

11. AN OVERVIEW ON JUDGMENT ENFORCEMENT

Judgment Enforcement Outline

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Modifications to Main Text

- Footnote 1: “596” should read “597(b)”
- Footnote 11: “9-5019” should read “9-501”
- Section 11.7, first paragraph: the correct DMV URL is <http://www.dmv.ny.gov>
- Section 11.9: The “Commission for the United Nations, Consular Corps and Protocol” has changed its name to “The New York City Mayor’s Office for International Affairs”
- Section 11.12, seventh paragraph: “within 5 days, serve written redirect questions.” should read “within 5 days, serve written recross questions.”
- Footnote 38: “47 N.Y. 639” should read “47 N.Y.2d 639”
- Footnote 36 and accompanying text: The homestead exemption has increased to up to \$150,000, dependant on county
- Footnote 93: “1692f” should read “1692p”

CHAPTER TWO

EVALUATING THE CLAIM

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[2.0] I. REVIEWING DOCUMENTATION

An attorney who evaluates a claim for collection should ensure that the creditor has supplied all relevant documentation of the debt. This may include, but is not limited to, a copy of a signed application and contract, proof of security, guarantees, invoices, statements, assignment agreements, and correspondence from the debtor. Not only does a well-organized file assist in evaluating the merit of the claim, it also enables an attorney to comply immediately with consumer verification requests and to anticipate possible defenses to the action.

The attorney should also conduct a preliminary investigation of the debtor to determine his or her status. For example, a debtor who is an active-duty member of the military service is afforded specific protections under the Servicemembers Civil Relief Act (SCRA).¹ Pursuant to this Act, the maximum rate of interest on credit obligations incurred before military service is limited to 6% during the period of military service.² In addition, upon application, the SCRA provides a service member who has notice of a pending civil action an automatic 90-day stay.³

A debtor may also be deceased, in which case the attorney should check Social Security death records⁴ and the appropriate surrogate's court for the existence of the decedent's estate within which to file a claim. In the case of a bankrupt debtor, it is essential for the attorney to identify pre-petition obligations that may have been discharged and post-petition obligations that are fully enforceable. Of course, in the case of a pending bankruptcy, the attorney is prohibited from taking virtually any action to collect the debt by automatic stay, but he or she may file a claim on the creditor's behalf.⁵

The attorney should also be cognizant of possible notice requirements under the Uniform Commercial Code (UCC) and the Bankruptcy Code. Pursuant to UCC § 2-702, a seller has a right to reclaim goods from an insolvent buyer *if* demand is made within ten days after receipt. If, how-

1 50 App. U.S.C. § 501–596.

2 50 App. U.S.C. § 527.

3 50 App. U.S.C. § 522. Active service members can be identified by accessing <www.servicememberscivilreliefact.com> (last visited May 16, 2008).

4 Social Security Death Index Search Engine, <<http://www.ssdi-search.com>> (last visited Feb. 23, 2008).

5 11 U.S.C. 362. Bankrupt debtors can be identified by accessing www.pacer.psc.uscourts.gov (last visited May 16, 2008).

ever, misrepresentation of solvency was made in writing within three months before delivery, this notice provision does not apply. The rights of a reclaiming seller under state law are preserved even if the debtor should file for bankruptcy relief.⁶

Similarly, if the debt is based on materials supplied or work performed in the construction industry, there are time limits within which to file a notice of mechanic's lien. For private improvements, N.Y. Lien Law § 10 (Lien Law) requires the lien to be filed within eight months after the last item of work was performed. (For a single-family residential house, the time period is shortened to four months.)⁷ For public improvements, Lien Law § 12 requires the lien to be filed within 30 days after the entire project is approved and accepted.

The attorney should also take note of acts constituting default under any contract and the notice requirements associated with the default. A default occurs not only whenever the debtor fails to tender a payment that is due, but the contract may specify that other acts (e.g., making false statements on loan application, failing to maintain insurance on collateral, etc.) also constitute defaults. The attorney should give notice of default according to the specific provisions in the contract, such as by first-class mail or registered mail.

An attorney who decides to undertake representation should review Part 1215 of the Joint Rules of the Appellate Division.⁸ This rule requires attorneys to provide clients with a "letter of engagement" that must (1) explain the scope of legal services to be performed; (2) explain the fees and expenses to be charged, together with the lawyer's billing practices; and (3) note that the client may have a right to arbitrate any fee dispute that may arise under Part 137 of the Rules of the Chief Administrator. However, there are exceptions to this rule; notably, it does not apply to matters where the legal fee is expected to be less than \$3,000.⁹

⁶ 11 U.S.C. § 546(c).

⁷ Lien Law § 10(1).

⁸ 22 N.Y. Comp. Codes R. & Regs. tit. 22, § 1215.1 (N.Y.C.R.R.).

⁹ 22 N.Y.C.R.R. § 1215.2.

[2.1] II. IDENTIFYING POTENTIAL CAUSES OF ACTION

An attorney evaluating a claim should also attempt to identify all potential causes of action. Many claims will undoubtedly be based upon contract, including promissory notes, credit card purchases, and deficiency actions. In addition to identifying the rights and duties of every party clearly, a properly completed contract will (1) clearly identify all parties to the transaction; (2) incorporate by reference all relevant documents; (3) clearly state the additions, deletions, and modifications to the existing contract in applicable amendments or addendums; and (4) contain the signatures of the parties to be bound.

The debt may also be secured or unsecured. If the debt is secured, the secured party has a right, upon default, to immediate possession of the collateral. Repossession is appropriate if the collateral can be taken without a breach of the peace. However, if the attorney has reason to believe that repossession cannot be accomplished peacefully or that the collateral is being hidden, he or she should commence an action in replevin.

If the claim involves a debtor and a secured party in a commercial transaction, the attorney should examine whether the secured party has perfected its security interest by filing a UCC financing statement.¹⁰ Depending on the nature of the collateral, the proper place to file a financing statement is either (1) the office designated for the filing or recording of a record of a mortgage on the related real property or (2) the office of the Secretary of State of New York.¹¹ The secured party may file either the security agreement itself or a financing statement. To be valid, the filed document must contain (1) the names of the debtor and the secured party and (2) a description of the collateral that “reasonably identifies what is described.”¹² A filed financing statement is effective for five years from the date of filing. It lapses on the expiration of the five-year period unless a continuation statement is filed within six months *prior* to the expiration date.¹³

10 New York State UCC records may be searched on the Department of State’s Web site, <<http://www.dos.state.ny.us>> (last visited Feb. 23, 2008).

11 UCC § 9-5019(a), (b).

12 UCC §§ 9-502(a), 9-504, 9-108.

13 UCC § 9-515.

Other potential causes of action in a collection referral are claims based on services (i.e., medical services rendered or goods, wares, and merchandise sold and delivered) or claims based on checks returned due to insufficient funds. In the case of a dishonored check, the attorney should request a copy of the check to ascertain all liable parties, including the drawer and endorser.

[2.2] III. ESTABLISHING LIABILITY— IDENTIFYING ALL PROPER DEFENDANTS

The next step in evaluating a collection claim is to identify all proper defendants. If a creditor renders services to a debtor who appears to be a minor, the attorney should identify the minor's responsible parents or legal guardian. In addition, the attorney should review all documentation for guarantors on credit applications or guaranty agreements. In the case of a corporate debt, the attorney should evaluate the capacity within which a corporate officer signed the application or contract for evidence of an intent to be personally obligated on the debt. The attorney should also make an effort to identify the legal composition and correct name of the debtor. It is important for the attorney to conduct an independent examination and not rely solely on the information provided by the creditor. A creditor may mistakenly assume the debtor was a corporation when the debtor was actually a person conducting business under a certificate of doing business under an assumed name (DBA). Whenever a debtor is involved in a commercial claim, the attorney should check both the New York State Department of State's Web site¹⁴ and the applicable county clerk's office to verify that debtor's status.

[2.3] IV. STATUTES OF LIMITATIONS

Together with potential notice requirements previously discussed, the attorney must also be aware of time restraints within which an action must be commenced. Pursuant to N.Y. Civil Practice Law & Rules section 211(b) (CPLR), judgments in New York State have a 20-year statute of limitations. This section creates a conclusive presumption of payment if 20 years have elapsed from the time the judgment was docketed, except where there is (1) a written acknowledgment of indebtedness signed by the person to be charged or (2) a payment of all or part of the amount recovered by the judgment. Pursuant to CPLR 211(e), an action or proceeding to enforce any order or judgment awarding support, alimony, or maintenance must be commenced within 20 years from the date of default

¹⁴ <<http://www.dos.state.ny.us>> (last visited Feb. 23, 2008).

in payment. Actions on express or implied contracts (except those governed by UCC article 2) and any action for which there is no other specific statute of limitation must be commenced within 6 years.¹⁵ Pursuant to UCC § 2-725, the statute of limitations on a contract for the sale of goods is 4 years and cannot be extended by agreement of the parties, but it may be shortened to a period of not less than 1 year.

[2.4] V. JURISDICTION

Jurisdiction depends on whether the referred claim is a consumer claim or a commercial claim. A consumer credit transaction is defined by CPLR 105(f) as a “transaction wherein credit is extended to an individual and the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes.” The federal Fair Debt Collection Practices Act (FDCPA) requires that all actions based on consumer credit transactions must be commenced either in the county where the contract was signed or the county where the debtor resides.¹⁶ In commercial claims, the attorney should review the entire contract for a forum selection clause. Depending on the particular language used, the jurisdiction agreement may be exclusive or permissive. An exclusive agreement *mandates* that any action based upon the contract must be brought in a particular state’s courts, whereas a permissive agreement *allows* an action to be brought in a particular state’s courts. In addition to the loss of time and money caused by commencing an action in an improper court, the creditor’s attorney whose case is dismissed for lack of jurisdiction also faces the risk of the action being time-barred. Similarly, the attorney should also examine the contract for mandatory arbitration clauses that may likewise result in dismissal of an action and raise time-bar concerns.

Whenever possible, the attorney should commence the action in city court, which has jurisdiction over actions and proceedings for the recovery of money and actions involving chattels, and whose filing fee is \$45 compared to \$210 to commence an action in supreme court. However, in order to have jurisdiction, the amount sought to be recovered must be less than \$15,000 (exclusive of interest and costs).¹⁷ In addition, pursuant to Uniform City Ct. § 213(a), either plaintiff or defendant must (1) be a resident of the city or of a town contiguous to such city, (2) have a regular employment within the city, or (3) have a place for the regular transaction

¹⁵ CPLR 213.

¹⁶ FDCPA § 1692(i).

¹⁷ N.Y. Uniform City Court Act § 202 (Uniform City Ct. Act).

of business within the city. Pursuant to Uniform City Ct. Act § 213(b), a corporation, association, or partnership is deemed a resident of the city if it has an office or agency or regularly transacts business in the city.

[2.5] VI. PLEADING CONSIDERATIONS

If a review of the creditor's documentation reveals that the creditor sent invoices and statements to the debtor, and the debtor failed to object within a reasonable period of time, an independent cause of action for an account stated should be plead.

The attorney should also thoroughly review all of the creditor's documentation for attorney fee provisions. These may be found in credit applications or the Note. Although N.Y. Personal Property Law § 402(6-a) declares null and void any provision in a retail installment contract which provides for the payment of attorney's fees incurred in a legal action or proceeding for collection, the Motor Vehicle Retail Installment Sales Act allows for the payment of attorney's fees "not exceeding fifteen percent of the amount due and payable under such contract where such contract is referred to an attorney not a salaried employee of the holder of the contract for collection, plus the court costs" if the contract so provides.¹⁸ Subject to contract limits, courts customarily award 25% of the principal balance due as "reasonable" attorney's fees. In addition, credit applications or agreements can also provide for a higher interest rate, as opposed to the statutory 9%.¹⁹

¹⁸ Personal Property Law § 302(7).

¹⁹ CPLR 5001, 5004.

CHAPTER ELEVEN

EVALUATING COLLECTION PROSPECTS

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* The author wishes to acknowledge the prior contributions Ronald Forster, Esq., and Jack L. Getman, Esq., as past authors of this chapter.

[11.0] I. INTRODUCTION

The entry of a judgment by itself usually does not result in the judgment debtor appearing voluntarily and satisfying the judgment. If the judgment is recorded or transcribed in the county in which the judgment debtor has real property, the judgment may result in a lien against the real property, but it does not produce cash for your client. It is the attorney's responsibility, in conjunction with the client, to evaluate the prospects of collecting the judgment. Since enforcement proceedings may be expensive in the way of filing fees, service of process, and examinations, it is important to evaluate whether the judgment debtor has nonexempt assets which can be levied upon or which otherwise are collectible.

In order to do this, it is necessary to obtain as much information as possible about the judgment debtor and his or her assets. The techniques are referred to as "asset locating" and "skip tracing." If the whereabouts of the judgment debtor are known, then the total collection process will be directed toward locating those assets which can be subject to enforcement and satisfaction of the judgment. The attorney must be familiar with the kinds of property that are exempt from execution. Article 52 of N.Y. Civil Practice Law & Rules (CPLR) provides the mechanism for locating assets and enforcing a money judgment, beginning with the identification of property that is subject to enforcement.¹

Assets are broken down into debts and property against which a money judgment can be enforced. The debt must be past due or yet to become due, certainly or upon demand of the judgment debtor, such as a time deposit or checking or savings account at a bank. It matters not where the debt was incurred nor whether it was to or from a nonresident. A cause of action capable of being assigned or transferred is a debt whether it occurred within or without the state. Similarly, any property which could be assigned or transferred, vested or not, or consisting of a present or future right, can be the proper subject of the enforcement of a money judgment. The debt or property must not be exempt from application to the satisfaction of the judgment.

Civil Practice Law & Rules 5205 covers personal property exemptions, and CPLR 5206 covers real property exemptions. Section 5222(e) of the CPLR mentions other exemptions under state and federal law.

¹ CPLR 5201(a).

Once all the exemptions are considered, a multitude of other assets remain that are subject to enforcement and satisfaction of a judgment. However, there have been some interesting interpretations of CPLR 5201. In *Glassman v. Hyder*,² the Court of Appeals held that future rental payments due to the judgment debtor are not a debt and not attachable, as such rental payments are contingent with no certainty of payment. Notwithstanding this legal determination, judgment creditors across the state commonly ask the sheriff to execute upon rents as they are paid. The Court of Appeals seemed to base its decision solely upon paragraph (a) of CPLR 5201, which deals with debts, and did not consider paragraph (b), which deals with property. If future rents are not considered debts because there is no certainty they will become due, why should they not be considered a property right that could be assigned or transferred? This seems to make more sense. Future rents certainly have value and, therefore, should be applicable to the satisfaction of a judgment as they become due.

Since a judgment creditor can execute against the real property, the issue of whether or not you can execute against the rent becomes moot.³ The problem, however, in proceeding against the property is that it may not be economically feasible. The amount of the judgment would control how to proceed. A real property execution can be costly and time-consuming. The costs of advertising and sheriff's fees are substantial even though recoverable. This method is not recommended where the judgment is relatively small. Furthermore, many courts in New York are reluctant to sell real property to satisfy a judgment, particularly if it also happens to be the judgment debtor's residence.

You must petition the court to permit such a sale where the value of the home exceeds \$50,000 above liens and encumbrances. Homes with a value under this amount are exempt from execution. The courts have been known to invoke protective orders against a sale where the debt is disproportionate to the value of the property and may also require that other remedies be exhausted first.⁴

Of course, under CPLR 5228 a receiver may be appointed who could collect the rents and apply them toward the judgment. Again, this would be time-consuming and require a lot of paperwork. Certainly it would be

2 *Glassman v. Hyder*, 23 N.Y.2d 354, 296 N.Y.S.2d 783 (1968).

3 David D. Siegel, McKinney's Practice Commentary, CPLR 5201(a) (1997).

4 *Gilchrist v. Commercial Credit Corp.*, 66 Misc. 2d 791, 322 N.Y.S.2d 200 (Sup. Ct., Nassau Co. 1971).

preferable if the rents could be executed against like other property. In 1976, the Court of Appeals, in *Abkco Industries, Inc. v. Apple Films Inc.*,⁵ may have decided just that. This case involved a licensing agreement between a British company and a New York company to market a film involving the Beatles in the United States. Under the agreement, a percentage of the profit was to be paid to the British firm. The court brushed over the contingent nature of the “debt” and treated the agreement as property capable of being assigned and subject to attachment. In reaching this conclusion, the court reviewed its decision in *Glassman v. Hyder*.⁶ The real property in the *Glassman* case was located in New Mexico, and since the situs of a leasehold of real estate is at the location of the real estate, the property was beyond the reach of New York courts, and only the question of future rents as debts could be considered.

It now appears possible that future rents could be reached as property under CPLR 5201(b) so long as the situs of the real estate is within the jurisdiction of the New York courts. It is clear that even if levy and execution cannot be maintained under CPLR 5201(a) dealing with contingent debts, it can be maintained if the debt can be treated as property.

Property can be either real or personal. However, shares in a cooperative apartment, although not actually real property, are treated as such for purposes of the homestead exemption pursuant to CPLR 5206. Unlike the condominium, which is treated as real property for all purposes,⁷ one would execute on a co-op by levying upon the shares of stock. The homestead exemption of \$50,000 above liens and encumbrances remains in effect for one year after payment to the judgment debtor. If the judgment debtor receives money as a result of a surplus money proceeding after a mortgage foreclosure, there is no exemption. The surplus money becomes personalty and is subject to execution at any time thereafter.⁸

Regardless of how property is classified, it must be found first in order to utilize any one of a number of judgment enforcement proceedings provided for under CPLR Article 52. In order to do this, you must use all of the available information at your disposal. The information you obtain

5 39 N.Y.2d 670, 385 N.Y.S.2d 511 (1976); cf. *Alliance Bond Fund v. Grupo Mexicano De Desarrollo*, 190 F.3d 16 (2d Cir. 1999) (applying *Abkco* holding to a case involving U.S. investors seeking to recover on defaulted Mexican construction notes).

6 *Glassman*, 23 N.Y.2d 354.

7 N.Y. Real Property Law § 339-G.

8 *First Fed. Sav. & Loan Ass'n of Rochester v. Brown*, 78 A.D.2d 119, 434 N.Y.S.2d 306 (4th Dep't 1980).

should lead to either possible assets or the realization that the judgment debtor is judgment proof and the claim is uncollectible for all practical purposes. A check of the bankruptcy filings in the debtor's district is important. If the debtor has filed during the last seven years, he or she cannot file now to avoid enforcement of the judgment.

The amount of effort put into collecting really is determined by the reward to be gained. The larger the debt, the greater the effort that can be made and justified economically. Realistically, and unfortunately, a majority of claims will go unpaid, and a substantial number of judgments will not be satisfied. This is especially true when a claim or judgment originated as a retail rather than a commercial claim. To a collection lawyer, a retail claim is made against an individual, whereas a commercial claim is made against a business. Retail claims generally consist of some type of consumer credit transaction. Commercial claims usually arise from nonpayment of goods or services used in connection with a business, and they probably are contested more often than retail claims. A judgment against a commercial establishment that is still doing business should present no problems unless the assets are not subject to levy or are inconsequential as compared to the debt. An example of this would be a real estate office with just a few desks, chairs, filing cabinets, and a typewriter that may be covered by a security agreement or lien. In such a case, efforts would be turned toward examining the debtor's books and records to confirm the existence of cash accounts and equivalents as well as accounts receivable. The real problem lies in tracking down the assets of individuals who are mobile and uncooperative and whose assets are not apparent. To do this, one should always begin with the client's file.

[11.1] II. THE CLIENT'S FILE

Nearly every creditor has made some effort to collect a past-due account before turning it over to a collection agency or an attorney for suit. It is important to obtain any documentation that may be in the file. Often, the client has personal knowledge of the debtor and knows where he or she banks or works. There may be a credit application which has information about assets and income. This is a good starting point, even if the application is very old and may not contain current information. Credit applications usually yield information about places of employment; banks; other income; home telephone numbers; Social Security numbers; and relatives' names, addresses, and telephone numbers. The Social Security number is a very important means of identification, especially if the debtor has a common name or was a single woman who is now married and using a different name. It also is useful in obtaining

credit bureau reports (although it is not required for that purpose). Where the debtor is a “skip” (no longer at his or her last-known address), contacting relatives can be useful in helping to locate him or her. Calling an old telephone number can also be fruitful. Often a debtor’s residence is occupied by a relative or someone else who knows where he or she is, and a debtor’s ex-spouse often will be happy to provide his or her whereabouts.

[11.2] III. PERSONAL CONTACT

Personal contact with the debtor should be attempted. Start with the white pages of the local telephone directory. If there is no listing, use the telephone number in your client’s file. If you happen to make contact with the debtor, first ascertain that the debtor is not represented by counsel and always start the conversation by asking if there is any reason why the judgment has not been paid. If the debtor is willing to talk, be willing to listen. Assuming that the debtor is exempt from execution because of bankruptcy or receipt of public assistance, the conversation should be directed toward his or her income and employment. Any information received voluntarily will result in time and expense saved.

A common reason debtors give for why they have not paid their debts is they have no money left after paying for necessities. Explore the possibilities of obtaining the resources with which to pay a judgment. There may be life insurance upon which money can be borrowed at a relatively low interest rate. If the debtor is employed, he or she may be able to borrow from a credit union. Sometimes debtors feel overwhelmed by the number of debts they are carrying, so they ignore all of them. An attorney might suggest the feasibility of a consolidation loan to a debtor. Some companies will extend credit to a person for the purpose of paying all other judgments and delinquencies, especially if the debtor’s salary and length of employment warrant consideration. If practical, a consolidation loan would allow the debtor to make one monthly payment, and the creditor would be paid at once. This would be preferable to filing an income execution that requires follow-up with the sheriff or marshal and receiving periodic payments, provided there are no prior garnishees ahead of you. It is important to recognize that although the direct approach may yield positive results, there is a risk that a debtor may elect to file bankruptcy.

[11.3] IV. THE COLE DIRECTORIES AND OTHER SOURCES

The more knowledge gathered about a debtor, the greater the chance of collecting a debt. One of the greatest tools for locating and obtaining

information about a debtor is a Cole directory.⁹ Cole Information Services publishes a series of local directories broken down by boroughs in New York City and by counties outside New York City. A Cole directory combines an alphabetical street directory, including address numbers, with a reverse telephone directory. A listing for a street address includes the names and telephone numbers of persons who live at that address. The directory also indicates if there is no telephone number or a nonpublished telephone number. A listing for a telephone number indicates to whom the number is assigned and his or her address.

You can also find the names and telephone numbers of your judgment debtor's neighbors using a Cole directory. Neighbors can be a great source of information. This is especially true in a small community. Other valuable information supplied in a Cole directory is a wealth code which designates the type of income area in which the debtor lives. People who live in high-income areas generally have more assets subject to execution. The directory also lists the year when a listing first appeared, which could indicate a debtor's stability and how well known he or she might be. If he or she has lived in a multiple dwelling for a long time, the landlord may be good source of information. Businesses and cross-streets are also indicated in Cole directories. By running a finger down the list, you can find any banks or financial institutions in the area. People generally will bank where it is convenient, near their home or place of employment. Of course, if the debtor's employment is known, it is easy to determine which banks are accessible.

Another important aspect of this directory is that it gives you a pretty good indication as to whether the debtor is a homeowner. If the addresses are single listings, the chances are that they are private homes. Further investigation as to whether the house is owned by the judgment debtor would then be warranted. These books are updated and renewed each year. The county grantee/grantor index will also yield deeds filed in the judgment debtor's name.

Also, use the Internet. A telephone number typed into the Google search engine will often yield an address. For new information not yet in the books, there is a private line service which will supply such information and is typically available at local public libraries. Similar reverse directory search tools can also be found on the Internet. Two such sites are <<http://www.switchboard.com>> and <<http://www.555-1212.com>>.

⁹ Cole Information Service directories are also available online at <www.colesdirectory.com>.

[11.4] V. CREDIT BUREAUS

There are a number of credit bureaus that collect and report the credit profiles of individuals and businesses. Much valuable information can be gleaned from these reports. The three main credit bureaus are Equifax (TRW), Experian, and TransUnion. If the client reports to any of these agencies, he or she could obtain a report for you or may already have one on file. For those attorneys doing volume collection work, arrangements can be made to tie directly into the credit bureau by teletype. The bureaus report positive and negative information. A report filled with negative information, such as many unpaid judgments, may indicate that the chances of collection are slight, or at least a great effort may have to be made to discover assets. Sometimes clues to collection may be hidden among the negative reports. For example, there may be a number of credit card companies and banks reporting derogatory information about the payment history of the judgment debtor and one bank reporting positive information. The necessity of a checking account for transacting business is extremely important, and it may be very well that a debtor does maintain an active checking account at that bank. A restraining notice served may capture the prize of collection.

Credit bureaus generally pick up the suits and judgments instituted and entered against debtors and, as far as practicable, report those that are satisfied. In some courts there is a tremendous lag in recording the filing of a satisfaction piece. If a judgment has been recently satisfied and marked as such, a contact with the attorney may lead you to assets which will help in the collection of your judgment.

Credit bureaus also report current information about a debtor's place of employment. Debtors constantly apply for credit, so information from a debtor's credit application form could lead to collection.

An attorney must be careful that information reported applies to his or her client's debtor. A careful check of the information will avoid confusion and possible liability. There are many examples of variances like different Social Security numbers in files; many fathers and sons have the same names, and there is always confusion between "junior" and "senior"; and middle initials of variable spellings may lead to errors.

Bankruptcy is reported in many instances where you never received actual notice, or a debtor's credit profile may be so bad that you believe the debtor may be a candidate for bankruptcy. Where a petition in bankruptcy is noted, check the date of the filing of the petition to determine if

it encompasses the debt upon which the claim arises. If so, obtain a copy of the bankruptcy petition from the appropriate jurisdiction and check if the creditor is listed. If not, the bankruptcy discharge is ineffective against the judgment creditor.

It is not unusual to receive a claim against one who has filed bankruptcy, especially one based on a credit card. The petition does not require that an account number be disclosed and that the bankruptcy notice mailed to the creditor does not refer to the account number. Accordingly, the creditor is left with a name and address to check against his or her records. If the debtor has a common name or has moved recently and did not notify the creditor, he or she will be unable to use that information to identify the bankrupt. Any dunning or attempt to enforce collection will place the creditor's attorney in violation of the automatic stay provision of the Bankruptcy Act and could subject the attorney and the client to contempt of court. There are, of course, reasons under the Federal Bankruptcy Code¹⁰ to lift the automatic stay, and you should look for one. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, effective October 17, 2005,¹¹ imposes more restrictions on who may file for bankruptcy, and the means test will disqualify many debtors.

Information against consumers can be reported by the credit bureau until obsolete. In the case of bankruptcies, you cannot report more than ten years from the date of adjudication; and for suits and judgments, not more than seven years from entry or until the governing statute of limitations has expired, whichever is *longer*.

Accounts placed for collection or charged off to profit and loss can be reported for seven years.

[11.5] VI. LANDLORDS

A landlord is a good person to contact first when attempting to locate or verify a debtor's address. A landlord's name and telephone number can be obtained from a variety of sources. If a Cole directory is available, a call to the person living at the landlord's address usually will reveal the desired information. A visit to the county clerk's office to look at the deed to the property listed in the directory will provide the landlord's name, which could lead to his or her telephone number. Smaller cities keep lists of landlords and their properties in the housing department. In New York

¹⁰ See 11 U.S.C. § 362.

¹¹ Pub. L. No. 109-8, 119 Stat. 23, enacting S. 256, 109th Cong.

City, Federal Standard Abstract Inc. leases a directory that contains an alphabetical listing of landlords and their properties, including their names, addresses, and telephone numbers. This is helpful if the judgment debtor is also a landlord. The Internet provides a wealth of information about landlords in many geographical areas.

Once an attorney makes contact with a debtor's landlord, all available information should be obtained. If the landlord refuses to cooperate, the information can be subpoenaed.

Many times landlords will honor written requests for reports. If the debtor is a skip, it is probable that he or she may have left owing the landlord money; thus, the landlord would have a stake in trying to locate him or her.

[11.6] VII. COUNTY CLERK

For single- or two-family residences, the county clerk's office should be consulted to obtain information as to whether the judgment debtor owns real property. The deed to a residence, located by obtaining the property's lot and block numbers, will reveal the current owner's name. If the property belongs to the debtor, the attorney should check the previous deeds to the property to find out if the debtor owned the property in the past. If the debtor has been a previous owner, it is important to ascertain if the transfer was for a fair consideration and whether there is anything suspicious about the transfer such as a conveyance to a family member. Such conveyance may have been fraudulent as to creditors and subject to being overturned. Sometimes, for a reasonable fee, you can get someone to do title searches for you to establish current ownership.

While at the county clerk's office, a number of things can be checked. Information will be computerized or will still be in books. The defendant's book can be checked showing all judgments entered against a named individual. The book is arranged in alphabetical order and will list the judgment amount and whether it is satisfied. A computer search will list all filings under a debtor's name, usually back to the mid-1990s.

The judgment poll book should also be checked to determine if any of the judgments listed were entered against your particular debtor, which will be apparent if the addresses are the same. At this point, the focus should be on recently satisfied judgments because, like the credit bureau reports, they can lead to assets if the attorney of record is contacted. This is not to say that other judgments, especially recent ones, should not be

checked; only that the amount of judgments entered against someone with a common name could be voluminous, and a lot of time may be spent to no avail. Of course, if only a few judgments have been entered, the attorneys of record should be contacted on all of them.

N.Y. Uniform Commercial Code filings of secured transactions can also be checked for individuals and businesses at the county clerk's office. A list of property covered by the security agreement which may be available for levy if the debt has not been satisfied is listed. Note that each secured party has a claim superior to any unsecured claim. It will also indicate who the secured party is. Appropriate questions of the secured party may lead to additional assets subject to execution or information, which can lead to additional assets. Also available for inspection are certificates of doing business and partnerships. It is especially important to establish if your debtor is the principal of a business. Where a judgment debtor is a partner, his or her interest in the partnership can be levied upon. Any other partner on behalf of the partnership is a proper garnishee in such matters.¹² Note that many debtors who conduct business under an assumed name or d/b/a are actually out of business but have simply failed to file the appropriate form to discontinue use of the assumed name.

[11.7] VIII. DEPARTMENT OF MOTOR VEHICLES

While access to Department of Motor Vehicles records is restricted under the Federal Driver's Privacy Protection Act,¹³ there are permissible uses which may provide useful information. One such permissible use is in connection with court proceedings, including the "execution or enforcement of judgment and orders."¹⁴ The Department of Motor Vehicles Internet site, at <<http://www.nydmv.state.ny.us>>, provides extensive information about both restrictions to and methods for accessing records.

Of course the automobile itself is an asset capable of being levied upon and sold at public auction to satisfy a judgment. It is not exempt property unless it can be shown to bear a special relationship to the debtor's work and then exempt under CPLR 5205(a)(7) as a working tool.¹⁵ If there is

¹² CPLR 5201(c).

¹³ 18 U.S.C. §§ 2721 *et seq.*

¹⁴ 18 U.S.C. § 2721(b)(4).

¹⁵ *Thorpe Elec. Supply, Inc. v. Deitz*, 104 Misc. 2d 994, 429 N.Y.S.2d 386 (Sup. Ct., Albany Co. 1980).

still a lien against the vehicle, there may be little or no equity to justify further collection activities.

[11.8] IX. THE PROCESS SERVER

Collection work requires that every lead be followed and every piece of information be digested. The process server, having been to the home address or business, is a source of valuable information. When affidavits of service are submitted to you, a code relating to the type of area and which banks are nearby should be worked out. The process server may also be able to provide other information since he or she may have spoken with neighbors or landlords (in cases of nonmilitary service affidavits). The process server may be able to glean information about employment through these discussions. Process servers are paid and, therefore, should be required to provide us with any useful information which can be applied toward the satisfaction of a judgment, especially if it requires no real additional work. If you are using the sheriff as a process server, he or she may be unwilling to deal with information of an investigatory nature.

[11.9] X. THE NEW YORK CITY UNCCP

If your debtor happens to be a member of the diplomatic community, the New York City has an agency which acts as a liaison between diplomats and the business community. The Commission for the United Nations, Consular Corps and Protocol, is located at 2 United Nations Plaza, 27th floor, New York, N.Y. 10017. The commission's telephone number is (212) 319-9300, and its Internet site is <<http://www.nyc.gov/html/mcp/home.html>>. A letter addressed to the agency, together with a copy of your judgment asking them to intercede, is all that is necessary. They will write to the ambassador of the appropriate mission and request assistance in seeing that just debts are satisfied. A copy of that letter will be sent to you.

[11.10] XI. THE POST OFFICE

The post office can also be helpful in locating a debtor. A letter sent to the last-known home address marked "Address Correction Requested" will get you the forwarding address for a small fee. The post office also has a procedure for obtaining a home address where the mailing address is a post office box number. If the post office box is used by a business, the public can obtain the mailing address without a fee. If the address is a residence, only certain persons, such as those authorized by law to serve legal process, are entitled to obtain this information (see app. A). The

name and the address of the holder of a postage meter permit are available as well. For those people who send letters to you and use their employer's postage meter, the name and address where they are working can be obtained. All of these procedures, which constitute part of the Administrative Support Manual, can be requested from the regional director of the post office. Most local post offices have their own interpretations of post office regulations. Additional information can be found at the U.S. Postal Service Internet site at <<http://www.usps.com>>.

Often, additional information might be gleaned by speaking with small-town or village postal carriers as they are familiar with a judgment debtor or his or her family—after all, they see who is sending mail to the residence. Speaking with these carriers may provide additional information.

[11.11] XII. UNIONS

Knowledge of the type of work the debtor does can help locate the debtor's place of employment if he or she belongs to a union. If the debtor is a carpenter or electrician, for instance, he or she may belong to a union, and contact with the union may uncover information about his or her current employment. It will also reveal whether his or her membership is current, which would indicate that he or she still is employed in that line of work. Many union contracts provide for accumulation of vacation money, and some of that money can be reached by restraining notice and income execution. Other union benefits like pensions may also be revealed. In *Mackey v. Lanier Collection Agency & Service, Inc.*,¹⁶ the United States Supreme Court held that state law mechanisms for executing judgments against ERISA welfare benefit plans are not preempted by the ERISA statute.

[11.12] XIII. SUBPOENAS

When you have no specific information about assets from which a judgment can be enforced, or it cannot be obtained voluntarily, then you should use the CPLR disclosure devices. Civil Practice Law & Rules 5223 allows disclosure “of all matters relevant to the satisfaction of the judgment.” The devices used are subpoenas, which can be issued at any time prior to a judgment being satisfied or vacated.

¹⁶ 486 U.S. 825 (1988).

The authority to examine is very broad and allows examination of the judgment debtor or anyone who may be in possession of property belonging to the judgment debtor or persons who may have knowledge relevant to locating assets which are subject to enforcement under CPLR 5201.

In *Chemical Bank v. Sinoto*,¹⁷ the court went so far as to force an attorney to reveal the address of his client, the judgment debtor. The court held that although there is an attorney-client relationship that could prevent the disclosure of confidential communication, the information “must be a confidential communication made to the attorney for the purpose of obtaining legal advice or services.” There was no showing of that in this case.

It has also been held proper for a certified social worker to disclose names and addresses of persons constituting his or her account receivable.¹⁸

The subpoena must specify all of the parties to the action, contain the date and amount of the judgment as entered, the current balance due, and the court in which it was entered. It must also include a statement that false swearing or failure to comply with the subpoena is punishable as a contempt of court.

There are three kinds of subpoenas; any or all can be used. The first is the subpoena *ad testificandum*, requiring attendance for the taking of testimony upon oral or written questions. This provides a face-to-face confrontation with the person from whom you are seeking information and allows you to develop your line of questioning depending upon answers to previous questions. The second is a subpoena *duces tecum*, requiring the production of books and records to be examined. When examining some witnesses such as the judgment debtor, you want both his or her testimony and books and records. The third and, perhaps, the most useful for collection work is the information subpoena. The first two subpoenas are served in the same manner as a summons and, therefore, are governed by CPLR 2303.

Pursuant to CPLR 3107, at least 20 days' notice is required for a deposition upon oral questions. The court can order a shorter notice if it deems it warranted. Pursuant to CPLR 3109, notice of taking depositions on written questions is served upon the person to be examined. Within 15

¹⁷ N.Y.L.J. December 1, 1981, col. 3 (Sup. Ct., N.Y. County).

¹⁸ *Scherz v. Scherz*, 110 Misc. 2d 137, 442 N.Y.S.2d 41 (Sup. Ct., Orange Co. 1981).

days thereafter, a party may serve written cross-questions upon the opposing party. Within 7 days thereafter, the original party may serve written redirect questions, and a party may then, within 5 days, serve written redirect questions. The examination shall be held during regular business hours. If the party being examined is a party or officer, director, member, or employee of a party, the examination must be noticed within the county where he or she resides, has an office for the regular transaction of business in person, or where the action is pending. For other witnesses, the place of examination depends on whether they are residents or not. If a resident, then in the county where he or she resides or is regularly employed or has an office for the regular transaction of business in person. If a nonresident, the examination shall be noticed to take place in the county where served or regularly employed or where there is an office for the regular transaction of business in person. If the person designated to be deposed is substituted by another individual, pursuant to CPLR 3106(d) the deposing party must be put on notice at least 10 days before the date of deposition.

If the person to be examined is a public corporation or officer, agent, or employee thereof, the examination is held in the court within the county where the action is pending. Parties may stipulate otherwise.

Under CPLR 3113, depositions are usually taken before a notary public but cannot be taken before an attorney or employee of an attorney for a party or someone related by blood or affinity to a party.

There is no fee when a judgment debtor is subpoenaed. Others who are subpoenaed, “whether or not actual testimony is taken, shall receive for each day’s attendance fifteen dollars for attendance fees and twenty-three cents as travel expenses for each mile to the place of attendance from the place where he or she was served, and return.”¹⁹ There is no mileage fee if travel is wholly within a city.

The examination is taken under oath. Because the examination’s main purpose is to discover assets or information leading to assets, it is better to write the questions and answers in longhand to save the expense of hiring a stenographer. There are also a number of Blumberg forms, available at any legal stationery store, with questions for individual debtor, corporate debtor, third parties, and financial institutions. Many law firms retain their own set of questions on their in-house computer networks.

¹⁹ CPLR 8001(a).

Any objections to the proceeding shall be noted, but the examination shall proceed subject to the right of the person to apply for a protective order. It is a good practice to notice examinations at the courthouse so that should the witness or debtor refuse to answer a question, an application for a ruling can be made right there. Although the deposition shall be taken continuously and without unreasonable adjournment, the court can order it or the witness can agree. If the witness is the judgment debtor and does agree, it should be adjourned to a date to be agreed upon or a future date long enough to analyze and verify the answers already given. This is important because a judgment debtor cannot be subpoenaed or compelled to produce books and records within one year after the completion of a previous examination without leave of court,²⁰ which may not be granted freely without a strong showing of a compelling reason. It is interesting to note that no such restriction is placed on a witness other than the judgment debtor. Thus, protection is afforded to the person who owes money but not to someone who may have only information. Of course, one who believes he or she is being harassed unnecessarily can apply to the court for a protective order.²¹ The court can modify, deny, or limit any enforcement procedure. It also can supervise the disclosure procedure itself or through a referee or attorney selected by the parties.²² On the other hand, a restraining notice can be served only once upon the same person with respect to the same judgment without leave of court.²³ Thus you can examine a witness who may be in possession of property belonging to the judgment debtor more than once in a year but can serve a restraining notice only once in a lifetime without leave of court.

After the deposition is taken, it must, pursuant to CPLR 3116, be read to or by the witness and then signed by him or her after he or she makes any changes in form or substance with a statement of the reason for the changes. The changes are entered at the end of the deposition.

The information subpoena probably is used more often by attorneys doing volume collection work than any other type of subpoena. It is more efficient, less costly, and can be used to obtain certain information quickly. Under the Civil Practice Act, the information subpoena was intended to obtain information regarding a judgment debtor's holding only from financial institutions. There is no such restriction under the

20 CPLR 5224(f).

21 CPLR 5240.

22 CPLR 3104(a), (b).

23 CPLR 5222(c).

CPLR; although it still is used to obtain information from financial institutions, it can be used to obtain information from any source relevant to the satisfaction of the judgment.

An information subpoena contains the same information as the other two types of subpoenas and can also be served in the same manner as a summons. However, a big advantage is that it can be served by registered or certified mail, return receipt requested. Certified mail is less expensive than serving through a process server. The subpoena is accompanied by an original and copy of a set of questions and a prepaid, self-addressed return envelope. The answers must refer to the question to which it responds and be made under oath. Answers must be returned with the original questions within seven days after receipt.

When using a subpoena to discover assets, it is wise to utilize the provisions of CPLR 5222 related to restraining notices. A restraining notice can be served simultaneously with the subpoena, and, in fact, the two can be combined in one form (see app. B). This practice is particularly useful when serving banks or financial institutions. If assets are discovered by way of the subpoena, the restraining notice prohibits the transfer of any property, which can allow you time to levy upon the asset and make it applicable toward the satisfaction of your judgment.

The restraining notice does nothing more than “freeze” the asset. It does not give priority to a judgment creditor but allows him or her to select one of the other judgment enforcement proceedings to obtain priority, such as issuing a property execution to a sheriff or moving for a turnover order. In any case, time is of the essence, and the subpoena and restraining notice should be combined whenever possible.

When examining the judgment debtor, bear in mind that there is a high degree of probability that he or she will not be entirely candid about his or her assets. It stands to reason that if an examination is necessary, no real effort has been made to satisfy the judgment, and the judgment debtor is in no hurry to part with his or her money. If the judgment debtor is truly judgment proof, the examination probably will go more smoothly.

Think of the examination as an accountant preparing a balance sheet. In addition to discovering assets, check all liabilities, such as rent and family needs for food, clothing, transportation, and utilities. A person’s income must be equal to at least what he or she needs to survive.

Where a person says that he or she pays rent of \$500 a month and has income from unemployment insurance of only \$100 a week, there are most likely other sources of income from family, friends, bank accounts, or odd jobs. Always ask for verification. Check the lease to verify the rent and ask the debtor's landlord if it has been paid. Landlords generally require some credit information from renters and may be able to provide information about a last-known place of employment or a checking account if the rent is paid by check. The landlord also may know if someone other than the debtor has been writing the rent check.

If the debtor no longer resides at the address given, the landlord can probably supply the date of departure. This could be important for skip tracing. One of the neighbors may know the new address or the name of the moving company the debtor hired. Those records can be subpoenaed to obtain the new address.

When examining the judgment debtor, always seek the production of tax returns for at least the three preceding years. Requests to produce records prior to the time when the obligation was incurred would be unreasonable and could be met with a protective order. Recent returns are surely relevant and can be subpoenaed from the judgment debtor's accountant even if they were joint returns. In *Siemens & Halske, GmbH v. Gres*,²⁴ the judgment debtor was outside the court's jurisdiction. His joint tax return was with an accountant who was within the court's jurisdiction, and a subpoena *duces tecum* was served upon him. The court, in citing *Leonard v. Wargon*,²⁵ stated the public policy as "to put no obstacle in the path of one seeking to secure the enforcement of a judgment of a court of competent jurisdiction."

Tax returns can help obtain information about current sources of income and can provide the basis for a line of questions regarding the disposal of assets. A transfer of assets may be fraudulent and subject to recovery by the judgment creditor. Questions pertaining to the concealment of assets or transferred assets in fraud of creditors are relevant to the satisfaction of the judgment. Under the N.Y. Debtor and Creditor Law (DCL), a conveyance made or an obligation incurred which renders the judgment debtor insolvent is fraudulent if made without fair consideration. Actual intent to defraud need not be shown.²⁶ For example, if a

24 37 A.D.2d 768, 324 N.Y.S.2d 639 (1st Dep't 1971).

25 55 N.Y.S.2d 626 (Sup. Ct., Bronx Co. 1945).

26 DCL § 273.

judgment debtor transfers a house to his or her spouse for love and affection, the conveyance would be fraudulent if it rendered him or her insolvent, and it can be overturned. Spouses frequently transfer property back and forth between each other, depending on which one is in debt at the applicable time.

Similarly, any conveyance made without fair consideration by a defendant during the pendency of an action which has been docketed would be fraudulent on the part of the plaintiff without regard to actual intent if the judgment is not satisfied.²⁷ Accordingly, after the action has been commenced, any transfer of assets to a third party by the defendant can be reached by the judgment creditor. Conveyances by businesspersons that leave relatively small capital are fraudulent if made without fair consideration.²⁸

If a person believes he or she were about to incur a debt, a conveyance he or she makes would be fraudulent if it were made without fair consideration.²⁹ This, of course, is more difficult to establish since it deals with intent. The line of questions will be geared to discover intent or at least lead to the inescapable conclusion that the conveyance was made with intent to defraud.³⁰ Intent will include knowledge of impending debt and transfers made just at the time the debt is incurred and owing.

It is not necessary to move to set aside a fraudulent conveyance on a matured claim; execution against the property conveyed can be maintained.³¹ Such execution is, of course, subject to the rights of third parties to intercede.³²

In many instances the judgment debtor will not appear for an examination even though he or she has been properly served with a subpoena. This follows since most judgments are also obtained on default. In the field of collection work, it is common knowledge that most judgment debtors will not cooperate in helping to satisfy your judgment. The courts, from which a special proceeding can be commenced, are empowered to punish for contempt. Failure to obey a subpoena or falsely swearing to oral or writ-

27 DCL § 273-a.

28 DCL § 274.

29 DCL § 275.

30 DCL § 276.

31 DCL § 278(1)(b).

32 *Simon v. Bailey*, 172 Misc. 186, 14 N.Y.S.2d 822 (Sup. Ct., Steuben Co. 1939).

ten questions is punishable as a contempt of court. It is during such instances of noncompliance by judgment debtors that creditors must resort to contempt procedures in order to give substance to the provisions designed to aid in the enforcement of a judgment.

The information subpoena is the most useful and effective weapon in the discovery arsenal because of its basic simplicity. A set of questions is mailed and answers are received through the mail. Of course there may be some problems. Since the subpoena must be signed for, it may be returned as unclaimed. It cannot be re-sent by ordinary mail.³³ Answers received may be incomplete or ambiguous.

An information subpoena is used most commonly for verification of a debtor's place of employment or upon a banking institution. Although most employers will answer a subpoena, many do not do so within the seven days required. Some may take a month or more and may require a follow-up letter. The requested information should pertain to the debtor's current employment, salary, Social Security number, home address, and telephone number. If not currently employed, you want to find out the last date of employment and inquire whether the employer knows if judgment debtor is currently employed. Many past employers keep record of forwarding business addresses of former employees. Employers usually know a current home address, because a W-2 form for income taxes would have been mailed there for that portion of the year worked.

Another very important question that must not be overlooked is whether there are any income executions currently against the salary or wages. There may be so many others that collection through income execution would be virtually impossible since there can only be one in operation at a time. In such a case, if the amount of income warrants it, you might consider proceeding by way of an installment payment order,³⁴ which can operate at the same time as an income execution.

Some places of employment will not answer the questions as outlined. Instead they may send a response on their own letterhead stating that the judgment debtor is no longer employed. In other cases, the answers may not be sworn to or even signed by the person who answered them. It is not easy to tell if this is done out of carelessness or as a cover-up. Usually a telephone call insisting upon compliance is enough, or a follow-up letter enclosing a duplicate set of questions and answers and a reminder that

³³ *Carl v. Moyer*, 63 Misc. 2d 1052, 313 N.Y.S.2d 936 (Sup. Ct., Onondaga Co. 1970).

³⁴ CPLR 5226.

failure to honor the subpoena is a contempt of court will suffice. Because there is no control as to who will receive a subpoena served upon a place of business by mail, it is not unlikely that the judgment debtor will wind up with it. In such a case it may go unanswered, or the answers may be fabricated, which is why insisting upon notarization of the answers should be adhered to.

The post office requires that subpoenas be “so ordered” by a judge even though an attorney has the authority to issue them.

Banks rarely respond properly to an information subpoena. Usually they have their own form, which is answered and returned. The bank will have information about any active accounts belonging to the judgment debtor and the amounts in them that they have restrained. It is also important to determine whether the bank, pursuant to DCL § 151, has any set-off against the account, which is a superior right.³⁵ In *Industrial Commissioner v. South Shore Amusements, Inc.*,³⁶ the court held that:

The appellant’s right of setoff terminated with the levy. There is nothing in section 151 which requires the nullification of such levy. While that section does provide for a right of setoff, “notwithstanding the fact that such right of set off shall not have been exercised by such debtor prior to the . . . issuance of execution,” it does not provide for such right after levy.³⁷

This reasoning, however, was criticized by the Court of Appeals, i.e., *Industrial Commissioner v. Five Corners Tavern, Inc.*, where the Court questioned the *South Shore* court’s analysis of the seemingly conflicting rights granted by DCL § 151 and CPLR 5232.³⁸ The Court of Appeals, focusing on the legislative history, stated that the right of set-off granted by DCL § 151 allows the bank to retain the set-off defense *any* time after issuance of execution, not just before levy by service of execution.³⁹ Since the reasoning espoused by *South Shore* protected the right of set-off only between the issuance of the execution and the levy by service of execution, and such a time was usually only a day or two, DCL § 151 granted a

35 *Aspen Indus., Inc. v. Marine Midland Bank*, 52 N.Y.2d 575, 439 N.Y.S.2d 316 (1981).

36 55 A.D.2d 141, 389 N.Y.S.2d 850 (1st Dep’t 1976).

37 *Id.* at 143.

38 47 N.Y. 639, 419 N.Y.S.2d 931 (1979).

39 *Id.* at 645.

futile right; under the reasoning in *Five Corners*, on the other hand, the right of set-off as intended by the legislature was preserved. The Court further supported its criticism of *South Shore* by indicating that the precedent relied upon by *South Shore* involved the conflict between a federal statute and DCL § 151, therefore implicating the Supremacy Clause, whereas both *South Shore* and *Five Corners* involved the conflict between a state statute and DCL § 151.⁴⁰

In some instances the bank may have information about current employment of the judgment debtor. Find out whether there is a safe deposit box in which the judgment debtor has an interest. If the debtor will not open it voluntarily, the creditor must pay for a locksmith to open it. Since the information subpoena is combined with a restraining notice, all assets up to twice the judgment amount are restrained. This is so even if the account is a joint account. There is a rebuttable presumption that all monies restrained in a joint account belong to the judgment debtor. In the case of *Denton v. Grumbach*,⁴¹ the court stated that in a joint account there is a rebuttable presumption that the interest of the depositors is that of joint tenants. Joint tenants are said to be seized by the half and the whole; therefore, an attachment against the whole is proper.

Proper service upon a bank presents another problem. Since banks generally have branches scattered all over, the question arises as to which bank constitutes one of proper service. In New York law it was well settled that proper service upon a bank consisted of serving the branch where the account was located.⁴² The first few numbers of the account and a telephone call to the main branch allowed you to determine the location of a particular branch.

In *National Shipping and Trading Corp. v. Weeks Stevedoring Co.*,⁴³ the court held that “each branch of a bank is a separate and distinct business entity.” The court explained that unless each branch were treated separately, constant requests for approval from other branches would have to be made before any check could be paid, which would prove detrimental to normal banking procedures.

40 *Id.* at 647.

41 2 A.D.2d 420, 157 N.Y.S.2d 91 (3d Dep’t 1956).

42 *Bluebird Undergarment Corp. v. Gomez*, 139 Misc. 742, 249 N.Y.S. 319 (City Court, 1931); *Cronan v. Schilling*, 100 N.Y.S.2d 474 (Sup. Ct., N.Y. Co. 1950), *aff’d*, 282 A.D. 940, 126 N.Y.S.2d 192 (1st Dep’t 1953).

43 252 F. Supp. 275 (S.D.N.Y. 1966).

In 1980, with the advancing technology in high-speed computers came the case of *Digitrex Inc. v. Johnson*,⁴⁴ a federal case interpreting New York law. The court reviewed the previous New York rule and, persuaded by counsel for Manufacturers Hanover Bank, decided that service upon the main branch of a bank utilizing high-speed computers with central indexing capabilities “promotes rather than endangers the orderly transaction of banking business.”

The court then took judicial notice of the fact that most, if not all, New York City commercial banks have become largely computerized as described and rejected the previous rule:

We do not believe that the New York courts would today perpetuate an obsolete interpretation of the attachment statute which would . . . not only render creditors’ remedies less effective but interfere with the orderly business of the very banking institutions the interpretation was originally designed to protect. Believing that New York courts would today act in a sensible fashion, certainly the federal courts should not have to wait until some state court litigant brings a case to appellate attention before doing likewise.⁴⁵

It then appeared that New York had a new rule regarding service on a bank, but that was a premature perception. In an excellent article in the *New York Law Journal* by Bradley E. Rock, Esq.,⁴⁶ the author pointed out that a broad interpretation of the *Digitrex* case would be unwise. In *Digitrex*, the attack came from a judgment debtor whose account was restrained by service upon the main office. It is unlikely that a bank would be held liable for failing to honor a restraint if served at the main office instead of the branch where the account is located. The author points to UCC § 4-106, which provides, “A branch or separate office of a bank is a separate bank for the purpose of . . . determining the place at or to which action may be taken or notices or orders shall be given under this Article and Article 3.” Another sentence was added: “The receipt of any notice or order by or the knowledge of one branch or separate office of a bank is not actual or constructive notice to or knowledge of any other branch or office of the same bank.” The holding of *Digitrex* was further clarified by *Limonium Maritime v. Mizush-*

44 491 F. Supp. 66 (S.D.N.Y. 1980).

45 *Id.* at 69.

46 Rock, *Proper Place to Serve Restraining Notice on Bank*, N.Y.L.J., May 14, 1981, p. 1, cols. 2–3.

ima Marinera,⁴⁷ which held that the *Digitrex* exception is applicable only when the notice is served on the bank's main branch; the main office and relevant branches are in the same jurisdiction, and the branches are connected by computer to the main office and are under its control.

Not all banks had the capabilities discussed in *Digitrex*, so in 1981, the court found in *Therm X Chemical & Oil Corp. v. Extebank*⁴⁸ that service upon the main branch was not sufficient to hold the bank liable for failing to restrain an account located at a branch without showing that the branch received actual notice.

When dealing with a large bank equipped with sophisticated electronic equipment, service upon the main branch may achieve the desired result more quickly if you do not know in which branch the debtor maintains an account. The bank will not be held liable if it should honor checks and withdrawals after service. Because service of information subpoenas and restraining notices are relatively inexpensive, it pays to take a chance on serving the main office of a large bank in the hope that the judgment debtor has an account with the bank and that it can be discovered. It is prudent to call the main branch to find out if the debtor's branch can be determined by his or her account number.

The combination of information subpoena and restraining notice can also be served upon a credit union. Many employers have instituted credit unions for their employees' benefit. Sometimes knowing the field of work a debtor is in can lead you to a credit union and assets. For example, if you suspect the judgment debtor works for the city of New York but do not have specific knowledge as to the actual job, a restraint and subpoena directed toward the Municipal Credit Union may produce results. Not only might you restrain monies on deposit, but you can learn exactly where the debtor is employed and proceed to income execution. In local areas, try to determine the largest employers and corresponding credit unions to gain information about a debtor.

Other important providers of information include unions, utilities such as the telephone company, and medical plans such as Blue Cross. The telephone company takes credit information when installing a telephone and, if it is a relatively new installation, the information should be current (see app. C). Usually it has bank as well as employment information. Cell

⁴⁷ 961 F. Supp. 600 (S.D.N.Y. 1997).

⁴⁸ 84 A.D.2d 787, 444 N.Y.S.2d 26 (2d Dep't 1981).

phone companies should also be checked since many people now use their cell phone as their home phone.

If there is an active health insurance plan, and it happens to be a group plan paid for by an employer, this information can be obtained. It is necessary to have a Social Security number to obtain this information since the policy number is the same as the Social Security number. Sometimes an information subpoena is used to obtain the Social Security number from a previous employer. Also, the health plan can be checked; however, HIPAA may prevent the insurer from giving you any information.

It is not easy to discover assets, and attention must be paid to every detail. You never know what piece of information may lead to discovery. Sometimes, tracking leads and looking for clues is similar to detective work. It is time-consuming and can be expensive. The amount of effort expended will depend upon the potential for recovery. There is nothing more frustrating than spending time, effort, and money to locate a debtor and his or her assets only to discover that he or she has filed for bankruptcy. Sometimes a debtor may threaten to file for bankruptcy but not actually do so until you actually have levied upon a bank account or instituted an income execution. For this reason, you should check the bankruptcy docket at least once a week to look for a judgment debtor's name.

Most of the avenues outlined above are geared toward discovering a debtor's place of employment or bank account. Most judgments are satisfied through these two assets. Other assets can be discovered but are not as readily available, and execution against them may be cumbersome and expensive. There will always be a need for attorneys to enforce collection of judgments. How successful you are is directly proportional to the effort you are willing to make and your ability to interpret the information at your disposal, as well as the determination with which the debtor is avoiding payment. Locating the assets is only the first step. It is the enforcement devices which will lead to the satisfaction of the judgment.

[11.13] XIV. ONLINE RESOURCES

In your pursuit of a judgment debtor's assets, you should consider using the various resources available on the Internet. Chapter 3 lists a number of Internet sites that could prove helpful in discovering information about a judgment debtor.

In some cases, an Internet search will lead you directly to assets. Certainly, if you discover a bank account belonging to the judgment debtor,

that account would be subject to either a restraint or an execution. In some cases, an Internet search may direct you to assets or help you develop information which may be useful during examination of a judgment debtor in proceedings supplemental to the judgment. For example, if you find a UCC-1 financing statement filed against a debtor that lists specific property, you can follow up on whether the judgment debtor still holds the property and has any equity in the property. Perhaps you could determine from the secured party, by way of a third-party subpoena, what information the judgment debtor provided in the way of a financial statement when he or she obtained the credit to purchase the article covered by the financing statement. Likewise, the location of a bank where the debtor did business may also lead you to subpoena any financial statements from the bank that the judgment debtor has rendered to the bank in connection with his or her banking transactions.

Sometimes the use of these discovery techniques can be helpful in advising the client whether to spend additional funds attempting to collect the judgment. In fact, your Internet search may reveal bankruptcy filings, mortgage foreclosures, or substantial prior judgments which would indicate that there is little chance of collecting the judgment. Armed with this information, the client can more intelligently evaluate whether to expend additional funds in enforcing the judgment.

CHAPTER SIX

ALTERNATIVES TO LITIGATION

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[6.0] I. INTRODUCTION

There are essentially three main alternatives for recovering money judgments: (1) confessions of judgment, (2) stipulations of settlement, and (3) alternative dispute resolution. Both the confession of judgment and the stipulation of settlement are formats which can be utilized either pre- or postlitigation. Confessions of judgment are more typically used in lieu of litigation, whereas stipulations of settlement are regularly utilized after the institution of suit. Alternative dispute resolution can occur at any time.

[6.1] II. CONFESSIONS OF JUDGMENT

Section 3218 of the N.Y. Civil Practice Law & Rules (CPLR) is the applicable provision governing judgments by confession. The substantive content of an affidavit upon which a judgment by confession is predicated is articulated in CPLR 3218(a). The section provides that no action need be commenced and that the affidavit should relate specifically to an obligation of a debtor (potential defendant) where money is presently due or may become due to the creditor (potential plaintiff). The liability may be either contingent or direct in nature. Regardless of the nature of the liability, the sum due and owing must be embodied in a written affidavit signed by the defendant, which states the exact sum for which a judgment may be entered. The amount quantified therein is the maximum amount recoverable under any judgment entered in connection with the filing of the affidavit. Interest will not accrue on this amount unless it is so provided for in the affidavit.¹

The confession should contain language allowing for the entry of judgment and clearly and plainly set forth the material facts creating the indebtedness. It should also contain the precise sum of money so confessed that is justly due or may become due. The affidavit should also state the county where the defendant resides and, if the defendant is a nonresident, the county in which the judgment may be entered. Furthermore, if the affidavit relates to a contingent or future liability of the defendant, then it should recite the particular facts upon which the contingent liability is predicated and indicate that the amount confessed does not exceed the amount of the liability.

N.Y. Civil Practice Law & Rules section 3218(b) sets forth the requirements as to the actual entry of a confessed judgment. The affidavit must

¹ *Keller v. Greenstone*, 253 A.D. 573, 2 N.Y.S.2d 977 (1st Dep't 1938).

be filed within three years from the date of its execution.² Affidavits that confess judgments will not be accepted for filing by the judgment clerk if they are dated beyond three years. There is no discretion in these circumstances for courts to apply CPLR 2004, the statute pertaining to extending time periods.³ This three-year time limit must be scrupulously adhered to, particularly where it references a contingent liability or a direct liability in conjunction with an extended amortization program that exceeds a three-year period. An affidavit of confession may be filed before a default occurs, but no enforcement may commence until a default actually occurs.⁴ Upon entry of the judgment, the clerk of the court shall tax costs up to the amount of \$15 together with any disbursements taxable in the action. Thereafter, the judgment may be docketed and enforced in the same manner and with the same effect as any other judgment. However, no judgment by confession may be entered after the defendant's death.

There are instances where the affidavit may be utilized to secure a judgment for a portion of the identified debt. If this should occur, then execution upon such judgment can extend only to the amount which has become due. The balance of the judgment shall remain as security to the extent that it may create a lien for any further sums which may become due in the future.⁵ There also are provisions which provide that a joint debtor may confess a judgment for a joint debt. The obtaining of an affidavit of confession of judgment from a joint debtor does not bar the creditor from pursuing legal remedies against the nonconfessing co-debtor.

N.Y. Civil Practice Law & Rules section 3201 sets forth a limitation with respect to the procuring of confessions of judgment relating to certain "consumer" transactions. Specifically, it proscribes the entry of judgment by confession where the affidavit was executed prior to the time of a default and where the debt is for a sum of up to \$1,500. Moreover, the debt must have been incurred from the purchase of goods or services intended for any purpose other than a commercial or business use. Additionally, the debt must also be payable in two or more installments. If the creditor violates these limitations, the judgment is rendered null and void.

2 See *Moldavsky v. Nevins*, 184 Misc. 2d 968, 712 N.Y.S.2d 822 (Sup. Ct., Westchester Co. 2000) (motion to file judgment three years and three months after execution of affidavit of confession of judgment denied); see also *Hynes v. Skarvelis*, 6 Misc. 3d 1038(A), 800 N.Y.S.2d 347 (Sup. Ct., Kings Co. 2005).

3 See generally *Moldavsky*, 184 Misc. 2d at 969.

4 See generally *Granville v. Gratzner*, 200 Misc. 738, 105 N.Y.S.2d 607 (Sup. Ct., N.Y. Co. 1951), *rev'd on other grounds*, 281 A.D. 514, 120 N.Y.S.2d 797 (1st Dep't 1953).

5 See CPLR 3218(c).

A judgment obtained by confession can be challenged subsequently on motion of the judgment debtor on one or more of the following grounds: premature filing of the affidavit;⁶ nonoccurrence of a contingency stated in the affidavit;⁷ unauthorized entry of the confessed judgment;⁸ and revocation of authority to enter the confessed judgment by a later agreement between the judgment debtor and judgment creditor.⁹ Often a confession is challenged on the basis of improper venue.¹⁰

Any challenge to the confessed judgment by the judgment debtor involving issues of fact such as usury, failure of consideration, undue influence, fraud, or duress cannot be brought by motion and can be brought only via a plenary action.¹¹ The plenary action should be commenced within the statutory period upon the discovery of the matter in avoidance.¹² Confessions of judgment are always carefully scrutinized, and in passing upon them, courts have generally maintained a liberal attitude in favor of the judgment debtor.¹³

It should be noted that a judgment obtained by confession is also subject to attack by third-party creditors who may be prejudiced by the preadjudication entry of the judgment. These attacks generally involve allegations of noncompliance with the requirements of CPLR 3218(a), which dictates that the affidavit confessing judgment must state “concisely the facts out of which the debt arose” and/or state “concisely the facts constituting the liability.” This statutory mandate is designed for the

6 *See Franco v. Zeltser*, 111 A.D.2d 367, 489 N.Y.S.2d 583 (2d Dep’t 1985).

7 *Id.*

8 *See Ermiger v. Gross*, 125 A.D.2d 957, 510 N.Y.S.2d 47 (4th Dep’t 1986); *Ripoll v. Rodriguez*, 53 A.D.2d 638, 384 N.Y.S.2d 504 (2d Dep’t 1976).

9 *See A&C Employment Agency, Inc. v. Mercantile Corp.*, 53 Misc. 2d 768, 279 N.Y.S.2d 550 (Civ. Ct., N.Y. Co. 1967).

10 *Irons v. Roberts*, 206 A.D.2d 683, 614 N.Y.S.2d 792 (3d Dep’t 1994). (Unauthorized entry of confession of judgment in court other than one to which obligator consented was found to be void); *Terezakis v. Goldstein*, 168 Misc. 2d 298, 640 N.Y.S.2d 1005 (sup. Ct., N.Y. Co. 1966) (the proper venue of money actions is the residence of any party).

11 *Engster v. Passonno*, 202 A.D.2d 769, 608 N.Y.S.2d 740 (3d Dep’t 1994); *Scheckter v. Ryan*, 161 A.D.2d 344, 555 N.Y.S.2d 99 (1st Dep’t 1990); *Posner v. Posner*, 277 A.D.2d 298, 715 N.Y.S.2d 883 (2d Dep’t 2000); *see Rubino v. Csikortos*, 258 A.D.2d 638, 683 N.Y.S.2d 924 (2d Dep’t 1999); *Wilk v. Cohen*, 131 A.D.2d 466, 516 N.Y.S.2d 98 (2d Dep’t 1987); *City of Poughkeepsie v. Albano*, 122 A.D.2d 14, 504 N.Y.S.2d 183 (2d Dep’t 1986).

12 *Simeti v. Commissioner of Welfare*, 212 N.Y.S.2d 785 (Sup. Ct., Kings Co. 1961).

13 *Rae v. Kestenber*, 23 A.D.2d 565, 256 N.Y.S.2d 737 (2d Dep’t), *aff’d*, 16 N.Y.2d 1023, 265 N.Y.S.2d 904 (1965).

protection of third persons who may be prejudiced in the event that a collusively confessed judgment is entered, and judgment debtors themselves have traditionally not been permitted to challenge a confession of judgment on the ground that the statute's specificity requirements were not satisfied.¹⁴

It has been held in the case of *Baehre v. Rochester Dental Prosthetics, Inc.*,¹⁵ for example, that two confessions of judgment obtained by a law firm against a judgment debtor which referenced that the same arose from the rendition of "legal services" was voidable by third-party creditors because the affidavit did not contain precise enough information about the nature of the indebtedness. The mere reference to "legal services" was held to be insufficient insofar as it did not indicate when the services were rendered and why the judgment debtor was liable for these services. The *Baehre* case was cited with approval by the Second Department in *Dougherty v. Salty Dog, Inc.*,¹⁶ which affirmed a lower court decision granting the motion of a third-party judgment creditor for an order vacating a judgment by confession. The Second Department held that the affidavit confessing judgment for "legal services" was insufficient because it, like the confessed judgment in *Baehre*, lacked the requisite factual specificity to satisfy the dictates of CPLR 3218(a). In contrast, the Fourth Department case of *Spires v. Mihou*¹⁷ illustrates a sufficient affidavit filed in support of legal services, as it adequately stated the "nature, extent, duration and cost of the legal services rendered by plaintiff [attorney]".¹⁸

In another context, the degree of specificity in the affidavit was found to be adequate in *ILMS Realty Ass'n v. Madden*.¹⁹ In that case, the Second Department found that the following language in the affidavit of confession of judgment sufficiently described the facts constituting the contingent liability involved in that case: "This confession of judgment is for a debt justly due to the plaintiff arising from the following facts: personal guaranty of payment of indebtedness according to Credit Agreement dated November 19, 1987, which said Agreement has been breached."

14 *Burtner v. Burtner*, 144 A.D.2d 417, 533 N.Y.S.2d 991 (2d Dep't 1988); see *Sunbeam Farms, Inc. v. Troche*, 110 Misc. 2d 501, 442 N.Y.S.2d 842 (Civ. Ct., Bronx Co. 1981).

15 112 Misc. 2d 270, 446 N.Y.S.2d 901 (Sup. Ct., Erie Co. 1982).

16 131 A.D.2d 628, 516 N.Y.S.2d 713 (2d Dep't 1987).

17 273 A.D.2d 844, 844, 711 N.Y.S.2d 87 (4th Dep't 2000).

18 See also *Shemesh v. Judd Burstein, P.C.*, 2001 WL 1657202 (Sup. Ct. App. Term, 1st Dep't 2001) (citing *Spires*, 273 A.D.2d 844).

19 174 A.D.2d 603, 571 N.Y.S.2d 310 (2d Dep't 1991).

The court held that this concise statement of facts was sufficiently informative to enable third-party creditors to investigate the claim and ascertain its validity. In the case of *Princeton Bank & Trust Co. v. Berley*, the court held that an affidavit of confession of judgment is adequately detailed when there appears to be an honest recital of enough detail to permit verification of its genuineness and to simplify an investigation of the underlying facts.²⁰ Further, errors of detail that are not prejudicial or are balanced by other details which correct them should not invalidate the judgment.

Another interesting variation occurred in the case of *Reliance Ins. Co. v. Brown*.²¹ In that case, the defendants had personally guaranteed certain loans granted by the plaintiff and, in connection with the same, personally executed confessions of judgment and further granted a mortgage on their residence to secure the confession of judgment. The creditor commenced a foreclosure action on the mortgage, and the defendant disputed the foreclosure action by contending that the creditor's failure to file the affidavit of confession of judgment within the three-year statutory period extinguished the indebtedness and thereby rendered the mortgage void. The Third Department held that a triable issue of fact existed as to whether the mortgage secured only the confession of judgment or also the underlying indebtedness. Apparently, the language of the mortgage referenced the defendant's obligation to pay the indebtedness, and the appellate court determined that this was a matter for a trier of fact to determine. This holding raises a further question as to what would have happened had the affidavit of confession of judgment been recorded within the three-year period. Presumably, the creditor would have had to exhaust its remedies with respect to enforcing the judgment before it could foreclose the mortgage.

Where a judgment creditor has obtained a confessed judgment in another state but wants to convert that confessed judgment into a New York judgment, a word of caution is in order. Article 54 of the CPLR deals with the enforcement of foreign judgments entitled to full faith and credit in New York and establishes a simple registration procedure for entry of judgments in this state. However, CPLR 5402 expressly excludes the application of these simplified registration procedures for default judgments or judgments by confession.

²⁰ 57 A.D.2d 348, 394 N.Y.S.2d 714 (2d Dep't 1977).

²¹ 59 A.D.2d 968, 399 N.Y.S.2d 286 (3d Dep't 1977).

In order to convert a foreign judgment by confession into the equivalent of a New York judgment, a judgment creditor must bring a plenary action or use a CPLR 3213 motion-action. One way to avoid the burden of initiating a plenary action or a CPLR 3213 motion-action is to have the foreign judgment debtor authorize entry of the judgment in New York in the affidavit of confession of judgment. This method of expediting entry of the foreign confessed judgment in New York will likely be successful so long as the transaction out of which the confessed judgment arose had substantial contacts with New York State. However, if both the judgment debtor and the judgment creditor reside outside the state, and the transaction had all its contacts elsewhere, entry of the confessed judgment in New York in this manner may be susceptible to challenge on constitutional grounds.²²

Standard preprinted forms can be acquired in connection with obtaining an affidavit of confession of judgment (see app. A).

[6.2] III. STIPULATIONS OF SETTLEMENT

N.Y. Civil Practice Law & Rules section 2104 is the applicable provision governing all forms of stipulations, including stipulations of settlement. According to this section, an agreement (other than one made between counsel in open court) is not binding upon a party unless it is reduced to a writing subscribed to by the party or his or her attorney or in an order entered by the court. By a 2003 amendment, this section further provides that, notwithstanding its form, the terms of the stipulation of settlement shall be filed with the county clerk by the defendant. The defendant must also pay the corresponding filing fee of \$35.²³

Stipulations of settlement are favored by the courts as a means of expediting and simplifying the resolution of disputes and are not cast aside lightly.²⁴

There are no standardized formats for stipulations of settlement; however, if this tool is being used on a postsuit basis, it should contain the full

22 See *Atlas Credit Corp. v. Ezrine*, 25 N.Y.2d 219, 303 N.Y.S.2d 382 (1969), *rev'd on other grounds*, *Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 78 N.Y.2d 572, 578 N.Y.S.2d 115 (1991).

23 CPLR 8020(d), as added by 2003 N.Y. Laws ch. 62, § 25.

24 *Hallock v. State*, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510 (1984); *In re Galasso*, 35 N.Y.2d 319, 321, 361 N.Y.S.2d 871, (1974). See *Town of Clarkstown v. M.R.O. Pump & Tank, Inc.*, 287 A.D.2d 497, 731 N.Y.S.2d 231 (2d Dep't 2001); *In re Hoffman*, 287 A.D.2d 119, 733 N.Y.S.2d 168 (1st Dep't 2001); *Hauck v. State*, 2 Misc. 3d 770, 774 N.Y.S.2d 255 (Ct. Cl. 2003).

caption of the lawsuit, together with the appropriate index number and reference that the stipulation is being executed by the parties in settlement of the lawsuit, and that in the event of a default, judgment can be entered for the amount so stipulated together with all costs, disbursements, and interest. Since this is a negotiated document, provisions may be included requiring notice of default before proceeding with the filing of a judgment.

This tool can also be utilized on presuit basis. It is advisable to formalize any payment schedules with a judgment debtor into a stipulation which provides for the immediate entry of judgment, thereby obviating the need for time-consuming and costly litigation.

Courts have held that “[s]tipulations of settlement are essentially contracts and [should] be construed in accordance with contract principles and the parties’ intent.”²⁵ A stipulation of settlement will be enforced according to its terms and without resort to extrinsic evidence.²⁶

When the CPLR 2104 requirements for a binding stipulation have been met, and the agreement is clear and unambiguous on its face, few grounds exist for avoiding its enforcement. “Stipulations of settlement are generally not subject to renegotiation.”²⁷ Courts are even willing to enforce the terms of a stipulation of settlement notwithstanding a defendant’s willingness and ability to remedy the source of the dispute.²⁸ Further, stipulations will not be set aside “merely because in ‘hindsight’ a party decides that the terms of the stipulation were ‘improvident.’”²⁹ However, where there is sufficient cause to invalidate a contract, such as fraud, collusion, mistake, or accident, a party may be relieved from the consequences of a stipulation of settlement.³⁰

25 *Drew v. Prudential Ins. Co. of America*, 224 A.D.2d 1036, 1036, 637 N.Y.S.2d 589 (4th Dep’t 1996); *Serna v. Pergament Distribs., Inc.*, 182 A.D.2d 985, 986, 582 N.Y.S.2d 550 (3d Dep’t), *leave to appeal dismissed*, 80 N.Y.2d 893, 587 N.Y.S.2d 909 (1992).

26 *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 160, 565 N.Y.S.2d 440 (1990); *Teitelbaum Holdings, Ltd. v. Gold*, 48 N.Y.2d 51, 421 N.Y.S.2d 556 (1979).

27 *Dallin v. Dallin*, 225 A.D.2d 768, 769, 640 N.Y.S.2d 148 (2d Dep’t 1996).

28 *See, e.g., City of New York v. 130/40 Essex St. Dev. Corp.*, 302 A.D.2d 292, 756 N.Y.S.2d 23 (1st Dep’t 2003) (enforcing the eviction clause of a stipulation of settlement despite the defaulting tenant’s offer to pay its debt in full at the time of the proceeding).

29 *Hauck v. State*, 2 Misc. 3d 770, 774, 774 N.Y.S.2d 255 (Ct. Cl. 2003) (quoting *Town of Clarkstown v. M.R.O. Pump & Tank, Inc.*, 287 A.D.2d 497, 498, 731 N.Y.S.2d 231 (2d Dep’t 2001)).

30 *Hallock v. State*, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510 (1984).

While most stipulations of settlement involve parties that consent to be bound by their mutual agreement, some settlements require judicial approval. For example, N.Y. Estates, Powers and Trusts Law § 5-4.6 requires that the court approve, in writing, a settlement regarding wrongful death claims; CPLR 908 requires approval of the court if a class action is to be dismissed, discontinued, or compromised; N.Y. Town Law § 68 mandates court approval of the compromise or settlement of actions or proceedings against a town; and CPLR 1207 provides that the court may order settlement of any action commenced by or on behalf of an infant, incompetent, or conservatee.

“A settlement agreement entered into by the parties to a lawsuit does not terminate the action unless there has been an express stipulation of discontinuance or actual entry of judgment in accordance with the terms of the settlement.”³¹ In certain circumstances, it may be advantageous for parties to a stipulated settlement to continue the action and let the court retain jurisdiction for purposes of enforcing the settlement agreement. Should the parties choose to discontinue the action following a settlement, however, standard preprinted forms can be acquired in connection with the execution of stipulations of discontinuance (see Appendix B). Where an action is still pending, relief from a stipulation may be obtained by motion to the court. However, if the action has been terminated, relief must be obtained by plenary suit.

[6.3] IV. ALTERNATIVE DISPUTE RESOLUTION

Finally, there is a tremendous emphasis upon alleviating the dockets of the state’s court system by resolving commercial disputes through alternative dispute resolution (ADR) such as arbitration or nonbinding mediation. In many instances, the parties to a contract stipulate that any differences or breaches, including nonpayment, shall be resolved by mediation or arbitration (or sometimes both). Where there is not an expressed contractual provision establishing arbitration as a means of dispute resolution, the parties can stipulate at a subsequent point in time to resolve any such disputes through this mechanism. The local bar associations have generally adopted programs that facilitate arbitration. The American Arbitration Association can also be used as a means of dispute resolution. Technically, arbitration may be considered a litigation procedure since it does envision an adversarial process, and generally the parties feel there is cause to their respective positions. N.Y. Civil Practice Law & Rules article 75 pertains to arbitration and includes provisions

³¹ *Teitelbaum Holdings, Ltd.*, 48 N.Y.2d at 53.

relating to, inter alia, applications to compel or stay arbitration (CPLR 7503), the appointment of arbitrators (CPLR 7504), vacating and modifying arbitration awards (CPLR 7511), and judgments on arbitration awards (CPLR 7514).

In contrast, mediation is a nonbinding consensual dispute-resolution mechanism where a skilled facilitator assists the parties in crafting a voluntary outcome. It is particularly common, for example, where the parties have an ongoing business relationship, and the expense and potential acrimony of an adversarial proceeding might be detrimental to their continued business interests. In such situations, the goal is often to create a win-win situation and frequently encompasses matters beyond those directly in dispute.

In recent years, congested dockets have caused courts to become increasingly interested in ADR mechanisms, including arbitration and mediation. This interest has led some courts, both state and federal, to adopt voluntary and/or mandatory, nonbinding ADR procedures for cases pending before them. For example, CPLR 3405 authorizes the Chief Judge of the Court of Appeals to promulgate rules for arbitration of claims for the recovery of a sum of money not exceeding \$6,000 (exclusive of interest) in any court except the New York City civil courts and not exceeding \$10,000 (exclusive of interest) in the New York City civil courts. The arbitration procedure authorized by CPLR 3405 is articulated more specifically in Part 28 of the Rules of the Chief Judge. A similar arbitration procedure has been adopted by federal courts.³² It is incumbent on the careful practitioner to consult the local court rules where his or her case is pending to determine whether such ADR procedures are available or, even more important, required.

³² See 28 U.S.C. §§ 651–658.

CHAPTER SEVEN

INSTITUTING SUIT

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The purpose and function of the service of process, in addition to giving the court power over the parties, is to give the defendant notice of the commencement of the action.

[7.31] A. Service of a Summons Upon a Natural Person

Personal service of a summons upon a natural person can be made by one of the following five methods:

[7.32] 1. Personal Delivery

The first alternative is to deliver the summons within the state to the person to be served.¹⁰³

Personal delivery of the summons is the most desirable method of giving notice of a claim because it provides a defendant with firsthand knowledge that the action is being commenced. From the plaintiff's point of view, personal delivery is most desirable because it minimizes the risk of judgment being set aside.¹⁰⁴

Personal delivery also requires the defendant to appear sooner. A defendant served by personal delivery has 20 days to appear.¹⁰⁵ A defendant served by other methods has until 30 days after service "is complete,"¹⁰⁶ and service is complete 10 days after the affidavit of service is filed.¹⁰⁷ Taking into account the time it takes the plaintiff's attorney to get the affidavit of service from his or her process server and into the hands of the clerk, the difference in the times to appear can amount to a month. Such a difference can be significant in collection matters, where time is often an important factor.

Service of a summons will, in some cases, be considered valid personal delivery even though process is not handed to the defendant. This is so, for example, where a defendant resists service of process by force or deceit or a refusal to accept service.¹⁰⁸

¹⁰³ CPLR 308(1).

¹⁰⁴ See CPLR 317.

¹⁰⁵ CPLR 320(a).

¹⁰⁶ CPLR 320(a). *Id.*

¹⁰⁷ CPLR 308(2), 308(4).

¹⁰⁸ See, e.g., *Estate of Turecamo*, 96 Misc. 2d 120, 121, 408 N.Y.S.2d 930 (Sur. Ct., Nassau Co. 1978) (where the defendant refused to open the door to accept service).

[7.33] 2. Delivery and Mailing

The second alternative is to deliver the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place, or usual place of abode of the defendant and to mail the summons to the defendant at his or her last-known residence.¹⁰⁹ This method can be used without any prior effort to make personal delivery. Both delivery and mailing are essential for a court to obtain jurisdiction over the defendant.

The person of suitable age and discretion need not be an adult. Serving a teenager will suffice if it appears with reasonable certainty that he or she will advise the defendant of the service of process.¹¹⁰ A court may also consider fluency in English as a factor in determining whether the individual served was of suitable age and discretion, especially when the plaintiff, plaintiff's counsel, or the process server is on notice that such person is not fluent in English.¹¹¹

What constitutes a dwelling place or "usual place of abode" can be determined only by examining the facts of each case. The court will examine the circumstances to determine whether the delivery was reasonably calculated to give the defendant notice of the action. Generally, if a defendant resides in a multiple dwelling, the dwelling place or usual place of abode is the apartment of the defendant. The summons may nonetheless be delivered to a person living in another apartment in the same building, or, in some cases, to the doorman at the entrance to the lobby.¹¹² The court will examine the size of the apartment house, proximity of the place of delivery to the defendant's apartment, and other factors. Courts have also applied a similar approach in determining the "actual place of business" of the defendant.¹¹³

109 CPLR 308(2).

110 *See, e.g., Room Additions, Inc. v. Howard*, 124 Misc. 2d 19, 475 N.Y.S.2d 310 (Civ. Ct., Bronx Co. 1984); *see also Vill. of Nyack Hous. Auth. v. Scott*, 1 Misc. 3d 22, 767 N.Y.S.2d 562 (App. Term, 2d Dep't 2003).

111 *Nuez v. Diaz*, 101 Misc. 2d 399, 421 N.Y.S.2d 770 (Sup. Ct., Monroe Co. 1979); *see also Ralph C. Sutro Co. v. Valenzuela*, 113 A.D.2d 793, 493 N.Y.S.2d 370 (2d Dep't 1985).

112 *F.I. DuPont, Glore Forgan & Co. v. Chen*, 41 N.Y.2d 794, 396 N.Y.S.2d 343 (1977); *Braun v. St. Vincent's Hosp. & Med. Ctr.*, 57 N.Y.2d 909, 456 N.Y.S.2d 763 (1982).

113 *Di Giuseppe v. Di Giuseppe*, 70 Misc. 2d 188, 333 N.Y.S.2d 245 (Civ. Ct., N.Y. Co. 1972); *see also Socci v. China Grill, Inc.*, No. 30586/00, 2001 WL 1682876 (Sup. Ct., Kings Co. 2001).

Proof of such service must be filed within 20 days thereafter with the clerk of the court designated in the summons. Additionally, the proof of service must identify the person of suitable age and discretion; and the date, time, and place of service. Service is complete 10 days after filing.¹¹⁴

[7.34] 3. Agent for Service

A third alternative is to deliver the summons within the state to the agent designated by the defendant for service of process.¹¹⁵ This method is rarely used in collection practice, however, because a defendant will generally do little to cooperate with a plaintiff.

[7.35] 4. “Nailing” and Mailing

If service under CPLR 308(1) and (2) should fail, efforts to achieve service may be made by affixing the summons to the door of the defendant’s actual place of business, dwelling place, or usual place of abode within his or her state *and* mailing the summons to the defendant’s last-known address. Proof of service must be filed within 20 days, and service is complete 10 days after filing.¹¹⁶

Service is not complete until both acts of affixing and mailing are done, and the expiration of a statute of limitations will not be averted by affixing within the statutory time if the mailing is not also accomplished within the same period. Using registered or certified mail, return receipt requested, may avoid a possible claim that actual notice of the action was never received. On the other hand, defendants sometimes refuse registered or certified mail, and using ordinary mail raises a presumption of receipt. The attorney must judge for himself or herself which to use by considering all the circumstances of the particular case.

Because of the “due diligence” requirement built into the statute, service under this paragraph requires a more detailed affidavit of service, which must indicate the efforts made to achieve service under the other provisions.¹¹⁷ Generally, a single visit to the defendant’s premises when no one is at home will not suffice. On the other hand, several visits at dif-

¹¹⁴ CPLR 308(2).

¹¹⁵ CPLR 308(3); CPLR 318.

¹¹⁶ CPLR 308(4).

¹¹⁷ CPLR 306(c).

ferent times to the defendant's residence and place of business probably does constitute the requisite diligence. Again, the determination turns on the particular circumstances.

[7.36] 5. Court-Directed Service

The final alternative is offered by CPLR 308(5). The statute permits service to be made "in such manner as the court, upon motion without notice, directs if service is impracticable" under subdivisions (1), (2), and (4) of CPLR 308. This section is intended for use in unpredictable circumstances where a plaintiff is unable to follow the usual methods of service and the situation requires more flexibility. The Court of Appeals has held that in order for a plaintiff to use this section, he or she need only establish that the methods of service set forth in CPLR 308(1), (2), and (4) cannot be met.¹¹⁸

[7.37] 6. Personal Service by Mail

Civil Practice Law & Rules section 312-a authorizes personal service by first-class mail as an alternative to the methods of personal service authorized by CPLR 307, 308, 310, 311, or 312. This procedure must be strictly followed, and the person served must be provided with an acknowledgment form and a prepaid, addressed return envelope. Service by mail is not complete until the defendant returns the signed acknowledgment. This method is not very viable in a debt collection practice. Debtors are not prone to acknowledge such service, and when they fail to do so, the only penalty is the awarding of costs for disbursements incurred for the other service of process. Since the plaintiff is entitled to the award of disbursements for service of process in any bill of costs, attorneys are well advised to proceed with regular methods of service rather than the uncertainty of the time-consuming personal service by mail.

[7.38] B. "Additional Notice" Required in Some Cases

A natural person and a corporation are entitled to an "additional notice," in certain circumstances, of the commencement of an action based upon the entry of a default judgment under CPLR 3215(g). Therefore, it may be prudent for the plaintiff's attorney to make this additional mailing in every applicable case at the outset. If the plaintiff waits for a default in appearance by the defendant and then makes the additional

¹¹⁸ *Dobkin v. Chapman*, 21 N.Y.2d 490, 289 N.Y.S.2d 161 (1968).

mailing, his or her application for entry of a judgment will have to wait 20 more days.

The additional notice provision requires that the plaintiff or his or her attorney, at least 20 days prior to the entry of judgment, serve an additional copy of the summons upon the defendant by forwarding it by first-class mail to the defendant at his or her last-known residence. If, prior to the entry of judgment, the summons is returned by the post office as undeliverable, or the home address of the defendant is not known, then a copy of the summons should be mailed to the defendant's place of business, if known, in an envelope marked "Personal and Confidential" and not indicating that it is from an attorney.

[7.39] C. Personal Service Upon a Corporation

Personal service upon a domestic or foreign corporation shall be made by delivering the summons to an officer, director, managing or general agent, cashier or assistant cashier, or to any other agent authorized by appointment or by law to receive service.¹¹⁹

Generally, delivery of a summons to a low-level clerical employee who possesses no supervisory or administrative duties, and who tells the process server that he or she is unauthorized to accept service, is not good service upon the corporation.¹²⁰

An issue sometimes litigated is the question of who qualifies as a "managing or general agent." Generally, if there are a handful of employees at a corporate office, the person who appears to be in charge qualifies as a managing agent for service, and this person needs no formal title indicating a high position.

If service of process cannot be made upon a person located at the defendant's business, then personal service can be effected by service on the Secretary of State in Albany, NY.¹²¹ Service-of-process bureaus are available in Albany to handle this kind of service.

If the corporation to be served is not authorized to do business in New York State, service of process can be made pursuant to N.Y. Business and Corporation Law § 307 (BCL). Special care must be used to follow the

¹¹⁹ CPLR 311(a)(1).

¹²⁰ *Arce v. Sybron Corp.*, 82 A.D.2d 308, 441 N.Y.S.2d 498 (2d Dep't 1981).

¹²¹ BCL § 306(b)(1).

exact procedures and sequences of service required under § 307, as any deficiency will result in a failure to obtain jurisdiction over the defendant corporation.

If service upon a domestic or foreign corporation cannot be completed within the 120/15 days required by CPLR 306-b, then service may be made in such manner, and proof of service may, upon motion without notice, take such form as the court directs.¹²² Subdivision b provides an answer to the problems arising in the case law, which held that court-ordered “expedited” service under CPLR 308(5) was unavailable with respect to corporate defendants. The court can now, by an ex parte order, provide a means for making service when the plaintiff is encountering serious difficulty effectuating service pursuant to existing statutory methods in time to comply with the service requirements of CPLR 306-b.

[7.40] D. Personal Service Upon a Partnership

Personal service upon persons conducting a business as a partnership may be made by personally serving the summons within this state upon any one of the partners.¹²³ For any partner who is not personally served, however, only his or her partnership interest may be reached by the judgment creditor.¹²⁴

[7.41] 1. Personal Service on a Limited Partnership

In 1999, a new CPLR section was added¹²⁵ which provides for personal service upon domestic and foreign limited partnerships. Section 310-a of the CPLR allows service to be made by delivering a copy to any managing or general agent or general partner in this state, to any other agent or employee of the limited partnership authorized by appointment to receive service, or to any other person designated by the partnership. If service is impracticable, CPLR 310-a(b) provides that service can be made in such manner as the court, upon motion without notice, directs.

¹²² CPLR 311(b).

¹²³ CPLR 310(a).

¹²⁴ CPLR 5201(b).

¹²⁵ 1999 N.Y. Laws ch. 341, § 1.

[7.42] 2. Personal Service on Limited Liability Companies

Also added in 1999,¹²⁶ CPLR 311-a addresses service of process on limited liability companies. Under this section, service may be made by delivering a copy to any member of the company in this state if the management of the company is vested in its members, to any manager of the company in this state if the management of the company is vested in one or more managers, to any other agent authorized by appointment to receive process, or to any other person designated by the company. If service is impracticable, CPLR 311-a(b) allows the court, upon motion without notice, to direct the manner for service.

[7.43] E. Personal Service Outside New York

Service of process outside New York gives personal jurisdiction if the defendant is a domiciliary of the state or has committed acts which meet the requirements of CPLR 302.¹²⁷ The time to answer a summons served outside the state is 30 days from the time service is complete rather than the 20 days available where service is made by personal delivery within the state.¹²⁸

[7.44] F. Commencement of the Action and Proof of Service/Filing

It should be noted at the outset of an action that recent amendments to § 400 of both the Uniform City Ct. Act and the Uniform Dist. Ct. Act have altered the way in which an action is commenced in all city and district courts throughout the state. Effective September 8, 2005, the statutes as amended provide that an action in city court is commenced “by filing a summons and complaint.”¹²⁹ Serving a complaint prior to filing in the lower courts now subjects the complaint to dismissal.¹³⁰ In addition, special proceedings in either court are also commenced in the same fashion (i.e., by the filing of the notice of petition and petition). However, with respect to special proceedings, the filing of an order to show cause in place of a notice of petition is sufficient to commence the action. The leg-

¹²⁶ 1999 N.Y. Laws ch. 341, § 1.

¹²⁷ CPLR 313.

¹²⁸ CPLR 320(a).

¹²⁹ See Uniform City Civ. Act § 400(1) and Uniform Dist. Ct. Act § 400(1).

¹³⁰ *Perrone v. Jim Doyle Ford, Inc.*, 13 Misc. 3d 312, 818 N.Y.S.2d 907 (Dist. Ct., Nassau Co. 2006).

islature has defined “filing” in either court as “the delivery of the summons and complaint, the notice of petition and petition or order to show cause and petition to the clerk of the court in which the action or proceeding is brought together with any fee required by section nineteen hundred eleven of this act.”¹³¹

Neither of these amendments affects the proof of filing requirements in the lower courts.

Civil Practice Law & Rules section 306-b eliminates the requirement concerning the filing of proof of service, requiring only that service be completed within 120 days. However, the requirement that proof of service must be filed when service is made under CPLR 308(2) and 308(4) remains unchanged. In those cases, proof of service must be filed with the clerk of the court within 20 days after service is made, and service is deemed complete 10 days after such filing. The time frames governing completion of service should be carefully computed when determining the date of default for a default judgment.

[7.45] G. The Attorney’s Responsibility

Arranging for service of process by an independent contractor does not relieve an attorney of vicarious liability for the process server’s negligence. An attorney owes a nondelegable duty to the client to exercise care in the service of process.¹³² In *Kleeman*, the attorney was held responsible for malpractice when he delivered a medical malpractice summons and complaint to an independent process server, who then served the documents on the physician’s secretary rather than on the physician. By the time the defective service was discovered, the statute of limitations had expired on the client’s claim. The Court of Appeals found that the duty the attorney owed to his client was nondelegable and reversed an order granting summary judgment in favor of the attorney.

¹³¹ See Uniform City Ct. Act § 400(1); Uniform Dist. Ct. Act § 400(1).

¹³² See *Kleeman v. Rheingold*, 81 N.Y.2d 270, 598 N.Y.S.2d 149 (1993).

CHAPTER NINE

PROCEDURES DURING LITIGATION

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PROCEDURES DURING LITIGATION

Under N.Y. Civil Practice Law & Rules section 304 (CPLR), “[an] action is commenced by filing a summons and complaint or summons with notice” in the county clerk’s office.¹ Unless a defendant makes a motion pursuant to CPLR 3211 to dismiss one or more causes of action in the complaint, he or she files an answer which “may include a counterclaim against a plaintiff and a cross-claim against a defendant.”² A defendant may also make a claim against (1) another claimant by filing an interpleader complaint or (2) a person not already a party in the action by filing a third-party complaint.³ A plaintiff must reply to a counterclaim, and a party must answer an interpleader complaint or third-party complaint.⁴ A defendant must answer a cross-claim only if the answer contains a demand for an answer. Otherwise, the cross-claim shall be deemed denied or avoided.⁵

After service of the summons and complaint, answer, and reply, if required, commonly referred to as “joining of issue,” the parties and their counsel plot their litigation strategy. The objective of plaintiff’s counsel is to get to the courthouse as quickly as possible. To that end, plaintiff and his or her counsel should diligently respond to all discovery demands; complete the discovery phase efficiently; and avoid getting bogged down in unnecessary, time-consuming, and expensive motion practice. The goal is to get the case on the trial calendar, which will result in either settlement of the case or an early trial date. Once you obtain a judgment, plaintiff can commence enforcement proceedings immediately to collect the judgment, pursuant to CPLR Article 52.

The defendant, on the other hand, has greater advantage when resolution of the case is prolonged, becoming expensive for the plaintiff to prosecute. This may lead to a favorable settlement, but defendant must be careful to avoid conduct which might be deemed frivolous.

Defendant’s counsel has numerous tools at his or her disposal, which, when employed, may also result in a delay to the ultimate resolution of

1 *See also* New York City Civil Court Act (City Civ. Ct. Act) § 400 and Uniform District Court Act (Uniform Dist. Ct. Act) § 400.

2 CPLR 3011.

3 *Id.*

4 *Id.* A reply is not required in civil court and district court actions unless required by court order. City Civ. Ct. Act § 907 and Uniform Dist. Ct. Act § 907.

5 CPLR 3011. A cross-claim in civil court and district court actions must be answered. City Civ. Ct. Act § 907(b) and Uniform Dist. Ct. Act § 907(b).

the case. Prior to interposing an answer to the complaint, a defendant can move to dismiss the complaint pursuant to CPLR 3211 on various grounds such as statute of limitations or statute of frauds, a lack of jurisdiction over the person or subject matter, failure to state a cause of action, a defense based on documentary evidence, or a claim that has been discharged in bankruptcy. These affirmative defenses can also be interposed in the defendant's answer.

Note that an affirmative defense asserting improper service is waived unless the defendant moves to dismiss on such grounds within 60 days after service of the responsive pleading.⁶ If defendant successfully challenges service, the court may order a "traverse hearing" to determine if service was proper. The motion and hearing will delay resolution of the case on the merits, and if successful, the plaintiff may be compelled to start the action all over again and re-serve the defendant with the pleadings.

Other actions by the defendant which may result in delaying resolution of the case include affirmative defenses, counterclaims against the plaintiff, cross-claims against other defendants, and/or commencing a third-party action against new parties. The defendant typically serves numerous discovery demands, including deposition notices, interrogatories, document demands, demand for verified bill of particulars,⁷ notices to admit, and demand for expert disclosure. Generally, the defendant serves a notice to take the plaintiff's deposition, along with the answer, to preserve priority in conducting depositions.⁸ Motion practice along with these discovery demands generate much paper and result in delays typically more harmful to plaintiff than defendant.

In sum, the object of plaintiff's attorney is to proceed with the forceful prosecution of the case toward settlement or judgment and eventual recovery. In contrast, delays in resolution generally work to the advantage of the defendant in obtaining the best settlement for his client, if not an outright dismissal on the merits. However, counsel for both sides must avoid conduct which might be deemed frivolous.⁹

6 CPLR 3211(e).

7 The demand for a verified bill of particulars is not technically a discovery device, as explained below.

8 CPLR 3106.

9 See chapter 8, III. (§8.7).

A judgment is often the culmination of much work, time, and expense by attorneys and their client(s). In consumer credit cases, however, the majority of judgments entered are obtained by default because in these types of cases there is frequently no legal dispute that the claim is actually due and owing. An answer interposed avoids a default judgment, delaying the ultimate resolution of the case and often resulting in settlement including a favorable repayment of the indebtedness.

Although the entry of a judgment is the end of litigation in favor of the successful party, the vast majority of cases are settled prior to the entry of judgment. It should be noted that a representation made by an attorney in settlement of a case, when approved, accepted, and confirmed by the other party, is binding to constitute an enforceable settlement. Presumably, an attorney making the representation of settlement has the authority of his or her client. Practically speaking, it is in an attorney's best interest to obtain from the client, in writing, the authority to settle a claim, thus avoiding any dispute if the client later reneges or disavows the settlement.

[9.1] I. ENTRY OF DEFAULT JUDGMENTS

[9.2] A. Entry by Clerk

When a defendant has failed to appear, plead, or proceed to trial within one year from the date of default, a default judgment can be entered against him or her. Under CPLR 3215(a), the clerk of the court has the authority to enter a default judgment without judicial assistance when the "plaintiff's claim is for a sum certain or for a sum which can by computation be made certain," and application is made within one year of the default. The clerk, typically a judgment clerk, can enter a default judgment upon submission of the following papers: a summons and verified complaint; proof of service, including that the defendant is not in the military service; proof of facts constituting the claim, the default, and the amount due; and proof that the defendant was provided with an additional 20 days' notice as specified in CPLR 3215(g)(3) and (4).¹⁰ Although a verified complaint can qualify as "affidavit of merit," as a practical matter most jurisdictions require an affidavit of merit by the plaintiff, even if the complaint was verified by counsel pursuant to CPLR 3020(d)(3).

When a default judgment is sought against a natural person "in an action based upon nonpayment of a contractual obligation," plaintiff must provide defendant with "additional notice" at least 20 days before entry of

¹⁰ CPLR 3215(f).

the judgment. Under CPLR 3215(g)(3)(i), a copy of the summons must be mailed to the defendant as specified therein. Likewise, a corporate defendant is also entitled to an additional 20 days' notice before a default judgment is obtained against the corporation if service upon the corporation was effectuated pursuant to N.Y. Business Corporation Law § 306(b) (service upon a corporation through the Secretary of State).

If the default judgment is not entered within one year from the date of the default, the attorney must apply to the court, on notice to the defaulting party, for leave to enter judgment.¹¹ The application must contain a good and sufficient reason for not obtaining a judgment by default within one year and should include an affidavit of merit by the party.¹²

[9.3] B. Entry by Court

In all other circumstances, such as when the amount demanded in the complaint is not a “sum certain,” damages are to be assessed by the court, or the court will direct a reference as to specific issues. Only the court can enter a default judgment.¹³ In the event multiple defendants are named, the judgment should contain an order of severance identifying which defendants were not served or the parties against whom judgment is not sought.

There are other types of default judgments, such as one in which a defendant initially serves an answer but fails to subsequently appear in the case. Technically, this type of judgment is not a “default judgment,” as defendant has appeared and answered; it is referred to as an inquest before the clerk if the amount demanded in the complaint is for a sum certain which can be entered by the clerk. At an arbitration before an arbitrator or panel, if the amount demanded is not for a sum certain, the arbitrator has the same powers as a judge and can hear the proof as to damages and award judgment.

Where the application for the judgment is made to the court, a defendant who has appeared in the action is entitled to five days' notice of the time and place of the motion.¹⁴ Under CPLR 3215(g)(1), a defendant who

¹¹ CPLR 3215(c).

¹² *Id.*

¹³ CPLR 3215(b).

¹⁴ CPLR 3215(g).

has not appeared is entitled to notice only if more than one year has elapsed since the default.

[9.4] II. OPENING DEFAULT JUDGMENTS

Generally, there is a strong public policy that actions be resolved on their merits.¹⁵ As such, courts are rather liberal in vacating default judgments.

Courts are even more liberal in vacating default judgments against pro se defendants without the typical stringent requirements usually required for such relief. The civil court and district courts are equipped to assist pro se defendants with the necessary forms for orders to show cause and motions seeking such relief. Pro se litigants explain both the reason for the default and their defenses to the claims against them. If the judge signs the order to show cause and schedules a hearing, a defendant must serve plaintiff as specified in the court's order. Both plaintiff and defendant then return to court, and the court decides whether to vacate the default judgment.

Motions to vacate a default judgment are generally made pursuant to CPLR 5015(a)(1). Under this section, the moving party must establish that (1) the default was "excusable," and (2) he or she possesses a meritorious defense to the claim.¹⁶ A defendant must make a motion to the court, by order to show cause or notice of motion, to vacate a default judgment. Generally, this type of motion is made by order to show cause, which includes a temporary restraining order staying enforcement proceedings on the judgment and execution. If an execution has been issued by plaintiff's counsel, serve the sheriff or marshal with the order to show cause with supporting papers so that he or she realizes that a stay is in place.

The motion must be supported by a detailed affidavit of a person having knowledge of the facts in order to establish a meritorious defense and a legal and sufficient reason for the failure to answer or appear.¹⁷ A copy of the proposed answer, along with affirmative defenses and counterclaims, should be annexed to the motion papers. Documentation is also

¹⁵ See *Mele v. Okubo*, 36 A.D.3d 599, 827 N.Y.S.2d 284 (2d Dep't 2007); *N.Y. Univ. Hosp. Rusk Inst. v. Ill. Nat'l Ins. Co.*, 31 A.D.3d 511, 818 N.Y.S.2d 585 (2d Dep't 2006).

¹⁶ See *Rugieri v. Bannister*, 7 N.Y.3d 742, 819 N.Y.S.2d 861 (2006); *Eugene DiLorenzo, Inc. v. A.C. Dutton Labor Co.*, 67 N.Y.2d 138, 501 N.Y.S.2d 8 (1986).

¹⁷ See *Rugieri*, 7 N.Y.3d 742; *Eugene Di Lorenzo, Inc.*, 67 N.Y.2d 138.

helpful to show a bona fide dispute or inability to answer. Motions under CPLR 5015 are discretionary and are usually granted upon a showing of the necessary requirements.¹⁸

The additional grounds to vacate a judgment under CPLR 5015(a) are

1. newly discovered evidence;
2. fraud, misrepresentation, or other misconduct of an adverse party;
3. lack of jurisdiction to render the person or order; or
4. reversal, modification, or vacatur of a prior judgment or order upon which it is based.

Under certain limited circumstances, application can also be made to an administrative judge by formal notice to all the parties under CPLR 5015(c). This procedure is invoked only when the issue presented affects a multitude of parties and cases and there is a clear and proper showing that the default judgments were obtained by “fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities.”¹⁹ The court then weighs the number of judgments obtained on these grounds, and whether a number of defendants were deprived of their rights to answer before proceeding in this manner.²⁰ In opposing a motion to vacate a default judgment, plaintiff’s counsel should take into account the following strategic considerations:

1. Request that the judgment and/or execution remain as security pending final outcome of the case.
2. Raise lack of jurisdiction over person (opposing counsel should be prepared to attempt to waive such defense in answer).
3. Request that the stay not be continued beyond initial hearing date of motion.

¹⁸ See *Cappel v. RKO Stanley Warner Theaters, Inc.*, 61 A.D.2d 936, 403 N.Y.S.2d 31 (1st Dep’t 1978).

¹⁹ CPLR 5015(c).

²⁰ See *Thompson v. Chemical Bank*, 84 Misc. 2d 721, 375 N.Y.S.2d 729 (Civ. Ct., N.Y. Co. 1975); see also *Mead v. First Trust & Deposit Co.*, 60 A.D.2d 71, 400 N.Y.S.2d 936 (4th Dep’t 1977).

A default judgment also can be opened under CPLR 317 if the person was not personally served with the summons. Such person may, upon a finding of the court that he or she did not personally receive notice of the summons in time to defend and has a meritorious defense, be allowed to defend the action within one year after he or she obtains knowledge of entry of the judgment but not more than five years after such entry, *upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense*. If this defense is successful, the court can direct and enforce restitution in the same manner and subject to the same conditions as it can be when a judgment is reversed or modified on appeal.²¹ Under this section, a defendant must also establish a meritorious defense.

[9.5] III. ATTORNEY'S FEES

Seeking attorney's fees in the summons and complaint is an issue that might delay a prompt resolution of the case. Such awards are intended to compensate the creditor, in whole or in part, for the expense incurred in collection actions. Defendants are extremely reluctant to pay attorney's fees incurred by plaintiffs as part of any settlement. Note also that a clerk has no authority to award attorney's fees on a default judgment. As a practical matter, if the attorney's fees are nominal, a plaintiff should consider waiving them to obtain the judgment from the clerk as quickly as possible.

The well-established rule applying to attorney's fees is that each party pays its own attorney unless recovery of attorney's fees is permitted under the governing agreement or authorized by a statutory provision.²²

Generally, all agreements with financial institutions include contractual provisions for the institution to recover costs of collection, including attorney's fees, in the event of a default thereunder. It is well settled that contractual provisions providing for attorney's fees are valid.²³

²¹ CPLR 317 (emphasis added).

²² See *Feeney v. Licari*, 131 A.D.2d 539, 516 N.Y.S.2d 265 (2d Dep't 1987).

²³ *Roe v. Smyth*, 278 N.Y. 364 (1938); *Waxman v. Williamson*, 256 N.Y. 117 (1931); *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516, 381 N.Y.S.2d 459 (1976); *Franklin Nat'l Bank v. Wall St. Commercial Corp.*, 40 Misc. 2d 1003, 244 N.Y.S.2d 491 (Sup. Ct., Nassau Co. 1963), *aff'd*, 21 A.D.2d 878, 251 N.Y.S.2d 892 (2d Dep't 1964); *Harradine v. Bd. of Supervisors*, 73 A.D.2d 118, 425 N.Y.S.2d 182 (4th Dep't 1980); *Brownie's Army & Navy Store, Inc. v. E.J. Burke, Jr., Inc.*, 72 A.D.2d 171, 424 N.Y.S.2d 800 (4th Dep't 1980).

Statutory provisions such as N.Y. Banking Law § 108(4)(c)(iii) and (5)(e)(iv) authorize the recovery of attorney's fees in consumer loans, revolving credit agreements, and checking account overdraft loans. N.Y. Personal Property Law § 413(5) allows attorney's fees of up to 20% in retail installment credit agreements if there is a default and the matter is referred to outside counsel. Personal Property Law § 302(7) allows attorney's fees of up to 15% in a motor vehicle retail sales agreement.

Notwithstanding formulas in various agreements providing for the calculation of attorney's fees, such fees are determined on a quantum meruit basis rather than by a mechanical application of a blanket formula contained in the agreement between the creditor and debtor.²⁴ The legal rationale for this theory is that attorney's fees are unliquidated in amount and should be reasonable in accordance with the legal work performed. As noted by the appellate court in *Korea First Bank of New York v. Cha*, where the lower court "did not undertake any inquiry on the record into the reasonableness of the contractual 15% attorney's fee rate, the issue is remanded and is to be determined in accordance with the rule set forth in *Matter of First Natl. Bank v. Brower* (42 N.Y.2d 471, 474)."²⁵ Thus, courts have the right to review and undertake any inquiry on the record into the reasonableness of the attorney's fees.²⁶

[9.6] IV. INTEREST RATES

Interest is to be computed from the "earliest ascertainable date the cause of action existed."²⁷ The post-maturity rate of interest on consumer loans or other consumer transactions depends on the rate specified in the governing agreement or the rate provided for in a disclosure statement. This rate of interest, if higher than the statutory interest rate of 9%, can be assessed and computed up to the date of entry of judgment. In the event the contract, agreement, or disclosure statement is silent as to the rate of interest, plaintiff may seek up to 9% per annum.

The successful party in an action is entitled to an award of interest. If interest is not included in a decision or referee's report, the successful

24 *First Nat'l Bank of E. Islip v. Brower*, 42 N.Y.2d 471, 398 N.Y.S.2d 875 (1977).

25 259 A.D.2d 378, 379, 687 N.Y.S.2d 124 (1st Dep't 1999); A.D.2d 730, 453 N.Y.S.2d 857 (3d Dep't 1982); see also *Fed. Land Bank v. Ambrosano*, 89 A.D.2d 730, 453, N.Y.S.2d 857 (3d Dep't 1982).

26 *Gair v. Peck*, 6 N.Y.2d 97, 188 N.Y.S.2d 491 (1959); *First Nat'l Bank*, 42 N.Y.2d 471; *Korea First Bank v. Chung Jae Cha*, 259 A.D.2d 378, 678 N.Y.S.2d 124 (1st Dep't 1999).

27 CPLR 5001(b).

party may move to reform the decision to include interest. Every money judgment will bear interest from the date of its entry.²⁸ Every order directing the payment of money which has been docketed as a judgment will bear interest from the date of such docketing.²⁹ The post-judgment rate of interest also is 9% per annum.³⁰

[9.7] V. TRANSCRIBING JUDGMENTS

Entry of judgment occurs when the judgment clerk affixes the name of the clerk of the court and the date to the judgment roll. Plaintiff's attorney should calculate the accrued interest due and submit a "Bill of Costs" along with the judgment, which includes all taxable costs and disbursements. In most courts it is unnecessary for the judgment to be formally entered in the judgment book to be official and valid.

After the entry of judgment in the lower courts, such as the New York City Civil Court or the district courts, it is necessary to obtain a transcript of the judgment and file the transcript with the county clerk in the jurisdiction where the judgment was entered and any other county where defendant resides or owns real property. The judgment will not act as a lien against real property unless this is done.

A judgment of the supreme court does not require docketing with the county clerk of the court of entry, as it is automatically deemed docketed in that county.³¹ However, a supreme court judgment should be docketed in other counties where the defendant resides or owns real property. Filing or transcribing a judgment with the county clerk creates a lien on the defendant's real property for ten years or longer if extended by motion.³² A small fee is charged for obtaining and filing transcripts of judgments. A judgment is "presumed to be paid and satisfied within twenty years."³³

The purpose of creating a lien on the judgment debtor's real property is to force the debtor to address the judgment in the event he or she seeks to sell the property or refinance the mortgage on the property. A judgment

28 CPLR 5003.

29 *Id.*

30 CPLR 5004.

31 CPLR 5018.

32 CPLR 5203(a), (b).

33 CPLR 211(b).

creditor also may foreclose on a judgment lien against real property.³⁴ In New York State, the homestead exemption has been increased from \$10,000 to \$50,000. The total homestead exemption for a husband and wife is \$100,000.

Before proceeding against the debtor's real property, plaintiff's counsel should consider the amount of the judgment as well as the fees due to the sheriff and for the advertising and sale of the real property. If the real property is not considered a homestead but an investment or business property, an execution can be delivered to the sheriff, and the sale conducted pursuant to CPLR 5236. If a homestead is involved, a judgment creditor must commence a special proceeding under CPLR 5206(e):

A judgment creditor may commence a special proceeding in the county in which the homestead is located against the judgment debtor for the sale, by a Sheriff or receiver, of a homestead exceeding fifty thousand dollars in value. The court may direct that the notice of petition be served upon any other person. The court, if it directs such a sale, shall so marshal the proceeds of the sale that the right and interest of each person in the proceeds shall correspond as nearly as may be to his right and interest in the property sold.

Generally, courts are reluctant to sell the real property of a judgment debtor if it is his or her principal residence and the amount of the judgment is nominal. The court can invoke, pursuant to CPLR 5240, a protective order and require that other remedies be exhausted.³⁵

Although shares in a cooperative apartment are technically not considered real property, they are treated as such for the purpose of the homestead exemption under CPLR 5206. The homestead exemption also includes a lot of land with a dwelling, units in a condominium apartment, and a mobile home.

Money paid to a judgment debtor up to \$50,000 "as representing his interest in the proceeds, is exempt for one year after the payment."³⁶ If the judgment debtor receives money as a result of a surplus money proceed-

34 See CPLR 5206.

35 *Gilchrist v. Commercial Credit Corp.*, 66 Misc. 2d 791, 322 N.Y.S.2d 200 (Sup. Ct., Nassau Co. 1971).

36 CPLR 5206(e).

ing after a mortgage foreclosure, there is no exemption because the surplus becomes personally subject to execution personally.

[9.8] VI. FOREIGN JUDGMENTS

A foreign judgment entered in any court in the United States is entitled to full faith and credit in New York “except one obtained by default in appearance or by confession of judgment.”³⁷

It is fundamental that a state must give the final judgment of a sister state the same force and effect as it is entitled to in the state in which it is rendered.³⁸ The full faith and credit clause in the U.S. Constitution directs that “Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.”³⁹ The United States Supreme Court has recognized that to fulfill this constitutional mandate, the judgment of a state court should have the same credit, validity, and effect in every other court of the United States as in the state where it was rendered.⁴⁰ The Court held that a court in one state must give binding effect to the judgment of another state “despite the claim that the original court did not have jurisdiction over the defendant’s person, once it was shown to the court in [the second state] that the question had been fully litigated in [the first state].”⁴¹ Moreover, “[a] judgment presumes jurisdiction over the subject matter and over the persons.”⁴² Given the foregoing, it is clear that a judgment lawfully entered in one state will receive full faith and credit in New York, “except one obtained by default in appearance, or by confession of judgment.”⁴³

Foreign judgments, final and conclusive where entered, can be enforced in the same manner as New York Supreme Court judgments as follows:

37 CPLR 5401.

38 U.S. Const. art. IV, § 1.

39 *Id.*

40 *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guaranty Ass’n*, 455 U.S. 691 (1982); *City of Philadelphia v. Bauer*, 97 N.J. 372, 478 A.2d 773 (1984); *Baldwin v. Iowa S. Traveling Men’s Ass’n*, 283 U.S. 522 (1931).

41 *Durfee v. Duke*, 375 U.S. 106, 111 (1963).

42 *Cook v. Cook*, 342 U.S. 126, 128 (1951).

43 CPLR 5401.

1. Foreign judgments must be authenticated and filed within ninety days thereof with any county clerk of the state together with an affidavit stating that the judgment was not obtained by default or by confession of judgment, the judgment remains unpaid and has not been stayed, setting forth the name and last known address of the judgment debtor.⁴⁴
2. “Within thirty days after filing of the judgment and the affidavit, the judgment creditor shall mail notice of the filing of the foreign judgment to the judgment debtor at his last known address.”⁴⁵

If the foreign judgment cannot be filed, a plaintiff must then sue on the judgment or make a motion for summary judgment in lieu of complaint pursuant to CPLR 3213.⁴⁶

Under CPLR 5304, a court can refuse to recognize a foreign country’s judgment if it is found that the foreign court did not have personal and subject matter jurisdiction, the defendant did not receive sufficient notice, there was fraud in obtaining the judgment, or if the judgment is against public policy of New York. These issues can be raised in New York in attacking the foreign judgment. New York courts have discretion to recognize foreign country judgments where it has been proven that the defendant was properly and personally served or appeared in the foreign country.⁴⁷

[9.9] VII. ANSWERS

After service of the summons and complaint, provided the defendant does not default, plaintiff’s attorney will be served with an answer by a defendant. An answer without any jurisdictional defenses based on improper service of the summons and complaint on the defendant gives the court in personam jurisdiction over the defendant.

Upon receipt of an answer by an attorney, it is worthwhile to contact defendant’s attorney to get a sense of whether or not the case can be set-

⁴⁴ CPLR 5402.

⁴⁵ CPLR 5403.

⁴⁶ CPLR 5406.

⁴⁷ CPLR 5305.

tled. If the dispute is not substantial, or the answer was interposed solely to avoid a default judgment, there is a chance that the case can be settled. If the answer was interposed solely to delay the resolution of the case because of the defendant's inability to pay, every effort should be made to arrange an acceptable repayment schedule with defendant.

Plaintiff's attorney should analyze the answer carefully to determine if there are any special defenses or counterclaims which require immediate attention. Plaintiff must serve a reply to a counterclaim asserted in an action pending in supreme court.⁴⁸ In actions pending in civil court, city courts, and district courts, the counterclaim is deemed denied, and no reply is necessary unless directed by court order.⁴⁹

If the cause of action is one for goods sold and delivered, and the answer alleges a defect in the merchandise, you should promptly contact your client to determine if there is any record or correspondence by the defendant complaining of the merchandise, its quality or defective condition, or failure of delivery. If your client confirms that the dispute has merit, you should make an attempt to adjust the dispute with defendant's attorney. The adjustment could be in the form of a discount or credit or an offer to repair the defective item. If successful at the outset of litigation, this approach can save time and expense of further litigation and should be encouraged.

Another good practice is to require the defendant to be specific in its answer by preparing a complaint in accordance with CPLR 3016, which provides as follows:

In an action involving the sale and delivery of goods, or the performing of labor or services, or the furnishing of materials, the plaintiff may set forth and number in his verified complaint the items of his claim and the reasonable value or agreed price of each. *Thereupon the defendant by his verified answer shall indicate specifically those items he disputes and whether in respect of delivery or performance, reasonable value or agreed price.*⁵⁰

Plaintiff's attorney should make every effort by the use of discovery or motion practice to limit and narrow the issues in the lawsuit. You must

48 CPLR 3011, 3019.

49 See City Civ. Ct. Act § 907 and Uniform Dist. Ct. Act § 907.

50 CPLR 3016(f) (emphasis added).

determine who has the burden of proof on each issue in dispute and select the most appropriate discovery device to obtain the requisite information to assist in the prosecution of the claim or the defense of the action.

[9.10] VIII. DISCOVERY DEVICES

Civil Practice Law & Rules Article 31 governs discovery. An attorney must become familiar with all discovery devices at his or her disposal. Civil Practice Law & Rules 3101(a) contemplates broad disclosure and that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” Thus, if the information is material and relevant to the issues, it is discoverable.

There are several disclosure devices, which are not exclusive of each other, that can limit and narrow the issues in the case for purposes of trial, including “depositions upon oral questions or without the state upon written questions, interrogatories, demands [for names of witnesses] and addresses,” notice of discovery, and request for admissions.⁵¹ The only restriction in using one or more of the disclosure devices, with the exception of matrimonial actions, is a party cannot serve interrogatories and also demand of a bill of particulars.⁵² The sanctions for failing to comply with disclosure are set forth in CPLR 3126.

If the disclosure sought is oppressive or burdensome, not material or necessary, or germane to the issues, a party can seek a protective order pursuant to CPLR 3103, which provides that the court may by its own initiative, or upon motion of any party or of any person from whom discovery is sought make a protective order denying, limiting, conditioning, or regulating the use of any disclosure device. An order of this nature is designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.⁵³ The making of such motion stays or suspends the particular disclosure in dispute.⁵⁴

A demand for a bill of particulars, although, technically, it is not considered a discovery device, is an extremely useful tool. Under CPLR 304, any party can require any other party to give a bill of particulars of such

⁵¹ CPLR 3102.

⁵² CPLR 3130.

⁵³ CPLR 3103(a).

⁵⁴ CPLR 3103(b).

party's claim or a copy of the items of the account alleged in a pleading. If defendant's answer contains affirmative defenses and/or counterclaim, the plaintiff is entitled to a bill of particulars concerning such defenses and counterclaims.

It is well-established law that the function of a bill of particulars is to limit the evidence which may be introduced at the trial and the theory of recovery.⁵⁵ It is limited to the issues or matters on which the party upon whom demand is made has the burden of proof.⁵⁶ Accordingly, such issues as lack of personal jurisdiction, evidentiary requests, wrong party defendant, and payment cannot be obtained through a bill of particulars. In essence, the purpose of a bill of particulars is to advise the adversary of what the pleader is claiming (not what the facts actually are), so that the adversary may not be surprised at the trial. A party served with a demand for a bill of particulars shall serve a bill of particulars within 30 days of service of such demand.⁵⁷ The sanctions for failing to serve a bill of particulars, or for serving a defective bill, are preclusion of the evidence sought, or a conditional preclusion.⁵⁸

Most important, a bill of particulars cannot be used to correct an improper complaint. If a plaintiff's attorney fails to include a specific allegation in the complaint, he or she cannot try to "correct" the pleading by supplying the information in the bill of particulars. The initial pleading is still deficient. Where there is a variance between the bill of particulars and any other document, even the pleading amplified, it is the bill of particulars which must govern.

An examination before trial, commonly referred to as a deposition, is a critical discovery device. The deposition gives the litigants an opportunity to face each other before trial, thereby opening dialogue for a possible settlement of the case. Counsel also gets the opportunity to assess whether the opposing party is credible and makes a good witness. Depositions also provide an excellent opportunity to learn as much as possible about the other side's case. A deposition of a party or witness can be used for many purposes, including impeachment of the testimony of the party or witness at trial or perpetuating the testimony if the witness or party is dead, infirm

55 *In re Estate of Frieman*, 51 A.D.2d 1018, 381 N.Y.S.2d 302 (2d Dep't 1976).

56 *Zummo v. Campbell Realty Corp.*, 27 Misc. 2d 607, 213 N.Y.S.2d 125 (Sup. Ct., Suffolk Co. 1961).

57 CPLR 3042.

58 *Id.*

and unable to appear at trial, or the party or witness cannot be found after due diligence to locate him or her for trial.⁵⁹

In the notice to take deposition, you should name and identify the party or witness to be deposed. If a witness is not identified, the noticed party has the option of selecting the witness to be produced and examined, provided the witness has knowledge of the facts.

The notice to admit is another useful disclosure device.⁶⁰ Although the language of CPLR 3123 permits service of the notice to admit up to 20 days before trial, generally a party is precluded from serving such a notice if a note of issue or notice of trial, with its certificate of readiness, has been filed.⁶¹

The purpose of a notice to admit is to elicit an admission of something to which the seeking party “reasonably believes there can be no substantial dispute” that is within the knowledge of the other party or ascertainable “upon reasonable inquiry.”⁶² It is doubtful that the party seeking the admission can obtain an admission of something that is at the core of the dispute. For example, a defendant could not be compelled to admit that he agreed to pay a disputed amount or admit to the genuineness of copies of the requesting party’s own documents.

Interrogatories can also be propounded on an opposing party pursuant to CPLR 3130. This device is used to elicit information relating to the substance and merit of an adversary’s claim, including all evidentiary matter, regardless of the burden of proof. Interrogatories are sometimes used if a party does not want to incur the expense or time of a deposition.⁶³ Subsequent sets of interrogatories can be propounded if the questions are germane, material and relevant, and not duplicative or oppressive or burdensome.

The answers to interrogatories must be under oath and served within 20 days after service of the interrogatories and must state with particularity any reasons for objections.⁶⁴ The respondent is required to include the

59 CPLR 3117.

60 CPLR 3123.

61 N.Y. Codes, Rules & Regulations § 202.17.

62 CPLR 3123(a).

63 CPLR 3130.

64 CPLR 3133(a).

question being answered before each response.⁶⁵ Amendments to interrogatories may be made only by court order except as provided in CPLR 3101(h).⁶⁶

The use of notices for discovery and inspection pursuant to CPLR 3120 should also be considered. This device enables the party requesting the discovery to obtain a copy of the documents that the adversary intends to rely on at trial. Where the issue is payment, obtaining copies of proof of payment through this device is an effective way of eliminating such disputes.

Pursuant to CPLR 3122, objections to notices for discovery and inspection must be made within 20 days of service of the notice. The objections must state with reasonable particularity the basis for each objection. If the party making the demand is dissatisfied with the reply, he or she may make an application to compel disclosure pursuant to CPLR 3124 and/or for sanctions pursuant to CPLR 3126, which includes striking pleadings, precluding evidence, and other penalties.⁶⁷

[9.11] IX. MOTION PRACTICE

A motion to dismiss a cause of action, defense, or counterclaim pursuant to CPLR 3211 is an important weapon for the attorneys to expedite the resolution of a claim on the merits or to flush out the other side's case. It also delays the action, since this motion also extends the time to serve an answer until ten days after service of notice of entry of an order determining the motion.⁶⁸ Prior to answering the complaint, a defendant may move to dismiss a specific cause of action or an entire action on the grounds specified in CPLR 3211(a). A motion to dismiss a cause of action or defense under this section indicates that the attorney-movant means business and will engage in forceful litigation either to force a settlement or to obtain a judgment in his or her client's favor.

Generally speaking, only one CPLR 3211 dismissal motion is permitted. However, making such a motion does not preclude an attorney from then moving for summary judgment under CPLR 3212. Certain defenses,

⁶⁵ CPLR 3133(b).

⁶⁶ CPLR 3133(c).

⁶⁷ *See Town of East Greenbush v. Ashland Chem. Co.*, 99 A.D.2d 604, 471 N.Y.S.2d 709 (3d Dep't 1984); *see also Kihl v. Pfeffer*, 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999).

⁶⁸ CPLR 3211(f).

if not raised in such a motion or an answer, are deemed waived.⁶⁹ The court also has the discretion to treat a motion to dismiss as one for summary judgment provided both parties are properly notified of same.⁷⁰ A motion can also be used to dismiss one or more defenses.⁷¹

The advantages to proceeding under CPLR 3211 is that the motion can be made before joining of issue; and the court can order an immediate trial of the issues raised on the motion, order a continuance for further affidavits, or even order disclosure, if warranted.⁷²

A CPLR 3211 motion is often used to challenge jurisdiction over the person of a defendant. This defense, if not raised prior to joinder of issue, can be raised in defendant's answer.⁷³ Pursuant to CPLR 3211(e), if such defense is raised in the answer, the defendant must move for judgment on that issue within 60 days, or the defense is deemed to have been waived. The time limit may be extended by the court only on the ground of undue hardship, and it is strictly enforced.⁷⁴

The courts generally order a traverse hearing on the issue of service when a motion is made to dismiss for lack of jurisdiction over a person, or the issue is raised on vacating a judgment procured on default. A plaintiff has the burden of showing proper service. If the objections to service are sustained, it is good practice to have a process server poised to serve a new summons and complaint on the defendant. Service should be done outside the courthouse in order to avoid any judicial impropriety.

Additionally, a party can also move for summary judgment pursuant to CPLR 3212 when there are no material facts in dispute and he or she is entitled to judgment as a matter of law.⁷⁵ A party can also seek partial summary judgment "as to one or more causes of action, or part thereof, in favor of any one or more parties."⁷⁶ A court can grant summary judgment

69 CPLR 3211(e).

70 CPLR 3211(c).

71 CPLR 3211(b).

72 CPLR 3211(d).

73 CPLR 3211(e).

74 *See Abitol v. Schiff*, 180 Misc. 2d 949, 691 N.Y.S.2d 753 (Sup. Ct., Queens Co. 1999), *aff'd*, 276 A.D.2d 571, 714 N.Y.S.2d 880 (2d Dep't 2000).

75 CPLR 3212(b).

76 CPLR 3212(e).

as to liability and set the case down for trial or inquest to assess damages.⁷⁷

A summary judgment motion can only be made after “issue has been joined.” It is important to note that the court can set a deadline for filing summary judgment motions, which can be no earlier than 30 days after the filing of the note of issue (i.e., completion of discovery). If the court does not set a date, the motion must be made within 120 days of filing the note of issue “except with leave of court upon good cause shown.”⁷⁸ In practice, most courts shorten the 120-day time limit to make summary judgment motions.

Summary judgment is designed to expedite all civil cases by eliminating those claims from the trial calendar which can be resolved as a matter of law.⁷⁹

A party moving for summary judgment is obligated to come forward with evidence to support his or her position, including affidavits from persons having personal knowledge of the facts.⁸⁰ Parties opposing such motions have the same requirement.⁸¹ An affidavit of the party’s attorney, where he or she has no personal knowledge of the facts, cannot support summary judgment or create questions of fact in opposing same.⁸² A defense may not be considered where the opposing affidavit is that of the defendant’s attorney, who does not indicate why the defendant did not execute it, and upon what basis his or her own knowledge of the facts is founded.⁸³ Civil Practice Law & Rules 3212(b) also requires that the motion papers shall be supported by affidavit, a copy of the pleadings, and

77 CPLR 3212(c).

78 CPLR 3212(a). *See also Gonzalez v. 98 Mag. Leasing Corp.*, 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000).

79 *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974); *Friends of Animals, Inc. v. Associated Fur Mfrs. Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

80 *See State v. U.S. Fidelity & Guar. Co.*, 221 A.D.2d 849, 633 N.Y.S.2d 874 (3d Dep’t 1995); *Cicatello v. Tops Friendly Mkts., Inc.*, 186 A.D.2d 1091, 590 N.Y.S.2d 796 (4th Dep’t 1992); *Castro v. N.Y. Life Ins. Co.*, 153 Misc. 2d 1, 588 N.Y.S.2d 695 (Sup. Ct. N.Y. Co. 1991).

81 *See Schultz v. Von Voight*, 86 N.Y.2d 865, 635 N.Y.S.2d 167 (1995); *Lavin & Kleiman v. J.M. Heinike Assocs., Inc.*, 221 A.D.2d 919, 633 N.Y.S.2d 901 (4th Dep’t 1995); *Louis Hackmeyer, Inc. v. New Warsaw Bakery, Inc.*, 197 A.D.2d 677, 602 N.Y.S.2d 904 (2d Dep’t 1993).

82 *See Werndein v. Johnson*, 221 A.D.2d 899, 633 N.Y.S.2d 908 (4th Dep’t 1995); *Bua v. S. Shore Skating, Inc.*, 193 A.D.2d 774, 598 N.Y.S.2d 75 (2d Dep’t 1993).

83 *Louis Sherry Ice Cream Co. v. Kroggel*, 42 Misc. 2d 21, 245 N.Y.S.2d 755 (Sup. Ct., N.Y. Co. 1963).

other available proof, such as depositions and written admissions. The affidavit must be by a person having knowledge of the facts; it must recite all of the material facts; and it must show that there is no defense to the cause of action or defense has no merit.⁸⁴ The party making the motion must make a prima facie case as a matter of law.

The standard for summary judgment motions was summarized succinctly by the Court of Appeals in *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*,⁸⁵ as follows:

To obtain summary judgment it is necessary that the movant establish his cause of action or defense “sufficiently to warrant the court as a matter of law in directing judgment” in his favor (CPLR 3212, subd. [b]) and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment, the opposing party must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212, subd. [b]). Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirements of tender in admissible form.⁸⁶

Finally, it should be remembered that a motion for summary judgment is the equivalent of a trial on paper without witnesses. Such a motion is the procedural equivalent of a trial.⁸⁷ It is incumbent on a party who opposes a motion for summary judgment to assemble, lay bare, and reveal its proof to establish a genuine issue of fact for trial. Moreover, to defeat

⁸⁴ CPLR 3212(b).

⁸⁵ 46 N.Y.2d 1065, 1067–68, 416 N.Y.S.2d 790 (1979).

⁸⁶ *Id.* (citations omitted).

⁸⁷ *Falk v. Goodman*, 7 N.Y.2d 87, 195 N.Y.S.2d 645 (1959).

such a motion, a party must present evidentiary facts sufficient to raise a triable issue of fact.⁸⁸

Clearly, a motion for summary judgment will not be granted when the answer asserts lack of jurisdiction over the person as a defense, as there is a triable issue of fact. However, the plaintiff can wait 60 days to ascertain if the defendant will seek judgment on that issue. This leads us to an important consideration when this defense is raised on the issue of statute of limitations. In a situation where the statute is not a problem, it is good practice to move for a traverse hearing so the issue of service can be promptly resolved, and a new summons served immediately thereafter if the objections are sustained. Promptly starting a new action is of critical importance if the statute of limitations is scheduled to expire.

Another tool for the expeditious resolution of cases is CPLR 3213,⁸⁹ which provides that “[w]hen the action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.”⁹⁰ If the motion is denied, the moving and answering papers will be deemed the complaint and answer, respectively, unless the court orders otherwise.⁹¹

The most troublesome issue under CPLR 3213 is whether the document at issue constitutes “an instrument for the payment of money only.” The Court of Appeals has held, “A document comes within CPLR 3213 ‘if a *prima facie* case would be made out by the instrument and a failure to make the payment is called for by its terms.’ The instrument does not

88 *Oppenheimer v. Dresdner Bank A.G.*, 50 A.D.2d 434, 377 N.Y.S.2d 625 (2d Dep’t 1975), *aff’d* 41 N.Y.2d 949, 394 N.Y.S.2d 634 (1977); *Di Sabato v. Soffes*, 9 A.D.2d 297, 193 N.Y.S.2d 184 (1st Dep’t 1959); *see Empire Magnetic Imaging, Inc. v. Comprehensive Care of N.Y., P.C.*, 271 A.D.2d 472, 705 N.Y.S.2d 652 (2d Dep’t 2000); *Suitor v. Boivin*, 219 A.D.2d 799, 631 N.Y.S.2d 960 (4th Dep’t 1995); *Moshier v. Phoenix Cent. Sch. Dist.*, 199 A.D.2d 1019, 605 N.Y.S.2d 581 (4th Dep’t 1993), *aff’d* 83 N.Y.2d 947, 615 N.Y.S.2d 872 (1994); *Masucci v. Feder*, 196 A.D.2d 416, 601 N.Y.S.2d 108 (1st Dep’t 1993).

89 This tool is also available in civil court and district court actions. City Civ. Ct. Act § 1004 and Uniform Dist. Ct. Act § 1004.

90 CPLR 3213; *see also Kornfeld v. NRX Techs., Inc.*, 93 A.D.2d 772, 461 N.Y.S.2d 342 (1st Dep’t 1983); *Flagship Int’l Corp. v. The Dennelisse Corp.*, 38 A.D.3d 307, 833 N.Y.S.2d 3 (1st Dep’t 2007).

91 *Id.*

qualify if outside proof is needed, other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document.”⁹²

A motion under CPLR 3213 can be an expeditious way to obtain judgment, provided that the instrument is for the payment of money only and the only issue is its nonpayment.

[9.12] X. DEBT COLLECTION RESTRICTIONS

Under the Fair Debt Collection Practices Act,⁹³ attorneys are included within the definition of “debt collectors” and are subject to the Act’s provisions thereof. Chapter 5 provides detailed information about what actions an attorney can and cannot take while engaged in the collection of retail or consumer debt.

92 *Weissman v. Sinorm Deli, Inc.*, 88 N.Y.2d 437, 444, 646, N.Y.S.2d 308, 311 (1996) (quoting *Interman Indus. Prods., Ltd. v. R.S.M. Electron Power, Inc.*, 37, N.Y.2d 151, 155, 371 N.Y.S.2d 675, 680 (1975)).

93 15 U.S.C. §§ 1692–1692f.

CHAPTER TWELVE

POST-JUDGMENT PROCEDURES

William Ilecki, Esq.*

* The author wishes to acknowledge the prior contributions of Richard J. Miller, Esq., as a past author of this chapter.

[12.0] I. COMPLIANCE WITH CONSUMER PROTECTION STATUTES

The Fair Debt Collection Practices Act¹ is applicable to attorneys collecting on consumer debts. It is essential that all informal written and verbal communications comply fully with the act. New York practitioners are also referred to N.Y. General Business Law § 601 for the state's regulations governing all consumer collection activities.

As to the initial post-judgment notice, it is suggested that a copy of the judgment with notice of entry thereof be included with the said notice in order to commence the time periods for proceedings affecting the validity of the judgment pursuant to N.Y. Civil Practice Law & Rules 317 and 5015 (CPLR). Any initial post-judgment letter should also include the validation notice required by 15 U.S.C. § 1692g, as well as the following language required by 15 U.S.C. § 1692e(11), also known as the "Baby Miranda": This is "an attempt [] to collect a debt and any information obtained will be used for that purpose. . . ." Additionally, all subsequent communications, excepting formal pleadings made in connection with a legal action, must disclose to the debtor that said communication is from a debt collector.²

While it is arguable that subpoenas, executions and motions should not be subject to the technical disclosure notices of the FDCPA, the practitioner must consider *Heintz v. Jenkins*,³ which held that there is no litigation exception to the application of the act. As for enforcement procedures, including contempt, it has been held that the FDCPA also applies to the venue of such procedures.⁴ As a result, additional special proceedings may need to be commenced if the judgment was not entered in the court where the consumer judgment debtor currently resides or where the consumer signed the contract.⁵

Clearly, many of the provisions of the FDCPA prohibiting abusive practices such as unreasonable third-party communication, improper threats or false representations to the debtor, as well as attempts to collect

1 15 U.S.C. §§ 1692–1692p (FDCPA).

2 15 U.S.C. § 1692e(11).

3 514 U.S. 291 (1995).

4 *Fox v. Citicorp Credit Servs.*, 15 F.3d 1507 (9th Cir. 1994); *Flores v. Quick Collect, Inc.*, 2007 WL 2769003 (D. Or. 2007).

5 15 U.S.C. § 1692i(a)(2).

post-judgment charges not allowable under law, would apply to all enforcement-of-judgment activities under the reasoning of *Heintz*.

[12.1] II. OBTAINING INFORMATION TO ENFORCE THE JUDGMENT

[12.2] A. Important Factors When Conducting Post-Judgment Discovery

Perhaps the most important aspect of the post-Judgment collection process involves the effort necessary to obtain information about the financial situation of the judgment debtors. In most cases, this effort will be repeated many times during the life of a judgment (20 years pursuant to CPLR 211, unless extended). It is very common for your Judgment to be one of many defaulted debts of the judgment debtor. Common causes for these defaults could include recent sickness, job loss, or divorce; the judgment debtor may be experiencing a traumatic financial upheaval at this time. Nevertheless, if the judgment debtor avoids a bankruptcy filing, it is usually the case that he or she will be in a position to make payments on the judgment at some point in the future. When this happens, you should have procedures in place to discover the new financial information of the judgment debtor.

This section deals with the formal post-judgment disclosure proceedings, but these efforts should also be combined with attempts to collect information from other public sources. For example, a proper Internet search can assist in obtaining asset information, skip tracing, and reviewing credit reports and histories. As more courts and county clerks' offices allow for online searches, you can discover valuable information in public records, including pending court cases in which the judgment debtor is a plaintiff, deeds, mortgages, bankruptcies, and other judgments against the judgment debtor.

Additionally, you may be contacted directly by the judgment debtor in his or her attempt to resolve the judgment. During these discussions, you are permitted to verify information to assess the debtor's financial situation. The goal should be to resolve the judgment through voluntary payments in a sufficient and acceptable amount. Nevertheless, financial information should still be obtained as it may be needed in the event of default by the judgment debtor.

[12.3] B. Information Subpoena—CPLR 5224

The simplest and most practical post-Judgment discovery device for attorneys is the information subpoena. This form can be issued by the judgment creditor's attorney and is favored due to the fact that it can be served upon any judgment debtor or other witness by certified mail. An information subpoena is quicker and cheaper than formal service by a process server. The subpoena must be accompanied by an original and copy of a questionnaire to be completed by the judgment debtor or witness before a notary public. It must be returned in the self-addressed, stamped envelope provided with the subpoena; no fee is required to be paid to any non-party witness. However, if the subpoena is issued to a non-party witness, the following certification must be included in the subpoena and signed by the judgment creditor or attorney:

I hereby certify that this Information Subpoena complies with rule 5224 of the Civil Practice Law and Rules and that I have a reasonable belief that the party receiving this Subpoena has in their possession information about the debtor that will assist the creditor in collecting the Judgment.

If this certification is not included in the subpoena, the subpoena is deemed void.⁶ Also, if the recipient of the Subpoena (other than the judgment debtor) may move to quash the subpoena pursuant to CPLR 2304, the motion would be made to the court that issued the underlying judgment.

Service of an information subpoena can also be made by magnetic tape or other electronic means *if* the recipient consents in writing, similar to the provisions for service of a restraining notice. Unlike a subpoena duces tecum, an information subpoena can also be served outside of New York State upon a nonresident of this state.⁷

Pursuant to CPLR 5223, the judgment debtor is required to respond to a broad range of disclosure requests in the questionnaire that are relevant to the satisfaction of the Judgment. A subpoena can also be issued to

⁶ CPLR 5224(a)(3)(ii).

⁷ *Aquavella v. Equivision, Inc.*, 181 Misc. 2d 322, 694 N.Y.S.2d 547 (Sup. Ct. Monroe Co. 1999), appeal dismissed, 270 A.D.2d 972, 706 N.Y.S.2d 297 (4th Dep't 2000); *Harbor Footwear Group, Ltd. v. ASA Trading, Inc.*, 1 Misc. 3d 911A; 781 N.Y.S.2d 624 (Sup. Ct., Nassau Co. 2004).

obtain asset information from third parties, including debt consultants.⁸ A judgment creditor can seek a broad range of information from non-parties pursuant to a subpoena (e.g., real property, bank accounts, stocks, safe deposit boxes and other valuables, sources of income, employment, testamentary gifts and business ownership).⁹ Nevertheless, a third party need not incur inordinate expense in responding to a subpoena.¹⁰

[12.4] C. Subpoena Duces Tecum—CPLR 5224

The issuance of a subpoena to obtain a post-judgment deposition and/or documents of the judgment debtor or non-party witness is very similar to the procedure used in pre-judgment disclosure.¹¹ The deposition must be returnable in the county in which the judgment debtor resides, is regularly employed, or has an office for the regular transaction of business in person, or within the county in which he is served.¹² If the deposition is issued from an action in New York City Civil Court, or in any city or district court in situations where judgments are taken in such courts, the practitioner must also refer to 22 N.Y. Codes, Rules & Regulations §§ 208.39, 210.39, and 212.39 (N.Y.C.R.R.), respectively, relative to procedural requirements if the deposition is returnable in city court. Subsection (f) of said rules requires that the following language be placed on all subpoenas: “This subpoena or process (as the case may be) requires your personal appearance at the time and place specified. Failure to appear may subject you to fine and imprisonment for Contempt of Court.”

This subpoena can be issued by an attorney of record for the judgment creditor,¹³ but a court order is required if more than one subpoena is

8 *Gryphon Domestic VI, LLC, et al., Petitioners-Respondents v. GBR Information Servs., Inc.*, 29 A.D.3d 392, 815 N.Y.S.2d 65 (1st Dep’t 2006).

9 *Blue v. Cablevision Sys.*, 2007 WL 1989258 (E.D.N.Y. 2006).

10 *Carrick Realty Corp. v. Flores*, 157 Misc. 2d 868, 598 N.Y.S.2d 903 (Civil Ct., N.Y. Co. 1993) (plaintiff requested numerous names of employees and their employers from payroll processing center; said witness was not required to provide said information if its computer was not programmed to search by name of employee, and the cost to search for same was estimated at a minimum of \$525,000, *Riverside Capital Advisors, Inc. v. First Secured Capital Corp.*, 28 A.D.3d 457 (2d Dep’t 2006), (subpoena quashed in its entirety where “lengthy requests contained within the subpoenas will cause unreasonable annoyance, disadvantage, and prejudice to those nonparties”).

11 CPLR art. 23.

12 CPLR 3110, 5224(c).

13 CPLR 2302.

served upon the judgment debtor within a one-year period.¹⁴ The subpoena is served in the same manner as a summons (except for the filing requirement), but a witness fee must be paid in advance if the individual served is not the judgment debtor.¹⁵ The deposition should be held before a person authorized to administer oaths,¹⁶ and a stenographer should take the testimony. While hiring a stenographer may be costly, in the absence of a proper deposition transcript, a court will be unable to review the record to determine whether contempt exists due to improper responses received during the deposition.¹⁷

Like the information subpoena, the subpoena duces tecum can be served upon a non-party witness who may have information relevant to satisfaction of the judgment; the judgment debtor has been held to have no right to notice of a subpoena served upon said third party and no right to appear at the deposition of the witness.¹⁸ Notwithstanding the 2004 amendment to CPLR 2303, requiring that a copy of any subpoena served in a *pending* action also be served upon other appearing defendants, one court continued to support the position that a judgment debtor has no right to service of a subpoena on a third party.¹⁹

CPLR 5224(a-1) clarifies that a subpoena duces tecum properly served on any party or non-party while in the state, or any business licensed or conducting business in New York, shall be required to fully provide the relevant documents, even if the documents are located outside of New York State.

[12.5] D. Contempt

[12.6] 1. Conduct Subject to Contempt

As is often the case, the judgment debtor (and occasionally third parties) will fail to comply with supplementary (post-judgment) proceedings. Pursuant to CPLR 5251, false swearing or other noncompliance with a

¹⁴ CPLR 5224(f).

¹⁵ CPLR 2303, 5224(b).

¹⁶ CPLR 3113, 5224(d).

¹⁷ *Aaron v. McIntyre*, 15 A.D.3d 475, 790 N.Y.S.2d 187 (2d Dep't 2005).

¹⁸ *ITT Commercial Finance Corp. v. Bailey*, 166 Misc. 2d 24, 631 N.Y.S.2d 225 (Sup. Ct., Chautauqua Co. 1995).

¹⁹ *Goldman & Greenbaum v. Mackay*, 2004 N.Y.L.J., Oct. 15, 2004, p. 22, col. 1 (Sup. Ct., N.Y. Co.), *depublished by* No. 600452/1995, 2004 WL 2255127 (Sup Ct., N.Y. Co. 2004).

restraining notice, subpoena, or order is punishable as a contempt of court. The sanction of contempt has been held to be limited to violations relative to restraining notices, subpoenas, and court orders and is not available to punish violations relative to executions.²⁰ Additionally, non-compliance with restraining notices and subpoenas may be punishable *only* by contempt, and there is no private cause of action,²¹ although a separate action against a noncompliant bank, which included a claim for attorney fees incurred by the judgment creditor, was permitted as a result of the egregious conduct of the third-party bank.²²

[12.7] 2. Venue

Contempt proceedings must be commenced in the county court or supreme court in a county in which the contemnor is employed or resides, or in a city court in such county if judgment was entered.²³

The requirement of CPLR 5221(a) regarding which court is proper for the commencement of a special proceeding is jurisdictional, but the requirement regarding the proper county is a matter of venue and is waived if not objected to by the respondent.²⁴

Included with the 2006 amendment to CPLR 5224 relative to certifications in Information Subpoenas was a provision permitting enforcement proceedings for noncompliance with an Information Subpoena to be commenced in the Court that issued the Judgment.²⁵ A judgment creditor can save additional costs associated with supreme court practice by commencing contempt proceedings in a city court if the Judgment was entered in city court.

20 *Household Finance Corp. v. Rochester Cmty. Sav. Bank*, 143 Misc. 2d 436, 541 N.Y.S.2d 160 (Rochester City Ct. 1989).

21 *Miller v. Saretsky*, 171 Misc. 2d 404, 654 N.Y.S.2d 970 (Sup. Ct., Suffolk Co. 1996).

22 *Salles v. Chase Manhattan Bank*, 300 A.D.2d 226, 754 N.Y.S.2d 236 (1st Dep't 2002).

23 CPLR 5210, 5221; N.Y. City Civil Court Act 210 (City Civil Ct. Act); N.Y. Uniform City Court Act 210 (Uniform City Ct. Act). *See also In re Luppoli*, 275 A.D.2d 44, 714 N.Y.S.2d 497 (2d Dep't 2000), which held that a surrogate's court also had power to punish for a civil contempt in an enforcement proceeding involving an estate as creditor.

24 *Cornell Fed. Credit Union v. Thorpe*, 199 A.D.2d 936, 606 N.Y.S.2d 90 (3d Dep't 1993).

25 CPLR 5224(a)(3)(iv); *see* CPLR 2308(b).

[12.8] 3. Procedures

The procedures for civil contempt are set forth in N.Y. Judiciary Law §§ 753–756. To ensure proper notice and personal jurisdiction, the contemnor should be served with the papers personally within 10 to 30 days prior to the return date, or as the court directs. The motion papers must contain the warning: **“YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.”**²⁶ The requirements contained in the Judiciary Law must be strictly complied with. For example, failure to have the contempt papers printed in at least eight-point, bold type constituted sufficient cause to deny the contempt motion.²⁷ However, the Second Department, in *Home Surplus of Brooklyn, Inc. v. Home Surplus, Inc.*,²⁸ held that the trial court’s omission of the recital required by Judiciary Law § 770 was held to be a mere irregularity not affecting the substantial rights of the parties, which the appellate court had the inherent power to correct.

For jurisdictional reasons, a special proceeding was required to punish a non-party for contempt. However, CPLR 5224(a)(3)(iv) provides that CPLR 2308(b) will apply to enforcement of an information subpoena. CPLR 2308(b) specifies that a party may “move” for compliance with the subpoena. This appears to obviate the need for a special proceeding to be commenced for noncompliance with an information subpoena. Rather, CPLR 2308(b)(1) provides for a motion to compel compliance of a duly authorized and served Subpoena.

A hearing is required if issues of fact are raised; however, no hearing is required if the contemnor admits the violation or fails to sufficiently deny the allegations contained in the contempt papers.²⁹ A judgment debtor cannot raise the privilege against self-incrimination as a defense for the failure to comply with an information subpoena for the first time at the Contempt hearing.³⁰ *However, if the underlying judgment is vacated, the judgment creditor’s right to any discovery sought pursuant to the informa-*

26 Judiciary Law § 756 (“Jud. Law”).

27 *Arnold v. Salubro*, 3 Misc. 3d 1104A, 787 N.Y.S.2d 675 (N.Y. Dist. Ct. 2004).

28 3 A.D.3d 472, 769 N.Y.S.2d 904 (2d Dep’t 2004).

29 *Tedesco v. Tedesco*, 13 Misc. 3d 1245A (Sup. Ct., Westchester Co. 2006).

30 *Chase Manhattan Bank, Nat’l Ass’n v. Fed. Chandros, Inc.*, 148 A.D.2d 567, 539 N.Y.S.2d 36 (2d Dep’t 1989).

tion subpoena no longer exists, and a denial of the contempt application based thereon was proper.³¹

[12.9] 4. Damages

If a Court orders compliance with an Information Subpoena, a penalty not exceeding \$50, plus damages sustained from the non-compliance, with additional costs not exceeding \$50, may be imposed and payable to the Judgment-Creditor.³²

For noncompliance with the CPLR Article 52 procedures, Orders of contempt can provide for a fine to be paid by the contemnor to the judgment creditor for all damages of the judgment creditor, plus an amount up to \$250.³³ The contemnor is allowed a minimum of ten days to purge the contempt through compliance with the notice or subpoena. Payment of the fine is excused if the contemnor moves the court within such ten-day period and proves an inability to pay same.³⁴ The actual damages from noncompliance are often nominal and are usually equal only to the amount lost by the judgment creditor as a result of the witness's disobedience of the subpoena, as the witness is not automatically liable for the entire amount of the uncollected judgment.³⁵ However, in *Corpuel v. Galasso*,³⁶ the court upheld a fine against a non-party witness in the amount of \$1,412,800 for failure to comply with a subpoena; this non-compliance was part of a scheme to frustrate the judgment creditor's efforts to collect on the judgment. Additionally, a judgment creditor has been permitted to recover attorney's fees and interest for a contempt motion *and* appeal of the motion by the contemnor.³⁷ The judgment creditor has a duty to mitigate damages caused by the civil contempt, and laches can be raised as a defense by the contemnor.³⁸

31 *Carr v. Decesare*, 280 A.D.2d 852, 720 N.Y.S.2d 411 (3d Dep't 2001).

32 CPLR 5224(a)(3)(iv), 2308(b)(1).

33 CPLR 5224(a)(3)(iv), 2308.

34 Jud. Law § 773.

35 *Barclays Bank, PLC v. Hughes*, 306 A.D.2d 406, 761 N.Y.S.2d 278, 761 N.Y.S.2d 493 (2d Dep't 2003).

36 240 A.D.2d 531, 659 N.Y.S.2d 65 (2d Dep't 1997), *leave to appeal dismissed*, 91 N.Y.2d 922, 669 N.Y.S.2d 263, *reargument denied*, 91 N.Y.2d 1003, 676 N.Y.S.2d 130 (1998).

37 *Ross v. Congregation B'Nai Abraham Mordechai*, 12 Misc. 3d 559 (N.Y. City Civil Ct. 2006).

38 *Hero Boy, Inc. v. Dell'Orto*, 306 A.D.2d 226, 761 N.Y.S.2d 648 (1st Dep't 2003).

[12.10] 5. Warrant

If the Contemnor fails to comply with either the Order of Contempt or Order compelling compliance with an Information Subpoena, a Warrant for Arrest can issue; upon the return of the Warrant, formal commitment to jail can be authorized pursuant to the requirements of CPLR 2308(b)(1) or Judiciary Law § 772.

Due process has been held to preclude a warrant from issuing only upon proof by affidavit that the contempt had not been purged, without affording the nonparties an opportunity to contest the accuracy of that affidavit.³⁹ In a city court action, the order of contempt and warrant can be served only in the county where the court is located or in any adjoining county;⁴⁰ however, only the sheriff, and not a city marshal, has the power to arrest.⁴¹

[12.11] III. ACTIONS AGAINST PROPERTY**[12.12] A. Judicial Liens on Real Property****[12.13] 1. Obtaining the Lien**

The judgment constitutes a lien upon any real property in which the judgment debtor has an interest in the county where a transcript of judgment is filed; the real property is subject to the lien even if the judgment debtor acquired his interest after the filing of the transcript, although a purchase-money mortgage has priority.⁴² If the judgment was entered in a supreme court or county court, the lien is automatically created in that county. For city court judgments, a transcript must be obtained from the court and filed in the county clerk's office.

No subsequent transfer of the judgment debtor's interest in the real estate is effective as to the Judgment lien.⁴³ The lien also remains after a judgment debtor's discharge in bankruptcy unless the judgment debtor takes an action to avoid or otherwise eliminate the lien in the bankruptcy proceeding. This is not done in many cases. Without question, it is often

³⁹ *Riverside Capital Advisors, Inc. v. First Secured Capital Corp.*, 28 A.D.3d 455 (2d Dep't 2006).

⁴⁰ N.Y.C. Civil Ct. Act 1509; Uniform City Ct. Act 1509.

⁴¹ CPLR 105(s-1).

⁴² CPLR 5203.

⁴³ *Id.*

not practical to attempt to sell the real property through a sheriff's real property execution. Nevertheless, it is common to receive requests for judgment payoffs due to pending sales or refinances of real property. Many times this is a welcome surprise to the attorney and the creditor, and it is highly recommended that the lien be perfected by way of proper filing of the transcript.

[12.14] 2. Duration

Pursuant to CPLR 5203, a judgment lien is effective for a 10-year period after filing of the judgment roll, unless extended pursuant to CPLR 5014. Even if the original lien has expired, a judgment creditor can commence an action upon the original judgment and obtain a new 10-year lien with a new 20-year judgment limitations period.⁴⁴

[12.15] 3. Tenancy by Entirety

Real estate owned by a judgment debtor and non-debtor spouse as tenants by entirety is also subject to the Judgment lien and is generally not exempt from execution, but such property is subject to the rights of survivorship on the non-debtor spouse.⁴⁵ A court can deny the sale of real property owned with a spouse and may be more likely to deny such sale if there is scant equity or a small judgment balance with time remaining on the lien.⁴⁶ A court will be more likely to approve the sale if the real property is not the marital residence.⁴⁷ Due to the non-debtor spouse's right of survivorship, if a sale is approved, a court should condition any sale of entireties residential property on the purchaser having no right to the possession, use, or occupancy of the subject real property, since the non-debtor spouse and her family resided on the real property.⁴⁸

In a situation where a property is sold by either spouse, the tenancy by entireties is terminated. A judgment creditor can execute upon one half of any mortgage payments due to a debtor husband and non-debtor wife for the purchase of real property previously owned as tenants by the entireties.⁴⁹ In *Lauro v. Bradley*, the creditor was allowed to collect on the mort-

44 *Anchor Sav. Bank v. Parker*, 10 Misc. 3d 1074A (Sup. Ct., Nassau Co. 2006).

45 *In re Persky*, 893 F.2d 15 (2d Cir. 1989).

46 *Seyfarth v. Bi-County Electric Corp.*, 73 Misc. 2d 363 (Sup. Ct., Nassau Co. 1973).

47 *Putnam County Nat'l Bank v. Prysclak*, 226 A.D.2d 358 (2d Dep't 1996).

48 *Nat'l Loan Investors, LP v. Futersak*, 294 A.D.2d 506, 742 N.Y.S.2d 846 (2d Dep't 2002).

49 *Lauro v. Bradley*, 266 A.D.2d 911, 697 N.Y.S.2d 882 (4th Dep't 1999).

gage payments even though the wife provided the entire consideration for the initial purchase of the real property; the wife's transfer of the real estate to the husband was treated as an implied gift. Tenancy by entirety is extinguished by divorce or transfer of the ownership interest by either spouse.

[12.16] B. Restraining Notice

In New York, a lien of a Judgment on personal property generally requires a levy pursuant to a property execution. Nevertheless, an important collection procedure that usually precedes the property execution is the restraining notice.⁵⁰ The restraining notice is usually served in conjunction with a subpoena to prevent any transfer of assets for a long enough period to allow for a sheriff's levy.

[12.17] 1. Issuance

The restraining notice should state all parties, judgment creditor and judgment debtor, the court, amount and date judgment entered. The notice must also contain a warning relative to disobedience of the notice being punishable as a contempt of court. The restraining notice can be issued by a support collection unit, clerk of the court or attorney for the judgment creditor as an officer of the court. The attorney must actually sign the notice but can serve a copy; no typewritten or stamped reproduction of the attorney's name is acceptable. A restraining notice need only be served once upon a judgment debtor to be valid for the life of the judgment. However, a court must approve a restraining notice served more than once upon the same non-party relative to the same judgment debtor.

The notice is served personally (as a summons), or by certified mail; regular mail is permitted if issued by the support collection unit. Additionally, it is proper to serve a bank's main office in lieu of service upon the particular branch where money may be located; a bank is under an obligation to take practical and reasonable measures under the circumstances to allow for retrieval of information relative to assets which may be subject to a restraining notice.⁵¹ The rule upheld in *Therm-X Chemical & Oil Corp. v. Extebank*⁵² that a restraining notice must be served upon the particular branch would appear obsolete in the computer age.

50 CPLR 5222.

51 *S&S Mach. Corp. v. Mfrs. Hanover Trust Co.*, 219 A.D.2d 249, 638 N.Y.S.2d 953 (1st Dep't 1996).

52 84 A.D.2d 787, 444 N.Y.S.2d 26 (2d Dep't 1981).

Service of a restraining notice now can be made by magnetic tape or other electronic means *if* the recipient consents in writing.⁵³ Pursuant to CPLR 2103(f)(2), electronic means is defined as “any method of transmission of information between computers . . . which allows the recipient to reproduce the information transmitted in a tangible medium of expression.” This method would allow for an inexpensive and expeditious service on banks and other large institutions; however, it is required that creditor’s counsel obtain the consent of such recipient bank or other institution.

[12.18] 2. Notice to Judgment Debtor

In response to *Follette v. Vitanza*,⁵⁴ which held certain Article 52 procedures to be unconstitutional as violative of the judgment debtor’s due process rights for failure to require service on the judgment debtor of a notice of exemptions from garnishment pursuant to 15 U.S.C. § 1673, and procedures to modify same pursuant to CPLR 5231(g) and 5240, a notice to judgment debtor now must be served within one year before service of the restraining notice (or property execution), or within four days after service of the restraining notice (with a copy of same).⁵⁵ The failure to properly and timely serve the notice renders the restraining notice and/or execution ineffective, regardless of whether the judgment debtor suffered any prejudice.⁵⁶

The text of the required notice follows:

NOTICE TO JUDGMENT DEBTOR OR OBLIGOR

Money or property belonging to you may have been taken or held in order to satisfy a judgment or order which has been entered against you. Read this carefully.

YOU MAY BE ABLE TO GET YOUR MONEY BACK

State and federal laws prevent certain money or property from being taken to satisfy judgments or orders. Such

53 CPLR 5222(g).

54 658 F. Supp. 492 (N.D.N.Y. 1987).

55 CPLR 5222(d), 5222(e).

56 *Lincoln Fin. Servs., Inc. v. Miceli*, 17 Misc. 3d 1109A (N.Y. Dist. Ct. 2007); *Friedman v. Mayerhoff*, 156 Misc. 2d 295, 592 N.Y.S.2d 909 (Civil Ct., Kings Co. 1992).

money or property is said to be “exempt”. The following is a partial list of money which may be exempt:

1. Supplemental security income, (SSI);
2. Social security;
3. Public assistance (welfare);
4. Alimony or child support;
5. Unemployment benefits;
6. Disability benefits;
7. Workers’ compensation benefits;
8. Public or private pensions; and
9. Veterans benefits.

If you think that any of your money that has been taken or held is exempt, you must act promptly because the money may be applied to the judgment or order. If you claim that any of your money that has been taken or held is exempt, you may contact the person sending this notice.

Also, YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. The law (New York civil practice law and rules, article four and sections fifty-two hundred thirty-nine and fifty-two hundred forty) provides a procedure for determination of a claim to an exemption.⁵⁷

[12.19] 3. Effect of the Restraining Notice

At the time of service of the notice, if a non-party owes money to the judgment debtor or is in possession or custody of property in which it may “have reason to believe” that the judgment debtor has an interest, said non-party may not sell, assign, transfer, or interfere with *any* property in which the judgment debtor has an interest, including any property or

⁵⁷ CPLR 5222(e).

interest of the debtor acquired after service of the notice. The restraint will not apply to the extent that such property exceeds twice the judgment balance. This prohibition is effective for a period from one year from the date of service, unless sooner terminated upon other direction of issuing attorney, sheriff, or court order, or if the judgment is otherwise satisfied. The court can extend the one-year period upon motion pursuant to CPLR 5240, but it should be noted that the restraining notice gives no priority over an intervening property execution from another judgment creditor.⁵⁸ Arguably, it is even possible to restrain transfers of property (as well as execute property) outside the state, so long as the New York courts have jurisdiction over the transferor.⁵⁹

The form of the notice need not identify specifically the source of property held by the third party which is subject to the restraint.⁶⁰ Mass mailings of restraining notices to all banks in the county without knowledge that any specific bank holds an account is not abusive and is proper.⁶¹ Upon receipt of a notice, a bank has been held to have until the close of business on the day following receipt of the restraining notice to honor same, if said time is reasonably necessary for the bank to comply.⁶²

In addition to possible contempt penalties, noncompliance with a restraining notice may subject a third party to a special proceeding for damages equal to an amount transferred.⁶³ In *River Seafoods*, the bank claimed that it did not have any funds in the judgment debtor's account at the time of service of the restraining notice; however, Chase responded to the information subpoena served with the notice by claiming that there were funds in the debtor's account, and that a hold had been placed. The court held that the bank was liable for future deposits into the judgment debtor's account and was estopped from claiming that no funds would have been subject to the restraint at the time of service of the notice.⁶⁴

58 *Kitson & Kitson v. City of Yonkers*, 10 A.D.3d 21, 778 N.Y.S.2d 503 (2d Dep't 2004).

59 *Gryphon Dom. VI, LLC v. APP Int'l Fin. Co., B.V.*, 41 A.D.3d 25, 836 N.Y.S.2d 4 (1st Dep't 2007); *contra Palestine Monetary Auth. v. Strachman*, 15 Misc. 3d 1006 (Sup. Ct., N.Y. Co. 2007).

60 *Niagara Mohawk Power Corp. v. Young*, 135 A.D.2d 1139, 523 N.Y.S.2d 275 (4th Dep't 1987).

61 *Solow v. Bethlehem Steel Corp.*, 204 A.D.2d 227, 612 N.Y.S.2d 402 (1st Dep't 1994).

62 *Zemo Leasing Corp. v. Bank of N.Y.*, 158 Misc. 2d 991, 602 N.Y.S.2d 503 (Sup. Ct., Rockland Co. 1993).

63 *River Seafoods, Inc. v. JP Morgan Chase Bank*, 19 A.D.3d 120, 796 N.Y.S.2d 71 (1st Dep't 2005).

64 *Id.*

[12.20] 4. Joint Bank Accounts with Non-Judgment Debtor Turnover Proceeding

In the event that you have restrained a joint account owned by the judgment debtor and a non-party, a special proceeding is required to obtain a turnover order relative to the account, and a mere property execution will not result in a transfer of funds to the sheriff. In such special proceeding, pursuant to CPLR 5225(b) all parties to a joint bank account must be served,⁶⁵ and even a new military status affidavit can be required.⁶⁶

It had previously been held that the burden is on the judgment creditor to rebut the presumption that only half of the funds in the joint account belong to the judgment debtor,⁶⁷ even if there is a default in the special proceeding by the debtor.⁶⁸ There is an insufficient rebuttal of this presumption by the non-Debtor joint tenant if there is no proof to identify deposits or bills paid from the account, and all deposits were basically commingled.⁶⁹

Nevertheless, more recently, the majority of courts have determined that the mere default of the debtor and non-debtor joint tenant in appearing and responding to the special proceeding adequately rebuts this presumption and allows the judgment creditor to reach the whole account.⁷⁰

One court has held that an account titled solely to a non-debtor spouse can be restrained if the source of funds consists solely from the judgment debtor, and if the funds in the account were used to pay the judgment debtor's expenses.⁷¹

65 *Citibank (S.D.) N.A. v. Island Fed. Credit Union*, 190 Misc. 2d 694, 740 N.Y.S.2d 546 (App. Term, 2d Dep't 2001).

66 *Palisades Acquisition V, LLC v. Ibrahim*, 12 Misc. 3d 340 (Civ. Ct., N.Y. Co. 2006).

67 *Mendel v. Chervanyou*, 147 Misc. 2d 1056, 559 N.Y.S.2d 616 (Civ. Ct., Kings Co. 1990).

68 *Amalgamated Bank of N.Y. v. Germain*, 2 Misc. 3d 1010A, 784 N.Y.S.2d 918 (Sup. Ct. Nassau Co. 2004).

69 *Citibank (South Dakota), N.A. v. Five Star Bank*, 12 Misc. 3d 1181(A), 824 N.Y.S.2d 761 (Sup. Ct., Yates Co. 2006).

70 *LR Credit 10, LLC v. Welsh*, 2007 NY Slip Op 52193(U) (Auburn City Ct. 2007); *Rappaport, Steele & Co., P.C. v. JP Morgan Chase Bank, N.A.*, 13 Misc. 3d 1203(A), 824 N.Y.S.2d 758 (Dist. Ct., Nassau Co. 2006); *Velocity Invs., LLC/Citibank, v. Astoria Fed. Savings & Loan*, 12 Misc. 3d 1184A, 824 N.Y.S.2d 767 (N.Y. Dist. Ct. 2006); *Ford Motor Credit Co. v. Astoria Fed.*, 189 Misc. 2d 475, 733 N.Y.S.2d 583 (Dist. Ct., Nassau Co. 2001).

71 *Bingham v. Zolt*, 231 A.D.2d 479, 647 N.Y.S.2d 220 (1st Dep't 1996).

[12.21] C. Personal Property Execution

Civil Practice Law & Rules 5201 permits a judgment creditor to enforce a judgment against any nonexempt property or interest of the judgment debtor. Sections 5230 and 5232 of the CPLR provide for the issuance of a property execution upon personal property. Generally, the most common type of property execution involves a levy upon bank accounts of the judgment debtor by the sheriff. The bank or other third party has 90 days to deliver the funds in the account to the sheriff, who will then apply the funds to the debt. In the event that property consists of “property capable of delivery” (e.g., a motor vehicle), an auction will occur pursuant to CPLR 5233. Sections 5225 and 5227 permit a special proceeding to be commenced against a judgment debtor or non-party in the event that a court order is necessary to compel payment of attachable property.

For any execution, the notice to judgment debtor provided in CPLR 5222 must be similarly served upon the judgment debtor. Counsel should provide proof to the sheriff that said notice has been served in lieu of payment of sheriff’s fees to serve same.

For judgments entered in New York City Civil Court, or in any other city or district court, no execution may be issued if a party has appeared by an attorney unless the attorney is served with a copy of the judgment; if the defendant has appeared *pro se* and later defaulted, he or she must be served with a copy of the judgment by delivery or certified mail.⁷²

[12.22] 1. Priorities

The date of delivery of the execution to the sheriff creates the lien upon personal property and generally determines the order or priority of the execution, even as to third parties.⁷³ Nevertheless, executions to enforce child support obligations have a first priority over all other executions.⁷⁴ Additionally, the entry of an order under CPLR 5225(a) directing the judgment debtor to deliver designated property to a sheriff gives the judgment creditor a “lien” on the property and a priority against other judgment creditors in respect of that property as of the time the order is filed.⁷⁵

⁷² 22 N.Y.C.R.R. §§ 208.37, 210.37, 212.37.

⁷³ CPLR 5202.

⁷⁴ CPLR 5234(b).

⁷⁵ David D. Siegel, McKinney’s Practice Commentary, CPLR 5225 (1997).

[12.23] 2. Extensions

Civil Practice Law & Rules 5230 allows for an extension of the 60-day life of the property execution once for an additional 60 days without court order. A motion for another extension of a levy may be made, even after the levy has expired in lieu of service of multiple executions.⁷⁶

[12.24] 3. Sheriff's Poundage

In addition to statutory fees and mileage, if a Sheriff or Marshal collects monies due on a judgment pursuant to any execution (property or income), or if a case settles after a Sheriff's levy made by service of an execution, the Sheriff is entitled to poundage fees under CPLR 8012. However, the Sheriff's poundage fees are not due if the settlement is made after delivery of an execution to Sheriff, but before levy.⁷⁷ Poundage may also be due where an execution is vacated or set aside after levy under CLPR 8012, or where the party who issued the process under which the Sheriff or Marshal acts interferes with the collection of the money.⁷⁸ If a settlement of the case is made after a Sheriff's levy, the entire value of settlement is subject to the Sheriff's poundage; this sum is to be paid by the Plaintiff or Plaintiff's Attorney, not the defendant.⁷⁹ The Sheriff is now permitted to commence an action against the responsible party or person for poundage pursuant to CPLR 8012(b)(5), and is entitled to recover costs and reasonable attorney fees in said action.

[12.25] D. Real Property Execution

A judgment creditor can issue an execution against the debtor's real property, even after the ten-year judgment lien has expired. The procedure for a sale of real property is provided in CPLR 5236.

In the event that a judgment creditor attempts to execute and sell residential real estate, CPLR 5206(e) provides for a special proceeding to direct the sale of residential real estate subject to a homestead exemption. This proceeding requires a separate action under a new index number.⁸⁰

76 *Kitson & Kitson v. City of Yonkers*, 10 A.D.3d 21, 778 N.Y.S.2d 503 (2d Dep't 2004).

77 *Alvarez v. Brooklyn Hosp.-Caledonian Hosp.*, 255 A.D.2d 278, 679 N.Y.S.2d 408 (2d Dep't 1998).

78 *Solow Mgmt. Corp. v. Tanger*, 43 A.D.3d 691, 841 N.Y.S.2d 532 (1st Dep't 2007).

79 *County of Westchester v. Riechers*, 6 Misc. 3d 584, 785 N.Y.S.2d 892 (Sup. Ct., Westchester Co. 2004).

80 *Braz v. Shvartsman*, 300 A.D.2d 582, 752 N.Y.S.2d 376 (2d Dep't 2002).

“In this manner, a more appropriate means of effecting service can be utilized, the property can be accurately appraised, adequate notice of the sale can be given beforehand, and allocations can be aptly applied first to the Respondent’s exemption, then to the Petitioner’s judgment, and any excess surplus retained for the benefit of the Respondent.”⁸¹ The sheriff conducting the sale lacks standing to seek any modification in the exemption amount as determined by the court.⁸²

Civil Practice Law & Rules 5240 permits a judgment debtor to redeem the real property prior to completion of the sheriff’s sale by delivery of the deed; the redemption requires payment of the entire Judgment due.⁸³

[12.26] E. Income Execution

[12.27] 1. Amount Subject to Income Execution

Civil Practice Law & Rules 5231 provides for the procedure for an income execution to issue to the sheriff for attachment to non-exempt money of the judgment debtor received from any source and not just earnings. In compliance with 15 U.S.C. § 1671, no amounts shall be withheld unless the disposable earnings of the judgment debtor exceed 30 times the federal minimum wage as prescribed by the Fair Labor Standards Act at said time (currently \$196.50), which would thereby entitle the judgment creditor to the lesser of:

- a. 10% of the gross wage earned; or
- b. 25% of the net wage earned; or
- c. The amount earned over \$196.50.

[12.28] 2. Federal Employees

Pursuant to the Hatch Act (1993),⁸⁴ garnishment of wages of federal employees is available in New York. Said executions are permitted to be served directly to the employers by counsel. Unfortunately, should the federal agency fail to withhold wages pursuant to the execution, it may not be possible to recover any damages from any agency of the United

⁸¹ *Sunset View Ass’n, Inc. v. Olsen*, 2003 NY slip op. 51242U (Sup. Ct., Kings Co. 2003).

⁸² *Sheldon v. Vermonty*, 36 A.D.3d 619, 827 N.Y.S.2d 287 (2d Dep’t 2007).

⁸³ *Sweeney, Cohn, Stahl & Vaccaro v. Kane*, 33 A.D.3d 785, 822 N.Y.S.2d 632 (2d Dep’t 2006).

⁸⁴ 5 U.S.C. § 5520a.

States, even if state law would subject a private employer to liability for the amounts which should have been garnished.⁸⁵

[12.29] 3. Support Executions and Orders

Civil Practice Law & Rules 5241 and 5242 were added to provide for garnishment of income to enforce support obligations. Section 5241 allows garnishment to issue upon three missed payment intervals, or one month's payment, whichever occurs sooner. The only exemptions from support executions are amounts received from Supplemental Security Income (SSI) and social services benefits.⁸⁶ If the defendant is supporting a second spouse or second dependent child, the maximum limit of income which can be withheld is 50% of disposable earnings, or 55% if the defendant is 12 or more weeks in arrears. The limits are 60% and 65%, respectively, if there is no other spouse or child to be supported by the defendant. Sections 5241 and 5242 apply only to support and maintenance obligations, and not attorney's fees due.⁸⁷

If health insurance is required pursuant to a qualified medical support order, the execution can require the employer to purchase such and enroll eligible dependents pursuant to the order or judgment (unless such insurance would not be available anyway to the defendant) and seek reimbursement from the defendant. Said deductions are subject to the above-referenced limits and are superseded in priority by any deductions due for actual support.⁸⁸

[12.30] 4. Priorities

Pursuant to CPLR 5234(b), 5241(h), and 5241(c), support enforcement income executions and orders have priority over other income executions. Given the fact that support executions or orders will usually garnish more than 25% of the judgment-debtor's disposable income, the non-support executions must wait until the support execution or order is terminated before receiving any payments. (If there is a young child for whom the support is owed, the practitioner should consider other procedures to col-

85 *First Virginia Bank v. Randolph*, 110 F.3d 75 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998).

86 CPLR 5242.

87 *Sitarek v. Sitarek*, 179 A.D.2d 1065, 579 N.Y.S.2d 523 (4th Dep't 1992); *Anostario v. Anostario*, 249 A.D.2d 612, 670 N.Y.S.2d 629 (3d Dep't 1998).

88 CPLR 5241(b), (c), (g).

lect the judgment.) If there are two or more support executions or orders, each support creditor will receive payments in proportion to which his or her claim bears to the combined total of all support executions or orders. There have been different holdings relative to whether the judgment debtor who is dutifully and voluntarily paying support in excess of 25% of his or her disposable earnings should be allowed a stay of enforcement of a non-support income execution. In *American Express Centurion v. Melia*,⁸⁹ the court concluded that while CPLR 5231(g) does not permit such modification, CPLR 5240 empowers the court to modify a non-support income execution where the judgment debtor is voluntarily paying support. *Midatlantic National Bank/North v. Reif*,⁹⁰ which held that a reduction in income execution deductions was impermissible under CPLR 5231(g), CPLR 5240 authorized such reductions where the judgment debtor was also voluntarily paying support. However, in *Tilden Financial Corp. v. Corwin*, the court refused to modify the non-support execution in such an instance, conceding that the judgment debtor who pays support voluntarily was in a worse position than one who neglected his or her support obligations.⁹¹ In *Nord v. Berman*, the court refused to allow an automatic reduction of an income execution against a debtor voluntarily paying child support but did hold that payments due under an income execution could be modified pursuant to CPLR 5240 upon a proper showing by the debtor “must show substantial hardship and an unfair burden in meeting obligations.”⁹²

[12.31] 5. Installment Payment Orders

If the judgment debtor is receiving otherwise non-attachable income due to an exemption, a judgment creditor can still proceed to obtain an order directing that the judgment debtor make periodic payments toward the judgment balance.⁹³ The court can impute income on CPLR 5226 motions and can order more money to be paid if the judgment debtor is misrepresenting his income and rendering services without adequate compensation.”⁹⁴ One court has ruled that it is appropriate to consider gifts

89 155 Misc. 2d 587, 589 N.Y.S.2d 290 (Civil Ct., Kings Co. 1992).

90 732 F. Supp. 354 (E.D.N.Y. 1990).

91 149 Misc. 2d 544, 566 N.Y.S.2d 457 (Sup. Ct., N.Y. Co. 1990).

92 5 Misc. 3d 1002A, 798 N.Y.S.2d 711 (1st Dep’t 2004).

93 *Balanoff v. Niosi*, 16 A.D.3d 53, 791 N.Y.S.2d 553 (2d Dep’t 2005).

94 *Nutmeg Fin. Servs., Inc. v. Richstone*, 186 A.D.2d 58, 587 N.Y.S.2d 653 (1st Dep’t 1992).

received by judgment debtors in determining the amount that a judgment debtor can afford to pay under an installment payment order.⁹⁵

The court in which the judgment was taken has been held to retain jurisdiction over a defendant for enforcement proceedings; therefore, the court can determine a motion for an installment payment order even if the defendant has moved to a foreign country.⁹⁶

[12.32] F. Exemptions

In general, CPLR 5205 enumerates the kinds of personal property that are exempt from application to the satisfaction of money judgments. For instance, exemptions are specified for minor personal tangible goods, such as stoves kept in the judgment debtor's dwelling house, the family bible and family pictures, and necessary working tools not exceeding six hundred dollars in value."

Traditionally, the judgment debtor bears the burden of claiming and proving the applicability of an exemption (seeking relief under CPLR 5240), but only when the exempt status of the property is unclear to the judgment creditor or a levying officer. Similarly, when a judgment creditor seeks to restrain funds in a judgment debtor's bank account, the judgment debtor has the burden of claiming and proving the applicability of an exemption because only he or she knows the source of the funds which may qualify for an exemption. By contrast, if property or funds are easily identifiable as exempt, the judgment debtor does not have the burden of claiming the exemption in order to benefit from its application. While it has generally been held that the judgment debtor bears the burden of proving his or her reasonable requirements, the judgment creditor bears the initial burden of tendering and framing the issue upon his or her own motion for an installment payment order.⁹⁷

There is generally no requirement that a judgment-creditor ensure that there are non-exempt funds in a debtor's bank account before serving a restraining notice or execution. For this reason, the court in *Contact Services, LLC v. Gregory* required the judgment creditor to include language notifying any third party served with a restraining notice that said third party need not restrain accounts consisting solely of exempt Social Secu-

⁹⁵ *City of Albany Ind. Dev. Agency v. Garg*, 268 A.D.2d 784, 704 N.Y.S.2d 154 (3d Dep't 2000).

⁹⁶ *Rochdale Holding Corp v. Neuendorf*, N.Y.L.J., Feb. 1, 2005, p. 18 (Sup. Ct., N.Y. Co. 2005).

⁹⁷ *Balanoff v. Niosi*, 16 A.D.3d 53, 791 N.Y.S.2d 553 (2d Dep't 2005).

ity.⁹⁸ Federal agencies are considering similar proposals to protect against restraints or executions related to direct deposits of exempt funds.

Some of the more important exemptions are noted below (see also Notice to Judgment Debtor, III.B.2 [§12.18]):

1. Pensions and retirement accounts. The exemption for pension trusts and other retirement plans (now also including Individual Retirement Accounts) pursuant to CPLR 5205(c) has been extended to a 100% exemption without determining whether the full exemption is necessary and to what extent it is “reasonably necessary for the support of the debtor and any dependent of the debtor.”⁹⁹ Nevertheless, a judgment creditor can still proceed against an exempt pension trust if contributions were made in fraud of creditors¹⁰⁰ or within 90 days of interposition of the claim on which such judgment was entered.¹⁰¹ Additionally, CPLR 5205(c)(4) was amended in 1997 to protect rights of individuals attempting to enforce obligations under support and alimony orders, as well as Qualified Domestic Relations’ Orders (QDRO), against otherwise exempt trust or retirement property.¹⁰²
2. Wages. In addition to the exemption relative to income executions, a debtor may exempt 90% of wages earned within 60 days of the income execution. This exemption can be limited by a determination by the court that a portion of the exemption amount is “unnecessary for the reasonable requirements of the judgment debtor and his dependents.”¹⁰³
3. Veteran’s benefits.
4. Social Security, private disability payments, and Social Security disability payments.¹⁰⁴

98 10 Misc. 3d 968, 806 N.Y.S.2d 407 (Rochester City Ct. 2005).

99 CPLR 5205(d)(1).

100 *Planned Consumer Marketing, Inc. v. Coats and Clark, Inc.*, 71 N.Y.2d 442, 527 N.Y.S.2d 185 (1988).

101 CPLR 5205(c)(5).

102 See also *Berger-Carniol v. Carniol*, 273 A.D.2d 427, 710 N.Y.S.2d 114 (2d Dep’t 2000).

103 CPLR 5205(d).

104 42 U.S.C. § 407(a).

5. Alimony and support. There is also a limitation on the exemption under CPLR 5205(d), but the determination must be made by the court that issued the support order.
6. Workers' Compensation and unemployment benefits.
7. Social services assistance. This includes wages if the employee also receives public assistance (N.Y. Social Services Law § 137-A).
8. Homestead exemption. Residence includes mobile home and condominium. The homestead exemption has been increased to \$50,000 effective August 30, 2005, pursuant to chapter 623 of the N.Y. Laws of 2005.

The previous amendment in 1977 (increasing the exemption to \$10,000) specifically provided that the increased exemption amount would "not affect the application of property to the satisfaction of a money judgment for a debt contracted before it takes effect." The 2005 amendment states only that it "shall take effect immediately." It is presumed that the debtors' counsel will try to claim that the 2005 amendments will apply retroactively to all judgment liens. However, consider the fact that "[a]s a general rule statutes are to be construed as prospective only in the absence of an unequivocal expression of a legislative intent to the contrary, and where a statute directs that it is to take effect immediately, it does not have any retroactive operation or effect."¹⁰⁵ Additionally, it should be argued that any retroactive increase in the homestead exemption would unconstitutionally impair the rights of existing lien creditors.¹⁰⁶ This analysis was rejected, and the exemption increase was applied retroactively to existing judgment liens by the Bankruptcy Court for the Northern District of New York.¹⁰⁷

As to this exemption, no homestead exemption applies where the defendant vacated the property over three years prior to execution, even if same was required pursuant to a divorce stipulation.¹⁰⁸ However, the exemption also continues after the death of the judgment debtor for bene-

¹⁰⁵ *Murphy v. Bd. of Educ.*, 104 A.D.2d 796, 797, 480 N.Y.S.2d 138 (2d Dep't 1984), *aff'd*, 64 N.Y.2d 856, 487 N.Y.S.2d 325 (1985); N.Y. General Construction Law § 93.

¹⁰⁶ *Addiss v. Selig*, 264 N.Y. 274 (1934).

¹⁰⁷ *In re Brown*, No. 06-3019, 2007 WL 2120380 (Bankr. N.D.N.Y. July 23, 2007); *In re Trudell*, No. 06-0611K, 1008 WL 141775 (Bankr. W.D.N.Y. Jan. 14, 2008).

¹⁰⁸ *Dawson v. Krolkowski*, 140 Misc. 2d 343, 530 N.Y.S.2d 931 (1988); *see also Fontana v. Fontana*, 89 A.D.2d 843, 530 N.Y.S.2d 931 (2d Dep't 1982).

fit of surviving spouse and minor children to age of majority. It also attaches to proceeds of sale of the residence for one year.

9. Insurance, disability, life insurance. See also N.Y. Insurance Law § 3212, including proceeds and avails, unless upon the judgment debtor's life with judgment debtor as beneficiary.
10. Security deposits on residential rent and utilities. However, funds held by an attorney in escrow accounts to fund a debt-reduction program and are not submitted for the purpose of seeking legal advice or services, are subject to attachment and execution.¹⁰⁹
11. Trusts, fully exempt if created by third parties. However, it is settled that creditors may reach funds in a Totten trust if other assets of a decedent's estate have been exhausted.¹¹⁰

¹⁰⁹ *Greenwood Trust Co. v. Andrew F. Capoccia Law Ctr., L.L.C.*, 184 Misc. 2d 143, 706 N.Y.S.2d 844 (Sup. Ct., Erie Co. 2000).

¹¹⁰ *In re Estate of Mirsky*, 154 Misc. 2d 278, 280–81, 586 N.Y.S.2d 205 (Sur. Ct., Bronx Co. 1992).

ADDENDUM

The following sections and rules of Article 52 of the Civil Practice Law and Rules have been updated since the date of publication of the course materials:

Section 5203. Priorities and liens upon real property.

- L. 2010, ch. 427, §1, eff. Aug. 30, 2010, added a new subparagraph (c), providing that a judgment effectuating a determination awarding ownership of interest in real property, and docketed within thirty days thereafter, is deemed docketed on the day immediately preceding the date of the determination, for purposes of establishing the priority of that determination against a judicial lien on such property created upon a simultaneous or later filing of a bankruptcy petition.

Section 5205. Personal property exempt from application to the satisfaction of money judgments.

- L. 2010, ch. 568, eff. Jan. 21, 2011, amended §5205(a) to increase the amounts of certain real and personal property that are exempt from money judgments and bankruptcy, provide a choice between claiming state or federal exemptions in such instances, and provide for cost of living adjustments in such amounts every three years.
- L. 2011, ch. 1, eff. Jan. 21, 2011, amended §5205(a)(8) to clarify the language increasing property values which are exempt from the satisfaction of a money judgment and the exemptions in bankruptcy where the state of New York or any of its agencies or any municipal corporation is the judgment creditor.

Section 5206. Real property exempt from application to the satisfaction of money judgments.

- L. 2010, ch. 568, eff. Jan. 21, 2011, amended §5206(a), (d), and (e) to increase the amounts of certain real and personal property that are exempt from money judgments and bankruptcy, provide a choice between claiming state or federal exemptions in such instances, and provide for cost of living adjustments in such amounts every three years.

Rule 5224. Subpoena; procedure.

- L. 2011, ch. 342, eff. Sept. 2, 2011, amended CPLR Rule 5224(a)(3)(i) to refer to General Business Law §601 in establishing guidelines for information subpoenas.

Section 5253. Cost of living adjustment for personal and real property exempt from application to the satisfaction of money judgments and exemptions in bankruptcy.

- L. 2010, ch. 568, eff. Jan. 21, 2011, added CPLR §5253 to increase the amounts of certain real and personal property that are exempt from money judgments and bankruptcy, provide a choice between claiming the state or federal exemptions in such instances, and provide for cost of living adjustments in such amounts every three years.

New York Civil Practice Law & Rules Article 52

§ 5201. Debt or property subject to enforcement; proper garnishee

(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

(c) Proper garnishee for particular property or debt.

1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.

2. Where property consists of a right or interest to or in a decedent's estate or any other property or fund held or controlled by a fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee..3. Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee..4. Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee; except that section 8--112 of the uniform commercial code shall govern the extent to which and the means by which any interest in a certificated security, uncertificated security or security entitlement (as defined in article eight of the uniform commercial code) may be reached by garnishment, attachment or other legal process.

§ 5202. Judgment creditor's rights in personal property(a) Execution creditor's rights.

Where a judgment creditor has delivered an execution to a sheriff, the judgment creditor's rights in a debt owed to the judgment debtor or in an interest of the judgment debtor in personal property, against which debt or property the judgment may be enforced, are superior to the extent of the amount of the execution to the rights of any transferee of the debt or property, except:

1. a transferee who acquired the debt or property for fair consideration before it was levied upon; or
2. a transferee who acquired a debt or personal property not capable of delivery for fair consideration after it was levied upon without knowledge of the levy...(b) Other judgment creditor's rights. Where a judgment creditor has secured an order for delivery of, payment of, or appointment of a receiver of, a debt owed to the judgment debtor or an interest of the judgment debtor in personal property, the judgment creditor's rights in the debt or property are superior to the rights of any transferee of the debt or property, except a transferee who acquired the debt or property for fair consideration and without notice of such order.

§ 5203. Priorities and liens upon real property

(a) Priority and lien on docketing judgment. No transfer of an interest of the judgment debtor in real property, against which property a money judgment may be enforced, is effective against the judgment creditor either from the time of the docketing of the judgment with the clerk of the county in which the property is located until ten years after the filing of the judgment-roll, or from the time of the filing with such clerk of a notice of levy pursuant to an execution until the execution is returned, except:

1. a transfer or the payment of the proceeds of a judicial sale, which shall include an execution sale, in satisfaction either of a judgment previously so docketed or of a judgment where a notice of levy pursuant to an execution thereon was previously so filed; or
2. a transfer in satisfaction of a mortgage given to secure the payment of the purchase price of the judgment debtor's interest in the property; or
3. a transfer to a purchaser for value at a judicial sale, which shall include an execution sale; or
4. when the judgment was entered after the death of the judgment debtor; or
5. when the judgment debtor is the state, an officer, department, board or commission of the state, or a municipal corporation; or
6. when the judgment debtor is the personal representative of a decedent and the judgment was awarded in an action against him in his representative capacity.

(b) Extension of lien. Upon motion of the judgment creditor, upon notice to the judgment debtor, served personally or by registered or certified mail, return receipt requested, to the last known address of the judgment debtor, the court may order that the lien of a money judgment upon real property be effective after the expiration of ten years from the filing of the judgment-roll, for a period no longer than the time during which the judgment creditor was stayed from enforcing the judgment, or the time necessary to complete advertisement and sale of real property in accordance with section 5236, pursuant to an execution delivered to a sheriff prior to the expiration of ten years from the filing of the judgment-roll. The order shall be effective from the time it is filed with the clerk of the county in which the property is located and an appropriate entry is made upon the docket of the judgment.

(c) Notwithstanding any other provision of law, where a court makes an oral or written determination on the record awarding ownership of an interest in real property, and a judgment effectuating such determination is docketed with the clerk of the county in which such property is located not later than thirty days thereafter, such judgment shall be deemed entered and docketed on the day immediately preceding the date of such determination solely for purposes of establishing the priority thereof against a judicial lien on such property created upon the simultaneous or later filing of a petition in bankruptcy pursuant to the United States bankruptcy code, as amended.

§ 5204. Release of lien or levy upon appeal

Upon motion of the judgment debtor, upon notice to the judgment creditor, the sheriff and the sureties upon the undertaking, the court may order, upon such terms as justice requires, that the lien of a money judgment, or that a levy made pursuant to an execution issued upon a money judgment, be released as to all or specified real or personal property upon the ground that the judgment debtor has given an undertaking upon appeal sufficient to secure the judgment creditor.

§ 5205. Personal property exempt from application to the satisfaction of money judgments

(a) Exemption for personal property. The following personal property when owned by any person is exempt from application to the satisfaction of a money judgment except where the judgment is for the purchase price of the exempt property or was recovered by a domestic, laboring person or mechanic for work performed by that person in such capacity:

1. all stoves and home heating equipment kept for use in the judgment debtor's dwelling house and necessary fuel therefor for one hundred twenty days; one sewing machine with its appurtenances;
2. religious texts, family pictures and portraits, and school books used by the judgment debtor or in the family; and other books, not exceeding [fig 2] five hundred dollars in value, kept and used as part of the family or judgment debtor's library;
3. a seat or pew occupied by the judgment debtor or the family in a place of public worship;.
4. domestic animals with the necessary food for those animals for [fig 1] one hundred twenty days, provided that the total value of such animals and food does not exceed [fig 2] one thousand dollars; all necessary food actually provided for the use of the judgment debtor or his family for one hundred twenty days;
5. all wearing apparel, household furniture, one mechanical, gas or electric refrigerator, one radio receiver, one television set, one computer and associated equipment, one cellphone, crockery, tableware and cooking utensils necessary for the judgment debtor and the family; all prescribed health aids;
6. a wedding ring; a watch, jewelry and art not exceeding one thousand dollars in value;
7. tools of trade, necessary working tools and implements, including those of a mechanic, farm machinery, team, professional instruments, furniture and library, not exceeding [fig 1] three thousand dollars in value, together with the necessary food for the team for [fig 2] one hundred twenty days, provided, however, that the articles specified in this paragraph are necessary to the carrying on of the judgment debtor's profession or calling [fig 3] ;
8. one motor vehicle not exceeding four thousand dollars in value above liens and encumbrances of the debtor; if such vehicle has been equipped for use by a disabled debtor, then ten thousand dollars in value above liens and encumbrances of the debtor; provided, however, that this exemption for one motor vehicle shall not apply if the debt enforced is for child support, spousal support, maintenance, alimony or equitable distribution, or if the state of New York or any of its agencies or any municipal corporation is the judgment creditor; and
9. if no homestead exemption is claimed, then one thousand dollars in personal property, bank account or cash.

(b) Exemption of cause of action and damages for taking or injuring exempt personal property. A cause of action, to recover damages for taking or injuring personal property exempt from application to the satisfaction of a money judgment, is exempt from application to the satisfaction of a money judgment. A money judgment and its proceeds arising out of such a cause of action is exempt, for one year after the collection thereof, from application to the satisfaction of a money judgment.

(c) Trust exemption. 1. Except as provided in paragraphs four and five of this subdivision, all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.

2. For purposes of this subdivision, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either any trust or plan, which is qualified as an individual retirement account under section four hundred eight or section four hundred eight A of the United States Internal Revenue Code of 1986, as amended, a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, or created as a result of rollovers from such plans pursuant to sections 402 (a) (5), 403 (a) (4), 408 (d) (3) or 408A of the Internal Revenue Code of 1986, as amended, or a plan that satisfies the requirements of section 457 of the Internal Revenue Code of 1986, as amended, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan or (v) a participant in a section 457 plan.

3. All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in paragraph two of this subdivision shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.

4. This subdivision shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended or under any order of support, alimony or maintenance of any court of competent jurisdiction to enforce arrears/past due support whether or not such arrears/past due support have been reduced to a money judgment.

5. Additions to an asset described in paragraph two of this subdivision shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

(d) Income exemptions. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be

unnecessary for the reasonable requirements of the judgment debtor and his dependents:

1. ninety per cent of the income or other payments from a trust the principal of which is exempt under subdivision (c); provided, however, that with respect to any income or payments made from trusts, custodial accounts, annuities, insurance contracts, monies, assets or interest established as part of an individual retirement account plan or as part of a Keogh (HR-10), retirement or other plan described in paragraph two of subdivision (c) of this section, the exception in this subdivision for such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents shall not apply, and the ninety percent exclusion of this paragraph shall become a one hundred percent exclusion;
2. ninety per cent of the earnings of the judgment debtor for his personal services rendered within sixty days before, and at any time after, an income execution is delivered to the sheriff or a motion is made to secure the application of the judgment debtor's earnings to the satisfaction of the judgment; and
3. payments pursuant to an award in a matrimonial action, for the support of a wife, where the wife is the judgment debtor, or for the support of a child, where the child is the judgment debtor; where the award was made by a court of the state, determination of the extent to which it is unnecessary shall be made by that court.

(e) Exemptions to members of armed forces. The pay and bounty of a noncommissioned officer, musician or private in the armed forces of the United States or the state of New York; a land warrant, pension or other reward granted by the United States, or by a state, for services in the armed forces; a sword, horse, medal, emblem or device of any kind presented as a testimonial for services rendered in the armed forces of the United States or a state; and the uniform, arms and equipments which were used by a person in the service, are exempt from application to the satisfaction of a money judgment; provided, however, that the provisions of this subdivision shall not apply to the satisfaction of any order or money judgment for the support of a person's child, spouse, or former spouse.

(f) Exemption for unpaid milk proceeds. Ninety per cent of any money or debt due or to become due to the judgment debtor for the sale of milk produced on a farm operated by him and delivered for his account to a milk dealer licensed pursuant to article twenty-one of the agriculture and markets law is exempt from application to the satisfaction of a money judgment.

(g) Security deposit exemption. Money deposited as security for the rental of real property to be used as the residence of the judgment debtor or the judgment debtor's family; and money deposited as security with a gas, electric, water, steam, telegraph or telephone corporation, or a municipality rendering equivalent utility services, for services to judgment debtor's residence or the residence of judgment debtor's family, are exempt from application to the satisfaction of a money judgment.

(h) The following personal property is exempt from application to the satisfaction of money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

1. any and all medical and dental accessions to the human body and all personal property or equipment that is necessary or proper to maintain or assist in sustaining or maintaining one or more major life activities or is utilized to provide mobility for a person with a permanent disability; and

2. any guide dog, service dog or hearing dog, as those terms are defined in section one hundred eight of the agriculture and markets law, or any animal trained to aid or assist a person with a permanent disability and actually being so used by such person, together with any and all food or feed for any such dog or other animal.

(i) Exemption for life insurance policies. The right of a judgment debtor to accelerate payment of part or all of the death benefit or special surrender value under a life insurance policy, as authorized by paragraph one of subsection (a) of section one thousand one hundred thirteen of the insurance law, or to enter into a viatical settlement pursuant to the provisions of article seventy-eight of the insurance law, is exempt from application to the satisfaction of a money judgment.

(j) Exemption for New York state college choice tuition savings program trust fund payment monies. Monies in an account created pursuant to article fourteen-A of the education law are exempt from application to the satisfaction of a money judgment as follows:

1. one hundred percent of monies in an account established in connection with a scholarship program established pursuant to such article is exempt;
2. one hundred percent of monies in an account is exempt where the judgment debtor is the account owner and designated beneficiary of such account and is a minor; and
3. an amount not exceeding ten thousand dollars in an account, or in the aggregate for more than one account, is exempt where the judgment debtor is the account owner of such account or accounts.
- 4.

For purposes of this subdivision, the terms "account owner" and "designated beneficiary" shall have the meanings ascribed to them in article fourteen-A of the education law.

(k) Notwithstanding any other provision of law to the contrary, where the judgment involves funds of a convicted person as defined in paragraph (c) of subdivision one of section six hundred thirty-two-a of the executive law, and all or a portion of such funds represent compensatory damages awarded by judgment to a convicted person in a separate action, a judgment obtained pursuant to such section six hundred thirty-two-a shall not be subject to execution or enforcement against the first ten percent of the portion of such funds that represents compensatory damages in the convicted person's action; provided, however, that this exemption from execution or enforcement shall not apply to judgments obtained by a convicted person prior to the effective date of the chapter of the laws of two thousand one which added this sentence or to any amendment to such judgment where such amendment was obtained on or after the effective date of this subdivision. For the purpose of determining the amount of a judgment which is not subject to execution or enforcement pursuant to this subdivision: (i) the court shall deduct attorney's fees from that portion of the judgment that represents compensatory damages and multiply the remainder of compensatory damages by ten percent; and (ii) when the judgment includes compensatory and punitive damages,

attorney's fees shall be pro rated among compensatory and punitive damages in the same proportion that all attorney's fees bear to all damages recovered.

(l) Exemption of banking institution accounts into which statutorily exempt payments are made electronically or by direct deposit.

1. If direct deposit or electronic payments reasonably identifiable as statutorily exempt payments were made to the judgment debtor's account in any banking institution during the forty-five day period preceding the date a restraining notice was served on the banking institution or an execution was served upon the banking institution by a marshal or sheriff, then two thousand five hundred dollars in the judgment debtor's account is exempt from application to the satisfaction of a money judgment. Nothing in this subdivision shall be construed to limit a creditor's rights under 42 U.S.C. § 659 or 38 U.S.C. § 5301 or to enforce a child support, spousal support, alimony or maintenance obligation. Nothing in this subdivision shall alter the exempt status of funds that are protected from execution, levy, attachment, garnishment or other legal process, pursuant to this section or under any other provision of state or federal law, or shall affect the right of a judgment debtor to claim such exemption.

2. For purposes of this article, "statutorily exempt payments" means any personal property exempt from application to the satisfaction of a money judgment under any provision of state or federal law. Such term shall include, but not be limited to, payments from any of the following sources: social security, including retirement, survivors' and disability benefits, supplemental security income or child support payments; veterans administration benefits; public assistance; workers' compensation; unemployment insurance; public or private pensions; railroad retirement; and black lung benefits.

3.

(i) Beginning on April first, two thousand twelve, and at each three-year interval ending on April first thereafter, the dollar amount of the exemption provided in this section, subdivisions (e) and (h) of section fifty-two hundred twenty-two, subdivision (a) of section fifty-two hundred thirty and subdivision (e) of section fifty-two hundred thirty-two of this article in effect immediately before that date shall be adjusted as provided in subparagraph (ii) of this paragraph.

(ii) The superintendent of financial services shall determine the amount of the adjustment based on the change in the Consumer Price Index for All Urban Consumers, New York-Northern New Jersey-Long Island, NY-NJ-CT-PA, published by the U.S. Department of Labor, Bureau of Labor Statistics, for the most recent three-year period ending on December thirty-first preceding the adjustment, with each adjusted amount rounded to the nearest twenty-five dollars.

(iii) Beginning on April first, two thousand twelve, and at each three-year interval ending on April first thereafter, the [fig 1] superintendent of financial services shall publish the current dollar amount of the exemption provided in this section, subdivisions (e) and (h) of section fifty-two hundred twenty-two, subdivision (a) of section fifty-two hundred thirty and subdivision (e) of section fifty-two hundred thirty-two of this chapter, together with the date of the next

scheduled adjustment. The publication shall be substantially in the form set below:

CURRENT DOLLAR AMOUNT OF EXEMPTION FROM ENFORCEMENT OF JUDGMENT UNDER NEW YORK CIVIL PRACTICE LAW AND RULES Sections 5205(l), 5222(e), 5222(h), 5230(a), and 5232(e)

The following is the current dollar amount of exemption from enforcement of money judgments under CPLR sections 5205(l), 5222(e), 5222(h), 5230(a), and 5232(e), as required by CPLR section 5205(l)(3): (Amount)

This amount is effective on April 1, (year) and shall not apply to cases commenced before April 1, (year). The next adjustment is scheduled for April 1, (year).

(iv) Adjustments made under subparagraph (i) of this paragraph shall not apply with respect to restraining notices served or executions effected before the date of the adjustment.

(m) Nothing in subdivision (l) of this section limits the judgment debtor's exemption rights in this section or under any other law.

(n) Notwithstanding any other provision of law to the contrary, the term "banking institution" when used in this article shall mean and include all banks, trust companies, savings banks, savings and loan associations, credit unions, foreign banking corporations incorporated, chartered, organized or licensed under the laws of this state, foreign banking corporations maintaining a branch in this state, and nationally chartered banks.

(o) The provisions of subdivisions (l), (m) and (n) of this section do not apply when the state of New York, or any of its agencies or municipal corporations is the judgment creditor, or if the debt enforced is for child support, spousal support, maintenance or alimony, provided that the restraining notice or execution contains a legend at the top thereof, above the caption, in sixteen point bold type with the following language: "The judgment creditor is the state of New York, or any of its agencies or municipal corporations, AND/OR the debt enforced is for child support, spousal support, maintenance or alimony."

§ 5206. Real property exempt from application to the satisfaction of money judgments

(a) Exemption of homestead. Property of one of the following types, not exceeding one hundred fifty thousand dollars for the counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, Rockland, Westchester and Putnam; one hundred twenty-five thousand dollars for the counties of Dutchess, Albany, Columbia, Orange, Saratoga and Ulster; and seventy-five thousand dollars for the remaining counties of the state in value above liens and encumbrances, owned and occupied as a principal residence, is exempt from application to the satisfaction of a money judgment, unless the judgment was recovered wholly for the purchase price thereof:

1. a lot of land with a dwelling thereon,
2. shares of stock in a cooperative apartment corporation,
3. units of a condominium apartment, or
4. a mobile home.

But no exempt homestead shall be exempt from taxation or from sale for non-payment of taxes or assessments.

(b) Homestead exemption after owner's death. The homestead exemption continues after the death of the person in whose favor the property was exempted for the benefit of the surviving spouse and surviving children until the majority of the youngest surviving child and until the death of the surviving spouse.

(c) Suspension of occupation as affecting homestead. The homestead exemption ceases if the property ceases to be occupied as a residence by a person for whose benefit it may so continue, except where the suspension of occupation is for a period not exceeding one year, and occurs in consequence of injury to, or destruction of, the dwelling house upon the premises.

(d) Exemption of homestead exceeding one hundred fifty thousand dollars in value for the counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, Rockland, Westchester and Putnam; one hundred twenty-five thousand dollars for the counties of Dutchess, Albany, Columbia, Orange, Saratoga and Ulster; and seventy-five thousand dollars for the remaining counties of the state. The exemption of a homestead is not void because the value of the property exceeds one hundred fifty thousand dollars for the counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, Rockland, Westchester and Putnam; one hundred twenty-five thousand dollars for the counties of Dutchess, Albany, Columbia, Orange, Saratoga and Ulster; and seventy-five thousand dollars for the remaining counties of the state but the lien of a judgment attaches to the surplus..**(e)** Sale of homestead exceeding one hundred fifty thousand dollars for the counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, Rockland, Westchester and Putnam; one hundred twenty-five thousand dollars for the counties of Dutchess, Albany, Columbia, Orange, Saratoga and Ulster; and seventy-five thousand dollars for the remaining counties of the state in value. A judgment creditor may commence a special proceeding in the county in which the homestead is located against the judgment debtor for the sale, by a sheriff or receiver, of a homestead exceeding one

hundred fifty thousand dollars for the counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, Rockland, Westchester and Putnam; one hundred twenty-five thousand dollars for the counties of Dutchess, Albany, Columbia, Orange, Saratoga and Ulster; and seventy-five thousand dollars for the remaining counties of the state in value. The court may direct that the notice of petition be served upon any other person. The court, if it directs such a sale, shall so marshal the proceeds of the sale that the right and interest of each person in the proceeds shall correspond as nearly as may be to his right and interest in the property sold. Money, not exceeding one hundred fifty thousand dollars for the counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, Rockland, Westchester and Putnam; one hundred twenty-five thousand dollars for the counties of Dutchess, Albany, Columbia, Orange, Saratoga and Ulster; and seventy-five thousand dollars for the remaining counties of the state, paid to a judgment debtor, as representing his interest in the proceeds, is exempt for one year after the payment, unless, before the expiration of the year, he acquires an exempt homestead, in which case, the exemption ceases with respect to so much of the money as was not expended for the purchase of that property; and the exemption of the property so acquired extends to every debt against which the property sold was exempt. Where the exemption of property sold as prescribed in this subdivision has been continued after the judgment debtor's death, or where he dies after the sale and before payment to him of his portion of the proceeds of the sale, the court may direct that portion of the proceeds which represents his interest be invested for the benefit of the person or persons entitled to the benefit of the exemption, or be otherwise disposed of as justice requires.

(f) Exemption of burying ground. Land, set apart as a family or private burying ground, is exempt from application to the satisfaction of a money judgment, upon the following conditions only:

1. a portion of it must have been actually used for that purpose;
2. it must not exceed in extent one-fourth of an acre; and
3. it must not contain any building or structure, except one or more vaults or other places of deposit for the dead, or mortuary monuments...

§ 5207. Enforcement involving the state

None of the procedures for the enforcement of money judgments are applicable to a judgment against the state. All procedures for the enforcement of money judgments against other judgment debtors are applicable to the state, its officers, agencies and subdivisions, as a garnishee, except where otherwise proscribed by law, and except that an order in such a procedure shall only provide for the payment of moneys not claimed by the state, and no judgment shall be entered against the state, or any officer, department, board or commission thereof, in such a procedure. This section shall not be deemed to grant any court jurisdiction to hear and determine claims or actions against the state not otherwise given by law to such court.

§ 5208. Enforcement after death of judgment debtor; leave of court; extension of lien

Except where otherwise prescribed by law, after the death of a judgment debtor, an execution upon a money judgment shall not be levied upon any debt owed to him or any property in which he has an interest, nor shall any other enforcement procedure be undertaken with respect to such debt or property, except upon leave of the surrogate's court which granted letters testamentary or letters of administration upon the estate. If such letters have not been granted within eighteen months after the death, leave to issue such an execution or undertake such enforcement procedure may thereafter be granted, upon motion of the judgment creditor upon such notice as the court may require, by any court from which the execution could issue or in which the enforcement procedure could be commenced. A judgment lien existing against real property at the time of a judgment debtor's death shall expire two years thereafter or ten years after filing of the judgment-roll, whichever is later.

§ 5209. Discharge of garnishee's obligation

A person who, pursuant to an execution or order, pays or delivers, to the judgment creditor or a sheriff or receiver, money or other personal property in which a judgment debtor has or will have an interest, or so pays a debt he owes the judgment debtor, is discharged from his obligation to the judgment debtor to the extent of the payment or delivery.

§ 5210. Power of court to punish for contempt

Every court in which a special proceeding to enforce a money judgment may be commenced, shall have power to punish a contempt of court committed with respect to an enforcement procedure.

§ 5211. Privilege on examination; immunity

The court may confer immunity upon any witness in accordance with the provisions of section 50.20 of the criminal procedure law for testimony or evidence in an enforcement procedure relating to disposition of property in which the judgment debtor has an interest, or relating to his or another person's claim to be entitled, as against the judgment creditor or a receiver, to hold property derived from or through the judgment debtor, or to be discharged from the payment of a debt which was due to the judgment debtor; provided, however, that no immunity shall be conferred except upon twenty-four hours' written notice to the appropriate district attorney [attorney] [1] having an official interest therein.

§ 5221. Where enforcement proceeding commenced

(a) Court and county in which proceeding commenced.

1. If the judgment sought to be enforced was entered in the city court of any city outside the city of New York, and the respondent resides or is regularly employed or has a place for the regular transaction of business in person within the county in which the court is or was located, a special proceeding authorized by this article shall be commenced in that court or in the county court of that county.

2. If the judgment sought to be enforced was entered in a district court, or by a justice of the peace whose office has been or is by law to be abolished and whose jurisdiction has been or is by law to be superseded by a district court, and the respondent resides or is regularly employed or has a place for the regular transaction of business in person within the county in which such district court is established, a special proceeding authorized by this article shall be commenced in such district court.

3. If the judgment sought to be enforced was entered in the municipal court of the city of New York, the city court of the city of New York or the civil court of the city of New York, and the respondent resides or is regularly employed or has a place for the regular transaction of business in person within that city, a special proceeding authorized by this article shall be commenced in the civil court of the city of New York.

4. In any other case, if the judgment sought to be enforced was entered in any court of this state, a special proceeding authorized by this article shall be commenced, either in the supreme court or a county court, in a county in which the respondent resides or is regularly employed or has a place for the regular transaction of business in person or, if there is no such county, in any county in which he may be served or the county in which the judgment was entered.

5. If no court in which a special proceeding authorized by this article could be commenced is in session, the special proceeding may be commenced in the supreme court or a county court in any county within the judicial district in which the proceeding could otherwise be commenced or in any county adjoining the county in which the proceeding could otherwise be commenced.

(b) Notices, subpoenas and motions. A notice or subpoena authorized by this article may be issued from, and a motion authorized by this article may be made before, any court in which a special proceeding authorized by this article could be commenced if the person served with the notice, subpoena or notice of motion were respondent.

§ 5222. Restraining notice

(a) Issuance; on whom served; form; service. A restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court, or by the support collection unit designated by the appropriate social services district. It may be served upon any person, except the employer of a judgment debtor or obligor where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor or obligor. It shall be served personally in the same manner as a summons or by registered or certified mail, return receipt requested or if issued by the support collection unit, by regular mail, or by electronic means as set forth in subdivision (g) of this section. It shall specify all of the parties to the action, the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount then due thereon, the names of all parties in whose favor and against whom the judgment or order was entered, it shall set forth subdivision (b) and shall state that disobedience is punishable as a contempt of court, and it shall contain an original signature or copy of the original signature of the clerk of the court or attorney or the name of the support collection unit which issued it. Service of a restraining notice upon a department or agency of the state or upon an institution under its direction shall be made by serving a copy upon the head of the department, or the person designated by him or her and upon the state department of audit and control at its office in Albany; a restraining notice served upon a state board, commission, body or agency which is not within any department of the state shall be made by serving the restraining notice upon the state department of audit and control at its office in Albany. Service at the office of a department of the state in Albany may be made by the sheriff of any county by registered or certified mail, return receipt requested, or if issued by the support collection unit, by regular mail.

(b) Effect of restraint; prohibition of transfer; duration. A judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest, except as set forth in subdivisions (h) and (i) of this section, and except upon direction of the sheriff or pursuant to an order of the court, until the judgment or order is satisfied or vacated. A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor or obligor, shall be subject to the notice except as set forth in subdivisions (h) and (i) of this section. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit, except as set forth in subdivisions (h) and (i) of this section, and except upon direction of the sheriff or pursuant to an order of the court, until the expiration of one year after the notice is served upon him or her, or until the judgment or order is satisfied or vacated, whichever event first occurs. A judgment creditor or support collection unit which has

specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained by reason of the restraint. If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor or obligor in an amount equal to twice the amount due on the judgment or order, the restraining notice is not effective as to other property or money.

(c) Subsequent notice. Leave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment or order. A judgment creditor shall not serve more than two restraining notices per year upon a natural person's banking institution account.

(d) Notice to judgment debtor or obligor. Except where the provisions of section fifty-two hundred twenty-two-a of this article are applicable, pursuant to subdivision (a) of such section, if a notice in the form prescribed in subdivision (e) of this section has not been given to the judgment debtor or obligor within a year before service of a restraining notice, a copy of the restraining notice together with the notice to judgment debtor or obligor shall be mailed by first class mail or personally delivered to each judgment debtor or obligor who is a natural person within four days of the service of the restraining notice. Such notice shall be mailed to the defendant at his or her residence address; or in the event such mailing is returned as undeliverable by the post office, or if the residence address of the defendant is unknown, then to the defendant in care of the place of employment of the defendant if known, in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by the return address or otherwise, that the communication is from an attorney or concerns a judgment or order; or if neither the residence address nor the place of employment of the defendant is known then to the defendant at any other known address.

(e) Content of notice. The notice required by subdivision (d) of this section shall be in substantially the following form and may be included in the restraining notice:

NOTICE TO JUDGMENT DEBTOR OR OBLIGOR

Money or property belonging to you may have been taken or held in order to satisfy a judgment or order which has been entered against you. Read this carefully.

YOU MAY BE ABLE TO GET YOUR MONEY BACK

State and federal laws prevent certain money or property from being taken to satisfy judgments or orders. Such money or property is said to be "exempt". The following is a partial list of money which may be exempt:

1. Supplemental security income, (SSI);
2. Social security;
3. Public assistance (welfare);
4. Spousal support, maintenance (alimony) or child support;
5. Unemployment benefits;
6. Disability benefits;
7. Workers' compensation benefits;

8. Public or private pensions;
9. Veterans benefits;
10. Ninety percent of your wages or salary earned in the last sixty days;
11. Twenty-five hundred dollars of any bank account containing statutorily exempt payments that were deposited electronically or by direct deposit within the last forty-five days, including, but not limited to, your social security, supplemental security income, veterans benefits, public assistance, workers' compensation, unemployment insurance, public or private pensions, railroad retirement benefits, black lung benefits, or child support payments;
12. Railroad retirement; and
13. Black lung benefits.

If you think that any of your money that has been taken or held is exempt, you must act promptly because the money may be applied to the judgment or order. If you claim that any of your money that has been taken or held is exempt, you may contact the person sending this notice.

Also, YOU MAY CONSULT AN ATTORNEY, INCLUDING ANY FREE LEGAL SERVICES ORGANIZATION IF YOU QUALIFY. You can also go to court without an attorney to get your money back. Bring this notice with you when you go. You are allowed to try to prove to a judge that your money is exempt from collection under New York civil practice law and rules, sections fifty-two hundred twenty-two-a, fifty-two hundred thirty-nine and fifty-two hundred forty. If you do not have a lawyer, the clerk of the court may give you forms to help you prove your account contains exempt money that the creditor cannot collect. The law (New York civil practice law and rules, article four and sections fifty-two hundred thirty-nine and fifty-two hundred forty) provides a procedure for determination of a claim to an exemption.

(f) For the purposes of this section "order" shall mean an order issued by a court of competent jurisdiction directing the payment of support, alimony or maintenance upon which a "default" as defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article has been established subject to the procedures established for the determination of a "mistake of fact" for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article except that for the purposes of this section only a default shall not be founded upon retroactive child support obligations as defined in paragraph (a) of subdivision one of section four hundred forty of the family court act and subdivision one of section two hundred forty and paragraph b of subdivision nine of section two hundred thirty-six of the domestic relations law.

(g) Restraining notice in the form of magnetic tape or other electronic means. Where such person consents thereto in writing, a restraining notice in the form of magnetic tape or other electronic means, as defined in subdivision (f) of rule twenty-one hundred three of this chapter, may be served upon a person other than the judgment debtor or obligor. A restraining notice in such form shall contain all of the information required to be specified in a restraining notice under subdivision (a), except for the original signature or copy of the original signature of the clerk or attorney who issued the restraining notice. The provisions of this subdivision notwithstanding, the notice required by subdivisions

(d) and (e) shall be given to the judgment debtor or obligor in the written form set forth therein.

(h) Effect of restraint on judgment debtor's banking institution account into which statutorily exempt payments are made electronically or by direct deposit. Notwithstanding the provisions of subdivision (b) of this section, if direct deposit or electronic payments reasonably identifiable as statutorily exempt payments as defined in paragraph two of subdivision (l) of section fifty-two hundred five of this article were made to the judgment debtor's account during the forty-five day period preceding the date that the restraining notice was served on the banking institution, then the banking institution shall not restrain two thousand five hundred dollars in the judgment debtor's account. If the account contains an amount equal to or less than two thousand five hundred dollars, the account shall not be restrained and the restraining notice shall be deemed void. Nothing in this subdivision shall be construed to limit a banking institution's right or obligation to restrain or remove such funds from the judgment debtor's account if required by 42 U.S.C. § 659 or 38 U.S.C. § 5301 or by a court order. Nothing in this subdivision shall alter the exempt status of funds that are protected from execution, levy, attachment, garnishment or other legal process, under section fifty-two hundred five of this article or under any other provision of state or federal law, or affect the right of a judgment debtor to claim such exemption.

(i) Effect of restraint on judgment debtor's banking institution account. A restraining notice issued pursuant to this section shall not apply to an amount equal to or less than the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable (as published on the websites of the United States department of labor and the state department of labor) except such part thereof as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents. This amount shall be equal to seventeen hundred sixteen dollars on the effective date of this subdivision, and shall rise to seventeen hundred forty dollars on July twenty-fourth, two thousand nine, and shall rise thereafter in tandem with the minimum wage. Nothing in this subdivision shall be construed to limit a banking institution's right or obligation to restrain or remove such funds from the judgment debtor's account if required by 42 U.S.C. § 659 or 38 U.S.C. § 5301 or by a court order. Where a judgment debtor's account contains an amount equal to or less than ninety percent of the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable (as published on the websites of the United States department of labor and the state department of labor), the account shall not be restrained and the restraining notice shall be deemed void, except as to those funds that a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents. Nothing in this subdivision shall alter the exempt status of funds which are exempt from execution, levy, attachment or garnishment, under section fifty-two hundred five of this article or under any other provision of state or federal law, or the right of a judgment debtor to claim such exemption.

(j) Fee for banking institution's costs in processing a restraining notice for an account. In the event that a banking institution served with a restraining notice cannot lawfully restrain a judgment debtor's banking institution account, or a restraint is placed on the

judgment debtor's account in violation of any section of this chapter, the banking institution shall charge no fee to the judgment debtor regardless of any terms of agreement, or schedule of fees, or other contract between the judgment debtor and the banking institution.

(k) The provisions of subdivisions (h), (i) and (j) of this section do not apply when the state of New York, or any of its agencies or municipal corporations is the judgment creditor, or if the debt enforced is for child support, spousal support, maintenance or alimony, provided that the restraining notice contains a legend at the top thereof, above the caption, in sixteen point bold type with the following language: "The judgment creditor is the state of New York, or any of its agencies or municipal corporations, AND/OR the debt enforced is for child support, spousal support, maintenance or alimony."

§ 5222-a. Service of notices and forms and procedure for claim of exemption

(a) Applicability. Any person authorized under subdivision (a) of section fifty-two hundred twenty-two of this article issuing a restraining notice affecting a natural person's account at a banking institution pursuant to such subdivision must comply with this section, in addition to the general provisions set forth in such section. Any sheriff levying against a natural person's account at a banking institution pursuant to section fifty-two hundred thirty-two of this article must comply with this section, in addition to the general provisions set forth in section fifty-two hundred thirty-two of this article. The procedures set forth in subdivisions (b), (c), (d), (e), (f) and (g) of this section shall not apply where pursuant to subdivision (h) and/or (i) of section fifty-two hundred twenty-two or subdivision (e) of section fifty-two hundred thirty-two of this article, no funds in the account are restrained or levied upon.

(b) Service of exemption notice and exemption claim form.

1. Service with restraining notice upon banking institution. The person issuing the restraining notice pursuant to subdivision (a) of section fifty-two hundred twenty-two of this article shall provide the banking institution with the restraining notice, a copy of the restraining notice, an exemption notice and two exemption claim forms with sections titled "ADDRESS A" and "ADDRESS B" completed. The exemption notice and exemption claim forms shall be in the forms set forth in paragraph four of this subdivision. The notice and the forms shall be served on the banking institution together with the restraining notice and copy of the restraining notice. Service must be accomplished in accordance with subdivision (a) or (g) of section fifty-two hundred twenty-two of this article. Failure to serve the notice and forms together with the restraining notice renders the restraining notice void, and the banking institution shall not restrain the account.

2. Service of execution by levy upon a garnishee banking institution. When serving an execution pursuant to subdivision (a) of section fifty-two hundred thirty-two of this article, the sheriff shall provide the banking institution with an exemption notice and two exemption claim forms, which shall be in the forms set forth in paragraph four of this subdivision. The sheriff shall serve both the exemption notice and the exemption claim forms on the banking institution together with the execution notice. Service must be accomplished in accordance with subdivision (a) of section fifty-two hundred thirty-two of this article. Failure to serve the notice and forms renders the execution void, and the banking institution shall not levy upon the account.

3. Service upon judgment debtor. Within two business days after receipt of the restraining notice or execution, exemption notice and exemption claim forms, the banking institution shall serve upon the judgment debtor the copy of the restraining notice, the exemption notice and two exemption claim forms. The banking institution shall serve the notice and forms by first class mail to the last known address of the judgment debtor. The inadvertent failure by a depository institution to provide the notice required by this subdivision shall not give rise to liability on the part of the depository institution.

4. Content of exemption notice and exemption claim form.

a. The exemption notice shall be in the following form:

"EXEMPTION NOTICE

as required by New York Law

YOUR BANK ACCOUNT IS RESTRAINED OR "FROZEN"

The attached Restraining Notice or notice of Levy by Execution has been issued against your bank account. You are receiving this notice because a creditor has obtained a money judgment against you, and one or more of your bank accounts has been restrained to pay the judgment. A money judgment is a court's decision that you owe money to a creditor. You should be aware that FUTURE DEPOSITS into your account(s) might also be restrained if you do not respond to this notice.

You may be able to "vacate" (remove) the judgment. If the judgment is vacated, your bank account will be released. Consult an attorney (including free legal services) or visit the court clerk for more information about how to do this.

Under state and federal law, certain types of funds cannot be taken from your bank account to pay a judgment. Such money is said to be "exempt."

DOES YOUR BANK ACCOUNT CONTAIN ANY OF THE FOLLOWING TYPES OF FUNDS?

1. Social security;
2. Social security disability (SSD);
3. Supplemental security income (SSI);
4. Public assistance (welfare);
5. Income earned while receiving SSI or public assistance;
6. Veterans benefits;
7. Unemployment insurance;
8. Payments from pensions and retirement accounts;
9. Disability benefits;
10. Income earned in the last 60 days (90% of which is exempt);
11. Workers' compensation benefits;
12. Child support;
13. Spousal support or maintenance (alimony);
14. Railroad retirement; and/or
15. Black lung benefits.

If YES, you can claim that your money is exempt and cannot be taken.

To make the claim, you must

- (a) complete the EXEMPTION CLAIM FORM attached;
 - (b) deliver or mail the form to the bank with the restrained or "frozen" account;
- and
- (c) deliver or mail the form to the creditor or its attorney at the address listed on the form.

You must send the forms within 20 DAYS of the postmarked date on the envelope holding this notice. You may be able to get your account released faster if you send to the creditor or its attorney written proof that your money is exempt. Proof can include an award letter from the government, an annual

statement from your pension, pay stubs, copies of checks, bank records showing the last two months of account activity, or other papers showing that the money in your bank account is exempt. If you send the creditor's attorney proof that the money in your account is exempt, the attorney must release that money within seven days. You do not need an attorney to make an exemption claim using the form."

b. The exemption claim form shall be in the following form:

NAME OF COURT, NAME OF COUNTY

-----X

PLAINTIFF/PETITIONER/CLAIMANT INDEX NO.

V. DEFENDANT/RESPONDENT EXEMPTION CLAIM FORM

-----X

NAME AND ADDRESS OF JUDGMENT NAME AND ADDRESS OF
FINANCIAL

CREDITOR OR ATTORNEY INSTITUTION
(To be completed by judgment (To be completed by judgment
creditor or attorney) creditor or attorney)

ADDRESS ADDRESS
A ----- B -----
----- -----

Directions: To claim that some or all of the funds in your account are exempt, complete both copies of this form, and make one copy for yourself. Mail or deliver one form to ADDRESS A and one form to ADDRESS B within twenty days of the date on the envelope holding this notice.

** If you have any documents, such as an award letter, an annual statement from your pension, paystubs, copies of checks or bank records showing the last two months of account activity, include copies of the documents with this form. Your account may be released more quickly. -----

I state that my account contains the following type(s) of funds (check all that apply):

- Social security Social security disability (SSD)
- Supplemental security income (SSI)
- Public assistance
- Wages while receiving SSI or public assistance
- Veterans benefits
- Unemployment insurance
- Payments from pensions and retirement accounts
- Income earned in the last 60 days (90% of which is exempt)
- Child support
- Spousal support or maintenance (alimony)
- Workers' compensation
- Railroad retirement or black lung benefits
- Other (describe exemption): -----

I request that any correspondence to me regarding my claim be sent to the following address:

(FILL IN YOUR COMPLETE ADDRESS)

I certify under penalty of perjury that the statement above is true to the best of my knowledge and belief.

DATE

SIGNATURE OF JUDGMENT DEBTOR

(c) Claim of exemption.

1. To claim an exemption pursuant to the procedures in this section, the judgment debtor shall complete the exemption claim forms, sign them under penalty of perjury, and serve them within twenty days of the date postmarked on the correspondence containing the notice and forms. The judgment debtor shall serve one completed exemption claim form on the banking institution and the other on the attorney for the judgment creditor. In the event that there is no attorney for the judgment creditor, then the exemption claim form must be served directly on the judgment creditor. The judgment debtor may serve the exemption claim forms in person or by first-class mail.
2. Where the banking institution receives an exemption claim form, it shall notify the judgment creditor forthwith of the date on which the funds will be released pursuant to paragraph three of this subdivision.
3. The banking institution shall release all funds in the judgment debtor's account eight days after the date postmarked on the envelope containing the executed exemption claim form mailed to the banking institution or the date of personal delivery of the executed exemption claim form to the banking institution, and the restraint shall be deemed void, except where the judgment creditor interposes an objection to the exemption within that time.
4. Where the executed exemption claim form sent to the judgment creditor is accompanied by information demonstrating that all funds in the account are exempt, the judgment creditor shall, within seven days of the postmark on the envelope containing the exemption claim form and accompanying information, instruct the banking institution to release the account, and the restraint shall be deemed void. Where the account contains some funds from exempt sources, and other funds from unknown sources, the judgment creditor shall apply the lowest intermediate balance principle of accounting and, within seven days of the postmark on the envelope containing the exemption claim form and accompanying information, shall instruct the banking institution to release the exempt money in the account. The provisions of paragraph two of subdivision (b) of rule twenty-one hundred three of this chapter shall not enlarge the judgment creditor's time to move pursuant to this section. Information demonstrating that funds are exempt includes, but is not limited to, originals or copies of benefit award letters, checks, check stubs or any other document that discloses the source of the judgment debtor's income, and bank records showing the last two months of account activity. If the judgment creditor fails to act in accordance with this subdivision, the judgment creditor shall be deemed to have acted in bad faith and the judgment debtor may seek a court award of the damages, costs, fees and penalties provided for in subdivision (g) of this section.

5. If no claim of exemption is received by the banking institution within twenty-five days after the notice and forms are mailed to the judgment debtor, the funds remain subject to the restraining notice or execution. Failure of the judgment debtor to deliver the executed exemption claim form does not constitute a waiver of any right to an exemption.

(d) Objection to exemption claim and request for hearing. A judgment creditor may object to the claim of exemption by moving for an order pursuant to section fifty-two hundred forty of this article. The judgment creditor must serve the banking institution and the judgment debtor with its motion papers within eight days after the date postmarked on the envelope containing the executed exemption claim form or the date of personal delivery of the executed exemption claim form to the banking institution, and the provisions of paragraph one of subdivision (b) of rule twenty-one hundred three of this chapter shall not enlarge the judgment creditor's time to move pursuant to this section. The judgment debtor shall be served at the address provided on the exemption claim form. The affirmation or affidavit in support of the motion shall demonstrate a reasonable belief that such judgment debtor's account contains funds that are not exempt from execution and the amount of such nonexempt funds. The executed exemption claim form shall be attached to the affirmation or affidavit. The affirmation or affidavit shall not be conclusory, but is required to show the factual basis upon which the reasonable belief is based. The hearing to decide the motion shall be noticed for seven days after service of the moving papers. The executed exemption claim form shall be prima facie evidence at such hearing that the funds in the account are exempt funds. The burden of proof shall be upon the judgment creditor to establish the amount of funds that are not exempt. The court shall, within five days of the hearing, issue an order stating whether or not funds in the account are exempt and ordering the appropriate relief. The judgment creditor or its attorney must serve the order on the banking institution and the judgment debtor no later than two business days after the court issues the order.

(e) Duties of banking institution if objection is made to exemption claim. Upon receipt of a written objection pursuant to subdivision (d) of this section from the judgment creditor or its attorney within the specified eight-day period, the banking institution shall retain the funds claimed to be exempt for twenty-one days unless otherwise ordered by the court. If the period of twenty-one days expires and the banking institution has not been otherwise ordered by the court, the banking institution shall release the funds to the judgment debtor.

(f) Release of funds. At any time during the procedure specified in this section, the judgment debtor or the judgment creditor may, by a writing dated after the service of the restraining notice, direct the banking institution to release the funds in question to the other party. Upon receipt of a release, the banking institution shall release the funds as directed.

(g) Proceedings; bad faith claims. Where the judgment creditor objects to a claim of exemption pursuant to subdivision (d) of this section and the court finds that the judgment creditor disputed the claim of exemption in bad faith, as provided in paragraph four of subdivision (c) of this section, the judgment debtor shall be awarded costs, reasonable attorney fees, actual damages and an amount not to exceed one thousand dollars.

(h) Rights of judgment debtor. Nothing in this section shall in any way restrict the rights and remedies otherwise available to a judgment debtor, including but not limited to, rights to property exemptions under federal and state law.

(i) The provisions of this section do not apply when the state of New York, or any of its agencies or municipal corporations is the judgment creditor, or if the debt enforced is for child support, spousal support, maintenance or alimony, provided that the restraining notice contains a legend at the top thereof, above the caption, in sixteen point bold type with the following language: "The judgment creditor is the state of New York, or any of its agencies or municipal corporations, AND/OR the debt enforced is for child support, spousal support, maintenance or alimony."

§ 5223. Disclosure

At any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.

R 5224. Subpoena; procedure

(a) Kinds and service of subpoena. Any or all of the following kinds of subpoenas may be served:

1. a subpoena requiring attendance for the taking of a deposition upon oral or written questions at a time and place named therein; or
2. a subpoena duces tecum requiring the production of books and papers for examination at a time and place named therein; or
3. an information subpoena, accompanied by a copy and original of written questions and a prepaid, addressed return envelope. Service of an information subpoena may be made by registered or certified mail, return receipt requested. Answers shall be made in writing under oath by the person upon whom served, if an individual, or by an officer, director, agent or employee having the information, if a corporation, partnership or sole proprietorship. Each question shall be answered separately and fully and each answer shall refer to the question to which it responds. Answers shall be returned together with the original of the questions within seven days after receipt. Where the person serving the subpoena is a judgment creditor, other than where the state, a municipality or an agency or officer of the state or a municipality is the judgment creditor, the following additional rules shall apply:
 - (i) information subpoenas, served on an individual or entity other than the judgment debtor, may be served on an individual, corporation, partnership or sole proprietorship only if the judgment creditor or the judgment creditor's attorney has a reasonable belief that the party receiving the subpoena has in their possession information about the debtor that will assist the creditor in collecting his or her judgment. Any information subpoena served pursuant to this subparagraph shall contain a certification signed by the judgment creditor or his or her attorney stating the following: I HEREBY CERTIFY THAT THIS INFORMATION SUBPOENA COMPLIES WITH RULE 5224 OF THE CIVIL PRACTICE LAW AND RULES AND SECTION 601 OF THE GENERAL BUSINESS LAW THAT I HAVE A REASONABLE BELIEF THAT THE PARTY RECEIVING THIS SUBPOENA HAS IN THEIR POSSESSION INFORMATION ABOUT THE DEBTOR THAT WILL ASSIST THE CREDITOR IN COLLECTING THE JUDGMENT. By signing the certification, the judgment creditor or attorney certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that the individual or entity receiving the subpoena has relevant information about the debtor.
 - (ii) if an information subpoena, served on an individual or entity other than the judgment debtor, does not contain the certification provided for in subparagraph (i) of this paragraph, such subpoena shall be deemed null and void.
 - (iii) if an information subpoena, served on an individual or entity other than the judgment debtor, does contain the certification provided for in subparagraph (i) of this paragraph, the individual, corporation, partnership or sole proprietorship receiving the subpoena, may move to quash the subpoena

pursuant to section twenty-three hundred four of this chapter, except that such motion shall be made in the court that issued the underlying judgment.

- (iv) failure to comply with an information subpoena shall be governed by subdivision (b) of section twenty-three hundred eight of this chapter, except that such motion shall be made in the court that issued the underlying judgment.

4. an information subpoena in the form of magnetic tape or other electronic means. Where the person to be served consents thereto in writing, an information subpoena in the form of magnetic tape or electronic means, as defined in subdivision (f) of rule twenty-one hundred three of this chapter, may be served upon the individual, or if a corporation, partnership, limited liability company, or sole proprietorship, upon the officer, director, agent or employee having the information. Answers shall be provided within seven days.

(a-1) Scope of subpoena duces tecum. A subpoena duces tecum authorized by this rule and served on a judgment debtor, or on any individual while in the state, or on a corporation, partnership, limited liability company or sole proprietorship doing business, licensed, qualified, or otherwise entitled to do business in the state, shall subject the person or other entity or business served to the full disclosure prescribed by section fifty-two hundred twenty-three of this article whether the materials sought are in the possession, custody or control of the subpoenaed person, business or other entity within or without the state. Section fifty-two hundred twenty-nine of this article shall also apply to disclosure under this rule.

(b) Fees. A judgment debtor served with a subpoena under this section and any other person served with an information subpoena shall not be entitled to any fee. Any other person served with a subpoena requiring attendance or the production of books and papers shall be paid or tendered in advance authorized traveling expenses and one day's witness fee.

(c) Time and place of examination. A deposition on oral or written questions or an examination of books and papers may proceed upon not less than ten days' notice to the person subpoenaed, unless the court orders shorter notice, before any person authorized by subdivision (a) of rule 3113. An examination shall be held during business hours and, if taken within the state, at a place specified in rule 3110. Upon consent of the witness, an examination may be held at any other place within the state and before any officer authorized to administer an oath.

(d) Conduct of examination. The officer before whom the deposition is to be taken shall put the witness on oath. If requested by the person conducting the examination, the officer shall personally, or by someone acting under his direction, record and transcribe the testimony and shall list all appearances by the parties and attorneys. Examination and cross-examination of the witness shall proceed as permitted in the trial of actions in open court. Cross-examination need not be limited to the subject matter of the examination in chief. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or of a person recording it, or to the manner of taking it, or to the testimony presented, or to the conduct of any person, and any other objection to the proceedings, shall be noted by the officer upon the deposition and the deposition shall proceed subject to the right of a person

to apply for a protective order. The deposition shall be taken continuously and without unreasonable adjournment, unless the court orders or the witness agrees otherwise. If the witness does not understand the English language, the judgment creditor shall, at his own expense, provide a translation of all questions and answers. Unless the court orders otherwise, a person other than the judgment debtor served with a subpoena duces tecum requiring the production of books of account may produce in place of the original books of account a sworn transcript of such accounts as are relevant.

(e) Signing deposition; physical preparation. At the request of the person conducting the examination, a deposition on written questions or a deposition on oral questions which has been transcribed shall be submitted to the witness and shall be read to or by him, and any changes in form or substance which the witness desires to make shall be entered upon the deposition with a statement of the reasons given by the witness for making them; and the deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign the deposition, the officer before whom the deposition was taken shall sign it and state on the record the fact of the witness's failure or refusal to sign together with any reason given. The deposition may then be used as fully as though signed. Where testimony is transcribed, the officer before whom the deposition was taken shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness.

(f) Subsequent examination. Leave of court is required to compel a judgment debtor to appear for the taking of his deposition or to compel the production by him of books and papers within one year after the conclusion of a previous examination of him with respect to the same judgment..

§ 5225. Payment or delivery of property of judgment debtor

(a) Property in the possession of judgment debtor. Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.

(b) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239.

(c) Documents to effect payment or delivery. The court may order any person to execute and deliver any document necessary to effect payment or delivery.

§ 5226. Installment payment order

Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is receiving or will receive money from any source, or is attempting to impede the judgment creditor by rendering services without adequate compensation, the court shall order that the judgment debtor make specified installment payments to the judgment creditor. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. In fixing the amount of the payments, the court shall take into consideration the reasonable requirements of the judgment debtor and his dependents, any payments required to be made by him or deducted from the money he would otherwise receive in satisfaction of other judgments and wage assignments, the amount due on the judgment, and the amount being or to be received, or, if the judgment debtor is attempting to impede the judgment creditor by rendering services without adequate compensation, the reasonable value of the services rendered.

§ 5227. Payment of debts owed to judgment debtor

Upon a special proceeding commenced by the judgment creditor, against any person who it is shown is or will become indebted to the judgment debtor, the court may require such person to pay to the judgment creditor the debt upon maturity, or so much of it as is sufficient to satisfy the judgment, and to execute and deliver any document necessary to effect payment; or it may direct that a judgment be entered against such person in favor of the judgment creditor. Costs of the proceeding shall not be awarded against a person who did not dispute the indebtedness. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239.

§ 5228. Receivers

(a) Appointment of receiver. Upon motion of a judgment creditor, upon such notice as the court may require, the court may appoint a receiver who may be authorized to administer, collect, improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest or to do any other acts designed to satisfy the judgment. As far as practicable, the court shall require that notice be given to the judgment debtor and to any other judgment creditors of the judgment debtor. The order of appointment shall specify the property to be received, the duties of the receiver and the manner in which they are to be performed. A receiver shall have no power to employ counsel unless expressly so authorized by order of the court. A receiver shall be entitled to necessary expenses and to such commissions, not exceeding five percent of the sums received and disbursed by him, as the court which appointed him allows, but if a judgment creditor is appointed receiver, he shall not be entitled to compensation. If a receiver has been appointed, a court making an order directing payment, or delivery, of property shall direct that payment, or delivery, be made to the receiver rather than to a sheriff. Sections 6402, 6403, 6404 and 6405 are applicable to receivers appointed under this subdivision.

(b) Extension of receivership. Where a receiver has been appointed, the court, upon motion of a judgment creditor, upon such notice as it may require, shall extend the receivership to his judgment.

§ 5229. Enforcement before judgment entered

In any court, before a judgment is entered, upon motion of the party in whose favor a verdict or decision has been rendered, the trial judge may order examination of the adverse party and order him restrained with the same effect as if a restraining notice had been served upon him after judgment.

§ 5230. Executions

(a) Form. An execution shall specify the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount due thereon and it shall specify the names of the parties in whose favor and against whom the judgment or order was entered. An execution shall direct that only the property in which a named judgment debtor or obligor who is not deceased has an interest, or the debts owed to the named judgment debtor or obligor, be levied upon or sold thereunder and shall specify the last known address of that judgment debtor or obligor. Except in cases when the state of New York, or any of its agencies or municipal corporations is the judgment creditor, or if the debt enforced is for child support, spousal support, maintenance or alimony, provided that in those instances the execution contains a legend at the top thereof, above the caption, in sixteen point bold type with the following language: "The judgment creditor is the state of New York, or any of its agencies or municipal corporations, AND/OR the debt enforced is for child support, spousal support, maintenance or alimony.", an execution notice shall state that, pursuant to subdivision (l) of section fifty-two hundred five of this article, two thousand five hundred dollars of an account containing direct deposit or electronic payments reasonably identifiable as statutorily exempt payments, as defined in paragraph two of subdivision (l) of section fifty-two hundred five of this article, is exempt from execution and that the garnishee cannot levy upon or restrain two thousand five hundred dollars in such an account. Except in cases when the state of New York, or any of its agencies or municipal corporations is the judgment creditor, or if the debt enforced is for child support, spousal support, maintenance or alimony, provided that in those instances the execution contains a legend at the top thereof, above the caption, in sixteen point bold type with the following language: "The judgment creditor is the state of New York, or any of its agencies or municipal corporations, AND/OR the debt enforced is for child support, spousal support, maintenance or alimony.", an execution notice shall likewise state that pursuant to subdivision (i) of section fifty-two hundred twenty-two of this article, an execution shall not apply to an amount equal to or less than ninety percent of the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents. Where the judgment or order was entered in a court other than the supreme, county or a family court, the execution shall also specify the date on which a transcript of the judgment or order was filed with the clerk of the county in which the judgment was entered. Where jurisdiction in the action was based upon a levy upon property or debt pursuant to an order of attachment, the execution shall also state that fact, describe all property and debts levied upon, and direct that only such property and debts be sold thereunder. Where the judgment or order was recovered for all or part of a mortgage debt, the execution shall also describe the mortgaged property, specify the book and page where the mortgage is recorded, and direct that no part of the mortgaged property be levied upon or sold thereunder.

(b) Issuance. At any time before a judgment or order is satisfied or vacated, an execution may be issued from the supreme court, county court or a family court, in the county in which the judgment was first docketed, by the clerk of the court or the attorney for the judgment creditor as officer of the court, to the sheriffs of one or more counties of the state, directing each of them to satisfy the judgment or order out of the real and

personal property of the judgment debtor or obligor and the debts due to him or her. Where the judgment or order is for support and is payable to the support collection unit designated by the appropriate social services district, such unit shall be authorized to issue the execution and to satisfy the judgment or order out of the real and personal property of the judgment debtor or obligor and the debts due to him or her.

(c) Return. An execution shall be returned to the clerk of the court from which it was issued or to the support collection unit within sixty days after issuance unless the execution has been served in accordance with section 5231 or subdivision (a) of section 5232. The time may be extended in writing for a period of not more than sixty additional days by the attorney for the judgment creditor or by the support collection unit. Further like extensions may be given by the attorney for the judgment creditor or by the support collection unit unless another execution against the same judgment debtor or obligor has been delivered to the same enforcement officer and has not been returned.

(d) Records of sheriff or support collection unit. Each sheriff or support collection unit shall keep a record of executions delivered showing the names of the parties and the judgment debtor or obligor; the dates of issue and return; the date and time of delivery, which shall be endorsed upon the execution; the amount due at the time the execution was delivered; and the amount of the judgment or order and of the sheriff's fees unpaid, if any, at the time of the return.

(e) For the purposes of this section "order" shall mean an order issued by a court of competent jurisdiction directing the payment of support, alimony or maintenance upon which a "default" as defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article has been established subject to the procedures established for the determination of a "mistake of fact" for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article, except that for the purposes of this section only, a default shall not be founded upon retroactive child support obligations as defined in paragraph (a) of subdivision one of section four hundred forty of the family court act and subdivision one of section two hundred forty, and paragraph b of subdivision nine of section two hundred thirty-six of the domestic relations law.

§ 5231. Income execution

(a) Form. An income execution shall specify, in addition to the requirements of subdivision (a) of section 5230, the name and address of the person from whom the judgment debtor is receiving or will receive money; the amount of money, the frequency of its payment and the amount of the installments to be collected therefrom; and shall contain a notice to the judgment debtor that he shall commence payment of the installments specified to the sheriff forthwith and that, upon his default, the execution will be served upon the person from whom he is receiving or will receive money.

(b) Issuance. Where a judgment debtor is receiving or will receive money from any source, an income execution for installments therefrom of not more than ten percent thereof may be issued and delivered to the sheriff of the county in which the judgment debtor resides or, where the judgment debtor is a non-resident, the county in which he is employed; provided, however, that (i) no amount shall be withheld from the judgment debtor's earnings pursuant to an income execution for any week unless the disposable earnings of the judgment debtor for that week exceed the greater of thirty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or thirty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable; (ii) the amount withheld from the judgment debtor's earnings pursuant to an income execution for any week shall not exceed twenty-five percent of the disposable earnings of the judgment debtor for that week, or, the amount by which the disposable earnings of the judgment debtor for that week exceed the greater of thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act of 1938 or thirty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable, whichever is less; (iii) if the earnings of the judgment debtor are also subject to deductions for alimony, support or maintenance for family members or former spouses pursuant to section five thousand two hundred forty-one or section five thousand two hundred forty-two of this article, the amount withheld from the judgment debtor's earnings pursuant to this section shall not exceed the amount by which twenty-five percent of the disposable earnings of the judgment debtor for that week exceeds the amount deducted from the judgment debtor's earnings in accordance with section five thousand two hundred forty-one or section five thousand two hundred forty-two of this article. Nothing in this section shall be construed to modify, abrogate, impair, or affect any exemption from the satisfaction of a money judgment otherwise granted by law.

(c) Definition of earnings and disposable earnings.

- (i) As used herein earnings means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.
- (ii) As used herein disposable earnings means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(d) Service upon debtor. Within twenty days after an income execution is delivered to the sheriff, the sheriff shall serve a copy of it upon the judgment debtor, in the same manner as a summons or, in lieu thereof, by certified mail return receipt requested

provided an additional copy is sent by regular mail to the debtor. If service is by mail as herein provided, the person effecting service shall retain the receipt together with a post office certificate of mailing as proof of such service.

(e) Levy upon default or failure to serve debtor. If a judgment debtor fails to pay installments pursuant to an income execution served upon him for a period of twenty days, or if the sheriff is unable to serve an income execution upon the judgment debtor within twenty days after the execution is delivered to the sheriff, the sheriff shall levy upon the money that the judgment debtor is receiving or will receive by serving a copy of the income execution, indorsed to indicate the extent to which paid installments have satisfied the judgment, upon the person from whom the judgment debtor is receiving or will receive money personally within the county in the same manner as a summons or by certified mail return receipt requested, except that such service shall not be made by delivery to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318.

(f) Withholding of installments. A person served with an income execution shall withhold from money then or thereafter due to the judgment debtor installments as provided therein and pay them over to the sheriff. If such person shall fail to so pay the sheriff, the judgment creditor may commence a proceeding against him for accrued installments. If the money due to the judgment debtor consists of salary or wages and his employment is terminated by resignation or dismissal at any time after service of the execution, the levy shall thereafter be ineffective, and the execution shall be returned, unless the debtor is reinstated or re-employed within ninety days after such termination.

(g) Statement on income execution. Any income execution delivered to the sheriff on or after the effective date of this act shall contain the following statement:

THIS INCOME EXECUTION DIRECTS THE WITHHOLDING OF UP TO TEN PERCENT OF THE JUDGMENT DEBTOR'S GROSS INCOME. IN CERTAIN CASES, HOWEVER, STATE OR FEDERAL LAW DOES NOT PERMIT THE WITHHOLDING OF THAT MUCH OF THE JUDGMENT DEBTOR'S GROSS INCOME. THE JUDGMENT DEBTOR IS REFERRED TO NEW YORK CIVIL PRACTICE LAW AND RULES § 5231 and 15 UNITED STATES CODE § 1671 ET SEQ.

I. LIMITATIONS ON THE AMOUNT THAT CAN BE WITHHELD.

- A. AN INCOME EXECUTION FOR INSTALLMENTS FROM A JUDGMENT DEBTOR'S GROSS INCOME CANNOT EXCEED TEN PERCENT (10%) OF THE JUDGMENT DEBTOR'S GROSS INCOME.
- B. IF A JUDGMENT DEBTOR'S WEEKLY DISPOSABLE EARNINGS ARE LESS THAN THIRTY (30) TIMES THE CURRENT FEDERAL MINIMUM WAGE (, PER HOUR), OR (), NO DEDUCTION CAN BE MADE FROM THE JUDGMENT DEBTOR'S EARNINGS UNDER THIS INCOME EXECUTION.
- C. A JUDGMENT DEBTOR'S WEEKLY DISPOSABLE EARNINGS CANNOT BE REDUCED BELOW THE AMOUNT ARRIVED AT BY MULTIPLYING THIRTY (30) TIMES THE CURRENT FEDERAL

MINIMUM WAGE (, PER HOUR), OR (), UNDER THIS INCOME EXECUTION.

- D. IF DEDUCTIONS ARE BEING MADE FROM A JUDGMENT DEBTOR'S EARNINGS UNDER ANY ORDERS FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES, AND THOSE DEDUCTIONS EQUAL OR EXCEED TWENTY-FIVE PERCENT (25%) OF THE JUDGMENT DEBTOR'S DISPOSABLE EARNINGS, NO DEDUCTION CAN BE MADE FROM THE JUDGMENT DEBTOR'S EARNINGS UNDER THIS INCOME EXECUTION.
- E. IF DEDUCTIONS ARE BEING MADE FROM A JUDGMENT DEBTOR'S EARNINGS UNDER ANY ORDERS FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES, AND THOSE DEDUCTIONS ARE LESS THAN TWENTY-FIVE PERCENT (25%) OF THE JUDGMENT DEBTOR'S DISPOSABLE EARNINGS, DEDUCTIONS MAY BE MADE FROM THE JUDGMENT DEBTOR'S EARNINGS UNDER THIS INCOME EXECUTION. HOWEVER, THE AMOUNT ARRIVED AT BY ADDING THE DEDUCTIONS FROM EARNINGS MADE UNDER THIS EXECUTION TO THE DEDUCTIONS MADE FROM EARNINGS UNDER ANY ORDERS FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES CANNOT EXCEED TWENTY-FIVE PERCENT (25%) OF THE JUDGMENT DEBTOR'S DISPOSABLE EARNINGS.

NOTE: NOTHING IN THIS NOTICE LIMITS THE PROPORTION OR AMOUNT WHICH MAY BE DEDUCTED UNDER ANY ORDER FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES.

II. EXPLANATION OF LIMITATIONS DEFINITIONS:

DISPOSABLE EARNINGS

DISPOSABLE EARNINGS ARE THAT PART OF AN INDIVIDUAL'S EARNINGS LEFT AFTER DEDUCTING THOSE AMOUNTS THAT ARE REQUIRED BY LAW TO BE WITHHELD (FOR EXAMPLE, TAXES, SOCIAL SECURITY, AND UNEMPLOYMENT INSURANCE, BUT NOT DEDUCTIONS FOR UNION DUES, INSURANCE PLANS, ETC.).

GROSS INCOME

GROSS INCOME IS SALARY, WAGES OR OTHER INCOME, INCLUDING ANY AND ALL OVERTIME EARNINGS, COMMISSIONS, AND INCOME FROM TRUSTS, BEFORE ANY DEDUCTIONS ARE MADE FROM SUCH INCOME.

ILLUSTRATIONS REGARDING EARNINGS:

IF DISPOSABLE EARNINGS IS: AMOUNT TO PAY OR DEDUCT

FROM
EARNINGS UNDER THIS INCOME
EXECUTION IS:

- (a) 30 TIMES FEDERAL MINIMUM WAGE () OR LESS NO PAYMENT OR DEDUCTION ALLOWED
- (b) MORE THAN 30 TIMES FEDERAL MINIMUM WAGE () AND LESS THAN 40 TIMES FEDERAL MINIMUM WAGE () OF GROSS EARNINGS THE LESSER OF: THE EXCESS OVER 30 TIMES THE FEDERAL MINIMUM WAGE () IN DISPOSABLE EARNINGS, or 10%
- (c) 40 TIMES THE FEDERAL MINIMUM WAGE () OR MORE OF GROSS EARNINGS. THE LESSER OF: 25% OF DISPOSABLE EARNINGS OR 10%

III. NOTICE: YOU MAY BE ABLE TO CHALLENGE THIS INCOME EXECUTION THROUGH THE PROCEDURES PROVIDED IN CPLR § 5231 (i) AND CPLR § 5240

IF YOU THINK THAT THE AMOUNT OF YOUR INCOME BEING DEDUCTED UNDER THIS INCOME EXECUTION EXCEEDS THE AMOUNT PERMITTED BY STATE OR FEDERAL LAW, YOU SHOULD ACT PROMPTLY BECAUSE THE MONEY WILL BE APPLIED TO THE JUDGMENT. IF YOU CLAIM THAT THE AMOUNT OF YOUR INCOME BEING DEDUCTED UNDER THIS INCOME EXECUTION EXCEEDS THE AMOUNT PERMITTED BY STATE OR FEDERAL LAW, YOU SHOULD CONTACT YOUR EMPLOYER OR OTHER PERSON PAYING YOUR INCOME. FURTHER, YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. NEW YORK STATE LAW PROVIDES TWO PROCEDURES THROUGH WHICH AN INCOME EXECUTION CAN BE CHALLENGED:

CPLR § 5231(i) MODIFICATION

AT ANY TIME, THE JUDGMENT DEBTOR MAY MAKE A MOTION TO A COURT FOR AN ORDER MODIFYING AN INCOME EXECUTION.

CPLR § 5240 MODIFICATION OR PROTECTIVE ORDER: SUPERVISION OF ENFORCEMENT

AT ANY TIME, THE JUDGMENT DEBTOR MAY MAKE A MOTION TO A COURT FOR AN ORDER DENYING, LIMITING, CONDITIONING, REGULATING, EXTENDING OR MODIFYING THE USE OF ANY POST-JUDGMENT ENFORCEMENT PROCEDURE, INCLUDING THE USE OF INCOME EXECUTIONS.

(h) Levy upon money payable by municipal corporation or the state. The levy of an income execution served upon a municipal or public benefit corporation, or board of education, shall be effective fifteen days after such service. Such an execution shall specify the title or position of the judgment debtor and the bureau, office, department or subdivision in which he is employed and the municipal or public benefit corporation, or board of education, shall be entitled to a fee of two dollars upon being served. A levy upon money payable directly by a department of the state, or by an institution under its jurisdiction, shall be made by serving the income execution upon the head of the department, or upon a person designated by him, at the office of the department in

Albany; a levy upon money payable directly upon the state comptroller's warrant, or directly by a state board, commission, body or agency which is not within any department of the state, shall be made by serving the income execution upon the state department of audit and control at its office in Albany. Service at the office of a department of the state in Albany may be made by the sheriff of any county by registered or certified mail, return receipt requested.

(i) Modification. At any time, the judgment creditor or the judgment debtor may move, upon such notice as the court may direct, for an order modifying an income execution.

(j) Priority; delivery to another sheriff. Two or more income executions issued against the same judgment debtor, specifying the same person from whom the money is received and delivered to the same or different enforcement officers shall be satisfied out of that money in the order in which the executions are delivered to an officer authorized to levy in the county, town or city in which the debtor resides or, where the judgment debtor is a non-resident, the county, town or city in which he is employed. If an income execution delivered to a sheriff is returned unsatisfied in whole or in part because the sheriff to whom it was delivered is unable to find within the county the person from whom the judgment debtor is receiving or will receive money, the execution may be delivered to the sheriff of any county in which such person may be found. The priority of an income execution delivered to a sheriff within twenty days after its return by each previous sheriff shall be determined by the time of delivery to the first sheriff.

(k) Accounting by sheriff. It shall be the duty of the sheriff to whom such income execution shall be delivered, from time to time and at least once every ninety days from the time a levy shall be made thereunder, to account for and pay over to the person entitled thereto all monies collected thereon, less his lawful fees and expenses for collecting the same.

§ 5232. Levy upon personal property

(a) Levy by service of execution. The sheriff or support collection unit designated by the appropriate social services district shall levy upon any interest of the judgment debtor or obligor in personal property not capable of delivery, or upon any debt owed to the judgment debtor or obligor, by serving a copy of the execution upon the garnishee, in the same manner as a summons, except that such service shall not be made by delivery to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318. In the event the garnishee is the state of New York, such levy shall be made in the same manner as an income execution pursuant to section 5231 of this article. A levy by service of the execution is effective only if, at the time of service, the person served owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property not capable of delivery in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in a notice which shall be served with the execution that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property not capable of delivery in the possession or custody of the person served. All property not capable of delivery in which the judgment debtor or obligor is known or believed to have an interest then in or thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due or thereafter coming due to the judgment debtor or obligor, shall be subject to the levy. The person served with the execution shall forthwith transfer all such property, and pay all such debts upon maturity, to the sheriff or to the support collection unit and execute any document necessary to effect the transfer or payment. After such transfer or payment, property coming into the possession or custody of the garnishee, or debt incurred by him, or her shall not be subject to the levy. Until such transfer or payment is made, or until the expiration of ninety days after the service of the execution upon him or her, or of such further time as is provided by any order of the court served upon him or her, whichever event first occurs, the garnishee is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit, except upon direction of the sheriff or the support collection unit or pursuant to an order of the court. At the expiration of ninety days after a levy is made by service of the execution, or of such further time as the court, upon motion of the judgment creditor or support collection unit has provided, the levy shall be void except as to property or debts which have been transferred or paid to the sheriff or to the support collection unit or as to which a proceeding under sections 5225 or 5227 has been brought. A judgment creditor who, or support collection unit which, has specified personal property or debt to be levied upon in a notice served with an execution shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained by reason of the levy.

(b) Levy by seizure. The sheriff or support collection unit of the appropriate social services district shall levy upon any interest of the judgment debtor in personal property capable of delivery by taking the property into custody without interfering with the lawful possession of pledgees and lessees. The sheriff or support collection unit shall forthwith serve a copy of the execution in the manner prescribed by subdivision (a) upon the person from whose possession or custody the property was taken.

(c) Notice to judgment debtor or obligor. Where an execution does not state that a notice in the form presented by subdivision (e) of section fifty-two hundred twenty-two of this chapter has been duly served upon the judgment debtor or obligor within a year, the sheriff or support collection unit shall, not later than four days after service of the execution upon any garnishee, mail by first class mail, or personally deliver, to each judgment debtor or obligor who is a natural person, a copy of the execution together with such notice. The sheriff or support collection unit shall specify on the notice to judgment debtor or obligor the name and address of the judgment creditor or the judgment creditor's attorney or the support collection unit. The notice shall be mailed to the judgment debtor or obligor at his or her residence address; and in the event such mailing is returned as undeliverable by the post office, or if the residence address of the judgment debtor or obligor is unknown, then to the judgment debtor or obligor in care of the place of employment of the judgment debtor or obligor if known, in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by the return address or otherwise, that the communication is from a sheriff or support collection unit or concerns a debt; or if neither the residence nor the place of employment of the judgment debtor or obligor is known, then to the judgment debtor or obligor at any other known address.

(d) For the purposes of this section "obligor" shall mean an individual other than a judgment debtor obligated to pay support, alimony or maintenance pursuant to an order of a court of competent jurisdiction who has been found to be in "default" of such order as such term is defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article and the establishment of such default has been subject to the procedures established for the determination of a "mistake of fact" for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article, except that for the purposes of this section only, a default shall not be founded upon retroactive child support obligations as defined in paragraph (c) of subdivision one of section four hundred forty and subdivision one of section two hundred forty, and paragraph b of subdivision nine of section two hundred thirty-six of the domestic relations law.

(e) Notwithstanding the provisions of subdivision (a) of this section, if direct deposit or electronic payments reasonably identifiable as statutorily exempt payments as defined in paragraph two of subdivision (l) of section fifty-two hundred five of this article were made to the judgment debtor's account during the forty-five day period preceding the date that the execution notice was served on the garnishee banking institution, then a garnishee banking institution shall not execute, levy, attach, garnish or otherwise restrain or encumber two thousand five hundred dollars in the judgment debtor's account. Notwithstanding the provisions of subdivision (a) of this section, an execution shall not apply to an amount equal to or less than the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable (as published on the websites of the United States department of labor and the state department of labor) except such part thereof as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents. This amount shall be equal to seventeen hundred sixteen dollars on the effective date of this subdivision, and shall rise to seventeen hundred forty dollars on July twenty-fourth, two thousand nine, and shall rise thereafter in tandem with the minimum wage. Nothing in this subsection shall be construed to limit a banking institution's right or obligation to restrain, remove or execute upon such funds from the judgment debtor's account if

required by 42 U.S.C. § 659 or 38 U.S.C. § 5301 or to enforce a child support, spousal support, alimony or maintenance obligation or by a court order. Nothing in this subdivision shall alter the exempt status of funds that are protected from execution, levy, attachment, garnishment, or other legal process, under section fifty-two hundred five of this article or under any other provision of state or federal law, or affect the right of a judgment debtor to claim such exemption.

(f) Fee for banking institution's costs in processing a levy by service of execution when account contains only exempt, direct deposit or electronic payments. In the event that a banking institution cannot lawfully garnish or execute upon on a judgment debtor's banking institution account or funds are garnished or executed upon in violation of any section of this chapter, the banking institution shall charge no fee to the judgment debtor regardless of any terms of agreement, or schedule of fees, or other contract between the judgment debtor and the banking institution.

(g) Where a levy by execution pursuant to this section is made against a natural person's account at a banking institution, the sheriff or support collection unit shall serve the banking institution with the exemption notice and two exemption claim forms prescribed in subdivision (b) of section fifty-two hundred twenty-two-a of this article. The notice and forms must be served upon the banking institution simultaneously with the execution and section fifty-two hundred twenty-two-a of this article shall apply, and all procedures stated therein must be followed. The banking institution shall not transfer the funds in the account to the sheriff or support collection unit for at least twenty-seven days. If, after thirty days, the banking institution has not received an exemption claim form from the judgment debtor, or a court order directing otherwise, it may thereafter transfer the funds to the sheriff or support collection unit.

(h) The provisions of subdivisions (e), (f) and (g) of this section do not apply when the state of New York, or any of its agencies or municipal corporations is the judgment creditor, or if the debt enforced is for child support, spousal support, maintenance or alimony provided that in those instances the execution contains a legend at the top thereof, above the caption, in sixteen point bold type with the following language: "The judgment creditor is the state of New York, or any of its agencies or municipal corporations, AND/OR the debt enforced is for child support, spousal support, maintenance or alimony."

§ 5233. Sale of personal property

(a) Public auction. The interest of the judgment debtor in personal property obtained by a sheriff pursuant to execution or order, other than legal tender of the United States, shall be sold by the sheriff at public auction at such time and place and as a unit or in such lots, or combination thereof, as in his judgment will bring the highest price, but no sale may be made to that sheriff or to his deputy or undersheriff. The property shall be present and within the view of those attending the sale unless otherwise ordered by the court.

(b) Public notice. A printed notice of the time and place of the sale shall be posted at least six days before the sale in three public places in the town or city in which the sale is to be held, provided however, in the city of New York, in lieu of posting such notice may be advertised in the auction columns of any morning newspaper published daily and Sunday in such city an edition of which appears on the newsstands the previous night and has a circulation of not less than three hundred thousand. An omission to so post or advertise notice, or the defacing or removal of a posted notice, does not affect the title of a purchaser without notice of the omission or offense.

(c) Order for immediate sale or disposition. The court may direct immediate sale or other disposition of property with or without notice if the urgency of the case requires.

(d) Unsaleable material. If property seized by the sheriff is considered by him to be material which, by law, may not be sold, he shall apply to the court for a determination whether the property can legally be sold. Reasonable notice of such application shall also be given to the owner of such property. If the court decides the property may not be legally sold, it shall order appropriate disposition of the property which may include its destruction.

§ 5234. Distribution of proceeds of personal property; priorities

(a) Distribution of proceeds of personal property. After deduction for and payment of fees, expenses and any taxes levied upon sale, delivery, transfer or payment, the proceeds of personal property or debt acquired by a receiver or a sheriff or other officer authorized to enforce the judgment shall be distributed to the judgment creditor and any excess shall be paid over to the judgment debtor. No distribution of proceeds shall be made until fifteen days after service of the execution except upon order of the court.

(b) Priority among execution creditors. Where two or more executions or orders of attachment are issued against the same judgment debtor or obligor and delivered to the same enforcement officer or issued by the support collection unit designated by the appropriate social services district, they shall be satisfied out of the proceeds of personal property or debt levied upon by the officer or by the support collection unit in the order in which they were delivered, such executions for child support shall have priority over any other assignment, levy or process. Where two or more executions or orders of attachment are issued against the same judgment debtor or obligor and delivered to different enforcement officers, and personal property or debt is levied upon within the jurisdiction of all of the officers, the proceeds shall be first applied in satisfaction of the execution or order of attachment delivered to the officer who levied, and thereafter shall be applied in satisfaction of the executions or orders of attachment delivered to those of the other officers who, before the proceeds are distributed, make a demand upon the officer who levied, in the order of such demands, except that such executions for child support shall have priority over any other assignment, levy or process. Where there is more than one past-due child support order, the proceeds shall be applied to the orders in proportion to the amount each order's claim bears to the combined total. Nothing herein shall be deemed to defeat or impair the rights of any secured party as such term is defined in paragraph seventy-two of subsection (a) of section 9-102 of the uniform commercial code. An execution or order of attachment returned by an officer before a levy or delivered to him after the proceeds of the levy have been distributed shall not be satisfied out of those proceeds.

(c) Priority of other judgment creditors. Where personal property or debt has been ordered delivered, transferred or paid, or a receiver thereof has been appointed by order, or a receivership has been extended thereto by order, and the order is filed before the property or debt is levied upon, the rights of the judgment creditor who secured the order are superior to those of the judgment creditor entitled to the proceeds of the levy. Where two or more such orders affecting the same interest in personal property or debt are filed, the proceeds of the property or debt shall be applied in the order of filing. Where delivery, transfer, or payment to the judgment creditor, a receiver, or a sheriff or other officer is not completed within sixty days after an order is filed, the judgment creditor who secured the order is divested of priority, unless otherwise specified in the order or in an extension order filed within the sixty days.

§ 5235. Levy upon real property

After the expiration of ten years after the filing of the judgment-roll, the sheriff shall levy upon any interest of the judgment debtor in real property, pursuant to an execution other than one issued upon a judgment for any part of a mortgage debt upon the property, by filing with the clerk of the county in which the property is located a notice of levy describing the judgment, the execution and the property. The clerk shall record and index the notice against the name of the judgment debtor, or against the property, in the same books, and in the same manner as a notice of the pendency of an action.

§ 5236. Sale of real property

(a) Time of sale; public auction. Between the fifty-sixth and the sixty-third day after the first publication of a copy of the notice of sale, unless the time is extended by order or the sale postponed by the sheriff, the interest of the judgment debtor in real property which has been levied upon under an execution delivered to the sheriff or which was subject to the lien of the judgment at the time of such delivery shall be sold by the sheriff pursuant to the execution at public auction at such time and place within the county where the real property is situated and as a unit or in such parcels, or combination thereof, as in his judgment will bring the highest price, but no sale may be made to that sheriff or to his deputy or undersheriff. If the property is situated in more than one county, it may be sold in a county in which any part is situated, unless the court orders otherwise.

(b) Sale of mortgaged property. Real property mortgaged shall not be sold pursuant to an execution issued upon a judgment recovered for all or part of the mortgage debt.

(c) Notice of sale. A printed notice of the time and place of the sale containing a description of the property to be sold shall be posted at least fifty-six days before the sale in three public places in the town or city in which the property is located, and, if the sale is to be held in another town or city, in three public places therein. Service by the sheriff of a copy of said notice on the judgment debtor shall be made as provided in section 308. A list containing the name and address of the judgment debtor and of every judgment creditor whose judgment was a lien on the real property to be sold and of every person who had of record any interest in or lien on such property forty-five days prior to the day fixed for the sale shall be furnished the sheriff by the judgment creditor, and each person on the list shall be served by the sheriff with a copy of the notice by personal delivery or by registered or certified mail, return receipt requested, at least thirty days prior to the day fixed for the sale. A copy of the notice shall be published at least once in each of four periods of fourteen successive days, the first of which periods may be measured from any day between the fifty-sixth and sixty-third days, preceding the time fixed for the sale in a newspaper published in the county in which the property is located or, if there is none, in a newspaper published in an adjoining county. An omission to give any notice required by this or the following subdivision, or the defacing or removal of a notice posted pursuant to either, does not affect the title of a purchaser without notice of the omission or offense.

(d) Notice of postponement of sale. Any person may, in writing served on the sheriff either by personal delivery or by registered or certified mail, return receipt requested, request that the sheriff notify him in the event that a scheduled sale is postponed. Such writing shall contain the person's name and mailing address. If the sale is for any reason postponed, notice of the postponed date need be given only to:

1. those whose requests, made as above provided, have been received by the sheriff at least five days prior to the postponed date,
2. those who appeared at the time and place previously appointed for the sale, and
3. the judgment debtor at his last known address.

The notice may be served either by personal delivery or by registered or certified mail, return receipt requested. Unless the court shall otherwise direct, it need not be posted or published.

(e) Effect of notice as against judgment creditors. A judgment creditor duly notified pursuant to subdivision (c) or (d) who fails to deliver an execution to the sheriff prior to the sale shall have no further lien on the property and, except as against the judgment debtor, no further interest in the proceeds of the sale.

(f) Conveyance; proof of notice. Within ten days after the sale, the sheriff shall execute and deliver to the purchaser proofs of publication, service and posting of the notice of sale, and a deed which shall convey the right, title and interest sold. Such proofs may be filed and recorded in the office of the clerk of the county where the property is located.

(g) Disposition of proceeds of sale. After deduction for and payment of fees, expenses and any taxes levied on the sale, transfer or delivery, the sheriff making a sale of real property pursuant to an execution shall, unless the court otherwise directs,

1. distribute the proceeds to the judgment creditors who have delivered executions against the judgment debtor to the sheriff before the sale, which executions have not been returned, in the order in which their judgments have priority, and
2. pay over any excess to the judgment debtor.

§ 5237. Failure of title to property sold

The purchaser of property sold by a sheriff pursuant to execution or order may recover the purchase money from the judgment creditors who received the proceeds if the property is recovered from such purchaser in consequence of an irregularity in the sale or a vacatur, reversal or setting aside of the judgment upon which the execution or order was based. If a judgment for the purchase money is so recovered against a judgment creditor in consequence of an irregularity in the sale, such judgment creditor may enforce his judgment as if no levy or sale had been made, and, for that purpose, he may move without notice for an order restoring any lien or priority or amending any docket entry affected by the sale.

§ 5238. Directions to the sheriff

Upon motion of any party, on notice to the sheriff and all other parties, the court may direct the sheriff to dispose of, account for, assign, return or release all or any part of any property or debt, or the proceeds thereof, or to file additional returns, subject to the payment of the sheriff's fees and expenses. As far as practicable, the court shall direct that notice of the motion be given to any other judgment creditors, at the addresses shown on the judgment docket and to any persons who have secured orders of attachment affecting any property or debt, or the proceeds thereof, sought to be returned or released.

§ 5239. Proceeding to determine adverse claims

Prior to the application of property or debt by a sheriff or receiver to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt. Service of process in such a proceeding shall be made by service of a notice of petition upon the respondent, the sheriff or receiver, and such other person as the court directs, in the same manner as a notice of motion. The proceeding may be commenced in the county where the property was levied upon, or in a court or county specified in subdivision (a) of section 5221. The court may vacate the execution or order, void the levy, direct the disposition of the property or debt, or direct that damages be awarded. Where there appear to be disputed questions of fact, the court shall order a separate trial, indicating the person who shall have possession of the property pending a decision and the undertaking, if any, which such person shall give. If the court determines that any claim asserted was fraudulent, it may require the claimant to pay to any party adversely affected thereby the reasonable expenses incurred by such party in the proceeding, including reasonable attorneys' fees, and any other damages suffered by reason of the claim. The court may permit any interested person to intervene in the proceeding.

§ 5240. Modification or protective order; supervision of enforcement

The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure. Section 3104 is applicable to procedures under this article.

§ 5241. Income execution for support enforcement

(a) Definitions. As used in this section and in section fifty-two hundred forty-two of this chapter, the following terms shall have the following meanings:

1. "Order of support" means any temporary or final order, judgment, agreement or stipulation incorporated by reference in such judgment or decree in a matrimonial action or family court proceeding, or any foreign support order, judgment or decree, registered pursuant to article five-B of the family court act which directs the payment of alimony, maintenance, support or child support.
2. "Debtor" means any person directed to make payments by an order of support.
3. "Creditor" means any person entitled to enforce an order of support, including a support collection unit.
4. "Employer" means any employer, future employer, former employer, union or employees' organization.
5. "Income payor" includes:
 - (i) the auditor, comptroller, trustee or disbursing officer of any pension fund, benefit program, policy of insurance or annuity;
 - (ii) the state of New York or any political subdivision thereof, or the United States; and
 - (iii) any person, corporation, trustee, unincorporated business or association, partnership, financial institution, bank, savings and loan association, credit union, stock purchase plan, stock option plan, profit sharing plan, stock broker, commodities broker, bond broker, real estate broker, insurance company, entity or institution.
6. "Income" includes any earned, unearned, taxable or non-taxable income, benefits, or periodic or lump sum payment due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers' compensation, disability benefits, unemployment insurance benefits, payments pursuant to a public or private pension or retirement program, federal social security benefits as defined in 42 U.S.C. section 662(f) (2), and interest, but excluding public assistance benefits paid pursuant to the social services law and federal supplemental security income.
7. "Default" means the failure of a debtor to remit to a creditor three payments on the date due in the full amount directed by the order of support, or the accumulation of arrears equal to or greater than the amount directed to be paid for one month, whichever first occurs.
8. "Mistake of fact" means an error in the amount of current support or arrears or in the identity of the debtor or that the order of support does not exist or has been vacated.

9. "Support collection unit" means any support collection unit established by a social services district pursuant to the provisions of section one hundred eleven-h of the social services law.

10. "Date of withholding" means the date on which the income would otherwise have been paid or made available to the debtor were it not withheld by the employer or income payor.

11. "Health insurance benefits" means any medical, dental, optical and prescription drugs and health care services or other health care benefits which may be provided for dependents through an employer or organization, including such employers or organizations which are self-insured.

12. "Business day" means a day on which state offices are open for regular business.

(b) Issuance.

(1) When a debtor is in default, an execution for support enforcement may be issued by the support collection unit, or by the sheriff, the clerk of court or the attorney for the creditor as an officer of the court. Where a debtor is receiving or will receive income, an execution for deductions therefrom in amounts not to exceed the limits set forth in subdivision (g) of this section may be served upon an employer or income payor after notice to the debtor. The amount of the deductions to be withheld shall be sufficient to ensure compliance with the direction in the order of support, and shall include an additional amount to be applied to the reduction of arrears. The creditor may amend the execution before or after service upon the employer or income payor to reflect additional arrears or payments made by the debtor after notice pursuant to subdivision (d) of this section, or to conform the execution to the facts found upon a determination made pursuant to subdivision (e) of this section.

(2)

(i) Where the court orders the debtor to provide health insurance benefits for specified dependents, an execution for medical support enforcement may, except as provided for herein, be issued by the support collection unit, or by the sheriff, the clerk of court or the attorney for the creditor as an officer of the court; provided, however, that when the court issues an order of child support or combined child and spousal support on behalf of persons other than those in receipt of public assistance or in receipt of services pursuant to section one hundred eleven-g of the social services law, such medical execution shall be in the form of a separate qualified medical child support order as provided by subdivision (j) of section four hundred sixteen of the family court act and paragraph (h) of subdivision one of section two hundred forty of the domestic relations law. Such execution for medical support enforcement may require the debtor's employer, organization or group health plan administrator to purchase on behalf of the debtor and the debtor's dependents such available health insurance benefits. Such execution shall direct the employer, organization or group health plan administrator to provide to the dependents for whom such benefits are required to be provided or such dependents' custodial parent or legal guardian or social services district on behalf of

persons applying for or in receipt of public assistance any identification cards and benefit claim forms and to withhold from the debtor's income the employee's share of the cost of such health insurance benefits, and to provide written confirmation of such enrollment indicating the date such benefits were or become available or that such benefits are not available and the reasons therefor to the issuer of the execution. An execution for medical support enforcement shall not require a debtor's employer, organization or group health plan administrator to purchase or otherwise acquire health insurance or health insurance benefits that would not otherwise be available to the debtor by reason of his or her employment or membership. Nothing herein shall be deemed to obligate or otherwise hold any employer, organization or group health plan administrator responsible for an option exercised by the debtor in selecting medical insurance coverage by an employee or member.

- (ii). Where the child support order requires the debtor to provide health insurance benefits for specified dependents, and where the debtor provides such coverage and then changes employment, and the new employer provides health care coverage, an amended execution for medical support enforcement may be issued by the support collection unit, or by the sheriff, the clerk of the court or the attorney for the creditor as an officer of the court without any return to court. The issuance of the amended execution shall transfer notice of the requirements of the order and the execution to the new employer, organization or group health plan administrator, and shall have the same effect as the original execution for medical support issued pursuant to this section unless the debtor contests the execution.

(3) Any inconsistent provisions of this title or other law notwithstanding, in any case in which a parent is required by a court order to provide health coverage for a child and the parent is eligible for health insurance benefits as defined in this section through an employer or organization, including those which are self-insured, doing business in the state, such employer or organization must, in addition to implementing the provisions of a medical support execution:

- (i) permit such parent to immediately enroll under such health insurance benefit coverage any such dependent who is otherwise eligible for such coverage without regard to any seasonal enrollment restrictions;
- (ii) if such a parent is enrolled but fails to make application to obtain coverage of such dependent child, immediately enroll such dependent child under such health benefit coverage upon application by such child's other parent or by the office of temporary and disability assistance or social services district furnishing medical assistance to such child, and
- (iii) not disenroll, or eliminate coverage of, such a child unless:
 - (A) the employer or organization is provided with satisfactory written evidence that such court order is no longer in effect, or the child is or will be enrolled in comparable health coverage through another insurer which will take effect not later than the effective date of such disenrollment, or

(B) such employer or organization has eliminated health insurance coverage for all similarly situated employees.

(c) Execution for support enforcement; form.

(1) The income execution shall contain the caption of the order of support, and specify the date that the order of support was entered, the court in which it was entered, the amount of the periodic payments directed, the amount of arrears, the nature of the default and the names of the debtor and creditor. In addition, the income execution shall include:

- (i) the name and address of the employer or income payor from whom the debtor is receiving or will receive income;
- (ii) the amount of the deductions to be made therefrom on account of current support, and the amount to be applied to the reduction of arrears;
- (iii) a notice that deductions will apply to current and subsequent income;
- (iv) a notice that the income execution will be served upon any current or subsequent employer or income payor unless a mistake of fact is shown within fifteen days, a notice of the manner in which a mistake of fact may be asserted, and a notice that, if the debtor claims a mistake of fact, a determination will be made within forty-five days after notice to the debtor as provided in subdivision (d) of this section, and that the debtor will receive written notice whether the income execution will be served and of the time that deductions will begin;
- (v) a notice that the employer or income payor must commence deductions no later than the first pay period that occurs after fourteen days following the service of the income execution and that payment must be remitted within seven business days of the date that the debtor paid;
- (vi) a notice that the income execution is binding until further notice; (vii) a notice of the substance of the provisions of section fifty-two hundred fifty-two of this chapter and that a violation thereof is punishable as a contempt of court by fine or imprisonment or both;
- (viii) a notice of the limitations upon deductions from wages set forth in subdivision (g) of this section;
- (ix) a notice that an employer must notify the issuer promptly when the debtor terminates employment and provide the debtor's last address and the name and address of the new employer, if known;
- (x) a notice that when an employer receives an income withholding instrument issued by another state, the employer shall apply the income withholding law of the state of the debtor's principal place of employment in determining:
 - (A) the employer's fee for processing income withholding;
 - (B) the maximum amount permitted to be withheld from the debtor's income;

- (C) the time periods within which the employer must implement the income withholding and forward the child support payment;
 - (D) the priorities for withholding and allocating income withheld for multiple child support creditors; and
 - (E) any withholding terms or conditions not specified in the withholding instrument; and.
- (xi) a notice that an employer who complies with an income withholding notice that is regular on its face shall not be subject to civil liability to any individual or agency for conduct in compliance with the notice.

(2) The medical support execution shall contain the caption of the order of support and specify the date that the order of support was entered and the court in which it was entered. Such execution shall include the name and address of the employer or organization and shall include: (i) a notice that the debtor has been ordered by the court to enroll the dependents in any available health insurance benefits and to maintain such coverage for such dependents as long as such benefits remain available; (ii) a notice inquiring of the employer or organization as to whether such health insurance benefits are presently in effect for the eligible dependents named in the execution, the date such benefits were or become available, or that such benefits are not available and the reasons therefor and directing that the response to such inquiry immediately be forwarded to the issuer of such execution; (iii) a statement directing the employer or organization to purchase on behalf of the debtor any available health insurance benefits to be made available to the debtor's dependents as directed by the execution, including the enrollment of such eligible dependents in such benefit plans and the provision to the dependents or such dependents' custodial parent or legal guardian or social services district on behalf of persons applying for or in receipt of public assistance of any identification cards and benefit claim forms; (iv) a statement directing the employer or organization to deduct from the debtor's income such amount which is the debtor's share of the premium, if any, for such health insurance benefits for such dependents who are otherwise eligible for such coverage without regard to any seasonal enrollment restrictions; (v) notice that the debtor's employer must notify the issuer promptly at any time the debtor terminates or changes such health insurance benefits; (vi) a statement that the debtor's employer or organization shall not be required to purchase or otherwise acquire health insurance or health insurance benefits for such dependents that would not otherwise be available to the debtor by reason of his employment or membership; (vii) a statement that failure to enroll the eligible dependents in such health insurance plan or benefits or failure to deduct from the debtor's income the debtor's share of the premium for such plan or benefits shall make such employer or organization jointly and severally liable for all medical expenses incurred on the behalf of the debtor's dependents named in the execution while such dependents are not so enrolled to the extent of the health insurance benefits that should have been provided under the execution; (viii) the name and last known mailing address of the debtor and the name and mailing address of the dependents; provided however, that the name and mailing address of a social services official may be substituted on behalf of such dependents; (ix) a reasonable description of the type of coverage to be provided to each dependent, or the manner in which such type of coverage is to be determined; (x) the period to which such execution applies; and.

(xi) a statement that the debtor's employer or organization shall not be required to provide any type or form of benefit or option not otherwise provided under the group health plan except to the extent necessary to meet the requirements of a law relating to medical child support described in section one thousand three hundred ninety-six-g-1 of title forty-two of the United States Code.

(d) Notice to debtor. The creditor shall serve a copy of the execution upon the debtor by regular mail to the debtor at his last known residence or such other place where he is likely to receive notice, or in the same manner as a summons may be served.

(e) Determination of mistake of fact. Where the execution has been issued by the support collection unit, the debtor may assert a mistake of fact and shall have an opportunity to make a submission in support of the objection within fifteen days from service of a copy thereof. Thereafter, the agency shall determine the merits of the objection, and shall notify the debtor of its determination within forty-five days after notice to the debtor as provided in subdivision (d) of this section. If the objection is disallowed, the debtor shall be notified that the income execution will be served on the employer or income payor, and of the time that deductions will begin. Where the income execution has been issued by an attorney as officer of the court, or by the sheriff, or by the clerk of the court, the debtor may assert a mistake of fact within fifteen days from service of a copy thereof by application to the supreme court or to the family court having jurisdiction in accordance with section four hundred sixty-one of the family court act. If application is made to the family court, such application shall be by petition on notice to the creditor and it shall be heard and determined in accordance with the provisions of section four hundred thirty-nine of the family court act, and a determination thereof shall be made, and the debtor notified thereof within forty-five days of the application. If application is made to the supreme court such application shall be by order to show cause or motion on notice to the creditor in the action in which the order or judgment sought to be enforced was entered and a determination thereof shall be made, and the debtor notified thereof within forty-five days of the application.

(f) Levy. If a debtor fails to show mistake of fact within fifteen days, or after a determination pursuant to subdivision (e) of this section has been made, or if the creditor is unable to serve the execution upon the debtor, the creditor may levy upon the income that the debtor is receiving or will receive by serving the execution upon the employer or income payor personally in the same manner as a summons or by regular mail, except that such service shall not be made by delivery to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318.

(g) Deduction from income.

(1) An employer or income payor served with an income execution shall commence deductions from income due or thereafter due to the debtor no later than the first pay period that occurs fourteen days after service of the execution, and shall remit payments to the creditor within seven business days of the date that the debtor is paid. Each payment remitted by an employer or income payor shall include, in addition to the identity and social security number of the debtor, the date and amount of each withholding of the debtor's income included in the payment. If the money due to the debtor consists of salary or wages and his or her employment is terminated by resignation or dismissal at any time after service of the execution, the levy shall thereafter be ineffective, and the execution shall be returned, unless the debtor is reinstated or re-employed within ninety days after such termination. An employer must notify the issuer promptly when the debtor terminates employment and provide the debtor's last address and name and address of the new employer, if known. Where the

income is compensation paid or payable to the debtor for personal services, the amount of the deductions to be withheld shall not exceed the following:

(i) Where a debtor is currently supporting a spouse or dependent child other than the creditor, the amount of the deductions to be withheld shall not exceed fifty percent of the earnings of the debtor remaining after the deduction therefrom of any amounts required by law to be withheld ("disposable earnings"), except that if any part of such deduction is to be applied to the reduction of arrears which shall have accrued more than twelve weeks prior to the beginning of the week for which such earnings are payable, the amount of such deduction shall not exceed fifty-five percent of disposable earnings.

(ii) Where a debtor is not currently supporting a spouse or dependent child other than the creditor, the amount of the deductions to be withheld shall not exceed sixty percent of the earnings of the debtor remaining after the deduction therefrom of any amounts required by law to be withheld ("disposable earnings"), except that if any part of such deduction is to be applied to the reduction of arrears which shall have accrued more than twelve weeks prior to the beginning of the week for which such earnings are payable, the amount of such deduction shall not exceed sixty-five percent of disposable earnings.

(2)

(A) An employer or income payor served with an income execution in accordance with paragraph one of this subdivision shall be liable to the creditor for failure to deduct the amounts specified. The creditor may commence a proceeding against the employer or income payor for accrued deductions, together with interest and reasonable attorney's fees.

(B) An employer or income payor served with an income execution in accordance with paragraph one of this subdivision shall be liable to the creditor and the debtor for failure to remit any amounts which have been deducted as directed by the income execution. Either party may commence a proceeding against the employer or income payor for accrued deductions, together with interest and reasonable attorney's fees.

(C) The actions of the employer or income payor in deducting or failing to deduct amounts specified by an income execution shall not relieve the debtor of the underlying obligation of support.

(D) In addition to the remedies herein provided and as may be otherwise authorized by law, upon a finding by the family court that the employer or income payor failed to deduct or remit deductions as directed in the income execution, the court shall issue to the employer or income payor an order directing compliance and may direct the payment of a civil penalty not to exceed five hundred dollars for the first instance and one thousand dollars per instance for the second and subsequent instances of employer or income payor noncompliance. The penalty shall be paid to the creditor and may be enforced in the same manner as a civil judgment or in any other manner permitted by law.

(3) If an employer, organization or group health plan administrator is served with an execution for medical support enforcement, such employer, organization or group health plan administrator shall: (i) purchase on behalf of the debtor any health insurance benefits which may be made available to the debtor's dependents as ordered by the execution, including the immediate enrollment of such eligible dependents in such benefit plans; (ii) provide the dependents for whom such benefits are required, or a social services official substituted for such dependents, identification cards and benefit claim forms; (iii) commence deductions from income due or thereafter due to the debtor

of such amount which is the debtor's share of the premium, if any, for such health insurance benefits, provided, however, that such deduction when combined with deductions for support does not exceed the limitations set forth in paragraph one of this subdivision and is consistent with the priority provisions set forth in subdivision (h) of this section; and (iv) provide a confirmation of such enrollment indicating the date such benefits were or become available or that such benefits are not available and the reasons therefor to the issuer of the execution. Except as otherwise provided by law, nothing herein shall be deemed to obligate an employer or organization to maintain or continue an employee's or member's health insurance benefits.

(4) If such employer, organization or group health plan administrator shall fail to so enroll such eligible dependents or to deduct from the debtor's income the debtor's share of the premium, such employer, organization or group health plan administrator shall be jointly and severally liable for all medical expenses incurred on behalf of the debtor's dependents named in the execution while such dependents are not so enrolled to the extent of the insurance benefits that should have been provided under such execution. Except as otherwise provided by law, nothing herein shall be deemed to obligate an employer, organization or group health plan administrator to maintain or continue an employee's or member's health insurance benefits. A levy pursuant to this section or an income deduction order pursuant to section 5242 of this chapter shall take priority over any other assignment, levy or process. If an employer or income payor is served with more than one execution pursuant to this section, or with an execution pursuant to this section and also an order pursuant to section 5242 of this chapter, and if the combined total amount of the deductions to be withheld exceeds the limits set forth in subdivision (g) of this section, the employer or income payor shall withhold the maximum amount permitted thereby and pay to each creditor that proportion thereof which such creditor's claim bears to the combined total. Any additional deduction authorized by subdivision (g) of this section to be applied to the reduction of arrears shall be applied to such arrears in proportion to the amount of arrears due to each creditor. Deductions to satisfy support obligations, including any additional deductions authorized by subdivision (g) of this section, shall have priority over deductions for the debtor's share of health insurance premiums.

(h) Priority. A levy pursuant to this section or an income deduction order pursuant to section 5242 of this chapter shall take priority over any other assignment, levy or process. If an employer or income payor is served with more than one execution pursuant to this section, or with an execution pursuant to this section and also an order pursuant to section 5242 of this chapter, and if the combined total amount of the deductions to be withheld exceeds the limits set forth in subdivision (g) of this section, the employer or income payor shall withhold the maximum amount permitted thereby and pay to each creditor that proportion thereof which such creditor's claim bears to the combined total. Any additional deduction authorized by subdivision (g) of this section to be applied to the reduction of arrears shall be applied to such arrears in proportion to the amount of arrears due to each creditor. Deductions to satisfy current support obligations shall have priority over deductions for the debtor's share of health insurance premiums which shall have priority over any additional deduction authorized by subdivision (g) of this section..(i) Levy upon money payable by the state. A levy upon money payable directly by a department of the state, or by an institution under its jurisdiction, shall be made by serving the income execution upon the head of the department, or upon a person designated by him, at the office of the department in Albany; a levy upon money payable directly upon the state comptroller's warrant, or directly by a state board,

commission, body or agency which is not within any department of the state, shall be made by serving the execution upon the state department of audit and control at its office in Albany. Service at the office of a department or any agency or institution of the state in Albany may be made by registered or certified mail, return receipt requested.

§ 5242. Income deduction order for support enforcement

(a) Upon application of a creditor, for good cause shown, and upon such terms as justice may require, the court may correct any defect, irregularity, error or omission in an income execution for support enforcement issued pursuant to section 5241 of this article.

(b) Upon application of a creditor, for good cause shown, the court may enter an income deduction order for support enforcement. In determining good cause, the court may take into consideration evidence of the degree of such debtor's past financial responsibility, credit references, credit history, and any other matter the court considers relevant in determining the likelihood of payment in accordance with the order of support. Proof of default establishes a prima facie case against the debtor, which can be overcome only by proof of the debtor's inability to make the payments. Unless the prima facie case is overcome, the court shall enter an income deduction order for support enforcement pursuant to this section.

(c)

(1) When the court enters an order of support on behalf of persons other than those in receipt of public assistance or in receipt of services pursuant to section one hundred eleven-g of the social services law, or registers pursuant to article five-B of the family court act an order of support which has been issued by a foreign jurisdiction and which is not to be enforced pursuant to title six-A of article three of the social services law, where the court determines that the respondent earns wages that could be subject to an income deduction order, the court shall issue an income deduction order to obtain payment of the order at the same time it issues or registers the order. The court shall enter the income deduction order unless the court finds and sets forth in writing (i) the reasons that there is good cause not to require immediate income withholding; or (ii) that an agreement providing for an alternative arrangement has been reached between the parties. Such agreement may include a written agreement or an oral stipulation, made on the record, that results in a written order. For purposes of this subdivision, good cause shall mean substantial harm to the debtor. The absence of an arrearage or the mere issuance of an income deduction order shall not constitute good cause. When the court determines that there is good cause not to issue an income deduction order immediately or when the parties agree to an alternative arrangement as provided in this paragraph, the court shall state expressly in the order of support the basis for its decision. In entering the income deduction order, the court shall specify an amount to be withheld by the debtor's employer, which shall be sufficient to ensure compliance with the order of support and also shall include an additional amount to be applied to the reduction of arrears, if any, and shall specify the names, addresses, and social security numbers of the parties to the support proceeding and the mailing address of the unit within the state office of temporary and disability assistance designated to receive such deductions. The court shall transmit copies of such order to the parties and to such unit.

(2) An employer served with an income deduction order entered pursuant to this subdivision shall commence deductions from the income due or thereafter due to the debtor no later than the first pay period that occurs fourteen days after service of the income deduction order, and shall remit payments to the state office of temporary and disability assistance pursuant to subdivision fourteen of section one hundred eleven-b of the social services law within ten days of the date that the debtor is paid. Each payment remitted by the employer shall be made payable to the creditor named in the order, and shall include the names, addresses, and social security numbers of the debtor and the

creditor, and the date and the amount of each withholding of the debtor's income included in the payment. An employer shall be liable to the creditor for failure to deduct the amounts specified in the income deduction order, provided however that deduction by the employer of the amounts specified shall not relieve the debtor of the underlying obligation of support. If an employer shall fail to so pay the creditor, the creditor may commence a proceeding against the employer for accrued deductions, together with interest and reasonable attorney's fees. If the debtor's employment is terminated by resignation or dismissal at any time after service of the income deduction order, the order shall cease to have force and effect unless the debtor is reinstated or re-employed by the same employer. An employer must notify the creditor promptly when the debtor terminates employment and must provide the debtor's last address and the name and address of the debtor's new employer, if known. Where the income is compensation paid or payable to the debtor for personal services, the amount withheld by the employer shall not exceed the following:

(i) Where the debtor currently is supporting a spouse or dependent child other than the creditor's dependent child, the amount withheld shall not exceed fifty percent of the earnings of the debtor remaining after the deduction therefrom of any amounts required by law to be withheld ("disposable earnings"), except that if any part of the deduction is to be applied to the reduction of arrears which shall have accrued more than twelve weeks prior to the beginning of the week for which such earnings are payable, the amount withheld shall not exceed fifty-five percent of disposable earnings.

(ii) Where the debtor currently is not supporting a spouse or dependent child other than the creditor's dependent child, the amount withheld shall not exceed sixty percent of the earnings of the debtor remaining after the deduction therefrom of any amounts required by law to be withheld ("disposable earnings"), except that if any part of the deduction is to be applied to the reduction of arrears which shall have accrued more than twelve weeks prior to the beginning of the week for which such earnings are payable, the amount withheld shall not exceed sixty-five percent of disposable earnings.

(d) An order pursuant to this section shall take priority over any other assignment, levy or process. If an employer or income payor is served with more than one income deduction order pertaining to a single employee pursuant to this section, or with an order issued pursuant to this section and also an execution pursuant to section 5241 of this chapter, and if the combined total amount of the income to be withheld exceeds the limits set forth in subdivision (c) of this section, the employer or income payor shall withhold the maximum amount permitted thereby and pay to each creditor that proportion thereof which such creditor's claim bears to the combined total.

(e) An employer or income payor shall be liable to the creditor for failure to deduct the amounts specified, provided however that deduction of the amounts specified by the employer or income payor shall not relieve the debtor of the underlying obligation of support.

(f) A creditor shall not be required to issue process under section 5241 of this article prior to obtaining relief pursuant to this section.

(g) Where the court issues an income deduction order for support enforcement payable to the support collection unit, as defined in paragraph nine of subdivision (a) of section 5241 of this article, each payment remitted by an employer or income payor shall include, in addition to the identity and social security number of the debtor, the date and amount of each withholding of the debtor's income included in the payment..

§ 5250. Arrest of judgment debtor

Upon motion of the judgment creditor without notice, where it is shown that the judgment debtor is about to depart from the state, or keeps himself concealed therein, and that there is reason to believe that he has in his possession or custody property in which he has an interest, the court may issue a warrant directed to the sheriff of any county in which the judgment debtor may be located. The warrant shall command the sheriff to arrest the judgment debtor forthwith and bring him before the court. The sheriff shall serve a copy of the warrant and the papers upon which it was based upon the judgment debtor at the time he makes the arrest. When the judgment debtor is brought before the court, the court may order that he give an undertaking, in a sum to be fixed by the court, that he will attend before the court for examination and that he will obey the terms of any restraining notice contained in the order.

§ 5251. Disobedience of subpoena, restraining notice or order; false swearing; destroying notice of sale

Refusal or willful neglect of any person to obey a subpoena or restraining notice issued, or order granted, pursuant to this title; false swearing upon an examination or in answering written questions; and willful defacing or removal of a posted notice of sale before the time fixed for the sale, shall each be punishable as a contempt of court.

§ 5252. Discrimination against employees and prospective employees based upon wage assignment or income execution

1. No employer shall discharge, lay off, refuse to promote, or discipline an employee, or refuse to hire a prospective employee, because one or more wage assignments or income executions have been served upon such employer or a former employer against the employee's or prospective employee's wages or because of the pendency of any action or judgment against such employee or prospective employee for nonpayment of any alleged contractual obligation. In addition to being subject to the civil action authorized in subdivision two of this section, where any employer discharges, lays off, refuses to promote or disciplines an employee or refuses to hire a prospective employee because of the existence of one or more income executions and/or income deduction orders issued pursuant to section fifty-two hundred forty-one or fifty-two hundred forty-two of this article, the court may direct the payment of a civil penalty not to exceed five hundred dollars for the first instance and one thousand dollars per instance for the second and subsequent instances of employer or income payor discrimination. The penalty shall be paid to the creditor and may be enforced in the same manner as a civil judgment or in any other manner permitted by law.

2. An employee or prospective employee may institute a civil action for damages for wages lost as a result of a violation of this section within ninety days after such violation. Damages recoverable shall not exceed lost wages for six weeks and in such action the court also may order the reinstatement of such discharged employee or the hiring of such prospective employee. Except as provided for in subdivision (g) of section fifty-two hundred forty-one, not more than ten per centum of the damages recovered in such action shall be subject to any claims, attachments or executions by any creditors, judgment creditors or assignees of such employee or prospective employee. A violation of this section may also be punished as a contempt of court pursuant to the provisions of section seven hundred fifty-three of the judiciary law.

§ 5253. Cost of living adjustment for personal and real property exempt from application to the satisfaction of money judgments and exemptions in bankruptcy

(a) Beginning on April first, two thousand twelve, and at each three-year interval ending on April first thereafter, the dollar amount of the exemption provided in sections fifty-two hundred five and fifty-two hundred six of this article and sections two hundred eighty-two and two hundred eighty-three of the debtor and creditor law shall be adjusted as provided in subdivision (b) of this section.

(b) The [fig 1] superintendent of financial services shall determine the amount of the adjustment based on the change in the consumer price index for all urban consumers, New York-Northern New Jersey-Long Island, NY-NJ-CT-PA, published by the U.S. department of labor, bureau of labor statistics, for the most recent three-year period ending on December thirty-first preceding the adjustment, with each adjusted amount rounded to the nearest twenty-five dollars.

(c) Beginning on April first, two thousand twelve, and at each three-year interval ending on April first thereafter, the [fig 1] superintendent of financial services shall publish the current dollar amount of the applicable exemption provided in this article, together with the date of the next scheduled adjustment. The publication shall be substantially in the form set forth below:

"Current dollar amount of exemption from application to the satisfaction of money judgments under New York civil practice law and rules sections 5205 and 5206 and exemptions in bankruptcy under debtor and creditor law sections 282 and 283:

The following is the current dollar amount of exemptions from the satisfaction of money judgments under civil practice law and rules sections 5205 and 5206 and under debtor and creditor law sections 282 and 283:

(amount)

This amount is effective on April 1, (year) and shall not apply to cases commenced before April 1, (year). The next adjustment is scheduled for April 1, (year). Such adjustments shall not apply with respect to restraining notices served or executions effected before the date of the adjustment. Nothing in this section limits the judgment debtor's exemption rights in this section or under any other law."

ARTICLE 52
ENFORCEMENT OF MONEY JUDGMENTS

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 (j) Exemption for New York state college choice tuition savings program trust fund payment monies.
 (k) Enacted without subdivision heading.
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 (m) Enacted without subdivision heading.
 (n) Enacted without subdivision heading.
5206. Real property exempt from application to the satisfaction of money judgments.
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 - (d) Enacted without subdivision heading.
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§ 5201. Debt or property subject to enforcement; proper garnishee.

(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

(c) Proper garnishee for particular property or debt.

1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.

2. Where property consists of a right or interest to or in a decedent's estate or any other property or fund held or controlled by a

fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee.

3. Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee.

4. Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee; except that section 8--112 of the uniform commercial code shall govern the extent to which and the means by which any interest in a certificated security, uncertificated security or security entitlement (as defined in article eight of the uniform commercial code) may be reached by garnishment, attachment or other legal process.

§ 5202. Judgment creditor's rights in personal property.

(a) Execution creditor's rights. Where a judgment creditor has delivered an execution to a sheriff, the judgment creditor's rights in a debt owed to the judgment debtor or in an interest of the judgment debtor in personal property, against which debt or property the judgment may be enforced, are superior to the extent of the amount of the execution to the rights of any transferee of the debt or property, except:

1. a transferee who acquired the debt or property for fair consideration before it was levied upon; or
2. a transferee who acquired a debt or personal property not capable of delivery for fair consideration after it was levied upon without knowledge of the levy.

(b) Other judgment creditor's rights. Where a judgment creditor has secured an order for delivery of, payment of, or appointment of a receiver of, a debt owed to the judgment debtor or an interest of the judgment debtor in personal property, the judgment creditor's rights in the debt or property are superior to the rights of any transferee of the debt or property, except a transferee who acquired the debt or property for fair consideration and without notice of such order.

§ 5203. Priorities and liens upon real property. (a) Priority and lien on docketing judgment. No transfer of an interest of the judgment debtor in real property, against which property a money judgment may be enforced, is effective against the judgment creditor either from the time of the docketing of the judgment with the clerk of the county in which the property is located until ten years after filing of the judgment-roll, or from the time of the filing with such clerk of a notice of levy pursuant to an execution until the execution is returned, except:

1. a transfer or the payment of the proceeds of a judicial sale, which shall include an execution sale, in satisfaction either of a judgment previously so docketed or of a judgment where a notice of levy pursuant to an execution thereon was previously so filed; or
2. a transfer in satisfaction of a mortgage given to secure the payment of the purchase price of the judgment debtor's interest in the property; or
3. a transfer to a purchaser for value at a judicial sale, which shall include an execution sale; or
4. when the judgment was entered after the death of the judgment debtor; or
5. when the judgment debtor is the state, an officer, department, board or commission of the state, or a municipal corporation; or
6. when the judgment debtor is the personal representative of a decedent and the judgment was awarded in an action against him in his representative capacity.

(b) Extension of lien. Upon motion of the judgment creditor, upon notice to the judgment debtor, served personally or by registered or certified mail, return receipt requested, to the last known address of

the judgment debtor, the court may order that the lien of a money judgment upon real property be effective after the expiration of ten years from the filing of the judgment-roll, for a period no longer than the time during which the judgment creditor was stayed from enforcing the judgment, or the time necessary to complete advertisement and sale of real property in accordance with section 5236, pursuant to an execution delivered to a sheriff prior to the expiration of ten years from the filing of the judgment-roll. The order shall be effective from the time it is filed with the clerk of the county in which the property is located and an appropriate entry is made upon the docket of the judgment.

§ 5204. Release of lien or levy upon appeal. Upon motion of the judgment debtor, upon notice to the judgment creditor, the sheriff and the sureties upon the undertaking, the court may order, upon such terms as justice requires, that the lien of a money judgment, or that a levy made pursuant to an execution issued upon a money judgment, be released as to all or specified real or personal property upon the ground that the judgment debtor has given an undertaking upon appeal sufficient to secure the judgment creditor.

§ 5205. Personal property exempt from application to the satisfaction of money judgments. (a) Exemption for personal property. The following personal property when owned by any person is exempt from application to the satisfaction of a money judgment except where the judgment is for the purchase price of the exempt property or was recovered by a domestic, laboring person or mechanic for work performed by that person in such capacity:

1. all stoves kept for use in the judgment debtor's dwelling house and necessary fuel therefor for sixty days; one sewing machine with its appurtenances;

2. the family bible, family pictures, and school books used by the judgment debtor or in the family; and other books, not exceeding fifty dollars in value, kept and used as part of the family or judgment debtor's library;

3. a seat or pew occupied by the judgment debtor or the family in a place of public worship;

4. domestic animals with the necessary food for those animals for sixty days, provided that the total value of such animals and food does not exceed four hundred fifty dollars; all necessary food actually provided for the use of the judgment debtor or his family for sixty days;

5. all wearing apparel, household furniture, one mechanical, gas or electric refrigerator, one radio receiver, one television set, crockery, tableware and cooking utensils necessary for the judgment debtor and the family;

6. a wedding ring; a watch not exceeding thirty-five dollars in value; and

7. necessary working tools and implements, including those of a mechanic, farm machinery, team, professional instruments, furniture and library, not exceeding six hundred dollars in value, together with the necessary food for the team for sixty days, provided, however, that the articles specified in this paragraph are necessary to the carrying on of the judgment debtor's profession or calling.

(b) Exemption of cause of action and damages for taking or injuring exempt personal property. A cause of action, to recover damages for taking or injuring personal property exempt from application to the satisfaction of a money judgment, is exempt from application to the satisfaction of a money judgment. A money judgment and its proceeds arising out of such a cause of action is exempt, for one year after the collection thereof, from application to the satisfaction of a money judgment.

(c) Trust exemption. 1. Except as provided in paragraphs four and five

of this subdivision, all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.

2. For purposes of this subdivision, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either any trust or plan, which is qualified as an individual retirement account under section four hundred eight or section four hundred eight A of the United States Internal Revenue Code of 1986, as amended, a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, or created as a result of rollovers from such plans pursuant to sections 402 (a) (5), 403 (a) (4), 408 (d) (3) or 408A of the Internal Revenue Code of 1986, as amended, or a plan that satisfies the requirements of section 457 of the Internal Revenue Code of 1986, as amended, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan or (v) a participant in a section 457 plan.

3. All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in paragraph two of this subdivision shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.

4. This subdivision shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended or under any order of support, alimony or maintenance of any court of competent jurisdiction to enforce arrears/past due support whether or not such arrears/past due support have been reduced to a money judgment.

5. Additions to an asset described in paragraph two of this subdivision shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

(d) Income exemptions. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

1. ninety per cent of the income or other payments from a trust the principal of which is exempt under subdivision (c); provided, however, that with respect to any income or payments made from trusts, custodial accounts, annuities, insurance contracts, monies, assets or interest established as part of an individual retirement account plan or as part of a Keogh (HR-10), retirement or other plan described in paragraph two of subdivision (c) of this section, the exception in this subdivision for such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents shall not apply, and the ninety percent exclusion of this paragraph shall become a one hundred percent exclusion;

2. ninety per cent of the earnings of the judgment debtor for his personal services rendered within sixty days before, and at any time after, an income execution is delivered to the sheriff or a motion is

made to secure the application of the judgment debtor's earnings to the satisfaction of the judgment; and

3. payments pursuant to an award in a matrimonial action, for the support of a wife, where the wife is the judgment debtor, or for the support of a child, where the child is the judgment debtor; where the award was made by a court of the state, determination of the extent to which it is unnecessary shall be made by that court.

(e) Exemptions to members of armed forces. The pay and bounty of a non-commissioned officer, musician or private in the armed forces of the United States or the state of New York; a land warrant, pension or other reward granted by the United States, or by a state, for services in the armed forces; a sword, horse, medal, emblem or device of any kind presented as a testimonial for services rendered in the armed forces of the United States or a state; and the uniform, arms and equipments which were used by a person in the service, are exempt from application to the satisfaction of a money judgment; provided, however, that the provisions of this subdivision shall not apply to the satisfaction of any order or money judgment for the support of a person's child, spouse, or former spouse.

(f) Exemption for unpaid milk proceeds. Ninety per cent of any money or debt due or to become due to the judgment debtor for the sale of milk produced on a farm operated by him and delivered for his account to a milk dealer licensed pursuant to article twenty-one of the agriculture and markets law is exempt from application to the satisfaction of a money judgment.

(g) Security deposit exemption. Money deposited as security for the rental of real property to be used as the residence of the judgment debtor or the judgment debtor's family; and money deposited as security with a gas, electric, water, steam, telegraph or telephone corporation, or a municipality rendering equivalent utility services, for services to judgment debtor's residence or the residence of judgment debtor's family, are exempt from application to the satisfaction of a money judgment.

(h) The following personal property is exempt from application to the satisfaction of money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

1. any and all medical and dental accessions to the human body and all personal property or equipment that is necessary or proper to maintain or assist in sustaining or maintaining one or more major life activities or is utilized to provide mobility for a person with a permanent disability; and

2. any guide dog, service dog or hearing dog, as those terms are defined in section one hundred eight of the agriculture and markets law, or any animal trained to aid or assist a person with a permanent disability and actually being so used by such person, together with any and all food or feed for any such dog or other animal.

(i) Exemption for life insurance policies. The right of a judgment debtor to accelerate payment of part or all of the death benefit or special surrender value under a life insurance policy, as authorized by paragraph one of subsection (a) of section one thousand one hundred thirteen of the insurance law, or to enter into a viatical settlement pursuant to the provisions of article seventy-eight of the insurance law, is exempt from application to the satisfaction of a money judgment.

(j) Exemption for New York state college choice tuition savings program trust fund payment monies. Monies in an account created pursuant to article fourteen-A of the education law are exempt from application to the satisfaction of a money judgment as follows:

1. one hundred percent of monies in an account established in connection with a scholarship program established pursuant to such article is exempt;

2. one hundred percent of monies in an account is exempt where the judgment debtor is the account owner and designated beneficiary of such

account and is a minor; and

3. an amount not exceeding ten thousand dollars in an account, or in the aggregate for more than one account, is exempt where the judgment debtor is the account owner of such account or accounts.

For purposes of this subdivision, the terms "account owner" and "designated beneficiary" shall have the meanings ascribed to them in article fourteen-A of the education law.

(k) Notwithstanding any other provision of law to the contrary, where the judgment involves funds of a convicted person as defined in paragraph (c) of subdivision one of section six hundred thirty-two-a of the executive law, and all or a portion of such funds represent compensatory damages awarded by judgment to a convicted person in a separate action, a judgment obtained pursuant to such section six hundred thirty-two-a shall not be subject to execution or enforcement against the first ten percent of the portion of such funds that represents compensatory damages in the convicted person's action; provided, however, that this exemption from execution or enforcement shall not apply to judgments obtained by a convicted person prior to the effective date of the chapter of the laws of two thousand one which added this sentence or to any amendment to such judgment where such amendment was obtained on or after the effective date of this subdivision. For the purpose of determining the amount of a judgment which is not subject to execution or enforcement pursuant to this subdivision: (i) the court shall deduct attorney's fees from that portion of the judgment that represents compensatory damages and multiply the remainder of compensatory damages by ten percent; and (ii) when the judgment includes compensatory and punitive damages, attorney's fees shall be pro rated among compensatory and punitive damages in the same proportion that all attorney's fees bear to all damages recovered.

(l) Exemption of banking institution accounts into which statutorily exempt payments are made electronically or by direct deposit. 1. If direct deposit or electronic payments reasonably identifiable as statutorily exempt payments were made to the judgment debtor's account in any banking institution during the forty-five day period preceding the date a restraining notice was served on the banking institution or an execution was served upon the banking institution by a marshal or sheriff, then two thousand five hundred dollars in the judgment debtor's account is exempt from application to the satisfaction of a money judgment. Nothing in this subdivision shall be construed to limit a creditor's rights under 42 U.S.C. § 659 or 38 U.S.C. § 5301. Nothing in this subdivision shall alter the exempt status of funds that are protected from execution, levy, attachment, garnishment or other legal process, pursuant to this section or under any other provision of state or federal law, or shall affect the right of a judgment debtor to claim such exemption.

2. For purposes of this article, "statutorily exempt payments" means any personal property exempt from application to the satisfaction of a money judgment under any provision of state or federal law. Such term shall include, but not be limited to, payments from any of the following sources: social security, including retirement, survivors' and disability benefits, supplemental security income or child support payments processed and received pursuant to title IV-D of the Social Security Act; veterans administration benefits; public assistance; workers' compensation; unemployment insurance; public or private pensions; railroad retirement; and black lung benefits.

3. (i) Beginning on April first, two thousand twelve, and at each three-year interval ending on April first thereafter, the dollar amount of the exemption provided in this section, subdivisions (e) and (h) of section fifty-two hundred twenty-two, subdivision (a) of section fifty-two hundred thirty and subdivision (e) of section fifty-two hundred thirty-two of this article in effect immediately before that date shall be adjusted as provided in subparagraph (ii) of this paragraph.

(ii) The superintendent of banks shall determine the amount of the adjustment based on the change in the Consumer Price Index for All Urban Consumers, New York-Northern New Jersey-Long Island, NY-NJ-CT-PA, published by the U.S. Department of Labor, Bureau of Labor Statistics, for the most recent three-year period ending on December thirty-first preceding the adjustment, with each adjusted amount rounded to the nearest twenty-five dollars.

(iii) Beginning on April first, two thousand twelve, and at each three-year interval ending on April first thereafter, the superintendent of banks shall publish the current dollar amount of the exemption provided in this section, subdivisions (e) and (h) of section fifty-two hundred twenty-two, subdivision (a) of section fifty-two hundred thirty and subdivision (e) of section fifty-two hundred thirty-two of this chapter, together with the date of the next scheduled adjustment. The publication shall be substantially in the form set below:

CURRENT DOLLAR AMOUNT OF EXEMPTION FROM ENFORCEMENT OF JUDGMENT UNDER NEW YORK CIVIL PRACTICE LAW AND RULES Sections 5205(1), 5222(e), 5222(h), 5230(a), and 5232(e)

The following is the current dollar amount of exemption from enforcement of money judgments under CPLR sections 5205(1), 5222(e), 5222(h), 5230(a), and 5232(e), as required by CPLR section 5205(1)(3):

(Amount)

This amount is effective on April 1, (year) and shall not apply to cases commenced before April 1, (year). The next adjustment is scheduled for April 1, (year).

(iv) Adjustments made under subparagraph (i) of this paragraph shall not apply with respect to restraining notices served or executions effected before the date of the adjustment.

(m) Nothing in subdivision (l) of this section limits the judgment debtor's exemption rights in this section or under any other law.

(n) Notwithstanding any other provision of law to the contrary, the term "banking institution" when used in this article shall mean and include all banks, trust companies, savings banks, savings and loan associations, credit unions, foreign banking corporations incorporated, chartered, organized or licensed under the laws of this state, foreign banking corporations maintaining a branch in this state, and nationally chartered banks.

§ 5206. Real property exempt from application to the satisfaction of money judgments. (a) Exemption of homestead. Property of one of the following types, not exceeding fifty thousand dollars in value above liens and encumbrances, owned and occupied as a principal residence, is exempt from application to the satisfaction of a money judgment, unless the judgment was recovered wholly for the purchase price thereof:

1. a lot of land with a dwelling thereon,
2. shares of stock in a cooperative apartment corporation,
3. units of a condominium apartment, or
4. a mobile home.

But no exempt homestead shall be exempt from taxation or from sale for non-payment of taxes or assessments.

(b) Homestead exemption after owner's death. The homestead exemption continues after the death of the person in whose favor the property was exempted for the benefit of the surviving spouse and surviving children until the majority of the youngest surviving child and until the death of the surviving spouse.

(c) Suspension of occupation as affecting homestead. The homestead exemption ceases if the property ceases to be occupied as a residence by a person for whose benefit it may so continue, except where the suspension of occupation is for a period not exceeding one year, and occurs in consequence of injury to, or destruction of, the dwelling house upon the premises.

(d) Exemption of homestead exceeding fifty thousand dollars in value. The exemption of a homestead is not void because the value of the

property exceeds fifty thousand dollars but the lien of a judgment attaches to the surplus.

(e) Sale of homestead exceeding fifty thousand dollars in value. A judgment creditor may commence a special proceeding in the county in which the homestead is located against the judgment debtor for the sale, by a sheriff or receiver, of a homestead exceeding fifty thousand dollars in value. The court may direct that the notice of petition be served upon any other person. The court, if it directs such a sale, shall so marshal the proceeds of the sale that the right and interest of each person in the proceeds shall correspond as nearly as may be to his right and interest in the property sold. Money, not exceeding fifty thousand dollars, paid to a judgment debtor, as representing his interest in the proceeds, is exempt for one year after the payment, unless, before the expiration of the year, he acquires an exempt homestead, in which case, the exemption ceases with respect to so much of the money as was not expended for the purchase of that property; and the exemption of the property so acquired extends to every debt against which the property sold was exempt. Where the exemption of property sold as prescribed in this subdivision has been continued after the judgment debtor's death, or where he dies after the sale and before payment to him of his portion of the proceeds of the sale, the court may direct that portion of the proceeds which represents his interest be invested for the benefit of the person or persons entitled to the benefit of the exemption, or be otherwise disposed of as justice requires.

(f) Exemption of burying ground. Land, set apart as a family or private burying ground, is exempt from application to the satisfaction of a money judgment, upon the following conditions only:

1. a portion of it must have been actually used for that purpose;
2. it must not exceed in extent one-fourth of an acre; and
3. it must not contain any building or structure, except one or more vaults or other places of deposit for the dead, or mortuary monuments.

§ 5207. Enforcement involving the state. None of the procedures for the enforcement of money judgments are applicable to a judgment against the state. All procedures for the enforcement of money judgments against other judgment debtors are applicable to the state, its officers, agencies and subdivisions, as a garnishee, except where otherwise prescribed by law, and except that an order in such a procedure shall only provide for the payment of moneys not claimed by the state, and no judgment shall be entered against the state, or any officer, department, board or commission thereof, in such a procedure. This section shall not be deemed to grant any court jurisdiction to hear and determine claims or actions against the state not otherwise given by law to such court.

§ 5208. Enforcement after death of judgment debtor; leave of court; extension of lien. Except where otherwise prescribed by law, after the death of a judgment debtor, an execution upon a money judgment shall not be levied upon any debt owed to him or any property in which he has an interest, nor shall any other enforcement procedure be undertaken with respect to such debt or property, except upon leave of the surrogate's court which granted letters testamentary or letters of administration upon the estate. If such letters have not been granted within eighteen months after the death, leave to issue such an execution or undertake such enforcement procedure may thereafter be granted, upon motion of the judgment creditor upon such notice as the court may require, by any court from which the execution could issue or in which the enforcement procedure could be commenced. A judgment lien existing against real property at the time of a judgment debtor's death shall expire two years thereafter or ten years after filing of the judgment-roll, whichever is later.

§ 5209. Discharge of garnishee's obligation. A person who, pursuant to an execution or order, pays or delivers, to the judgment creditor or

a sheriff or receiver, money or other personal property in which a judgment debtor has or will have an interest, or so pays a debt he owes the judgment debtor, is discharged from his obligation to the judgment debtor to the extent of the payment or delivery.

§ 5210. Power of court to punish for contempt. Every court in which a special proceeding to enforce a money judgment may be commenced, shall have power to punish a contempt of court committed with respect to an enforcement procedure.

§ 5211. Privilege on examination; immunity. The court may confer immunity upon any witness in accordance with the provisions of section 50.20 of the criminal procedure law for testimony or evidence in an enforcement procedure relating to disposition of property in which the judgment debtor has an interest, or relating to his or another person's claim to be entitled, as against the judgment creditor or a receiver, to hold property derived from or through the judgment debtor, or to be discharged from the payment of a debt which was due to the judgment debtor; provided, however, that no immunity shall be conferred except upon twenty-four hours' written notice to the appropriate district attorney having an official interest therein.

§ 5221. Where enforcement proceeding commenced. (a) Court and county in which proceeding commenced. 1. If the judgment sought to be enforced was entered in the city court of any city outside the city of New York, and the respondent resides or is regularly employed or has a place for the regular transaction of business in person within the county in which the court is or was located, a special proceeding authorized by this article shall be commenced in that court or in the county court of that county.

2. If the judgment sought to be enforced was entered in a district court, or by a justice of the peace whose office has been or is by law to be abolished and whose jurisdiction has been or is by law to be superseded by a district court, and the respondent resides or is regularly employed or has a place for the regular transaction of business in person within the county in which such district court is established, a special proceeding authorized by this article shall be commenced in such district court.

3. If the judgment sought to be enforced was entered in the municipal court of the city of New York, the city court of the city of New York or the civil court of the city of New York, and the respondent resides or is regularly employed or has a place for the regular transaction of business in person within that city, a special proceeding authorized by this article shall be commenced in the civil court of the city of New York.

4. In any other case, if the judgment sought to be enforced was entered in any court of this state, a special proceeding authorized by this article shall be commenced, either in the supreme court or a county court, in a county in which the respondent resides or is regularly employed or has a place for the regular transaction of business in person or, if there is no such county, in any county in which he may be served or the county in which the judgment was entered.

5. If no court in which a special proceeding authorized by this article could be commenced is in session, the special proceeding may be commenced in the supreme court or a county court in any county within the judicial district in which the proceeding could otherwise be commenced or in any county adjoining the county in which the proceeding could otherwise be commenced.

(b) Notices, subpoenas and motions. A notice or subpoena authorized by this article may be issued from, and a motion authorized by this article may be made before, any court in which a special proceeding authorized by this article could be commenced if the person served with the notice, subpoena or notice of motion were respondent.

§ 5222. Restraining notice. (a) Issuance; on whom served; form; service. A restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court, or by the support collection unit designated by the appropriate social services district. It may be served upon any person, except the employer of a judgment debtor or obligor where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor or obligor. It shall be served personally in the same manner as a summons or by registered or certified mail, return receipt requested or if issued by the support collection unit, by regular mail, or by electronic means as set forth in subdivision (g) of this section. It shall specify all of the parties to the action, the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount then due thereon, the names of all parties in whose favor and against whom the judgment or order was entered, it shall set forth subdivision (b) and shall state that disobedience is punishable as a contempt of court, and it shall contain an original signature or copy of the original signature of the clerk of the court or attorney or the name of the support collection unit which issued it. Service of a restraining notice upon a department or agency of the state or upon an institution under its direction shall be made by serving a copy upon the head of the department, or the person designated by him or her and upon the state department of audit and control at its office in Albany; a restraining notice served upon a state board, commission, body or agency which is not within any department of the state shall be made by serving the restraining notice upon the state department of audit and control at its office in Albany. Service at the office of a department of the state in Albany may be made by the sheriff of any county by registered or certified mail, return receipt requested, or if issued by the support collection unit, by regular mail.

(b) Effect of restraint; prohibition of transfer; duration. A judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest, except as set forth in subdivisions (h) and (i) of this section, and except upon direction of the sheriff or pursuant to an order of the court, until the judgment or order is satisfied or vacated. A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor or obligor, shall be subject to the notice except as set forth in subdivisions (h) and (i) of this section. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit, except as set forth in subdivisions (h) and (i) of this section, and except upon direction of the sheriff or pursuant to an order of the court, until the expiration of one year after the notice is served upon him or her, or until the judgment or order is satisfied or vacated, whichever event first occurs. A judgment creditor or support collection unit which has specified personal property or debt in a restraining

notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained by reason of the restraint. If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor or obligor in an amount equal to twice the amount due on the judgment or order, the restraining notice is not effective as to other property or money.

(c) Subsequent notice. Leave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment or order. A judgment creditor shall not serve more than two restraining notices per year upon a natural person's banking institution account.

(d) Notice to judgment debtor or obligor. Except where the provisions of section fifty-two hundred twenty-two-a of this article are applicable, pursuant to subdivision (a) of such section, if a notice in the form prescribed in subdivision (e) of this section has not been given to the judgment debtor or obligor within a year before service of a restraining notice, a copy of the restraining notice together with the notice to judgment debtor or obligor shall be mailed by first class mail or personally delivered to each judgment debtor or obligor who is a natural person within four days of the service of the restraining notice. Such notice shall be mailed to the defendant at his or her residence address; or in the event such mailing is returned as undeliverable by the post office, or if the residence address of the defendant is unknown, then to the defendant in care of the place of employment of the defendant if known, in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by the return address or otherwise, that the communication is from an attorney or concerns a judgment or order; or if neither the residence address nor the place of employment of the defendant is known then to the defendant at any other known address.

(e) Content of notice. The notice required by subdivision (d) of this section shall be in substantially the following form and may be included in the restraining notice:

NOTICE TO JUDGMENT DEBTOR OR OBLIGOR

Money or property belonging to you may have been taken or held in order to satisfy a judgment or order which has been entered against you. Read this carefully.

YOU MAY BE ABLE TO GET YOUR MONEY BACK

State and federal laws prevent certain money or property from being taken to satisfy judgments or orders. Such money or property is said to be "exempt". The following is a partial list of money which may be exempt:

1. Supplemental security income, (SSI);
2. Social security;
3. Public assistance (welfare);
4. Spousal support, maintenance (alimony) or child support;
5. Unemployment benefits;
6. Disability benefits;
7. Workers' compensation benefits;
8. Public or private pensions;
9. Veterans benefits;
10. Ninety percent of your wages or salary earned in the last sixty days;
11. Twenty-five hundred dollars of any bank account containing statutorily exempt payments that were deposited electronically or by direct deposit within the last forty-five days, including, but not limited to, your social security, supplemental security income, veterans benefits, public assistance, workers' compensation, unemployment insurance, public or private pensions, railroad retirement benefits, black lung benefits, or child support payments;
12. Railroad retirement; and
13. Black lung benefits.

If you think that any of your money that has been taken or held is exempt, you must act promptly because the money may be applied to the judgment or order. If you claim that any of your money that has been taken or held is exempt, you may contact the person sending this notice.

Also, YOU MAY CONSULT AN ATTORNEY, INCLUDING ANY FREE LEGAL SERVICES ORGANIZATION IF YOU QUALIFY. You can also go to court without an attorney to get your money back. Bring this notice with you when you go. You are allowed to try to prove to a judge that your money is exempt from collection under New York civil practice law and rules, sections fifty-two hundred twenty-two-a, fifty-two hundred thirty-nine and fifty-two hundred forty. If you do not have a lawyer, the clerk of the court may give you forms to help you prove your account contains exempt money that the creditor cannot collect. The law (New York civil practice law and rules, article four and sections fifty-two hundred thirty-nine and fifty-two hundred forty) provides a procedure for determination of a claim to an exemption.

(f) For the purposes of this section "order" shall mean an order issued by a court of competent jurisdiction directing the payment of support, alimony or maintenance upon which a "default" as defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article has been established subject to the procedures established for the determination of a "mistake of fact" for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article except that for the purposes of this section only a default shall not be founded upon retroactive child support obligations as defined in paragraph (a) of subdivision one of section four hundred forty of the family court act and subdivision one of section two hundred forty and paragraph b of subdivision nine of section two hundred thirty-six of the domestic relations law.

(g) Restraining notice in the form of magnetic tape or other electronic means. Where such person consents thereto in writing, a restraining notice in the form of magnetic tape or other electronic means, as defined in subdivision (f) of rule twenty-one hundred three of this chapter, may be served upon a person other than the judgment debtor or obligor. A restraining notice in such form shall contain all of the information required to be specified in a restraining notice under subdivision (a), except for the original signature or copy of the original signature of the clerk or attorney who issued the restraining notice. The provisions of this subdivision notwithstanding, the notice required by subdivisions (d) and (e) shall be given to the judgment debtor or obligor in the written form set forth therein.

(h) Effect of restraint on judgment debtor's banking institution account into which statutorily exempt payments are made electronically or by direct deposit. Notwithstanding the provisions of subdivision (b) of this section, if direct deposit or electronic payments reasonably identifiable as statutorily exempt payments as defined in paragraph two of subdivision (l) of section fifty-two hundred five of this article were made to the judgment debtor's account during the forty-five day period preceding the date that the restraining notice was served on the banking institution, then the banking institution shall not restrain two thousand five hundred dollars in the judgment debtor's account. If the account contains an amount equal to or less than two thousand five hundred dollars, the account shall not be restrained and the restraining notice shall be deemed void. Nothing in this subdivision shall be construed to limit a banking institution's right or obligation to restrain or remove such funds from the judgment debtor's account if required by 42 U.S.C. § 659 or 38 U.S.C. § 5301 or by a court order. Nothing in this subdivision shall alter the exempt status of funds that are protected from execution, levy, attachment, garnishment or other legal process, under section fifty-two hundred five of this article or under any other provision of state or federal law, or affect the right of a judgment debtor to claim such exemption.

(i) Effect of restraint on judgment debtor's banking institution

account. A restraining notice issued pursuant to this section shall not apply to an amount equal to or less than the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable (as published on the websites of the United States department of labor and the state department of labor) except such part thereof as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents. This amount shall be equal to seventeen hundred sixteen dollars on the effective date of this subdivision, and shall rise to seventeen hundred forty dollars on July twenty-fourth, two thousand nine, and shall rise thereafter in tandem with the minimum wage. Nothing in this subdivision shall be construed to limit a banking institution's right or obligation to restrain or remove such funds from the judgment debtor's account if required by 42 U.S.C. § 659 or 38 U.S.C. § 5301 or by a court order. Where a judgment debtor's account contains an amount equal to or less than ninety percent of the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable (as published on the websites of the United States department of labor and the state department of labor), the account shall not be restrained and the restraining notice shall be deemed void, except as to those funds that a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents. Nothing in this subdivision shall alter the exempt status of funds which are exempt from execution, levy, attachment or garnishment, under section fifty-two hundred five of this article or under any other provision of state or federal law, or the right of a judgment debtor to claim such exemption.

(j) Fee for banking institution's costs in processing a restraining notice for an account. In the event that a banking institution served with a restraining notice cannot lawfully restrain a judgment debtor's banking institution account, or a restraint is placed on the judgment debtor's account in violation of any section of this chapter, the banking institution shall charge no fee to the judgment debtor regardless of any terms of agreement, or schedule of fees, or other contract between the judgment debtor and the banking institution.

§ 5222-a. Service of notices and forms and procedure for claim of exemption. (a) Applicability. Any person authorized under subdivision (a) of section fifty-two hundred twenty-two of this article issuing a restraining notice affecting a natural person's account at a banking institution pursuant to such subdivision must comply with this section, in addition to the general provisions set forth in such section. Any sheriff or support collection unit levying against a natural person's account at a banking institution pursuant to section fifty-two hundred thirty-two of this article must comply with this section, in addition to the general provisions set forth in section fifty-two hundred thirty-two of this article. The procedures set forth in subdivisions (b), (c), (d), (e), (f) and (g) of this section shall not apply where pursuant to subdivision (h) and/or (i) of section fifty-two hundred twenty-two or subdivision (e) of section fifty-two hundred thirty-two of this article, no funds in the account are restrained or levied upon.

(b) Service of exemption notice and exemption claim form. 1. Service with restraining notice upon banking institution. The person or support collection unit issuing the restraining notice pursuant to subdivision (a) of section fifty-two hundred twenty-two of this article shall provide the banking institution with the restraining notice, a copy of the restraining notice, an exemption notice and two exemption claim forms with sections titled "ADDRESS A" and "ADDRESS B" completed. The

exemption notice and exemption claim forms shall be in the forms set forth in paragraph four of this subdivision. The notice and the forms shall be served on the banking institution together with the restraining notice and copy of the restraining notice. Service must be accomplished in accordance with subdivision (a) or (g) of section fifty-two hundred twenty-two of this article. Failure to serve the notice and forms together with the restraining notice renders the restraining notice void, and the banking institution shall not restrain the account.

2. Service of execution by levy upon a garnishee banking institution. When serving an execution pursuant to subdivision (a) of section fifty-two hundred thirty-two of this article, the sheriff or support collection unit shall provide the banking institution with an exemption notice and two exemption claim forms, which shall be in the forms set forth in paragraph four of this subdivision. The sheriff or support collection unit shall serve both the exemption notice and the exemption claim forms on the banking institution together with the execution notice. Service must be accomplished in accordance with subdivision (a) of section fifty-two hundred thirty-two of this article. Failure to serve the notice and forms renders the execution void, and the banking institution shall not levy upon the account.

3. Service upon judgment debtor. Within two business days after receipt of the restraining notice or execution, exemption notice and exemption claim forms, the banking institution shall serve upon the judgment debtor the copy of the restraining notice, the exemption notice and two exemption claim forms. The banking institution shall serve the notice and forms by first class mail to the last known address of the judgment debtor. The inadvertent failure by a depository institution to provide the notice required by this subdivision shall not give rise to liability on the part of the depository institution.

4. Content of exemption notice and exemption claim form. a. The exemption notice shall be in the following form:

"EXEMPTION NOTICE
as required by New York Law

YOUR BANK ACCOUNT IS RESTRAINED OR "FROZEN"

The attached Restraining Notice or notice of Levy by Execution has been issued against your bank account. You are receiving this notice because a creditor has obtained a money judgment against you, and one or more of your bank accounts has been restrained to pay the judgment. A money judgment is a court's decision that you owe money to a creditor. You should be aware that FUTURE DEPOSITS into your account(s) might also be restrained if you do not respond to this notice.

You may be able to "vacate" (remove) the judgment. If the judgment is vacated, your bank account will be released. Consult an attorney (including free legal services) or visit the court clerk for more information about how to do this.

Under state and federal law, certain types of funds cannot be taken from your bank account to pay a judgment. Such money is said to be "exempt."

DOES YOUR BANK ACCOUNT CONTAIN ANY OF THE FOLLOWING TYPES OF FUNDS?

1. Social security;
2. Social security disability (SSD);
3. Supplemental security income (SSI);
4. Public assistance (welfare);
5. Income earned while receiving SSI or public assistance;
6. Veterans benefits;
7. Unemployment insurance;
8. Payments from pensions and retirement accounts;
9. Disability benefits;
10. Income earned in the last 60 days (90% of which is exempt);
11. Workers' compensation benefits;
12. Child support;
13. Spousal support or maintenance (alimony);

- 14. Railroad retirement; and/or
- 15. Black lung benefits.

If YES, you can claim that your money is exempt and cannot be taken. To make the claim, you must

- (a) complete the EXEMPTION CLAIM FORM attached;
- (b) deliver or mail the form to the bank with the restrained or "frozen" account; and
- (c) deliver or mail the form to the creditor or its attorney at the address listed on the form.

You must send the forms within 20 DAYS of the postmarked date on the envelope holding this notice. You may be able to get your account released faster if you send to the creditor or its attorney written proof that your money is exempt. Proof can include an award letter from the government, an annual statement from your pension, pay stubs, copies of checks, bank records showing the last two months of account activity, or other papers showing that the money in your bank account is exempt. If you send the creditor's attorney proof that the money in your account is exempt, the attorney must release that money within seven days. You do not need an attorney to make an exemption claim using the form."

b. The exemption claim form shall be in the following form:

NAME OF COURT, NAME OF COUNTY

-----X

PLAINTIFF/PETITIONER/CLAIMANT
V.
DEFENDANT/RESPONDENT

INDEX NO.

EXEMPTION CLAIM FORM

-----X

NAME AND ADDRESS OF JUDGMENT
CREDITOR OR ATTORNEY
(To be completed by judgment
creditor or attorney)
ADDRESS
A _____

NAME AND ADDRESS OF FINANCIAL
INSTITUTION
(To be completed by judgment
creditor or attorney)
ADDRESS
B _____

Directions: To claim that some or all of the funds in your account are exempt, complete both copies of this form, and make one copy for yourself. Mail or deliver one form to ADDRESS A and one form to ADDRESS B within twenty days of the date on the envelope holding this notice. **If you have any documents, such as an award letter, an annual statement from your pension, paystubs, copies of checks or bank records showing the last two months of account activity, include copies of the documents with this form. Your account may be released more quickly.

I state that my account contains the following type(s) of funds (check all that apply):

- ___ Social security
- ___ Social security disability (SSD)
- ___ Supplemental security income (SSI)
- ___ Public assistance
- ___ Wages while receiving SSI or public assistance
- ___ Veterans benefits
- ___ Unemployment insurance
- ___ Payments from pensions and retirement accounts
- ___ Income earned in the last 60 days (90% of which is exempt)
- ___ Child support
- ___ Spousal support or maintenance (alimony)
- ___ Workers' compensation

____ Railroad retirement or black lung benefits
____ Other (describe exemption): _____

I request that any correspondence to me regarding my claim be sent to the following address:

(FILL IN YOUR COMPLETE ADDRESS)

I certify under penalty of perjury that the statement above is true to the best of my knowledge and belief.

DATE

SIGNATURE OF JUDGMENT DEBTOR

(c) Claim of exemption. 1. To claim an exemption pursuant to the procedures in this section, the judgment debtor shall complete the exemption claim forms, sign them under penalty of perjury, and serve them within twenty days of the date postmarked on the correspondence containing the notice and forms. The judgment debtor shall serve one completed exemption claim form on the banking institution and the other on the attorney for the judgment creditor. In the event that there is no attorney for the judgment creditor or support collection unit, then the exemption claim form must be served directly on the judgment creditor or support collection unit. The judgment debtor may serve the exemption claim forms in person or by first-class mail.

2. Where the banking institution receives an exemption claim form, it shall notify the judgment creditor forthwith of the date on which the funds will be released pursuant to paragraph three of this subdivision.

3. The banking institution shall release all funds in the judgment debtor's account eight days after the date postmarked on the envelope containing the executed exemption claim form mailed to the banking institution or the date of personal delivery of the executed exemption claim form to the banking institution, and the restraint shall be deemed void, except where the judgment creditor interposes an objection to the exemption within that time.

4. Where the executed exemption claim form sent to the judgment creditor or support collection unit is accompanied by information demonstrating that all funds in the account are exempt, the judgment creditor or support collection unit shall, within seven days of the postmark on the envelope containing the exemption claim form and accompanying information, instruct the banking institution to release the account, and the restraint shall be deemed void. Where the account contains some funds from exempt sources, and other funds from unknown sources, the judgment creditor or support collection unit shall apply the lowest intermediate balance principle of accounting and, within seven days of the postmark on the envelope containing the exemption claim form and accompanying information, shall instruct the banking institution to release the exempt money in the account. The provisions of paragraph two of subdivision (b) of rule twenty-one hundred three of this chapter shall not enlarge the judgment creditor's time to move pursuant to this section. Information demonstrating that funds are exempt includes, but is not limited to, originals or copies of benefit award letters, checks, check stubs or any other document that discloses the source of the judgment debtor's income, and bank records showing the last two months of account activity. If the judgment creditor or support collection unit fails to act in accordance with this subdivision, the judgment creditor or support collection unit shall be deemed to have acted in bad faith and the judgment debtor may seek a court award of the damages, costs, fees and penalties provided for in subdivision (g) of this section.

5. If no claim of exemption is received by the banking institution within twenty-five days after the notice and forms are mailed to the

judgment debtor, the funds remain subject to the restraining notice or execution. Failure of the judgment debtor to deliver the executed exemption claim form does not constitute a waiver of any right to an exemption.

(d) Objection to exemption claim and request for hearing. A judgment creditor may object to the claim of exemption by moving for an order pursuant to section fifty-two hundred forty of this article. The judgment creditor must serve the banking institution and the judgment debtor with its motion papers within eight days after the date postmarked on the envelope containing the executed exemption claim form or the date of personal delivery of the executed exemption claim form to the banking institution, and the provisions of paragraph one of subdivision (b) of rule twenty-one hundred three of this chapter shall not enlarge the judgment creditor's time to move pursuant to this section. The judgment debtor shall be served at the address provided on the exemption claim form. The affirmation or affidavit in support of the motion shall demonstrate a reasonable belief that such judgment debtor's account contains funds that are not exempt from execution and the amount of such nonexempt funds. The executed exemption claim form shall be attached to the affirmation or affidavit. The affirmation or affidavit shall not be conclusory, but is required to show the factual basis upon which the reasonable belief is based. The hearing to decide the motion shall be noticed for seven days after service of the moving papers. The executed exemption claim form shall be prima facie evidence at such hearing that the funds in the account are exempt funds. The burden of proof shall be upon the judgment creditor to establish the amount of funds that are not exempt. The court shall, within five days of the hearing, issue an order stating whether or not funds in the account are exempt and ordering the appropriate relief. The judgment creditor or its attorney must serve the order on the banking institution and the judgment debtor no later than two business days after the court issues the order.

(e) Duties of banking institution if objection is made to exemption claim. Upon receipt of a written objection pursuant to subdivision (d) of this section from the judgment creditor or its attorney within the specified eight-day period, the banking institution shall retain the funds claimed to be exempt for twenty-one days unless otherwise ordered by the court. If the period of twenty-one days expires and the banking institution has not been otherwise ordered by the court, the banking institution shall release the funds to the judgment debtor.

(f) Release of funds. At any time during the procedure specified in this section, the judgment debtor or the judgment creditor may, by a writing dated after the service of the restraining notice, direct the banking institution to release the funds in question to the other party. Upon receipt of a release, the banking institution shall release the funds as directed.

(g) Proceedings; bad faith claims. Where the judgment creditor objects to a claim of exemption pursuant to subdivision (d) of this section and the court finds that the judgment creditor disputed the claim of exemption in bad faith, as provided in paragraph four of subdivision (c) of this section, the judgment debtor shall be awarded costs, reasonable attorney fees, actual damages and an amount not to exceed one thousand dollars.

(h) Rights of judgment debtor. Nothing in this section shall in any way restrict the rights and remedies otherwise available to a judgment debtor, including but not limited to, rights to property exemptions under federal and state law.

§ 5223. Disclosure. At any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of

the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.

Rule 5224. Subpoena; procedure. (a) Kinds and service of subpoena. Any or all of the following kinds of subpoenas may be served:

1. a subpoena requiring attendance for the taking of a deposition upon oral or written questions at a time and place named therein; or

2. a subpoena duces tecum requiring the production of books and papers for examination at a time and place named therein; or

3. an information subpoena, accompanied by a copy and original of written questions and a prepaid, addressed return envelope. Service of an information subpoena may be made by registered or certified mail, return receipt requested. Answers shall be made in writing under oath by the person upon whom served, if an individual, or by an officer, director, agent or employee having the information, if a corporation, partnership or sole proprietorship. Each question shall be answered separately and fully and each answer shall refer to the question to which it responds. Answers shall be returned together with the original of the questions within seven days after receipt. Where the person serving the subpoena is a judgment creditor, other than where the state, a municipality or an agency or officer of the state or a municipality is the judgment creditor, the following additional rules shall apply:

(i) information subpoenas, served on an individual or entity other than the judgment debtor, may be served on an individual, corporation, partnership or sole proprietorship only if the judgment creditor or the judgment creditor's attorney has a reasonable belief that the party receiving the subpoena has in their possession information about the debtor that will assist the creditor in collecting his or her judgment. Any information subpoena served pursuant to this subparagraph shall contain a certification signed by the judgment creditor or his or her attorney stating the following: I HEREBY CERTIFY THAT THIS INFORMATION SUBPOENA COMPLIES WITH RULE 5224 OF THE CIVIL PRACTICE LAW AND RULES AND THAT I HAVE A REASONABLE BELIEF THAT THE PARTY RECEIVING THIS SUBPOENA HAS IN THEIR POSSESSION INFORMATION ABOUT THE DEBTOR THAT WILL ASSIST THE CREDITOR IN COLLECTING THE JUDGMENT. By signing the certification, the judgment creditor or attorney certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that the individual or entity receiving the subpoena has relevant information about the debtor.

(ii) if an information subpoena, served on an individual or entity other than the judgment debtor, does not contain the certification provided for in subparagraph (i) of this paragraph, such subpoena shall be deemed null and void.

(iii) if an information subpoena, served on an individual or entity other than the judgment debtor, does contain the certification provided for in subparagraph (i) of this paragraph, the individual, corporation, partnership or sole proprietorship receiving the subpoena, may move to quash the subpoena pursuant to section twenty-three hundred four of this chapter, except that such motion shall be made in the court that issued the underlying judgment.

(iv) failure to comply with an information subpoena shall be governed by subdivision (b) of section twenty-three hundred eight of this chapter, except that such motion shall be made in the court that issued the underlying judgment.

4. an information subpoena in the form of magnetic tape or other electronic means. Where the person to be served consents thereto in writing, an information subpoena in the form of magnetic tape or electronic means, as defined in subdivision (f) of rule twenty-one hundred three of this chapter, may be served upon the individual, or if a corporation, partnership, limited liability company, or sole proprietorship, upon the officer, director, agent or employee having the information. Answers shall be provided within seven days.

(a-1) Scope of subpoena duces tecum. A subpoena duces tecum authorized by this rule and served on a judgment debtor, or on any individual while in the state, or on a corporation, partnership, limited liability company or sole proprietorship doing business, licensed, qualified, or otherwise entitled to do business in the state, shall subject the person or other entity or business served to the full disclosure prescribed by section fifty-two hundred twenty-three of this article whether the materials sought are in the possession, custody or control of the subpoenaed person, business or other entity within or without the state. Section fifty-two hundred twenty-nine of this article shall also apply to disclosure under this rule.

(b) Fees. A judgment debtor served with a subpoena under this section and any other person served with an information subpoena shall not be entitled to any fee. Any other person served with a subpoena requiring attendance or the production of books and papers shall be paid or tendered in advance authorized traveling expenses and one day's witness fee.

(c) Time and place of examination. A deposition on oral or written questions or an examination of books and papers may proceed upon not less than ten days' notice to the person subpoenaed, unless the court orders shorter notice, before any person authorized by subdivision (a) of rule 3113. An examination shall be held during business hours and, if taken within the state, at a place specified in rule 3110. Upon consent of the witness, an examination may be held at any other place within the state and before any officer authorized to administer an oath.

(d) Conduct of examination. The officer before whom the deposition is to be taken shall put the witness on oath. If requested by the person conducting the examination, the officer shall personally, or by some one acting under his direction, record and transcribe the testimony and shall list all appearances by the parties and attorneys. Examination and cross-examination of the witness shall proceed as permitted in the trial of actions in open court. Cross-examination need not be limited to the subject matter of the examination in chief. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or of a person recording it, or to the manner of taking it, or to the testimony presented, or to the conduct of any person, and any other objection to the proceedings, shall be noted by the officer upon the deposition and the deposition shall proceed subject to the right of a person to apply for a protective order. The deposition shall be taken continuously and without unreasonable adjournment, unless the court orders or the witness agrees otherwise. If the witness does not understand the English language, the judgment creditor shall, at his own expense, provide a translation of all questions and answers. Unless the court orders otherwise, a person other than the judgment debtor served with a subpoena duces tecum requiring the production of books of account may produce in place of the original books of account a sworn transcript of such accounts as are relevant.

(e) Signing deposition; physical preparation. At the request of the person conducting the examination, a deposition on written questions or a deposition on oral questions which has been transcribed shall be submitted to the witness and shall be read to or by him, and any changes in form or substance which the witness desires to make shall be entered upon the deposition with a statement of the reasons given by the witness for making them; and the deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign the deposition, the officer before whom the deposition was taken shall sign it and state on the record the fact of the witness's failure or refusal to sign together with any reason given. The deposition may then be used as fully as though signed. Where testimony is transcribed, the officer before whom the deposition was taken shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness.

(f) Subsequent examination. Leave of court is required to compel a judgment debtor to appear for the taking of his deposition or to compel the production by him of books and papers within one year after the conclusion of a previous examination of him with respect to the same judgment.

§ 5225. Payment or delivery of property of judgment debtor. (a) Property in the possession of judgment debtor. Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.

(b) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239.

(c) Documents to effect payment or delivery. The court may order any person to execute and deliver any document necessary to effect payment or delivery.

§ 5226. Installment payment order. Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is receiving or will receive money from any source, or is attempting to impede the judgment creditor by rendering services without adequate compensation, the court shall order that the judgment debtor make specified installment payments to the judgment creditor. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. In fixing the amount of the payments, the court shall take into consideration the reasonable requirements of the judgment debtor and his dependents, any payments required to be made by him or deducted from the money he would otherwise receive in satisfaction of other judgments and wage assignments, the amount due on the judgment, and the amount being or to be received, or, if the judgment debtor is attempting to impede the judgment creditor by rendering services without adequate compensation, the reasonable value of the services rendered.

§ 5227. Payment of debts owed to judgment debtor. Upon a special proceeding commenced by the judgment creditor, against any person who it is shown is or will become indebted to the judgment debtor, the court may require such person to pay to the judgment creditor the debt upon

maturity, or so much of it as is sufficient to satisfy the judgment, and to execute and deliver any document necessary to effect payment; or it may direct that a judgment be entered against such person in favor of the judgment creditor. Costs of the proceeding shall not be awarded against a person who did not dispute the indebtedness. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239.

§ 5228. Receivers. (a) Appointment of receiver. Upon motion of a judgment creditor, upon such notice as the court may require, the court may appoint a receiver who may be authorized to administer, collect, improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest or to do any other acts designed to satisfy the judgment. As far as practicable, the court shall require that notice be given to the judgment debtor and to any other judgment creditors of the judgment debtor. The order of appointment shall specify the property to be received, the duties of the receiver and the manner in which they are to be performed. A receiver shall have no power to employ counsel unless expressly so authorized by order of the court. A receiver shall be entitled to necessary expenses and to such commissions, not exceeding five percent of the sums received and disbursed by him, as the court which appointed him allows, but if a judgment creditor is appointed receiver, he shall not be entitled to compensation. If a receiver has been appointed, a court making an order directing payment, or delivery, of property shall direct that payment, or delivery, be made to the receiver rather than to a sheriff. Sections 6402, 6403, 6404 and 6405 are applicable to receivers appointed under this subdivision.

(b) Extension of receivership. Where a receiver has been appointed, the court, upon motion of a judgment creditor, upon such notice as it may require, shall extend the receivership to his judgment.

§ 5229. Enforcement before judgment entered. In any court, before a judgment is entered, upon motion of the party in whose favor a verdict or decision has been rendered, the trial judge may order examination of the adverse party and order him restrained with the same effect as if a restraining notice had been served upon him after judgment.

§ 5230. Executions. (a) Form. An execution shall specify the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount due thereon and it shall specify the names of the parties in whose favor and against whom the judgment or order was entered. An execution shall direct that only the property in which a named judgment debtor or obligor who is not deceased has an interest, or the debts owed to the named judgment debtor or obligor, be levied upon or sold thereunder and shall specify the last known address of that judgment debtor or obligor. An execution notice shall state that, pursuant to subdivision (1) of section fifty-two hundred five of this article, two thousand five hundred dollars of an account containing direct deposit or electronic payments reasonably identifiable as statutorily exempt payments, as defined in paragraph two of subdivision (1) of section fifty-two hundred five of this article, is exempt from execution and that the garnishee cannot levy upon or restrain two thousand five hundred dollars in such an account. An execution notice shall likewise state that pursuant to subdivision (i) of section fifty-two hundred twenty-two of this article, an execution shall not apply to an amount equal to or less than ninety percent of the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty

times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents. Where the judgment or order was entered in a court other than the supreme, county or a family court, the execution shall also specify the date on which a transcript of the judgment or order was filed with the clerk of the county in which the judgment was entered. Where jurisdiction in the action was based upon a levy upon property or debt pursuant to an order of attachment, the execution shall also state that fact, describe all property and debts levied upon, and direct that only such property and debts be sold thereunder. Where the judgment or order was recovered for all or part of a mortgage debt, the execution shall also describe the mortgaged property, specify the book and page where the mortgage is recorded, and direct that no part of the mortgaged property be levied upon or sold thereunder.

(b) Issuance. At any time before a judgment or order is satisfied or vacated, an execution may be issued from the supreme court, county court or a family court, in the county in which the judgment was first docketed, by the clerk of the court or the attorney for the judgment creditor as officer of the court, to the sheriffs of one or more counties of the state, directing each of them to satisfy the judgment or order out of the real and personal property of the judgment debtor or obligor and the debts due to him or her. Where the judgment or order is for support and is payable to the support collection unit designated by the appropriate social services district, such unit shall be authorized to issue the execution and to satisfy the judgment or order out of the real and personal property of the judgment debtor or obligor and the debts due to him or her.

(c) Return. An execution shall be returned to the clerk of the court from which it was issued or to the support collection unit within sixty days after issuance unless the execution has been served in accordance with section 5231 or subdivision (a) of section 5232. The time may be extended in writing for a period of not more than sixty additional days by the attorney for the judgment creditor or by the support collection unit. Further like extensions may be given by the attorney for the judgment creditor or by the support collection unit unless another execution against the same judgment debtor or obligor has been delivered to the same enforcement officer and has not been returned.

(d) Records of sheriff or support collection unit. Each sheriff or support collection unit shall keep a record of executions delivered showing the names of the parties and the judgment debtor or obligor; the dates of issue and return; the date and time of delivery, which shall be endorsed upon the execution; the amount due at the time the execution was delivered; and the amount of the judgment or order and of the sheriff's fees unpaid, if any, at the time of the return.

(e) For the purposes of this section "order" shall mean an order issued by a court of competent jurisdiction directing the payment of support, alimony or maintenance upon which a "default" as defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article has been established subject to the procedures established for the determination of a "mistake of fact" for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article, except that for the purposes of this section only, a default shall not be founded upon retroactive child support obligations as defined in paragraph (a) of subdivision one of section four hundred forty of the family court act and subdivision one of section two hundred forty, and paragraph b of subdivision nine of section two hundred thirty-six of the domestic relations law.

§ 5231. Income execution. (a) Form. An income execution shall specify, in addition to the requirements of subdivision (a) of section 5230, the name and address of the person from whom the judgment debtor is

receiving or will receive money; the amount of money, the frequency of its payment and the amount of the installments to be collected therefrom; and shall contain a notice to the judgment debtor that he shall commence payment of the installments specified to the sheriff forthwith and that, upon his default, the execution will be served upon the person from whom he is receiving or will receive money.

(b) Issuance. Where a judgment debtor is receiving or will receive money from any source, an income execution for installments therefrom of not more than ten percent thereof may be issued and delivered to the sheriff of the county in which the judgment debtor resides or, where the judgment debtor is a non-resident, the county in which he is employed; provided, however, that (i) no amount shall be withheld from the judgment debtor's earnings pursuant to an income execution for any week unless the disposable earnings of the judgment debtor for that week exceed the greater of thirty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or thirty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable; (ii) the amount withheld from the judgment debtor's earnings pursuant to an income execution for any week shall not exceed twenty-five percent of the disposable earnings of the judgment debtor for that week, or, the amount by which the disposable earnings of the judgment debtor for that week exceed the greater of thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act of 1938 or thirty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable, whichever is less; (iii) if the earnings of the judgment debtor are also subject to deductions for alimony, support or maintenance for family members or former spouses pursuant to section five thousand two hundred forty-one or section five thousand two hundred forty-two of this article, the amount withheld from the judgment debtor's earnings pursuant to this section shall not exceed the amount by which twenty-five percent of the disposable earnings of the judgment debtor for that week exceeds the amount deducted from the judgment debtor's earnings in accordance with section five thousand two hundred forty-one or section five thousand two hundred forty-two of this article. Nothing in this section shall be construed to modify, abrogate, impair, or affect any exemption from the satisfaction of a money judgment otherwise granted by law.

(c) Definition of earnings and disposable earnings. (i) As used herein earnings means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(ii) As used herein disposable earnings means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(d) Service upon debtor. Within twenty days after an income execution is delivered to the sheriff, the sheriff shall serve a copy of it upon the judgment debtor, in the same manner as a summons or, in lieu thereof, by certified mail return receipt requested provided an additional copy is sent by regular mail to the debtor. If service is by mail as herein provided, the person effecting service shall retain the receipt together with a post office certificate of mailing as proof of such service.

(e) Levy upon default or failure to serve debtor. If a judgment debtor fails to pay installments pursuant to an income execution served upon him for a period of twenty days, or if the sheriff is unable to serve an income execution upon the judgment debtor within twenty days after the execution is delivered to the sheriff, the sheriff shall levy upon the money that the judgment debtor is receiving or will receive by serving a copy of the income execution, indorsed to indicate the extent to which paid installments have satisfied the judgment, upon the person from whom

the judgment debtor is receiving or will receive money personally within the county in the same manner as a summons or by certified mail return receipt requested, except that such service shall not be made by delivery to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318.

(f) Withholding of installments. A person served with an income execution shall withhold from money then or thereafter due to the judgment debtor installments as provided therein and pay them over to the sheriff. If such person shall fail to so pay the sheriff, the judgment creditor may commence a proceeding against him for accrued installments. If the money due to the judgment debtor consists of salary or wages and his employment is terminated by resignation or dismissal at any time after service of the execution, the levy shall thereafter be ineffective, and the execution shall be returned, unless the debtor is reinstated or re-employed within ninety days after such termination.

(g) Statement on income execution. Any income execution delivered to the sheriff on or after the effective date of this act shall contain the following statement:

THIS INCOME EXECUTION DIRECTS THE WITHHOLDING OF UP TO TEN PERCENT OF THE JUDGMENT DEBTOR'S GROSS INCOME. IN CERTAIN CASES, HOWEVER, STATE OR FEDERAL LAW DOES NOT PERMIT THE WITHHOLDING OF THAT MUCH OF THE JUDGMENT DEBTOR'S GROSS INCOME. THE JUDGMENT DEBTOR IS REFERRED TO NEW YORK CIVIL PRACTICE LAW AND RULES § 5231 AND 15 UNITED STATES CODE § 1671 ET SEQ.

I. LIMITATIONS ON THE AMOUNT THAT CAN BE WITHHELD.

A. AN INCOME EXECUTION FOR INSTALLMENTS FROM A JUDGMENT DEBTOR'S GROSS INCOME CANNOT EXCEED TEN PERCENT (10%) OF THE JUDGMENT DEBTOR'S GROSS INCOME.

B. IF A JUDGMENT DEBTOR'S WEEKLY DISPOSABLE EARNINGS ARE LESS THAN THIRTY (30) TIMES THE CURRENT FEDERAL MINIMUM WAGE (, PER HOUR), OR (), NO DEDUCTION CAN BE MADE FROM THE JUDGMENT DEBTOR'S EARNINGS UNDER THIS INCOME EXECUTION.

C. A JUDGMENT DEBTOR'S WEEKLY DISPOSABLE EARNINGS CANNOT BE REDUCED BELOW THE AMOUNT ARRIVED AT BY MULTIPLYING THIRTY (30) TIMES THE CURRENT FEDERAL MINIMUM WAGE (, PER HOUR), OR (), UNDER THIS INCOME EXECUTION.

D. IF DEDUCTIONS ARE BEING MADE FROM A JUDGMENT DEBTOR'S EARNINGS UNDER ANY ORDERS FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES, AND THOSE DEDUCTIONS EQUAL OR EXCEED TWENTY-FIVE PERCENT (25%) OF THE JUDGMENT DEBTOR'S DISPOSABLE EARNINGS, NO DEDUCTION CAN BE MADE FROM THE JUDGMENT DEBTOR'S EARNINGS UNDER THIS INCOME EXECUTION.

E. IF DEDUCTIONS ARE BEING MADE FROM A JUDGMENT DEBTOR'S EARNINGS UNDER ANY ORDERS FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES, AND THOSE DEDUCTIONS ARE LESS THAN TWENTY-FIVE PERCENT (25%) OF THE JUDGMENT DEBTOR'S DISPOSABLE EARNINGS, DEDUCTIONS MAY BE MADE FROM THE JUDGMENT DEBTOR'S EARNINGS UNDER THIS INCOME EXECUTION. HOWEVER, THE AMOUNT ARRIVED AT BY ADDING THE DEDUCTIONS FROM EARNINGS MADE UNDER THIS EXECUTION TO THE DEDUCTIONS MADE FROM EARNINGS UNDER ANY ORDERS FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES CANNOT EXCEED TWENTY-FIVE PERCENT (25%) OF THE JUDGMENT DEBTOR'S DISPOSABLE EARNINGS.

NOTE: NOTHING IN THIS NOTICE LIMITS THE PROPORTION OR AMOUNT WHICH MAY BE DEDUCTED UNDER ANY ORDER FOR ALIMONY, SUPPORT OR MAINTENANCE FOR FAMILY MEMBERS OR FORMER SPOUSES.

II. EXPLANATION OF LIMITATIONS

DEFINITIONS:

DISPOSABLE EARNINGS

DISPOSABLE EARNINGS ARE THAT PART OF AN INDIVIDUAL'S EARNINGS LEFT AFTER DEDUCTING THOSE AMOUNTS THAT ARE REQUIRED BY LAW TO BE WITHHELD (FOR EXAMPLE, TAXES, SOCIAL SECURITY, AND UNEMPLOYMENT INSURANCE, BUT NOT DEDUCTIONS FOR UNION DUES, INSURANCE PLANS, ETC.).
GROSS INCOME

GROSS INCOME IS SALARY, WAGES OR OTHER INCOME, INCLUDING ANY AND ALL OVERTIME EARNINGS, COMMISSIONS, AND INCOME FROM TRUSTS, BEFORE ANY DEDUCTIONS ARE MADE FROM SUCH INCOME.

ILLUSTRATIONS REGARDING EARNINGS:

IF DISPOSABLE EARNINGS IS:	AMOUNT TO PAY OR DEDUCT FROM EARNINGS UNDER THIS INCOME EXECUTION IS:
(a) 30 TIMES FEDERAL MINIMUM WAGE () OR LESS	NO PAYMENT OR DEDUCTION ALLOWED
(b) MORE THAN 30 TIMES FEDERAL MINIMUM WAGE () AND LESS THAN 40 TIMES FEDERAL MINIMUM WAGE ()	THE LESSER OF: THE EXCESS OVER 30 TIMES THE FEDERAL MINIMUM WAGE () IN DISPOSABLE EARNINGS, or 10% OF GROSS EARNINGS
(c) 40 TIMES THE FEDERAL MINIMUM WAGE () OR MORE	THE LESSER OF: 25% OF DISPOSABLE EARNINGS OR 10% OF GROSS EARNINGS.

III. NOTICE: YOU MAY BE ABLE TO CHALLENGE THIS INCOME EXECUTION THROUGH THE PROCEDURES PROVIDED IN CPLR § 5231 (i) AND CPLR § 5240

IF YOU THINK THAT THE AMOUNT OF YOUR INCOME BEING DEDUCTED UNDER THIS INCOME EXECUTION EXCEEDS THE AMOUNT PERMITTED BY STATE OR FEDERAL LAW, YOU SHOULD ACT PROMPTLY BECAUSE THE MONEY WILL BE APPLIED TO THE JUDGMENT. IF YOU CLAIM THAT THE AMOUNT OF YOUR INCOME BEING DEDUCTED UNDER THIS INCOME EXECUTION EXCEEDS THE AMOUNT PERMITTED BY STATE OR FEDERAL LAW, YOU SHOULD CONTACT YOUR EMPLOYER OR OTHER PERSON PAYING YOUR INCOME. FURTHER, YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. NEW YORK STATE LAW PROVIDES TWO PROCEDURES THROUGH WHICH AN INCOME EXECUTION CAN BE CHALLENGED:

CPLR § 5231(i) MODIFICATION. AT ANY TIME, THE JUDGMENT DEBTOR MAY MAKE A MOTION TO A COURT FOR AN ORDER MODIFYING AN INCOME EXECUTION.

CPLR § 5240 MODIFICATION OR PROTECTIVE ORDER: SUPERVISION OF ENFORCEMENT. AT ANY TIME, THE JUDGMENT DEBTOR MAY MAKE A MOTION TO A COURT FOR AN ORDER DENYING, LIMITING, CONDITIONING, REGULATING, EXTENDING OR MODIFYING THE USE OF ANY POST-JUDGMENT ENFORCEMENT PROCEDURE, INCLUDING THE USE OF INCOME EXECUTIONS.

(h) Levy upon money payable by municipal corporation or the state. The levy of an income execution served upon a municipal or public benefit corporation, or board of education, shall be effective fifteen days after such service. Such an execution shall specify the title or position of the judgment debtor and the bureau, office, department or subdivision in which he is employed and the municipal or public benefit corporation, or board of education, shall be entitled to a fee of two dollars upon being served. A levy upon money payable directly by a department of the state, or by an institution under its jurisdiction, shall be made by serving the income execution upon the head of the department, or upon a person designated by him, at the office of the department in Albany; a levy upon money payable directly upon the state comptroller's warrant, or directly by a state board, commission, body or agency which is not within any department of the state, shall be made by serving the income execution upon the state department of audit and control at its office in Albany. Service at the office of a department of the state in Albany may be made by the sheriff of any county by registered or certified mail, return receipt requested.

(i) Modification. At any time, the judgment creditor or the judgment debtor may move, upon such notice as the court may direct, for an order modifying an income execution.

(j) Priority; delivery to another sheriff. Two or more income executions issued against the same judgment debtor, specifying the same person from whom the money is received and delivered to the same or different enforcement officers shall be satisfied out of that money in the order in which the executions are delivered to an officer authorized to levy in the county, town or city in which the debtor resides or, where the judgment debtor is a non-resident, the county, town or city in which he is employed. If an income execution delivered to a sheriff is returned unsatisfied in whole or in part because the sheriff to whom it was delivered is unable to find within the county the person from whom the judgment debtor is receiving or will receive money, the execution may be delivered to the sheriff of any county in which such person may be found. The priority of an income execution delivered to a sheriff within twenty days after its return by each previous sheriff shall be determined by the time of delivery to the first sheriff.

(k) Accounting by sheriff. It shall be the duty of the sheriff to whom such income execution shall be delivered, from time to time and at least once every ninety days from the time a levy shall be made thereunder, to account for and pay over to the person entitled thereto all monies collected thereon, less his lawful fees and expenses for collecting the same.

§ 5232. Levy upon personal property. (a) Levy by service of execution. The sheriff or support collection unit designated by the appropriate social services district shall levy upon any interest of the judgment debtor or obligor in personal property not capable of delivery, or upon any debt owed to the judgment debtor or obligor, by serving a copy of the execution upon the garnishee, in the same manner as a summons, except that such service shall not be made by delivery to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318. In the event the garnishee is the state of New York, such levy shall be made in the same manner as an income execution pursuant to section 5231 of this article. A levy by service of the execution is effective only if, at the time of service, the person served owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property not capable of delivery in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in a notice which shall be served with the execution that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property not capable of delivery in the possession or custody of the person served. All property not capable of delivery in which the judgment debtor or obligor is known or believed to have an interest then in or thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due or thereafter coming due to the judgment debtor or obligor, shall be subject to the levy. The person served with the execution shall forthwith transfer all such property, and pay all such debts upon maturity, to the sheriff or to the support collection unit and execute any document necessary to effect the transfer or payment. After such transfer or payment, property coming into the possession or custody of the garnishee, or debt incurred by him, or her shall not be subject to the levy. Until such transfer or payment is made, or until the expiration of ninety days after the service of the execution upon him or her, or of such further time as is provided by any order of the court served upon him or her, whichever event first occurs, the garnishee is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose

of any such debt, to any person other than the sheriff or the support collection unit, except upon direction of the sheriff or the support collection unit or pursuant to an order of the court. At the expiration of ninety days after a levy is made by service of the execution, or of such further time as the court, upon motion of the judgment creditor or support collection unit has provided, the levy shall be void except as to property or debts which have been transferred or paid to the sheriff or to the support collection unit or as to which a proceeding under sections 5225 or 5227 has been brought. A judgment creditor who, or support collection unit which, has specified personal property or debt to be levied upon in a notice served with an execution shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained by reason of the levy.

(b) Levy by seizure. The sheriff or support collection unit of the appropriate social services district shall levy upon any interest of the judgment debtor in personal property capable of delivery by taking the property into custody without interfering with the lawful possession of pledgees and lessees. The sheriff or support collection unit shall forthwith serve a copy of the execution in the manner prescribed by subdivision (a) upon the person from whose possession or custody the property was taken.

(c) Notice to judgment debtor or obligor. Where an execution does not state that a notice in the form presented by subdivision (e) of section fifty-two hundred twenty-two of this chapter has been duly served upon the judgment debtor or obligor within a year, the sheriff or support collection unit shall, not later than four days after service of the execution upon any garnishee, mail by first class mail, or personally deliver, to each judgment debtor or obligor who is a natural person, a copy of the execution together with such notice. The sheriff or support collection unit shall specify on the notice to judgment debtor or obligor the name and address of the judgment creditor or the judgment creditor's attorney or the support collection unit. The notice shall be mailed to the judgment debtor or obligor at his or her residence address; and in the event such mailing is returned as undeliverable by the post office, or if the residence address of the judgment debtor or obligor is unknown, then to the judgment debtor or obligor in care of the place of employment of the judgment debtor or obligor if known, in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by the return address or otherwise, that the communication is from a sheriff or support collection unit or concerns a debt; or if neither the residence nor the place of employment of the judgment debtor or obligor is known, then to the judgment debtor or obligor at any other known address.

(d) For the purposes of this section "obligor" shall mean an individual other than a judgment debtor obligated to pay support, alimony or maintenance pursuant to an order of a court of competent jurisdiction who has been found to be in "default" of such order as such term is defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article and the establishment of such default has been subject to the procedures established for the determination of a "mistake of fact" for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article, except that for the purposes of this section only, a default shall not be founded upon retroactive child support obligations as defined in paragraph (c) of subdivision one of section four hundred forty and subdivision one of section two hundred forty, and paragraph b of subdivision nine of section two hundred thirty-six of the domestic relations law.

(e) Notwithstanding the provisions of subdivision (a) of this section, if direct deposit or electronic payments reasonably identifiable as statutorily exempt payments as defined in paragraph two of subdivision (1) of section fifty-two hundred five of this article were made to the

judgment debtor's account during the forty-five day period preceding the date that the execution notice was served on the garnishee banking institution, then a garnishee banking institution shall not execute, levy, attach, garnish or otherwise restrain or encumber two thousand five hundred dollars in the judgment debtor's account. Notwithstanding the provisions of subdivision (a) of this section, an execution shall not apply to an amount equal to or less than the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable (as published on the websites of the United States department of labor and the state department of labor) except such part thereof as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents. This amount shall be equal to seventeen hundred sixteen dollars on the effective date of this subdivision, and shall rise to seventeen hundred forty dollars on July twenty-fourth, two thousand nine, and shall rise thereafter in tandem with the minimum wage. Nothing in this subsection shall be construed to limit a banking institution's right or obligation to restrain, remove or execute upon such funds from the judgment debtor's account if required by 42 U.S.C. § 659 or 38 U.S.C. § 5301 or by a court order. Nothing in this subdivision shall alter the exempt status of funds that are protected from execution, levy, attachment, garnishment, or other legal process, under section fifty-two hundred five of this article or under any other provision of state or federal law, or affect the right of a judgment debtor to claim such exemption.

(f) Fee for banking institution's costs in processing a levy by service of execution when account contains only exempt, direct deposit or electronic payments. In the event that a banking institution cannot lawfully garnish or execute upon on a judgment debtor's banking institution account or funds are garnished or executed upon in violation of any section of this chapter, the banking institution shall charge no fee to the judgment debtor regardless of any terms of agreement, or schedule of fees, or other contract between the judgment debtor and the banking institution.

(g) Where a levy by execution pursuant to this section is made against a natural person's account at a banking institution, the sheriff or support collection unit shall serve the banking institution with the exemption notice and two exemption claim forms prescribed in subdivision (b) of section fifty-two hundred twenty-two-a of this article. The notice and forms must be served upon the banking institution simultaneously with the execution and section fifty-two hundred twenty-two-a of this article shall apply, and all procedures stated therein must be followed. The banking institution shall not transfer the funds in the account to the sheriff or support collection unit for at least twenty-seven days. If, after thirty days, the banking institution has not received an exemption claim form from the judgment debtor, or a court order directing otherwise, it may thereafter transfer the funds to the sheriff or support collection unit.

§ 5233. Sale of personal property. (a) Public auction. The interest of the judgment debtor in personal property obtained by a sheriff pursuant to execution or order, other than legal tender of the United States, shall be sold by the sheriff at public auction at such time and place and as a unit or in such lots, or combination thereof, as in his judgment will bring the highest price, but no sale may be made to that sheriff or to his deputy or undersheriff. The property shall be present and within the view of those attending the sale unless otherwise ordered by the court.

(b) Public notice. A printed notice of the time and place of the sale shall be posted at least six days before the sale in three public places in the town or city in which the sale is to be held, provided however,

in the city of New York, in lieu of posting such notice may be advertised in the auction columns of any morning newspaper published daily and Sunday in such city an edition of which appears on the newsstands the previous night and has a circulation of not less than three hundred thousand. An omission to so post or advertise notice, or the defacing or removal of a posted notice, does not affect the title of a purchaser without notice of the omission or offense.

(c) Order for immediate sale or disposition. The court may direct immediate sale or other disposition of property with or without notice if the urgency of the case requires.

(d) Unsaleable material. If property seized by the sheriff is considered by him to be material which, by law, may not be sold, he shall apply to the court for a determination whether the property can legally be sold. Reasonable notice of such application shall also be given to the owner of such property. If the court decides the property may not be legally sold, it shall order appropriate disposition of the property which may include its destruction.

§ 5234. Distribution of proceeds of personal property; priorities.

(a) Distribution of proceeds of personal property. After deduction for and payment of fees, expenses and any taxes levied upon sale, delivery, transfer or payment, the proceeds of personal property or debt acquired by a receiver or a sheriff or other officer authorized to enforce the judgment shall be distributed to the judgment creditor and any excess shall be paid over to the judgment debtor. No distribution of proceeds shall be made until fifteen days after service of the execution except upon order of the court.

(b) Priority among execution creditors. Where two or more executions or orders of attachment are issued against the same judgment debtor or obligor and delivered to the same enforcement officer or issued by the support collection unit designated by the appropriate social services district, they shall be satisfied out of the proceeds of personal property or debt levied upon by the officer or by the support collection unit in the order in which they were delivered, such executions for child support shall have priority over any other assignment, levy or process. Where two or more executions or orders of attachment are issued against the same judgment debtor or obligor and delivered to different enforcement officers, and personal property or debt is levied upon within the jurisdiction of all of the officers, the proceeds shall be first applied in satisfaction of the execution or order of attachment delivered to the officer who levied, and thereafter shall be applied in satisfaction of the executions or orders of attachment delivered to those of the other officers who, before the proceeds are distributed, make a demand upon the officer who levied, in the order of such demands, except that such executions for child support shall have priority over any other assignment, levy or process. Where there is more than one past-due child support order, the proceeds shall be applied to the orders in proportion to the amount each order's claim bears to the combined total. Nothing herein shall be deemed to defeat or impair the rights of any secured party as such term is defined in paragraph seventy-two of subsection (a) of section 9--102 of the uniform commercial code. An execution or order of attachment returned by an officer before a levy or delivered to him after the proceeds of the levy have been distributed shall not be satisfied out of those proceeds.

(c) Priority of other judgment creditors. Where personal property or debt has been ordered delivered, transferred or paid, or a receiver thereof has been appointed by order, or a receivership has been extended thereto by order, and the order is filed before the property or debt is levied upon, the rights of the judgment creditor who secured the order are superior to those of the judgment creditor entitled to the proceeds of the levy. Where two or more such orders affecting the same interest in personal property or debt are filed, the proceeds of the property or debt shall be applied in the order of filing. Where delivery, transfer,

or payment to the judgment creditor, a receiver, or a sheriff or other officer is not completed within sixty days after an order is filed, the judgment creditor who secured the order is divested of priority, unless otherwise specified in the order or in an extension order filed within the sixty days.

§ 5235. Levy upon real property. After the expiration of ten years after the filing of the judgment-roll, the sheriff shall levy upon any interest of the judgment debtor in real property, pursuant to an execution other than one issued upon a judgment for any part of a mortgage debt upon the property, by filing with the clerk of the county in which the property is located a notice of levy describing the judgment, the execution and the property. The clerk shall record and index the notice against the name of the judgment debtor, or against the property, in the same books, and in the same manner as a notice of the pendency of an action.

§ 5236. Sale of real property. (a) Time of sale; public auction. Between the fifty-sixth and the sixty-third day after the first publication of a copy of the notice of sale, unless the time is extended by order or the sale postponed by the sheriff, the interest of the judgment debtor in real property which has been levied upon under an execution delivered to the sheriff or which was subject to the lien of the judgment at the time of such delivery shall be sold by the sheriff pursuant to the execution at public auction at such time and place within the county where the real property is situated and as a unit or in such parcels, or combination thereof, as in his judgment will bring the highest price, but no sale may be made to that sheriff or to his deputy or undersheriff. If the property is situated in more than one county, it may be sold in a county in which any part is situated, unless the court orders otherwise.

(b) Sale of mortgaged property. Real property mortgaged shall not be sold pursuant to an execution issued upon a judgment recovered for all or part of the mortgage debt.

(c) Notice of sale. A printed notice of the time and place of the sale containing a description of the property to be sold shall be posted at least fifty-six days before the sale in three public places in the town or city in which the property is located, and, if the sale is to be held in another town or city, in three public places therein. Service by the sheriff of a copy of said notice on the judgment debtor shall be made as provided in section 308. A list containing the name and address of the judgment debtor and of every judgment creditor whose judgment was a lien on the real property to be sold and of every person who had of record any interest in or lien on such property forty-five days prior to the day fixed for the sale shall be furnished the sheriff by the judgment creditor, and each person on the list shall be served by the sheriff with a copy of the notice by personal delivery or by registered or certified mail, return receipt requested, at least thirty days prior to the day fixed for the sale. A copy of the notice shall be published at least once in each of four periods of fourteen successive days, the first of which periods may be measured from any day between the fifty-sixth and sixty-third days, preceding the time fixed for the sale in a newspaper published in the county in which the property is located or, if there is none, in a newspaper published in an adjoining county. An omission to give any notice required by this or the following subdivision, or the defacing or removal of a notice posted pursuant to either, does not affect the title of a purchaser without notice of the omission or offense.

(d) Notice of postponement of sale. Any person may, in a writing served on the sheriff either by personal delivery or by registered or certified mail, return receipt requested, request that the sheriff notify him in the event that a scheduled sale is postponed. Such writing shall contain the person's name and mailing address. If the sale is for

any reason postponed, notice of the postponed date need be given only to:

1. those whose requests, made as above provided, have been received by the sheriff at least five days prior to the postponed date,
2. those who appeared at the time and place previously appointed for the sale, and
3. the judgment debtor at his last known address.

The notice may be served either by personal delivery or by registered or certified mail, return receipt requested. Unless the court shall otherwise direct, it need not be posted or published.

(e) Effect of notice as against judgment creditors. A judgment creditor duly notified pursuant to subdivisions (c) or (d) who fails to deliver an execution to the sheriff prior to the sale shall have no further lien on the property and, except as against the judgment debtor, no further interest in the proceeds of the sale.

(f) Conveyance; proof of notice. Within ten days after the sale, the sheriff shall execute and deliver to the purchaser proofs of publication, service and posting of the notice of sale, and a deed which shall convey the right, title and interest sold. Such proofs may be filed and recorded in the office of the clerk of the county where the property is located.

(g) Disposition of proceeds of sale. After deduction for and payment of fees, expenses and any taxes levied on the sale, transfer or delivery, the sheriff making a sale of real property pursuant to an execution shall, unless the court otherwise directs,

1. distribute the proceeds to the judgment creditors who have delivered executions against the judgment debtor to the sheriff before the sale, which executions have not been returned, in the order in which their judgments have priority, and
2. pay over any excess to the judgment debtor.

§ 5237. Failure of title to property sold. The purchaser of property sold by a sheriff pursuant to execution or order may recover the purchase money from the judgment creditors who received the proceeds if the property is recovered from such purchaser in consequence of an irregularity in the sale or a vacatur, reversal or setting aside of the judgment upon which the execution or order was based. If a judgment for the purchase money is so recovered against a judgment creditor in consequence of an irregularity in the sale, such judgment creditor may enforce his judgment as if no levy or sale had been made, and, for that purpose, he may move without notice for an order restoring any lien or priority or amending any docket entry affected by the sale.

§ 5238. Directions to the sheriff. Upon motion of any party, on notice to the sheriff and all other parties, the court may direct the sheriff to dispose of, account for, assign, return or release all or any part of any property or debt, or the proceeds thereof, or to file additional returns, subject to the payment of the sheriff's fees and expenses. As far as practicable, the court shall direct that notice of the motion be given to any other judgment creditors, at the addresses shown on the judgment docket and to any persons who have secured orders of attachment affecting any property or debt, or the proceeds thereof, sought to be returned or released.

§ 5239. Proceeding to determine adverse claims. Prior to the application of property or debt by a sheriff or receiver to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt. Service of process in such a proceeding shall be made by service of a notice of petition upon the respondent, the sheriff or receiver, and such other person as the court directs, in the same manner as a notice of motion. The proceeding may be commenced in the county where the property was

levied upon, or in a court or county specified in subdivision (a) of section 5221. The court may vacate the execution or order, void the levy, direct the disposition of the property or debt, or direct that damages be awarded. Where there appear to be disputed questions of fact, the court shall order a separate trial, indicating the person who shall have possession of the property pending a decision and the undertaking, if any, which such person shall give. If the court determines that any claim asserted was fraudulent, it may require the claimant to pay to any party adversely affected thereby the reasonable expenses incurred by such party in the proceeding, including reasonable attorneys' fees, and any other damages suffered by reason of the claim. The court may permit any interested person to intervene in the proceeding.

§ 5240. Modification or protective order; supervision of enforcement.

The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure. Section 3104 is applicable to procedures under this article.

§ 5241. Income execution for support enforcement. (a) Definitions. As used in this section and in section fifty-two hundred forty-two of this chapter, the following terms shall have the following meanings:

1. "Order of support" means any temporary or final order, judgment, agreement or stipulation incorporated by reference in such judgment or decree in a matrimonial action or family court proceeding, or any foreign support order, judgment or decree, registered pursuant to article five-B of the family court act which directs the payment of alimony, maintenance, support or child support.

2. "Debtor" means any person directed to make payments by an order of support.

3. "Creditor" means any person entitled to enforce an order of support, including a support collection unit.

4. "Employer" means any employer, future employer, former employer, union or employees' organization.

5. "Income payor" includes:

(i) the auditor, comptroller, trustee or disbursing officer of any pension fund, benefit program, policy of insurance or annuity;

(ii) the state of New York or any political subdivision thereof, or the United States; and

(iii) any person, corporation, trustee, unincorporated business or association, partnership, financial institution, bank, savings and loan association, credit union, stock purchase plan, stock option plan, profit sharing plan, stock broker, commodities broker, bond broker, real estate broker, insurance company, entity or institution.

6. "Income" includes any earned, unearned, taxable or non-taxable income, benefits, or periodic or lump sum payment due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers' compensation, disability benefits, unemployment insurance benefits, payments pursuant to a public or private pension or retirement program, federal social security benefits as defined in 42 U.S.C. section 662(f) (2), and interest, but excluding public assistance benefits paid pursuant to the social services law and federal supplemental security income.

7. "Default" means the failure of a debtor to remit to a creditor three payments on the date due in the full amount directed by the order of support, or the accumulation of arrears equal to or greater than the amount directed to be paid for one month, whichever first occurs.

8. "Mistake of fact" means an error in the amount of current support or arrears or in the identity of the debtor or that the order of support does not exist or has been vacated.

9. "Support collection unit" means any support collection unit established by a social services district pursuant to the provisions of

section one hundred eleven-h of the social services law.

10. "Date of withholding" means the date on which the income would otherwise have been paid or made available to the debtor were it not withheld by the employer or income payor.

11. "Health insurance benefits" means any medical, dental, optical and prescription drugs and health care services or other health care benefits which may be provided for dependents through an employer or organization, including such employers or organizations which are self-insured.

12. "Business day" means a day on which state offices are open for regular business.

(b) Issuance. (1) When a debtor is in default, an execution for support enforcement may be issued by the support collection unit, or by the sheriff, the clerk of court or the attorney for the creditor as an officer of the court. Where a debtor is receiving or will receive income, an execution for deductions therefrom in amounts not to exceed the limits set forth in subdivision (g) of this section may be served upon an employer or income payor after notice to the debtor. The amount of the deductions to be withheld shall be sufficient to ensure compliance with the direction in the order of support, and shall include an additional amount to be applied to the reduction of arrears. The creditor may amend the execution before or after service upon the employer or income payor to reflect additional arrears or payments made by the debtor after notice pursuant to subdivision (d) of this section, or to conform the execution to the facts found upon a determination made pursuant to subdivision (e) of this section.

(2) (i) Where the court orders the debtor to provide health insurance benefits for specified dependents, an execution for medical support enforcement may, except as provided for herein, be issued by the support collection unit, or by the sheriff, the clerk of court or the attorney for the creditor as an officer of the court; provided, however, that when the court issues an order of child support or combined child and spousal support on behalf of persons other than those in receipt of public assistance or in receipt of services pursuant to section one hundred eleven-g of the social services law, such medical execution shall be in the form of a separate qualified medical child support order as provided by subdivision (f) of section four hundred sixteen of the family court act and paragraph (f) of subdivision one of section two hundred forty of the domestic relations law. Such execution for medical support enforcement may require the debtor's employer, organization or group health plan administrator to purchase on behalf of the debtor and the debtor's dependents such available health insurance benefits. Such execution shall direct the employer, organization or group health plan administrator to provide to the dependents for whom such benefits are required to be provided or such dependents' custodial parent or legal guardian or social services district on behalf of persons applying for or in receipt of public assistance any identification cards and benefit claim forms and to withhold from the debtor's income the employee's share of the cost of such health insurance benefits, and to provide written confirmation of such enrollment indicating the date such benefits were or become available or that such benefits are not available and the reasons therefor to the issuer of the execution. An execution for medical support enforcement shall not require a debtor's employer, organization or group health plan administrator to purchase or otherwise acquire health insurance or health insurance benefits that would not otherwise be available to the debtor by reason of his or her employment or membership. Nothing herein shall be deemed to obligate or otherwise hold any employer, organization or group health plan administrator responsible for an option exercised by the debtor in selecting medical insurance coverage by an employee or member.

(ii) Where the child support order requires the debtor to provide health insurance benefits for specified dependents, and where the debtor provides such coverage and then changes employment, and the new employer

provides health care coverage, an amended execution for medical support enforcement may be issued by the support collection unit, or by the sheriff, the clerk of the court or the attorney for the creditor as an officer of the court without any return to court. The issuance of the amended execution shall transfer notice of the requirements of the order and the execution to the new employer, organization or group health plan administrator, and shall have the same effect as the original execution for medical support issued pursuant to this section unless the debtor contests the execution.

(3) Any inconsistent provisions of this title or other law notwithstanding, in any case in which a parent is required by a court order to provide health coverage for a child and the parent is eligible for health insurance benefits as defined in this section through an employer or organization, including those which are self-insured, doing business in the state, such employer or organization must, in addition to implementing the provisions of a medical support execution:

(i) permit such parent to immediately enroll under such health insurance benefit coverage any such dependent who is otherwise eligible for such coverage without regard to any seasonal enrollment restrictions;

(ii) if such a parent is enrolled but fails to make application to obtain coverage of such dependent child, immediately enroll such dependent child under such health benefit coverage upon application by such child's other parent or by the office of temporary and disability assistance or social services district furnishing medical assistance to such child, and

(iii) not disenroll, or eliminate coverage of, such a child unless:
(A) the employer or organization is provided with satisfactory written evidence that such court order is no longer in effect, or the child is or will be enrolled in comparable health coverage through another insurer which will take effect not later than the effective date of such disenrollment, or

(B) such employer or organization has eliminated health insurance coverage for all similarly situated employees.

(c) Execution for support enforcement; form. (1) The income execution shall contain the caption of the order of support, and specify the date that the order of support was entered, the court in which it was entered, the amount of the periodic payments directed, the amount of arrears, the nature of the default and the names of the debtor and creditor. In addition, the income execution shall include:

(i) the name and address of the employer or income payor from whom the debtor is receiving or will receive income;

(ii) the amount of the deductions to be made therefrom on account of current support, and the amount to be applied to the reduction of arrears;

(iii) a notice that deductions will apply to current and subsequent income;

(iv) a notice that the income execution will be served upon any current or subsequent employer or income payor unless a mistake of fact is shown within fifteen days, a notice of the manner in which a mistake of fact may be asserted, and a notice that, if the debtor claims a mistake of fact, a determination will be made within forty-five days after notice to the debtor as provided in subdivision (d) of this section, and that the debtor will receive written notice whether the income execution will be served and of the time that deductions will begin;

(v) a notice that the employer or income payor must commence deductions no later than the first pay period that occurs after fourteen days following the service of the income execution and that payment must be remitted within seven business days of the date that the debtor paid;

(vi) a notice that the income execution is binding until further notice;

(vii) a notice of the substance of the provisions of section fifty-two

hundred fifty-two of this chapter and that a violation thereof is punishable as a contempt of court by fine or imprisonment or both;

(viii) a notice of the limitations upon deductions from wages set forth in subdivision (g) of this section;

(ix) a notice that an employer must notify the issuer promptly when the debtor terminates employment and provide the debtor's last address and the name and address of the new employer, if known;

(x) a notice that when an employer receives an income withholding instrument issued by another state, the employer shall apply the income withholding law of the state of the debtor's principal place of employment in determining:

(A) the employer's fee for processing income withholding;

(B) the maximum amount permitted to be withheld from the debtor's income;

(C) the time periods within which the employer must implement the income withholding and forward the child support payment;

(D) the priorities for withholding and allocating income withheld for multiple child support creditors; and

(E) any withholding terms or conditions not specified in the withholding instrument; and

(xi) a notice that an employer who complies with an income withholding notice that is regular on its face shall not be subject to civil liability to any individual or agency for conduct in compliance with the notice.

(2) The medical support execution shall contain the caption of the order of support and specify the date that the order of support was entered and the court in which it was entered. Such execution shall include the name and address of the employer or organization and shall include:

(i) a notice that the debtor has been ordered by the court to enroll the dependents in any available health insurance benefits and to maintain such coverage for such dependents as long as such benefits remain available;

(ii) a notice inquiring of the employer or organization as to whether such health insurance benefits are presently in effect for the eligible dependents named in the execution, the date such benefits were or become available, or that such benefits are not available and the reasons therefor and directing that the response to such inquiry immediately be forwarded to the issuer of such execution;

(iii) a statement directing the employer or organization to purchase on behalf of the debtor any available health insurance benefits to be made available to the debtor's dependents as directed by the execution, including the enrollment of such eligible dependents in such benefit plans and the provision to the dependents or such dependents' custodial parent or legal guardian or social services district on behalf of persons applying for or in receipt of public assistance of any identification cards and benefit claim forms;

(iv) a statement directing the employer or organization to deduct from the debtor's income such amount which is the debtor's share of the premium, if any, for such health insurance benefits for such dependents who are otherwise eligible for such coverage without regard to any seasonal enrollment restrictions;

(v) a notice that the debtor's employer must notify the issuer promptly at any time the debtor terminates or changes such health insurance benefits;

(vi) a statement that the debtor's employer or organization shall not be required to purchase or otherwise acquire health insurance or health insurance benefits for such dependents that would not otherwise be available to the debtor by reason of his employment or membership;

(vii) a statement that failure to enroll the eligible dependents in such health insurance plan or benefits or failure to deduct from the debtor's income the debtor's share of the premium for such plan or benefits shall make such employer or organization jointly and severally

liable for all medical expenses incurred on the behalf of the debtor's dependents named in the execution while such dependents are not so enrolled to the extent of the health insurance benefits that should have been provided under the execution;

(viii) the name and last known mailing address of the debtor and the name and mailing address of the dependents; provided however, that the name and mailing address of a social services official may be substituted on behalf of such dependents;

(ix) a reasonable description of the type of coverage to be provided to each dependent, or the manner in which such type of coverage is to be determined;

(x) the period to which such execution applies; and

(xi) a statement that the debtor's employer or organization shall not be required to provide any type or form of benefit or option not otherwise provided under the group health plan except to the extent necessary to meet the requirements of a law relating to medical child support described in section one thousand three hundred ninety-six-g-1 of title forty-two of the United States Code.

(d) Notice to debtor. The creditor shall serve a copy of the execution upon the debtor by regular mail to the debtor at his last known residence or such other place where he is likely to receive notice, or in the same manner as a summons may be served.

(e) Determination of mistake of fact. Where the execution has been issued by the support collection unit, the debtor may assert a mistake of fact and shall have an opportunity to make a submission in support of the objection within fifteen days from service of a copy thereof. Thereafter, the agency shall determine the merits of the objection, and shall notify the debtor of its determination within forty-five days after notice to the debtor as provided in subdivision (d) of this section. If the objection is disallowed, the debtor shall be notified that the income execution will be served on the employer or income payor, and of the time that deductions will begin. Where the income execution has been issued by an attorney as officer of the court, or by the sheriff, or by the clerk of the court, the debtor may assert a mistake of fact within fifteen days from service of a copy thereof by application to the supreme court or to the family court having jurisdiction in accordance with section four hundred sixty-one of the family court act. If application is made to the family court, such application shall be by petition on notice to the creditor and it shall be heard and determined in accordance with the provisions of section four hundred thirty-nine of the family court act, and a determination thereof shall be made, and the debtor notified thereof within forty-five days of the application. If application is made to the supreme court such application shall be by order to show cause or motion on notice to the creditor in the action in which the order or judgement sought to be enforced was entered and a determination thereof shall be made, and the debtor notified thereof within forty-five days of the application.

(f) Levy. If a debtor fails to show mistake of fact within fifteen days, or after a determination pursuant to subdivision (e) of this section has been made, or if the creditor is unable to serve the execution upon the debtor, the creditor may levy upon the income that the debtor is receiving or will receive by serving the execution upon the employer or income payor personally in the same manner as a summons or by regular mail, except that such service shall not be made by delivery to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318.

(g) Deduction from income. (1) An employer or income payor served with an income execution shall commence deductions from income due or thereafter due to the debtor no later than the first pay period that occurs fourteen days after service of the execution, and shall remit payments to the creditor within seven business days of the date that the debtor is paid. Each payment remitted by an employer or income payor shall include, in addition to the identity and social security number of

the debtor, the date and amount of each withholding of the debtor's income included in the payment. If the money due to the debtor consists of salary or wages and his or her employment is terminated by resignation or dismissal at any time after service of the execution, the levy shall thereafter be ineffective, and the execution shall be returned, unless the debtor is reinstated or re-employed within ninety days after such termination. An employer must notify the issuer promptly when the debtor terminates employment and provide the debtor's last address and name and address of the new employer, if known. Where the income is compensation paid or payable to the debtor for personal services, the amount of the deductions to be withheld shall not exceed the following:

(i) Where a debtor is currently supporting a spouse or dependent child other than the creditor, the amount of the deductions to be withheld shall not exceed fifty percent of the earnings of the debtor remaining after the deduction therefrom of any amounts required by law to be withheld ("disposable earnings"), except that if any part of such deduction is to be applied to the reduction of arrears which shall have accrued more than twelve weeks prior to the beginning of the week for which such earnings are payable, the amount of such deduction shall not exceed fifty-five percent of disposable earnings.

(ii) Where a debtor is not currently supporting a spouse or dependent child other than the creditor, the amount of the deductions to be withheld shall not exceed sixty percent of the earnings of the debtor remaining after the deduction therefrom of any amounts required by law to be withheld ("disposable earnings"), except that if any part of such deduction is to be applied to the reduction of arrears which shall have accrued more than twelve weeks prior to the beginning of the week for which such earnings are payable, the amount of such deduction shall not exceed sixty-five percent of disposable earnings.

(2) (A) An employer or income payor served with an income execution in accordance with paragraph one of this subdivision shall be liable to the creditor for failure to deduct the amounts specified. The creditor may commence a proceeding against the employer or income payor for accrued deductions, together with interest and reasonable attorney's fees.

(B) An employer or income payor served with an income execution in accordance with paragraph one of this subdivision shall be liable to the creditor and the debtor for failure to remit any amounts which have been deducted as directed by the income execution. Either party may commence a proceeding against the employer or income payor for accrued deductions, together with interest and reasonable attorney's fees.

(C) The actions of the employer or income payor in deducting or failing to deduct amounts specified by an income execution shall not relieve the debtor of the underlying obligation of support.

(D) In addition to the remedies herein provided and as may be otherwise authorized by law, upon a finding by the family court that the employer or income payor failed to deduct or remit deductions as directed in the income execution, the court shall issue to the employer or income payor an order directing compliance and may direct the payment of a civil penalty not to exceed five hundred dollars for the first instance and one thousand dollars per instance for the second and subsequent instances of employer or income payor noncompliance. The penalty shall be paid to the creditor and may be enforced in the same manner as a civil judgment or in any other manner permitted by law.

(3) If an employer, organization or group health plan administrator is served with an execution for medical support enforcement, such employer, organization or group health plan administrator shall: (i) purchase on behalf of the debtor any health insurance benefits which may be made available to the debtor's dependents as ordered by the execution, including the immediate enrollment of such eligible dependents in such benefit plans; (ii) provide the dependents for whom such benefits are required, or a social services official substituted for such dependents, identification cards and benefit claim forms; (iii) commence deductions

from income due or thereafter due to the debtor of such amount which is the debtor's share of the premium, if any, for such health insurance benefits, provided, however, that such deduction when combined with deductions for support does not exceed the limitations set forth in paragraph one of this subdivision and is consistent with the priority provisions set forth in subdivision (h) of this section; and (iv) provide a confirmation of such enrollment indicating the date such benefits were or become available or that such benefits are not available and the reasons therefor to the issuer of the execution. Except as otherwise provided by law, nothing herein shall be deemed to obligate an employer or organization to maintain or continue an employee's or member's health insurance benefits.

(4) If such employer, organization or group health plan administrator shall fail to so enroll such eligible dependents or to deduct from the debtor's income the debtor's share of the premium, such employer, organization or group health plan administrator shall be jointly and severally liable for all medical expenses incurred on behalf of the debtor's dependents named in the execution while such dependents are not so enrolled to the extent of the insurance benefits that should have been provided under such execution. Except as otherwise provided by law, nothing herein shall be deemed to obligate an employer, organization or group health plan administrator to maintain or continue an employee's or member's health insurance benefits.

(h) Priority. A levy pursuant to this section or an income deduction order pursuant to section 5242 of this chapter shall take priority over any other assignment, levy or process. If an employer or income payor is served with more than one execution pursuant to this section, or with an execution pursuant to this section and also an order pursuant to section 5242 of this chapter, and if the combined total amount of the deductions to be withheld exceeds the limits set forth in subdivision (g) of this section, the employer or income payor shall withhold the maximum amount permitted thereby and pay to each creditor that proportion thereof which such creditor's claim bears to the combined total. Any additional deduction authorized by subdivision (g) of this section to be applied to the reduction of arrears shall be applied to such arrears in proportion to the amount of arrears due to each creditor. Deductions to satisfy support obligations, including any additional deductions authorized by subdivision (g) of this section, shall have priority over deductions for the debtor's share of health insurance premiums.

(i) Levy upon money payable by the state. A levy upon money payable directly by a department of the state, or by an institution under its jurisdiction, shall be made by serving the income execution upon the head of the department, or upon a person designated by him, at the office of the department in Albany; a levy upon money payable directly upon the state comptroller's warrant, or directly by a state board, commission, body or agency which is not within any department of the state, shall be made by serving the execution upon the state department of audit and control at its office in Albany. Service at the office of a department or any agency or institution of the state in Albany may be made by registered or certified mail, return receipt requested.

§ 5242. Income deduction order for support enforcement. (a) Upon application of a creditor, for good cause shown, and upon such terms as justice may require, the court may correct any defect, irregularity, error or omission in an income execution for support enforcement issued pursuant to section 5241 of this article.

(b) Upon application of a creditor, for good cause shown, the court may enter an income deduction order for support enforcement. In determining good cause, the court may take into consideration evidence of the degree of such debtor's past financial responsibility, credit references, credit history, and any other matter the court considers relevant in determining the likelihood of payment in accordance with the order of support. Proof of default establishes a prima facie case

against the debtor, which can be overcome only by proof of the debtor's inability to make the payments. Unless the prima facie case is overcome, the court shall enter an income deduction order for support enforcement pursuant to this section.

(c) (1) When the court enters an order of support on behalf of persons other than those in receipt of public assistance or in receipt of services pursuant to section one hundred eleven-g of the social services law, or registers pursuant to article five-B of the family court act an order of support which has been issued by a foreign jurisdiction and which is not to be enforced pursuant to title six-A of article three of the social services law, where the court determines that the respondent earns wages that could be subject to an income deduction order, the court shall issue an income deduction order to obtain payment of the order at the same time it issues or registers the order. The court shall enter the income deduction order unless the court finds and sets forth in writing (i) the reasons that there is good cause not to require immediate income withholding; or (ii) that an agreement providing for an alternative arrangement has been reached between the parties. Such agreement may include a written agreement or an oral stipulation, made on the record, that results in a written order. For purposes of this subdivision, good cause shall mean substantial harm to the debtor. The absence of an arrearage or the mere issuance of an income deduction order shall not constitute good cause. When the court determines that there is good cause not to issue an income deduction order immediately or when the parties agree to an alternative arrangement as provided in this paragraph, the court shall state expressly in the order of support the basis for its decision. In entering the income deduction order, the court shall specify an amount to be withheld by the debtor's employer, which shall be sufficient to ensure compliance with the order of support and also shall include an additional amount to be applied to the reduction of arrears, if any, and shall specify the names, addresses, and social security numbers of the parties to the support proceeding and the mailing address of the unit within the state office of temporary and disability assistance designated to receive such deductions. The court shall transmit copies of such order to the parties and to such unit.

(2) An employer served with an income deduction order entered pursuant to this subdivision shall commence deductions from the income due or thereafter due to the debtor no later than the first pay period that occurs fourteen days after service of the income deduction order, and shall remit payments to the state office of temporary and disability assistance pursuant to subdivision fourteen of section one hundred eleven-b of the social services law within ten days of the date that the debtor is paid. Each payment remitted by the employer shall be made payable to the creditor named in the order, and shall include the names, addresses, and social security numbers of the debtor and the creditor, and the date and the amount of each withholding of the debtor's income included in the payment. An employer shall be liable to the creditor for failure to deduct the amounts specified in the income deduction order, provided however that deduction by the employer of the amounts specified shall not relieve the debtor of the underlying obligation of support. If an employer shall fail to so pay the creditor, the creditor may commence a proceeding against the employer for accrued deductions, together with interest and reasonable attorney's fees. If the debtor's employment is terminated by resignation or dismissal at any time after service of the income deduction order, the order shall cease to have force and effect unless the debtor is reinstated or re-employed by the same employer. An employer must notify the creditor promptly when the debtor terminates employment and must provide the debtor's last address and the name and address of the debtor's new employer, if known. Where the income is compensation paid or payable to the debtor for personal services, the amount withheld by the employer shall not exceed the following:

(i) Where the debtor currently is supporting a spouse or dependent child other than the creditor's dependent child, the amount withheld

shall not exceed fifty percent of the earnings of the debtor remaining after the deduction therefrom of any amounts required by law to be withheld ("disposable earnings"), except that if any part of the deduction is to be applied to the reduction of arrears which shall have accrued more than twelve weeks prior to the beginning of the week for which such earnings are payable, the amount withheld shall not exceed fifty-five percent of disposable earnings.

(ii) Where the debtor currently is not supporting a spouse or dependent child other than the creditor's dependent child, the amount withheld shall not exceed sixty percent of the earnings of the debtor remaining after the deduction therefrom of any amounts required by law to be withheld ("disposable earnings"), except that if any part of the deduction is to be applied to the reduction of arrears which shall have accrued more than twelve weeks prior to the beginning of the week for which such earnings are payable, the amount withheld shall not exceed sixty-five percent of disposable earnings.

(d) An order pursuant to this section shall take priority over any other assignment, levy or process. If an employer or income payor is served with more than one income deduction order pertaining to a single employee pursuant to this section, or with an order issued pursuant to this section and also an execution pursuant to section 5241 of this chapter, and if the combined total amount of the income to be withheld exceeds the limits set forth in subdivision (c) of this section, the employer or income payor shall withhold the maximum amount permitted thereby and pay to each creditor that proportion thereof which such creditor's claim bears to the combined total.

(e) An employer or income payor shall be liable to the creditor for failure to deduct the amounts specified, provided however that deduction of the amounts specified by the employer or income payor shall not relieve the debtor of the underlying obligation of support.

(f) A creditor shall not be required to issue process under section 5241 of this article prior to obtaining relief pursuant to this section.

(g) Where the court issues an income deduction order for support enforcement payable to the support collection unit, as defined in paragraph nine of subdivision (a) of section 5241 of this article, each payment remitted by an employer or income payor shall include, in addition to the identity and social security number of the debtor, the date and amount of each withholding of the debtor's income included in the payment.

§ 5250. Arrest of judgment debtor. Upon motion of the judgment creditor without notice, where it is shown that the judgment debtor is about to depart from the state, or keeps himself concealed therein, and that there is reason to believe that he has in his possession or custody property in which he has an interest, the court may issue a warrant directed to the sheriff of any county in which the judgment debtor may be located. The warrant shall command the sheriff to arrest the judgment debtor forthwith and bring him before the court. The sheriff shall serve a copy of the warrant and the papers upon which it was based upon the judgment debtor at the time he makes the arrest. When the judgment debtor is brought before the court, the court may order that he give an undertaking, in a sum to be fixed by the court, that he will attend before the court for examination and that he will obey the terms of any restraining notice contained in the order.

§ 5251. Disobedience of subpoena, restraining notice or order; false swearing; destroying notice of sale. Refusal or willful neglect of any person to obey a subpoena or restraining notice issued, or order granted, pursuant to this title; false swearing upon an examination or in answering written questions; and willful defacing or removal of a posted notice of sale before the time fixed for the sale, shall each be punishable as a contempt of court.

§ 5252. Discrimination against employees and prospective employees based upon wage assignment or income execution. 1. No employer shall discharge, lay off, refuse to promote, or discipline an employee, or refuse to hire a prospective employee, because one or more wage assignments or income executions have been served upon such employer or a former employer against the employee's or prospective employee's wages or because of the pendency of any action or judgment against such employee or prospective employee for nonpayment of any alleged contractual obligation. In addition to being subject to the civil action authorized in subdivision two of this section, where any employer discharges, lays off, refuses to promote or disciplines an employee or refuses to hire a prospective employee because of the existence of one or more income executions and/or income deduction orders issued pursuant to section fifty-two hundred forty-one or fifty-two hundred forty-two of this article, the court may direct the payment of a civil penalty not to exceed five hundred dollars for the first instance and one thousand dollars per instance for the second and subsequent instances of employer or income payor discrimination. The penalty shall be paid to the creditor and may be enforced in the same manner as a civil judgment or in any other manner permitted by law.

2. An employee or prospective employee may institute a civil action for damages for wages lost as a result of a violation of this section within ninety days after such violation. Damages recoverable shall not exceed lost wages for six weeks and in such action the court also may order the reinstatement of such discharged employee or the hiring of such prospective employee. Except as provided for in subdivision (g) of section fifty-two hundred forty-one, not more than ten per centum of the damages recovered in such action shall be subject to any claims, attachments or executions by any creditors, judgment creditors or assignees of such employee or prospective employee. A violation of this section may also be punished as a contempt of court pursuant to the provisions of section seven hundred fifty-three of the judiciary law.

