for the value of the defendant’s property at the time of the delivery of the writ or the amount necessary to satisfy the creditor/plaintiff’s judgment, whichever is less. ORS 18.775. In the event that a garnishee fails to serve the response within seven calendar days from the receipt, the garnishee may be ordered to appear and be found in contempt.

In the event that the garnishee fails to properly complete the form, or if the garnishor believes that the form is improperly completed or erroneous, the garnishee may be ordered to appear for an examination under oath concerning the response. ORS 12.085 provides a one-year statute of limitations from the date the writ is delivered to the garnishee. If the garnishor has not commenced legal action against the garnishee, on the writ, within that time frame, the garnishor’s enforcement rights have expired.

Garnishors, believing that the garnishees have either completed the response to garnishment form improperly or that have failed to respond at all, may apply to the court for an order to show cause why the garnishee should not be held in contempt. ORS 18.778(1). In such a case, the garnishor may ask the court to include language restraining the garnishee from disposing of or injuring the property alleged to be in the garnishee’s possession. ORS 18.778(2). In addition to the order to show cause, the garnishor may serve allegations in interrogatories on the garnishee.

K. SATISFACTION OF JUDGMENT/MONEY AWARD ORS 18.225 provides the mechanism for satisfying a Money Award through filing of a satisfaction document. ORS

18.235 also provides a statutory mechanism for the debtor to satisfy a Money Award in a judgment where the creditor fails or refuses to do so following payment of the judgment. If a court finds that the creditor willfully failed to provide a satisfaction under ORS 18.225, the court may render a supplemental judgment awarding reasonable attorney fees to the person making the motion. ORS 18.235.