

**DEBT RECOVERY IN THE UNITED STATES**  
**Vogt & Resnick, Law Corporations**

I.

Initiating Action in United States Against Debtor

B. Collection Without Suit - Alternatives:

1. Demand Letter
2. Settlement and Compromise - Negotiating the Claim
  - a. Promissory Note
  - b. Guaranty by third party
  - c. Security interest in debtor's property
3. Alternative Dispute Resolution
  - c. Advantages and Disadvantages
  - d. Arbitration/Mediation
  - e. JAMS, AAA
  - f. Court Ordered

B. Preliminary Pre-Lawsuit Steps

1. Determine Statute of Limitations: \*
  - a. Oral Contract - 2 years
  - b. Written Contract – 4 years.
  - c. Fraud or Mistake – 3 years.
  - d. Negotiable Promissory Note – 6 years.
2. Locate Debtor and Other Liable Parties - Evaluate the Claim
  - a. Probability of Prevailing
  - b. Costs of Litigating

C. Collection with Suit

1. Analyze Collectability
  - a. Asset Search

**DEBT RECOVERY IN THE UNITED STATES**  
**Vogt & Resnick, Law Corporations**

2. Provisional Remedies – Determine if these Should be Undertaken to Preserve Value of Potential Judgments to Prevent Debtor from Concealing or Dissipating Assets:

Remedies Available:

- a. Attachment
- b. Receivership

3. Determine Possibility and Effect of Debtor Filing for Bankruptcy - Halts all Collection and Enforcement Activity against Debtor.

Types:

- a. Chapter 7 - Filed by Individuals and Businesses Seeking Liquidation.
- b. Chapter 11 – Primarily intended for Reorganization of Businesses.
- c. Chapter 13 – Only for Individuals with Moderate Debt; Alternative to Liquidation, which may Require Repayment of Debt.

D. Determine Proper Court

1. Federal Court - Federal Law Claims, Diversity of Parties
2. State Court (most cases may be heard in state court – generally faster)
  - a. Proper Venue - (proper county location within state for filing of suit)\*
  - b. Proper Court in which to File Claim: \*
3. Small Claims Court (claims \$5,000 and under)
  - c. Superior Court Limited Civil Case (\$25,000 and under)
  - b. Superior Court Unlimited (claims over \$25,000)

**DEBT RECOVERY IN THE UNITED STATES**  
**Vogt & Resnick, Law Corporations**

- E. Post Judgment - Enforcement and Collection
  - 1. Judgment Enforceable for 10 Years, after which Renewable for Another 10 Years, or Can Initiate Independent Action on Judgment.
  - 2. Plan for Enforcement of Judgment
    - a. Location of Debtor's Available Assets
      - (1) Formal Discovery
      - (2) Judgment Debtor Examination
      - (3) Outside Investigation
    - b. Determine Preferable Enforcement Method(s)
      - (1) Writ of Execution on Assets
      - (2) Real and Personal Property Judgment Liens
      - (3) Wage Garnishment
      - (4) Writ of Possession or Sale
- II. Collection of Judgments Rendered Abroad
  - A. Determine State Statute in Particular State Where Debtor And/or Assets Located
    - 1. Generally: U.S. has no reciprocal treaty with any country requiring that it recognize judgments rendered abroad.
    - 2. But: Judgments may be enforceable in any particular American state depending on that states' statutory law on foreign money-judgments.  
  
(Example – In California, enforceability of foreign country money judgment permitted through the Uniform Foreign Money Judgment Recognition Act. (Cal. Code of Civil Procedure Sections 1713 et seq.)

**DEBT RECOVERY IN THE UNITED STATES**  
**Vogt & Resnick, Law Corporations**

B. Prerequisites for Enforcement:

Judgment Must Be Final, Conclusive and Enforceable Where Rendered

1. To be Conclusive, Foreign Court Must Have:
  - (a) Due process.
  - (b) Subject matter jurisdiction.
  - (c) Personal Jurisdiction over defendant.
  - (d) Defendant was personally served in foreign state
  - (e) Defendant voluntarily appeared.
  - (f) Defendant agreed to subject matter jurisdiction.
  - (g) Defendant domiciled or incorporated in foreign state.
  - (h) Defendant had business office in foreign state and action arose out of business from that office.
  - (i) Defendant operated motor vehicle or airplane in a foreign state and action arose from its operation.

Initiate Action to Obtain Domestic Judgment:

If requirements met and foreign judgment enforceable then: Creditor Must Bring a State Action to Obtain a Domestic Judgment Converted to U.S. Dollars.

\*May vary from state to state. All references herein are to California law.

**DEBT RECOVERY IN THE UNITED STATES**  
**Vogt & Resnick, Law Corporations**

**GLOSSARY OF TERMS - DEBT COLLECTION**

**BANKRUPTCY:** Creditors must always bear in mind the possibility that their debtors might file for bankruptcy protection. Filing bankruptcy triggers an automatic stay, halting all collection and enforcement activity against the debtor. Creditors' attorneys must thereafter be prepared to represent their clients' interests in federal bankruptcy courts.

Chapter 7: Individuals and businesses seeking liquidation generally file under Chapter 7. Under Chapter 7, the debtor's nonexempt assets are liquidated by a trustee and the proceeds distributed to creditors as required by the Bankruptcy Code. In most Chapter 7 cases, there are no assets, and unsecured creditors will not be paid any distributions.

Chapter 11: Chapter 11 is primarily intended for the reorganization of businesses (although some individuals are also eligible for Chapter 11 relief). Businesses usually file under Chapter 11 rather than Chapter 7 because the debtor is allowed to remain in possession of its assets, and the same management may continue to operate the business. Generally, a plan for reorganization is proposed, creditors may accept and the court may approve. Such a plan may alter the rights of secured and unsecured creditors and shareholders.

Chapter 13: Chapter 13 filings are sometimes referred to as "wage earner" cases. Chapter 13 may be used only by individual debtors with moderate total debts. It is intended as an alternative to liquidation for individual consumers or sole proprietors. As with Chapter 11, a plan must be proposed and confirmed by the court. This may require the debtor to repay some or all debts. The discharge is broader than in Chapter 7 cases.

**COMMERCIAL DEBTS:** Claims arising out of debts incurred in the course of business by a corporation, partnership or sole proprietor. Generally, these are easier to collect.

**CONSUMER DEBTS:** Claims incurred by individuals for personal, family or household purposes. Generally, these are more difficult to collect because consumer debt collection practices are extensively regulated by federal and state law.

**DEMAND LETTER:** Initial collection step by letter to debtor demanding payment by given deadline date, or suggestion that debtor contact attorney to discuss debt. Demand Letter is required before a suit can be filed on certain actions. Example:

**DEBT RECOVERY IN THE UNITED STATES**  
**Vogt & Resnick, Law Corporations**

promissory note or other obligation “due on demand.” Since some debtors have more than one creditor, acting quickly here gives the creditor a greater chance of collecting.

**FRAUDULENT TRANSFERS:** An attempt by the debtor to protect self from judgment, by transferring his or her interest in property to a trust, relatives, friends, or other third parties, with intent to hinder, delay or defraud existing or future creditors. Statutory remedies may apply to set such transfers aside.

**JUDGMENT DEBTOR EXAMINATION:** An examination of a judgment debtor is a post-judgment equivalent of a deposition. It is used to identify property in the possession and control of the judgment debtor or a third person (the non-debtor spouse), to learn about the property the debtor may obtain in the future, and to require the debtor or third person to turn over property to the levying officer. Service of the examination order creates a one-year lien on all of the debtor’s nonexempt personal property. Upon service of an examination order, the judgment debtor must appear in court (or before a referee) to furnish information to aid in enforcement of the money judgment.

**JUDGMENT PERIOD OF ENFORCEABILITY AND RENEWAL:** Judgments are generally enforceable immediately upon entry. If the debtor files an appeal, the enforceability of the judgment may be stayed pending appeal, if the debtor posts a bond. A money judgment may be enforced for a ten year period after entry. An enforceable judgment may be renewed for an additional period of ten years from the date the application to renew is filed.

**JURISDICTION:** Power of a particular court to hear the type of case that is then before it. Many cases have concurrent federal and state jurisdiction, meaning a lawsuit can be filed in either court. If so, the defendant has the right to remove an action filed in state court to federal court. However, some defendants prefer a state court with which they are more familiar.

Federal Courts: have jurisdiction to hear cases where (1) there is diversity of citizenship - lawsuit is between citizens of different states or between citizen of state and foreign country, or (2) federal question or interpretation of federal law at issue. Amount in controversy must exceed \$75,000. Note: a case cannot be removed to federal court on the basis of diversity of citizenship if any defendant served in the action is a citizen of the state in which the state court action is pending.

## **DEBT RECOVERY IN THE UNITED STATES**

### **Vogt & Resnick, Law Corporations**

**State Courts:** The proper state court for filing the action depends on a number of factors, including where the defendant is domiciled, where the contract was entered into, whether contract terms call for litigation in a particular forum, and where “minimal contacts” exist between the nonresident and the forum state.

**Venue:** The particular county within a state which is the proper place for trial of the action.

**Subject Matter Jurisdiction:** The court in which an action is filed must be competent to render a judgment. Limitations in this area depend on the amount in controversy:

**Small Claims Courts:** These courts have jurisdiction in actions for money damages not exceeding \$5,000. Advantages - small claims court is an alternative low-cost method of collection, with a speedy and final resolution and limited attorney involvement (not permitted in court).

**Limited Civil Case Matters / Municipal Courts:** Matters where money damages do not exceed \$25,000.

**Unlimited Civil Case Matters / Superior Courts:** Matters where money damages exceed \$25,000.

**PROVISIONAL REMEDIES:** These enable creditors to preserve the value of potential judgments while collection actions are pending by preventing debtors from transferring, encumbering, dissipating or concealing assets available to satisfy the judgments. These are temporary, and can only be pursued in connection with actions on underlying claims.

**Attachment:** Creates a judicial lien on the debtor’s attachable property. This protects the creditors’ priority so that a judgment ultimately obtained will be enforceable against the attached property.

**Receiverships:** A receiver is an officer and representative of the court, appointed to take possession of and preserve specified property that is the subject of pending litigation or to aid in the enforcement of a judgment. This is a provisional, equitable remedy.

**REAL AND PERSONAL PROPERTY JUDGMENT LIENS:** Ordinarily establish and preserve creditors’ priority over later liens. They are faster and less expensive to

**DEBT RECOVERY IN THE UNITED STATES**  
**Vogt & Resnick, Law Corporations**

obtain, but do not create immediate means of satisfying the judgment. They do not disturb the debtor's use of property.

**SECURED DEBT:** Debtor has given creditor a security interest in personal property or on real property. This permits creditor to foreclose or sell.

**SETTLEMENT AND COMPROMISE:** Voluntary repayment plan entered into by debtor to avoid litigation. Types:

**Promissory Note:** Written agreement by debtor for prescribed payments at definite times in accordance with the settlement entered into to avoid litigation. It should include an attorney fee clause and acceleration provisions in the event the debtor defaults. If debtor defaults, creditor sues on note, not on the original debt.

**Guaranty:** Third party guaranty of debt, particularly useful where debtor is corporation. Creditors with guaranties generally obtain payment before other unsecured creditors. If debtor defaults, creditor can sue debtor on the original obligation and guarantor on its obligation.

**Security:** Interest obtained in debtor's personal property or on real property, which should be "perfected" by creditor by recording in county office.

**STATUTE OF LIMITATIONS:** A specific period of time in which a lawsuit must be filed to preserve the right to bring an action. Examples: oral contract - 2years, written contract - 4 years; fraud or mistake - 3 years from time of discovery; negotiable promissory note - 6 years. Even though dispute may settle without lawsuit, if statutory period is about to run, creditor should always file lawsuit.

**WAGE GARNISHMENT:** Compels the debtor's employer to withhold the non-exempt portion of the debtor's disposable earnings for payment directly to the levying officer. It is inexpensive and sometimes the only means available to enforce a judgment.

**WRIT OF EXECUTION:** A court process directing the levying officer of the county where the levy is to be made to enforce a money judgment. It is the most common method of enforcing money judgments and highly effective in reaching virtually all of the debtor's nonexempt property. However, it can be more expensive than obtaining judgment liens, and may encourage the debtor to file for bankruptcy.

**DEBT RECOVERY IN THE UNITED STATES**  
**Vogt & Resnick, Law Corporations**

WRIT OF POSSESSION OR SALE: Allows the levying officer to take possession of or sell property to enforce a non-money judgment. Unlawful detainer and personal property judgments are typically enforced in this matter.