GOING TO COURT: OBTAINING A JUDGMENT

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I. SCOPE OF DISCUSSION

The following materials on pursuing collection through court action deal primarily with the procedures under Washington court rules, statutes, and case law in the areas of prejudgment remedies, and civil proceedings leading up to judgment, including discovery techniques, summary judgment, and trial. This discussion is designed to provide guidance to creditors, debtors, and their respective counsel (although primarily from a creditor's perspective) on the legal and practical challenges facing the parties to a collection action. Because of space and time limitations, this chapter can only provide an overview of the basic statutes, civil rules, and case law governing the commencement and prosecution of a collection action. Topics covered include prejudgment remedies, jurisdiction, venue, requirements of a summons and complaint, effective service, recovery of attorney fees and costs, default judgments, summary judgments, discovery techniques, confession of judgment, entry of judgment, duration of judgment, judgment lien, interest on judgments, and community/separate liability.

II. SELECTION OF THE FORUM AND VENUE

The selection of the forum and venue in the pursuit of a collection action is one of the most important decisions to be made in the case. That choice will affect not only the amount of the parties' resources that will be expended during the litigation, but also the ultimate success of the case. It therefore behooves the client and her counsel to select forum and venue based on an analysis of the issues rather than by rote procedures.

A. Small Claims Court.

This division of District Court was created to provide an inexpensive and speedy forum for the hearing of small-value claims. Attorneys are not allowed to represent parties in Small Claims Court, and the procedural rights of the parties are necessarily limited in order to achieve the speedy and inexpensive conclusion to lawsuits. No discovery is allowed in Small Claims Court. RCW 12.40.070-80. In addition to the bar on participation by attorneys, no Small Claims Court action may be prosecuted by assignees, e.g., collection agencies. RCW 12.40.070-080.

1. Jurisdiction.

Small Claims Courts have jurisdiction on claims for the **recovery of money only** when the amount claimed does not exceed $4,000.00. RCW 12.40.010.

2. Venue.

Generally, the case must be filed in the jurisdiction of the defendant's residence. Exceptions and specific rules can be found at RCW 3.66.040. You will need to appear at the proper court/division with the name, street address, and telephone number (if available) of the individual, business, partnership, or corporation you wish to sue. You can there prepare a Notice of Small Claim form that is provided by the Clerk. Small Claims Court filing fees vary, depending upon the county. The current filing fee for King County is $21.00.

3. Transfer of Action.

A defendant in a District Court case with a claim amount that falls within the jurisdiction limits of Small Claims Court may have the case removed to Small Claims Court. In this event, the plaintiff may still be represented by an attorney if it was represented when the action was commenced. RCW 12.40.025.

4. Trial.

The plaintiff and defendant must prepare their case and bring those witnesses or other evidence such as documents, records, photographs, or drawings to court to support their claim or defense. The parties can request that the court issue a subpoena to require a witness to appear at trial. Although court procedures for the presentation of evidence differ from court to court (ask the court clerk for guidance), the over-all theme in Small Claims Court is that the hearing will be informal. Although the rules of evidence are relaxed, witnesses must have personal knowledge of the facts in their testimony and all documents, records, photographs and/or drawings must be identified and explained by a witness with personal knowledge.

5. Judgment.

If the defendant does not appear at the trial, the Court will grant a judgment for the amount of the claim the plaintiff proves in court. However, the plaintiff must show proof that the complaint was served on the defendant. The Court can order judgment either against the defendant, or, if the defendant has filed a counterclaim, against the plaintiff, or both. When both parties are present, the Court, upon request, can enter an order instituting a payment plan.

6. Collection of Judgment.

It is important for the losing party in the Small Claims Court action to pay the judgment without delay. After the prevailing party receives payment, it must notify the Court in writing that the judgment has been satisfied. If no appeal is taken and the judgment is not paid within twenty (20) days of the judgment or the time set by the Court in the payment plan, the prevailing party may request in writing that the judgment be entered in the civil docket of the District Court. If the judgment is not satisfied within thirty (30) days of entry, the Court will automatically increase the judgment to include statutory costs. RCW 12.40.105. Once entered as a judgment in the District Court, all post-judgment remedies available in District Court may be used. RCW 12.40.110. Attorney fees and costs are recoverable for an execution to satisfy a Small Claims Court judgment. RCW 6.17.110(2). The post-judgment remedies available in District Court are more limited than that available in Superior Court. Methods of collection such as garnishment of wages, bank accounts, and other monies of the defendant, or an execution may be issued on cars, boats, or other personal property of the judgment debtor. If those collection procedures are not adequate, upon payment of a modest fee the District Court will provide a transcript of the judgment that can be filed in Superior Court for an additional modest fee. Once the judgment is filed in Superior Court, it creates a lien against all real estate held in the name of the judgment debtor, which is located in the same county of the Superior Court (except homestead property). To create a lien on homestead property, it is necessary to record a certified copy of the Superior Court judgment with the County Auditor.

7. Appeal.

The party who filed the claim cannot appeal if the amount claimed was less than $1,000.00. Moreover, the judgment debtor cannot appeal from a Small Claims Court judgment where the amount claimed was less than $100.00. To appeal, the appealing party is required to file an original Notice of Appeal in the Superior Court and pay the filing fee of $100.00 at the time of filing. Copies of the Notice of Appeal must be served on the other party and filed with the Clerk of the Small Claims Court, together with a bond sufficient to pay the judgment. In addition, a modest fee must be paid to the Small Claims Court Clerk for the transcript. The Notice of Appeal must be filed in the Superior Court within fourteen (14) days of the entry of the judgment. The appeal is heard based on the transcript of the Small Claims Court and is governed by Justice Court Rules 72-75—not the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ). RALJ 1.1(a).

B. District Court.

The statutes and rules governing District Court, formerly known as Justice Court, have been substantially changed in recent years in an effort to increase their caseload, on the theory that doing so would reduce the number of cases in Superior Court. At last check, the District Courts in the largest Puget Sound counties have local rules that should be checked before any litigation activity. Filing fees range from county to county, and top out at $41.00.

1. Jurisdiction.

The jurisdictional award limit has been increased to claims not exceeding $50,000.00, exclusive of interest, costs, and attorney fees. RCW 3.66.020. If a case if filed where the claim exceeds $50,000.00, the Court must order the removal of the case to Superior Court. JCR 14A(b). However, the plaintiff can waive any principle claim in excess of the $50,000.00 limit. District courts have no jurisdiction over lawsuits involving title to real property or foreclosure of real property liens, actions for false imprisonment, defamation, malicious prosecution, and claims against executors or administrators. RCW 3.66.030. District courts have jurisdiction to hear claims involving injuries to persons or property, injuries to real property, fraud, and contractual claims. RCW 3.66.030.

2. Venue.

In lawsuits for recovery of a money judgment, the lawsuit must be brought in the district where the defendant, or at least one of the defendants, resides. Lawsuits to recover personal property must be filed in the district where some or all of the property is located. Claims involving motor vehicle accidents can be brought in either the district where the accident occurred, or where the defendant resides. If the defendant's residence cannot be ascertained by reasonable efforts, the lawsuit may be filed in the district where the defendant is employed. A corporate defendant may be sued in any district where it transacts or previously transacted business, or in the district where any person resides upon whom process may be served. RCW 3.66.040(6).

3. Pretrial Procedure.

The Civil Rules for courts of limited jurisdiction (CRLJ) substantially track the Superior Court civil rules (CR). However, a substantial difference can be found in the amount of discovery allowed: the only discovery specifically allowed by CRLJ 26 are a demand for specification of damages, substantially limited interrogatories and requests for production of documents, the deposition of any party plus one additional person not a party. CRLJ 26(b) does allow further discovery allowed by the Court in its discretion. In determining whether additional discovery is justified, the Court will balance the expense or delay against the potential benefits. Another substantial difference from the Superior Court civil rules is that all discovery must be completed within ninety (90) days of service of the complaint, counterclaim, or cross claim. CRLJ 26(f). Unlike the 28-day notice period required on a motion for summary judgment in Superior Court, CRLJ 56 requires a mere ten (20) days between service and filing of the motion and the hearing. It should also be noted that the District Court statute was amended to District Court process (the service of lawsuit and subpoenas) effective statewide. RCW 3.66.100.

4. Attorney Fees and Costs.

Perhaps one of the most important issues to parties and their counsel in litigating civil cases these days is the recoverability of attorney fees and costs. As in Superior Court, the prevailing party is entitled to statutory attorney fees of $125.00 pursuant to RCW 12.20.060 (if the judgment amount is $50.00 or more). The prevailing party may also be entitled to attorney fees, pursuant to RCW 4.84.250, if the action involved a principle claim amount of less than $10,000.00. The defendant has two avenues under this statute to qualify for an award of attorney fees: the first is where the plaintiff recovers nothing, and the second is where the defendant makes a written offer in settlement at least ten (10) days prior to trial and the plaintiff's recovery is equal to or less than the defendant's offer. The plaintiff is entitled to attorney fees under the statute if it makes a written offer of settlement at least ten (10) days prior to trial and the judgment equals or exceeds the offer.

CRLJ 68 parallels Superior Court Civil Rule 68 in allowing a defendant to serve on the plaintiff an offer to allow judgment to be taken in a specified amount and, if the eventual judgment does not exceed the amount of the defendant's offer, the defendant is entitled to "costs." "Costs" do not include actual attorney fees but, rather, only those costs awardable, pursuant to RCW 4.84.010, e.g., filing fees, service of process cost, publication fees, notary fees, costs of depositions actually used at trial, and the cost of obtaining reports and records, and statutory attorney fees ($125.00).

5. Appeal From District Court to Superior Court.

Any final order or judgment issued by a District Court may be appealed by either party to the Superior Court in the county where the District Court is located. Rules For Appeal of Decisions of Limited Jurisdiction (RALJ), RALJ 2.3. An appeal to Superior Court is one based solely on the record of proceedings in the District Court—the Superior Court will not hear testimony, and proceeds in the same fashion as an appellate court. The party that "substantially prevails" on the appeal **shall** be awarded its costs incurred during the appeal. Such costs include the $125.00 statutory attorney fee, the Superior Court filing fee, the cost of obtaining the record of District Court proceedings, and other similar items. *See also* RCW 4.88.260.

C. Superior Court.

Superior Courts are the courts of general jurisdiction in Washington, pursuant to the Washington Constitution, Article IV, Section 6. Superior courts have unlimited subject matter jurisdiction, and subject matter jurisdiction of the superior courts is rarely, if ever, challenged. Because the District Court jurisdictional limit is $50,000.00, Superior Courts have exclusive jurisdiction over cases exceeding that limit. Superior Courts also hear appeals from courts of limited jurisdiction such as District Courts.

1. Personal Jurisdiction Over Individuals.

The Superior Court jurisdiction over individuals may be based on their physical presence in the state, domicile in the state, consent, or acts which submit the individual to the jurisdiction of the state. XIV Orland & Tegland, WASHINGTON PRACTICE, § 7. If jurisdiction is asserted based on a defendant's physical presence in the state or actions in the state, due process requirements require that the following criteria must be met: (1) that purposeful "minimum contacts" exist between the defendant and Washington; (2) that the plaintiff's claims "arise out of or relate to" those "minimum contacts"; and (3) that the exercise in jurisdiction be reasonable and consistent with the notions of "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

In the context of collection actions, the defendant's minimum contacts in Washington are generally not at issue. In these cases, potential defendants are either a resident of Washington or domiciled within the state.

The long-arm jurisdiction statute, RCW 4.28.185, provides Superior Courts with jurisdiction over nonresidents who have transacted any business in Washington or committed a tortious act in the state. The risk of relying on the long-arm statute is that the statute provides reasonable attorney fees to a prevailing defendant served under the statute.

2. Venue.

While jurisdiction concerns the power of a court to hear and decide a lawsuit, venue rules relate to the location where the lawsuit may be filed. If the collection action involves title to or possession of real estate, the lawsuit must be filed in the county where the property is located. RCW 2.08.210. All collection actions involving the recovery of or title to personal property must be brought in the county where personal property is located. If title or possession of property is not involved, venue for claims against individuals residing in Washington is found in the county where one of the defendants resides. RCW 4.12.025. On claims against resident corporate defendants, the plaintiff has the option of filing the lawsuit where the contract was entered, the work was performed, the tort was committed, or where the corporation transacts business. RCW 4.12.025. Venue in an action against a nonresident individual defendant may, at the option of a plaintiff, be found in any county where the defendant was served with the summons and complaint, the county where the acts were done which gave rise to the lawsuit, or, in the county where the plaintiff resides. RCW 4.28.180, .185; CR 82.

Washington law allows parties to stipulate to venue in a contract, and sophisticated contracting parties avail themselves of that tool.

III. PREJUDGMENT REMEDIES

A. In General.

Every creditor's attorney is faced with the prospect of a client with a solid claim against a debtor where the debtor has begun steps (or is likely) to convert assets into cash, dissipate assets, or make conveyances of assets to avoid creditor's claims. The creditor's attorney must then determine whether she can grab any of the debtor's assets prior to obtaining a judgment. To address this situation, Washington law provides two tools: prejudgment attachment and prejudgment garnishment. RCW Chapters 6.25 and 6.26. Like similar statutes in other states, these statutes have been challenged on due-process constitutional grounds. Prior to 1987, these statutes allowed the seizure of property without notice to the debtor or a hearing. However, in *Rogoski v. Hammond*, 9 Wn. App. 500, 513 P.2d 285 (1973), the Court of Appeals created a procedure to satisfy the due-process requirements of adequate notice and hearing, and thereby judicially legislated a process by which the statutes could pass constitutional muster. The Legislature in 1988 amended the prejudgment attachment and prejudgment garnishment statutes to incorporate the notice and hearing requirements instituted by *Rogoski*.

B. Prejudgment Attachment.

Prejudgment attachment allows a creditor to require the sheriff to seize the defendant's property to be held as security for the satisfaction of an eventual judgment. Although RCW 6.25.010 allows District Courts to issue writs of prejudgment attachment, such writs cannot attach real property or a vendor's interest in a real estate contract.

1. Prejudgment Attachment in Contract Claims.

RCW 6.25.030(10) is perhaps the most frequently used basis for prejudgment attachment: a prejudgment attachment is allowed whenever the cause of action is based on contract.

2. Other Grounds For Prejudgment Attachment.

Unless the creditor is pursuing a straight contract claim, the prejudgment attachment statute is fairly restrictive in allowing the use of this tool. The plaintiff must state by affidavit that the following grounds exist:

a. The plaintiff has reason to believe that the defendant is indebted to the plaintiff in a specified amount. The amount of debt need not be liquidated. *Buob v. Ochs*, 33 Wn.2d l732, 207 P.2d 189 (1949).

b. Neither the prejudgment attachment nor the lawsuit is prosecuted to hinder, delay, or defraud any creditor of the defendant; and

c. **One** of the following grounds exists:

- The defendant is a foreign corporation;
- The defendant is not a resident of Washington;
- The defendant has concealed himself to avoid service of process;
- The defendant has absconded or stayed away from his usual residence to avoid service of process;
- The defendant has removed or has plans to remove property from Washington with the intent to delay or defraud creditors;
- The defendant has assigned, secreted, or disposed of, or has plans to do so, his property with intent to delay or defraud creditors;
- The defendant has either converted or is about to convert his property into cash to avoid creditor claims;
- The defendant has committed fraud in incurring the obligation which underlies the lawsuit;
- The lawsuit is based on injuries caused by the defendant's felony, gross misdemeanor, or misdemeanor;
- The lawsuit is brought to recover on a contract, express or implied.

RCW 6.25.030.

d. A prejudgment attachment can be issued by the Court without notice or hearing only upon a showing by the plaintiff of special circumstances. RCW 6.25.070(2).

e. A prejudgment attachment may issue where the debt is not yet due.

Pursuant to RCW 6.25.040, property of the debtor may be attached before the debt is due or the debt is absolute and nothing but time is required to fix the amount. The plaintiff must show one of the following grounds:

- The defendant has disposed or has plans to dispose of his property with intent to defraud creditors;

- The defendant has plans to remove property from the state and has refused to make arrangements for securing the payment of the debt when it falls due;

- The debt was incurred to obtain property under false pretenses.

In cases where prejudgment attachment is sought when a debt is not yet due, the complaint and the affidavit in support of prejudgment attachment must each allege the necessary grounds for the attachment.

3. Timing.

RCW 6.25.020 provides that the prejudgment attachment may be issued at the time the lawsuit is filed or at any time before judgment.

4. Bond.

An attachment bond is required under RCW 6.25.080 for double the amount of the judgment demanded. The purpose of the bond is to secure the plaintiff's timely prosecution of the action and to pay any costs and damages that may be awarded the defendant caused by the attachment. The bond must meet the minimum amount of $3,000.00 in Superior Court and $500.00 in District Court. RCW 6.25.080 allows the court discretion to order a bond at less than the doubled claim amount in situations where there are other guarantees that the plaintiff can pay any judgment resulting from a wrongful attachment, e.g., the plaintiff is a financial institution. An exception to the bond requirement exists where real estate is attached and the ground supporting the attachment is that the defendant is either a foreign corporation, nonresident, or has concealed himself to avoid service of the summons and complaint. RCW 6.25.080(2).

5. Sheriff's Bond.

Adding yet more expense for a creditor seeking a prejudgment attachment, the sheriff requires an indemnity bond when attaching personal property in the amount of double the value of the property to be attached. RCW 36.28.050. The purpose of the sheriff's bond is to protect the sheriff against the costs of the attachment, claims for taking the wrong property; claims for taking exempt property, and other misdeeds.

6. Wrongful Attachment.

If the defendant whose property was attached believes it has grounds for pursuing an action for wrongful attachment, it can do so even before the principal action has concluded. An action for wrongful attachment may be brought against the surety on the attachment bond and the plaintiff, or either the plaintiff or the surety. *Wagner Development, Inc. v. Fidelity & Deposit Company of Maryland*, 95 Wn. App. 896, 977 P.2d 639 (1999). Defendants can take solace in the fact that if the plaintiff loses on the underlying claim, that fact is conclusive evidence of the wrongful attachment. If the debtor can show that the statutory grounds for prejudgment were not met, it may recover damages pursuant to RCW 6.25.100, including its actual damages plus attorney fees. If the court finds that the attachment was pursued with malicious intent, punitive damages may also be awarded.

C. Prejudgment Garnishment.

RCW Ch. 6.26 provides for the issuance of writs of prejudgment garnishment, provided that one or more of the grounds enumerated in the statute exist. The post-judgment garnishment statute, RCW Ch. 6.27, specifically applies to prejudgment garnishments, RCW 6.26.070, and it is therefore necessary to read both statutes prior to using this collection tool.

1. Necessities For Prejudgment Garnishment.

Like prejudgment attachment, a prejudgment writ of garnishment may be sought in either District or Superior Court between the time the action is filed and the entry of judgment. The grounds for issuance of the writ are organized around whether the writ is directed to the defendant's employer or not. If the writ is directed to an employer, the plaintiff must show the following grounds:

- The defendant is not a resident of Washington or is about to move from the state; or
- The defendant has concealed himself, absconded, or made himself unavailable for service of process; or
- Has removed, or has plans to remove, his property from the state with intent to delay or defraud creditors.

If the writ is directed to someone other than the defendant's employer, the plaintiff must show the following grounds:

- A prejudgment attachment has been issued in accordance with RCW Ch. 6.25; or

- The plaintiff's lawsuit concerns a debt that is due, liquidated, and unpaid; or

- One or more of the grounds for issuance of a prejudgment attachment, RCW 6.25.030 or .040, can be shown.

In addition to the above, the plaintiff, or someone on the plaintiff's behalf, must file a supporting affidavit concerning these additional grounds:

- Neither the prejudgment garnishment nor the lawsuit is pursued to hinder, delay, or defraud any creditor of the defendant;

- The plaintiff, or someone on plaintiff's behalf, has reason to believe that the defendant is indebted to the plaintiff in a specific amount;

- That one or more of the grounds for prejudgment garnishment as noted above exist (RCW 6.26.010);

- The plaintiff has reason to believe that the garnishee defendant is indebted to the defendant in an amount exceeding the defendant's exemptions from garnishment under state or federal law, or that the garnishee has possession or control of personal property belonging to the defendant which is not exempt from garnishment; and

- Whether the garnishee defendant is the employer of the defendant; and

- If the underlying debt is not then due, that nothing but time remains to fix the absolute indebtedness due.

Because of the necessary grounds that must be shown for issuance of a prejudgment writ of garnishment, it will be unusual for a plaintiff to obtain a prejudgment garnishment of the defendant's earnings.

2. Bond.

Like the prejudgment attachment bond, the plaintiff must obtain a prejudgment garnishment bond for double the amount of the debt claimed. RCW 6.26.020. As with the prejudgment attachment bond, the Court has discretion to require a bond in a lesser amount if circumstances warrant. RCW 6.26.020. The purpose of the bond is to ensure that the plaintiff will not delay in prosecuting the suit and will pay all damages and costs that may later be found to have been caused by a wrongful garnishment. The prejudgment attachment bond will not relieve the plaintiff of the burden of obtaining a prejudgment garnishment bond.

3. Procedure For Prejudgment Garnishment With Notice.

RCW 6.26.060(4) requires that the defendant shall be served with a copy of the following:

- A notice of hearing or an order to show cause;
- The plaintiff's affidavit in support of prejudgment garnishment;
- A copy of the writ, if issued; and
- If the individual is an individual, a copy of the exemption claim form and notice of rights form prescribed in RCW 6.26.060.

The plaintiff must prove at the hearing the probable validity of the plaintiff's underlying claim and that the grounds for garnishment exist. RCW 6.26.060(1).

4. Procedure For Prejudgment Garnishment Without Notice.

The grounds for issuance of prejudgment garnishment without prior notice are extremely limited. RCW 6.26.060(2). The Court must find that there is probable cause to believe the allegations in the plaintiff's affidavit which contains specific facts. RCW 6.26.060(2). Once the writ of prejudgment garnishment is issued and the garnishee defendant has been served, the defendant must receive prompt notice and a right to request an early hearing date. RCW 6.26.060(3). It should also be noted that appellate courts have looked askance at the issuance of prejudgment writs of attachment and garnishment without prior notice, often finding them to be unconstitutional. *See Tri-State Development v. Johnston*, 160 F.3d 528 (9th Cir. 1998). The post-notice requirements are so important as to be jurisdictional. RCW 6.26.060(4). Unless the defendant was served the summons and complaint by publication, notice must be served in the same manner as the summons and complaint.

5. Damages For Wrongful Garnishment.

The same discussion found under wrongful attachment applies here.

6. Replevin.

A writ of replevin is available prejudgment, where the plaintiff can show entitlement to property in the possession or control of the defendant. RCW Ch. 7.64. An order of replevin may only be issued after notice to the defendant and a hearing. RCW 7.64.010, .020.

The plaintiff must make the following showing to qualify for replevin:

- The plaintiff is the owner of the property or is entitled to possession by virtue of a property interest such as a security interest;
- The property is wrongfully detained by the defendant;
- The property has not been taken for a tax, assessment, or fine pursuant to statute and has not been seized under execution or attachment against the property of the plaintiff;
- The approximate value of the property.

The hearing date shall be set in the order to show cause and shall occur no earlier than ten (10) and no later than twenty-five (25) days after the date of the order to show cause. A certified copy of the order to show cause must be served on the defendant in the manner of service of the summons at least five (5) days before the hearing date. RCW 7.64.020(3) and (4).

7. Replevin Bond.

If, at the show cause hearing, the plaintiff establishes the right to obtain possession of the property pending conclusion of the lawsuit, the court will require a bond in an amount sufficient to pay all costs that may be adjudged to the defendant, any damages that would occur if the replevin were wrongful, court costs, reasonable attorney fees, and costs of recovery that the defendant may incur. RCW 7.64.035.

8. Procedure Upon Issuance.

After the Court issues the order awarding possession to the plaintiff, the plaintiff must deliver a copy of the bond and a certified copy of the order awarding possession to the sheriff of the county where the property is located, with instructions on where to locate the property. As with a writ of prejudgment attachment, the sheriff will require a sheriff's bond prior to enforcing the order awarding possession. The sheriff then takes possession of the property and, if the property is concealed in a building, will demand delivery of the property from the defendant. If the defendant fails to comply, the sheriff will enter the building by force and take possession. After taking possession of the property, the sheriff will release the property to the plaintiff upon payment of the sheriff's expenses for taking possession and keeping the property.

9. Defendant's Redelivery Bond.

Either at the time of the hearing on the order to show cause or at any time before the sheriff takes possession of the subject property, the defendant may post a redelivery bond and retain possession of the property, pending conclusion of the lawsuit. The bond must be equal to the value of the bond filed by the plaintiff. RCW 7.64.050.

10. Claims By Third Parties.

If the property subject to the order of possession is subject to a claim by any person other than the defendant, the defendant's agent, or the plaintiff, the claimant may assert the claim by means of a motion to intervene in the lawsuit. RCW 7.64.100.

D. Prejudgment Discovery Of Debtor's Assets.

A creditor may discover the assets of the debtor prior to judgment, pursuant to RCW 7.12.140:

> Examination Of Defendant As To His Property. Whenever it appears by the affidavit of the plaintiff that the plaintiff has probable cause to believe that a ground for attachment exists and it appears by the plaintiff's affidavit or by the return of the attachment that no property is known to the plaintiff or officer on which the attachment can be executed, or not enough to satisfy the plaintiff's claim, and it being shown to the court or judge by affidavit that the defendant has property within the state not exempted, the defendant may be required by such court or judge to attend before the court or judge or referee appointed by the court or judge and give information on oath respecting the property.

E. Temporary Restraining Orders and Injunctions.

The granting of temporary restraining orders and injunctions is governed by RCW 7.40 and by Superior Court Civil Rule 65. Injunctions are less effective than garnishments or attachments for the reason that plaintiff relies on the defendant to honor the injunction. An order of contempt provides little relief if the defendant's assets have been disposed of in violation of the injunction.

RCW 7.40.020 enumerates the grounds for issuance of an injunction:

> **. . .** [A]nd where it appears in the complaint at the commencement of the action, or during the pendency thereof, by affidavit, that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of his property.

1. Notice.

Notice is required unless a truly urgent situation can be shown to the Court. RCW 7.40.050 provides:

- No injunction shall be granted until it shall appear to the court or judge granting it, that someone or more of the opposite party concerned, has had reasonable notice of the time and place of making application, except that, in cases of emergency to be shown in the complaint, the court may grant a restraining order until notice can be given and hearing had thereon.

2. Bond.

No injunction can issue unless the requesting party files a bond in an amount sufficient to pay all the responding party's damages including costs. RCW 7.40.080, .085.

F. Receivership.

The court has broad powers pursuant to RCW 7.60.010 to appoint a receiver "to take charge of property during the pending of a civil action or proceeding, or upon a judgment, decree, or order therein, and to manage and dispose of it as the court or officer may direct." A receiver may be appointed to manage both real and personal property. The showing necessary for appointment of a receiver can be found in RCW 7.60.020:

Grounds For Appointment. A receiver may be appointed by the Court in the following cases:

(1) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his or her claim;

. . .

(3) In all actions where it is shown that the property, fund, or rents and profits in controversy are in danger of being lost, removed, or materially injured;

. . .

(5) When a corporation has been dissolved, or is in the process of dissolution or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights, and when the court in its sound discretion deems that the appointment of a receiver is necessary to secure ample justice to the parties; and

(6) In such other cases as may be provided by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties: PROVIDED, That no party or attorney or other person interested in an action shall be appointed receiver therein.

1. Procedure.

The procedure a creditor must employ in pursuing the appointment of a receiver can be found in CR 43(e)(2) which requires that the notice of hearing served on the defendant must designate the kind of evidence to be produced at the hearing. If the motion for appointment of a receiver is based on affidavits, copies of the affidavits must be served on the defendant at least three (3) days prior to the hearing. To present oral testimony at the hearing, the moving party must obtain prior approval of the court, which approval must be included in the three-day notice to the defendant. Rules governing receivership proceedings can also be found in CR 66, which mainly governs receivers appointed to liquidate and wind up the affairs of a corporation, partnership, or individual. In such receiverships, notice to creditors must be published advising creditors to file claims.

IV. REQUIREMENTS OF A SUMMONS AND COMPLAINT

A lawsuit in Washington is commenced by either filing the complaint or serving the summons and a copy of the complaint upon the defendant. CR 3(a). In order to perfect the commencement of the lawsuit so as to toll any applicable statute of limitations, both the filing of the lawsuit and service of process must be accomplished within ninety (90) days of each other. RCW 4.16.170.

A. Summons.

Civil Rule 4(a) and (b) sets forth the form and content requirements of the summons. The name of the state, court, and county in which the action is filed, the name of the parties, a notice to the defendant that he must serve a copy of his or her defense within twenty (20) days after service and that failure to do so will result in a default judgment, the address where the papers may be served on the plaintiff, and the signature and date by the plaintiff or attorney, must be served on the defendant. Courts will allow an action to proceed despite harmless errors in compliance with CR 4. *Wagnitz v. Ritter*, 31 Wash. 343, 17 P. 1035 (1903). Mistakes in the names of individuals or entities are not fatal to the lawsuit and can be corrected at any time by the Court.

B. Complaint.

Civil Rules 8 through 11 contain the requirements on the form and content of a complaint. In summary, the complaint must contain a short, plain statement of the claim showing that the plaintiff is entitled to relief. The complaint must also demand judgment for relief, although requests for relief may be stated in the alternative.

CR 54(c) allows the Court to grant the relief to which the prevailing party is entitled, even if the party is not demanding such relief in its pleading, except in the case of a default judgment. Therefore, because of the prevalence of default judgments in collection actions, counsel drafting the plaintiff's complaint is advised to specifically pray for the precise amount of the debt, if possible, and for prejudgment interest either at the statutory rate (currently 12%) or the contract rate. The plaintiff is entitled to prejudgment interest if the claim is liquidated, meaning that the claim amount is capable of determination without the court's use of discretion. *Hansen v. Rothaus*, 107 Wn.2d 468, 730 P.2d 662 (1986). Although it is important to plead specific debt amounts if known, it is sufficient to plead theories of liability, e.g., breach of written contract, breach of verbal contract, and negligence, in broad and general terms. It is important to include all possible theories of liability in the complaint—failing to do so may ultimately prevent the plaintiff from adding new theories later. *Beeler v. Hickman*, 50 Wn. App. 746, 750 P.2d 1282 (1988). The purpose of "notice pleading" is to give the opposing party notice of what the claims are and the factual grounds upon which they rest. CR 8(a), *Williams v. Western Sur Co.*, 6 Wn. App. 300, 492 P.2d 596 (1972).

The formatting requirements of a complaint can be found in CR 10. The complaint must contain a caption with the name of the court, the title of the lawsuit, the cause number, and the nature of the pleading. CR 10(a). If the plaintiff does not know the name of the defendant, it may designate a name such as "John Doe" if the complaint discloses the reasons therefor. Unless the plaintiff knows with certainty that the defendant is not currently married and was not married at the time that the claim arose, the lawsuit should name both the defendant and spouse, alleging that all acts were done by either defendant or spouse on behalf of their marital community. Without this contention and a judgment is entered, the judgment will be effective only against the defendant's separate property and his or her one-half interest in the community property. *DeElche v. Jacobsen*, 95 Wn.2d 237, 622 P.2d 835 (1988).

C. Civil Rule 11 Sanctions.

Civil Rule 11 requires that a party or their attorney who signs and files a complaint must do so in good faith. In particular, CR 11 provides:

> The signature of a party or of an attorney constitutes a certificate by him that he has read the pleading, motion or legal memorandum; that to the best of his knowledge, information or belief, formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

A complaint that is signed in violation of the rule qualifies for court-imposed sanctions that may include the attorney fees incurred by the responding party caused by the filing of the complaint. Sanctions may be awarded against the attorney who signed it, the represented party, or both.

The standard for evaluating whether the attorney conducted a reasonable investigation of the claim and the law prior to filing a complaint can be found in *Miller v. Badgley*, 51 Wn. App. 285, 753 P.2d 530:

> Whether or not a reasonable inquiry has been made depends on the circumstances of a particular case. Factors that the trial court may consider include the time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and the legal issues, and the need for discovery to develop factual circumstances underlying a claim.

If the court finds a violation of CR 11, sanctions are mandatory. *Miller* at 300. CR 11 imposes an objective rather than subjective standard of reasonableness.

V. SERVICE OF PROCESS

A. In General.

Civil Rule 4(c) provides that service of the summons and complaint, except when made by publication, shall be made either by the sheriff of the county where service is made, or by any person over 18 years of age who is competent to be a witness, other than a party. Although an attorney for the plaintiff can serve the summons and complaint, *Roth v. Nash*, 19 Wn.2d 731, 144 P.2d 271 (1943), it is not advisable because the attorney may thereby disqualify himself if forced to become a witness to substantiate proper service. An officer or employee of a corporation which is a party to the lawsuit but who is not personally named may also serve process, *Columbia Valley Credit Exchange, Inc. v. Lampson*, 12 Wn. App. 952, 533 P.2d 152 (1975), but it is also not advisable because of possible challenge as a witness for reasons of bias.

CR 4(d) and (e) explain the procedures for how a summons and complaint must be served. CR 4(d)(2) governs personal service in Washington and refers to the following statutes:

- RCW 4.28.080-.090 (general service of process statutes);
- RCW 23(b).05.040 (domestic corporations);
- RCW 23(b).15.100 (foreign corporations);

- RCW 46.64.040 (nonresident motorists);
- RCW 48.05.200 and .210 (foreign insurers);
- And any "other statutes which provide for personal service."

B. Service By Publication.

RCW 4.28.100 authorizes service by publication when the defendant cannot be found in the state. Because of the possibility of challenge, service by publication should be used only as a last resort. To qualify for such service, the plaintiff must file an affidavit stating that the defendant is not a resident or cannot be found within the state, that a copy of the summons and complaint were mailed to the defendant's place of residence (unless the residence is not known), that the defendant "being a resident of the state, has departed therefrom with intent to defraud his or her creditors or to avoid service of a summons, or keeps himself or herself concealed therein with like intent."

The courts will closely scrutinize the affidavits filed in support of service by publication, and will require the plaintiff's counsel to make a reasonable search to find the defendant. *Kennedy v. Korth*, 35 Wn. App. 622, 668 P.2d 614 (1983). In *Korth*, a doctor who was a German national returned to Germany after his hospital privileges were terminated. The Court held that the plaintiff had not demonstrated that the doctor had departed for the specific purpose of defrauding creditors or to avoid service of process, and, therefore, invalidated service by publication.

A defendant who has moved from Washington in order to establish residency in another state may not provide the basis for service by publication. *LaHart v. LaHart*, 13 Wn. App. 452, 535 P.2d 145 (1975).

The mechanics for publishing the summons can be found in RCW 4.28.110. In general, the summons must be published once a week for six (6) consecutive weeks in a newspaper of general circulation in the county where the action is filed. The summons may not be published until after the complaint is filed.

C. Mail As An Alternative To Publication.

CR 4(d)(4) allows service by mail in situations where service by publication is permitted. To use service by mail, the court must determine from the plaintiff's affidavit that service by mail is as likely to give actual notice as service by publication. Because of the unlikeliness that service by publication will provide actual notice, it should not be difficult to convince a court that service by mail is the better way to go. If the court allows, two (2) copies of the summons and complaint must be mailed to the defendant at the defendant's last-known address, one by regular mail and the other by certified mail.

VI. FACTORS INFLUENCING THE TIMING OF THE LAWSUIT

Because of the substantial expenses incurred in pursuing a claim, which expenses may or may not be recoverable from the defendant, it is generally the case that a creditor should exhaust negotiations with the defendant prior to filing a lawsuit. However, there are times when commencing the lawsuit prior to attempts to negotiate a settlement make sense. If it becomes apparent that the debtor is not negotiating in good faith, delaying the filing of a lawsuit makes little sense. Similarly, where the debtor is hard-boiled and has a reputation for hard tactics, such may justify commencing the lawsuit immediately. Some debtors, including corporate or institutional debtors, will not typically negotiate until after litigation has been commenced. In a claim against multiple defendants, it is the norm rather than the exception for the defendant to point fingers at each other on other liability or damages, or both, and a lawsuit will normally be necessary to terminate the blame-game.

On the other side of the coin, where the creditor is aware of potential problems with the claim, e.g., good-faith disputes on the amount of the debt or the debtor's liability therefor, the creditor may be better advised to exhaust every possible avenue for settlement prior to filing the lawsuit.

The tactic often employed by creditor counsel is to draft a complaint and forward it to the debtor for her consideration. The goal in this maneuver is to cause trepidation and elicit a more-favorable settlement offer. Unfortunately, it rarely works with a streetwise debtor.

VII. SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

The purpose of the Soldiers' and Sailors' Civil Relief Act, 15 U.S.C. § 501, *et seq*., is to protect individuals in the military services against lawsuits when the individual has not had an opportunity to appear in the action, either in person or through counsel, and when the failure to appear was due to military service. Furthermore, the Act is intended to promote military efficiency by alleviating the need for service personnel to deal with claims while abroad on duty.

Section 520 provides that, if a defendant fails to appear and the plaintiff moves for a default judgment, the plaintiff must file an affidavit asserting that the defendant is not in military service. If the plaintiff cannot determine whether or not the defendant serves in the military, the plaintiff must file an affidavit setting forth that the plaintiff is unable to determine military service. If the defendant is in military service, no judgment can be entered until the court has appointed an attorney to represent the defendant. In addition, the court may require the plaintiff to file a bond to indemnify the defendant against any loss or damage caused by any judgment that is entered and subsequently set aside.

The defendant's military service at the time of a default judgment does not necessarily invalidate the default judgment. If the default judgment was entered against the defendant while in military service or within thirty (30) days thereafter, **and it appears to the court that the defendant was prejudiced by reason of military service**, the judgment may be set aside. In addition, the defendant must show that he has a meritorious defense to the action and moves to set aside the judgment within ninety (90) days after termination of military service.

Section 521 of the Act provides that a lawsuit may be stayed while either a plaintiff or a defendant is in military service and unable to pursue or defend a claim. The granting of a stay is within the discretion of the court and must be based upon prejudice to the rights of the party in military service. *Smith v. Fitch*, 25 Wn.2d 619, 171 P.2d 682 (1946).

VIII. SUPERIOR COURT MANDATORY ARBITRATION

A. In General.

Each county may, if it elects, adopt mandatory arbitration in all Superior Court civil cases as provided in RCW Ch. 7.06 and the Mandatory Arbitration Rules (MAR). The majority of counties have instituted mandatory arbitration. A case must be arbitrated under the Rules if the sole relief is a money judgment and no party asserts a claim in excess of the current arbitration limit of $35,000.00, exclusive of attorney fees, interest, and costs. Parties may, for the purposes of qualifying for mandatory arbitration, waive all claims in excess of $35,000.00.

Each county opting for mandatory arbitration creates a panel of arbitrators who must be practicing attorneys for at least five years, unless the parties stipulate to a non-lawyer arbitrator. Each party is supplied a strike-list of five or more arbitrators and, unless the parties agree to the arbitrator, the court will select the arbitrator based upon the parties' selections.

B. Procedure.

Each county can adopt local rules governing any variations to the MARs. Discovery as of right is limited after cases are assigned to arbitration: A party may obtain a statement of damages, admissions under CR 36, and a deposition of another party. No other discovery is permitted except by stipulation or order of the arbitrator. The arbitration hearing is a largely informal affair, and the arbitrator has the authority to control the way the hearing is conducted as well as to apply the rules of evidence in a flexible manner.

C. Request For Trial De Novo.

Any party to the arbitration who is unhappy with the arbitration award may request a trial *de novo* (a new trial before the Superior Court) within twenty (20) days after the arbitrator's award is filed with the Clerk and delivered to the parties. The trial *de novo* is conducted as though no arbitration proceeding occurred. If the trial *de novo* is to a jury, no reference may be made to any aspect of the arbitration proceeding. If the appealing party fails to improve its position after the trial *de novo*, the court must assess costs and reasonable attorney fees against the appealing party incurred after the arbitration award.

VIII. COUNTERCLAIMS

Compulsory counterclaims are those against an opposing party arising out of the subject matter of the opposing party's claim. Any other claim is a permissive counterclaim. CR 13. Compulsory counterclaims must be asserted in the answer unless (a) its adjudication requires the presence of a third party over whom the court cannot acquire personal jurisdiction; (b) it is already the subject of another lawsuit; or (c) the lawsuit involves only *in rem* or quasi-*in rem* jurisdiction in which the court lacks personal jurisdiction over the opposing party. An unasserted compulsory counterclaim is barred by *res judicata* from assertion in a later lawsuit among the same parties. 43 Wn. App. 217 (1986).

Although it may be possible to frame the complaint in a manner designed to limit the scope of the action against the defendant and thereby perhaps avoid a compulsory counterclaim, a defendant in a collection action will normally assert any counterclaim available, compulsory or permissive, to achieve leverage in the litigation.

IX. FRAMING THE COMPLAINT TO AVOID DISCHARGE IN BANKRUPTCY

Having filed the lawsuit against a debtor, a creditor is often confronted with the debtor's threat to file bankruptcy. That threat is usually intended to persuade the creditor to abandon the collection lawsuit. Experienced collection counsel will, if the facts justify, draft the complaint in a way to implicate the grounds supporting the non-dischargeability of the debt, pursuant to the Bankruptcy Code, 11 U.S.C. § 523(a). Those grounds revolve around the major themes of the extension of credit for other value based upon the fraud or false pretenses of the debtor. If the collection action runs its course and the creditor obtains a judgment on a claim of fraud, that result will become collateral estoppel on the issue of fraud if the debtor were to file bankruptcy and attempt to discharge the judgment.

X. DISCOVERY

A. In General.

CR 26(a) enables the parties to obtain discovery by one or more of the following devices: (a) depositions upon oral examination or written questions; (b) written interrogatories; (c) production of documents or things, or permission to enter upon land or other property; (d) physical or mental examination; and (e) requests for admissions. Unless the court enters a protective order to the contrary, a party may use these discovery tools in any order or frequency. CR 26(d). Unlike its federal counterpart, CR 26 requires the parties to timely supplement responses to any question designed to discover possible witnesses, including experts, and to correct any previous answer which the party learns is no longer correct or was incorrect when given.

B. Scope of Discovery.

The parties may seek the discovery of information that may not necessarily be admissible at trial. Instead, the test is whether the information sought is relevant to the subject matter of the litigation or which may lead to the discovery of relevant admissible evidence. Parties are entitled to obtain insurance agreements and coverage limits.

1. Parties may request through interrogatories the identity of each expert witness that the other party intends to call at trial, the subject matter in which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

2. Under the "work product doctrine," trial preparation materials are protected from discovery except upon a showing of "substantial need" and an inability "without undue hardship" to obtain the information by other means. CR 26(b)(4).

XI. DEFAULT JUDGMENT

CR 55 provides that, if a responsive pleading (usually the answer) is not filed within the time required in the summons, the plaintiff may move for an order of default and, if appropriate, a default judgment. If the defendant has appeared in the lawsuit, either in writing or by other communication, a five-day notice of the motion (six days in King County) must be given. The practical effect of giving notice of the motion for default/default judgment is that the adverse party will usually respond prior to the hearing and thereby avoid default. If the defendant has not appeared, the motion for default/default judgment may be made without notice to the defendant unless the defendant was served more than one year before the hearing date.

The motion for default should state the basis of venue. The default judgment entered in the county of improper venue is valid, but a motion to vacate the default for improper venue would likely be granted. CR 55(c)(2). The defendant waives the improper venue if the defendant either stipulates to venue or is given notice of the motion for default and fails to object to the improper venue.

As stated earlier in these materials, the amount of a default judgment cannot exceed the relief requested in the complaint, making the drafting of the complaint vitally important.

A. Practice Tips.

In my experience in handling collection lawsuits for creditors, between one-third and one-half of all cases result in a default judgment. There are many reasons for this: The debtor has no defense, the debtor is averse to hiring counsel, the debtor cannot afford counsel, ignorance, the debtor has no assets to protect, or a combination of some or all of these factors. Although a default judgment saves the creditor the expense of protracted litigation, the result can be a shallow victory because often the debtor is judgment-proof, i.e., has no assets.

If pursuing a default judgment, always present an affidavit from the client establishing the amount of the debt and how the debt was calculated, including all prejudgment interest calculations. It is interesting to observe how often the creditor's counsel will sign an affidavit or declaration that recites the amount of the debt, despite the fact that the attorney has no personal knowledge.

B. Setting Aside a Default Order.

A default **order** may be set aside for good cause under CR 55(c) and the court may award terms against the party seeking to set aside the default order. Because the courts follow a policy in favor of determining actions on their merits, unless the defendant operated in bad faith or showed extreme neglect, a court will more likely than not set aside an order of default. It is somewhat more difficult to vacate a default **judgment** pursuant to CR 60(b). The usual grounds supporting a motion to vacate a default judgment are mistake, inadvertence, and excusable neglect. Such a motion must be made within a reasonable time and not more than one year after the judgment was entered. In addition, the party moving to vacate must show a *prima facie* meritorious defense to the judgment.

XII. SUMMARY JUDGMENT

CR 56 provides that a plaintiff or defendant may move with or without supporting affidavits for a summary judgment in its favor upon all or any part of its claim, counterclaim, or cross-claim.

A. Timing.

A defendant may file a motion for summary judgment at any time. The plaintiff may file such a motion after the expiration of the time in which the defendant is required to answer, or after the defendant files its own motion for summary judgment.

B. Burden of Proof.

The burden of proof is on the moving party, regardless of which party might have the burden of proof at trial. A motion for summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). The purpose of summary judgment is to prevent needless trials where there are only legal, not factual, issues. Affidavits in support of or in opposition to a motion for summary judgment must be made on personal knowledge showing that the witness is competent to testify, and must set forth facts that would be admissible in evidence. Summary judgment is unlikely where issues are presented to the court requiring its determination of the credibility of a witness, the reasonableness of a party's actions, and negligence.

XIII JUDGMENTS

A. Judgments In Bench Trials.

At the conclusion of a trial without a jury, CR 52 requires the judge to enter findings of fact and conclusions of law. A judgment entered without findings of fact is subject to a motion to vacate within the time for filing an appeal (30 days). Findings and conclusions are customarily prepared by the prevailing party and presented for approval on five-days' notice to the opposing party. CR 52. The Court is authorized to amend its findings within five (5) days after entry of the judgment. CR 52. The judgment is normally entered at the same time that the findings of fact and conclusions of law are approved. CR 54(f). If the prevailing party fails to present a judgment for entry within fifteen (15) days after the court's decision, the opposing party may do so. CR 56(e).

B. Judgment Form.

The judgment cannot be filed by the court clerk, and does not take effect, until the judgment has a summary at the beginning of the judgment identifying the judgment amount, the party in whose favor judgment was entered, counsel for the judgment creditor, the amount of prejudgment and post-judgment interest, the rate of post-judgment interest, and whether attorney fees or costs were awarded. RCW 4.64.030.

C. Duration of Judgments.

1. A judgment of the Superior Court, or District Court, is effective for ten (10) years. RCW 6.17.020. In addition, a judgment may be extended for an additional ten-year period. RCW 6.17.020(3). To qualify for the ten-year extension, the judgment creditor must apply to the court where the judgment was issued within ninety (90) days prior to the expiration of the judgment. In cases of District Court judgments that have been filed in the Superior Court, the application is made to the Superior Court rather than the District Court. RCW 6.17.020(3). To receive the ten-year extension, it is necessary to pay a new civil action filing fee in either the Superior Court or District Court.

D. Judgment Lien.

A judgment entered in United States District Court or Superior Court in the county in which the defendant's real property is located creates an automatic lien on such real property. RCW 4.56.190, .200, and .210. This is also now true for judgments in District Court that are filed with Superior Court. RCW 4.56.200(3). The automatic judgment lien applies to a debtor's tenant-in-common interest, *Logan v. Brooks*, 60 Wn. App. 777, 807 P.2d 377 (1991), and a debtor's interest as a purchaser under a real estate contract, *Cascade Security Bank v. Butler*, 88 Wn.2d 777, 567 P.2d 631 (1977).

In order to obtain a judgment lien on a debtor's homestead, it is necessary to record a certified copy of the judgment with the county auditor. RCW 6.13.090. The ten-year extension of a judgment, pursuant to RCW 6.17.020, does not require any additional action on the part of the judgment creditor in order to preserve the judgment lien. The priority of the judgment lien relates back to the date when the original judgment was either entered or recorded.

The judgment lien on the judgment debtor's homestead applies only to the equity value in excess of the homestead amount (currently $40,000.00, RCW 6.13.030).

A judgment creditor can obtain a judgment lien in a county other than the one where the judgment was issued by filing a certified abstract of the judgment with the clerk of the county where the judgment debtor's real property exists. RCW 4.56.200. In addition, the abstract of judgment must be recorded with the county auditor in order to create a lien on any homestead property.

To create a judgment lien on the debtor's personal property, it is necessary to have the sheriff levy upon (seize) the property through the execution process. RCW 4.56.190.

Although a judgment lien applies only to the property interests owned by the judgment debtor at the time of judgment, the judgment debtor cannot destroy a lien by transferring her interest in the real property. *Pumilite Tualatin, Inc. v. Cromb Leasing, Inc.*, 82 Wn. App. 767, 919 P.2d 1256 (1996). An item worthy of note is that the judgment creditor is not entitled to the protection of the deed recording statute, RCW 65.080.070, which gives a deed priority over all earlier unrecorded deeds or mortgages.

E. Prejudgment Interest.

The party whose judgment is entered is entitled to prejudgment interest when the amount claimed is liquidated. The amount is liquidated if the trier of fact need not exercise any discretion or determination of reasonableness in order to determine the amount of the principal judgment. *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 442 P.2d 621 (1968). The prejudgment interest rate will either be the rate specified in the contract between the parties or, if no contract existed or rate was specified, the judgment interest rate specified in RCW 19.52.010 (currently 12%).

F. Post-Judgment Interest.

Pursuant to RCW 4.56.110, judgments based on written contracts bear post-judgment interest at the rate specified in the contract or, if no contract existed or rate was specified, then at the judgment interest rate found in RCW 19.52.010.

XIV. COMMUNITY V. SEPARATE LIABILITY

A. Community Liability Presumed For Contract Debt.

Any debt incurred by either spouse during marriage is presumed to be a community debt. *Oil Heat Co. v. Sweeney*, 26 Wn. App. 351, 613 P.2d 169 (1980). The presumption of community liability may only be overcome by clear, cogent, and convincing evidence. This standard is difficult to meet, which situation is exacerbated by RCW 26.16.030 which extends management authority to both spouses during marriage. *Beyers v. Moore*, 45 Wn.2d 68, 272 P.2d 626 (1954). Where the parties are living separate and apart, they may overcome the community debt presumption because community liability will not attach to a marriage that is clearly defunct. *Dizard & Getty v. Damson*, 63 Wn.2d 526, 387 P.2d 964 (1964). The test is whether the parties by their conduct have made clear their intention to renounce the marriage and community, with no intention of ever resuming the relationship. *Togliatti v. Robertson*, 29 Wn.2d 844, 190 P.2d 575 (1948).

B. Separate Liability.

If the married couple can overcome the presumption of a community debt, the judgment against the debtor can be satisfied out of the debtor's separate property and his one-half interest in the community property. *DeElche v. Jacobsen*, 95 Wn.2d 237, 622 P.2d 835 (1980).

C. Anti-Nuptial Debts.

Any debt incurred prior to marriage must be reduced to judgment within three (3) years of the marriage for the creditor to avoid the debtor's community property protections.

XV. CONFESSION OF JUDGMENT

A. In General.

A confession of judgment pursuant to RCW Ch. 4.60 is a very handy tool for both creditors and debtors: It is often used by parties in conjunction with a settlement agreement and used to secure the debtor's performance of the obligation, usually the payment of money, required in the settlement agreement. In that context, the confession of judgment is normally executed by the debtor and held by the creditor's counsel until the satisfaction of the debtor's obligation. If the debtor defaults in its obligation, the creditor's attorney then simply files the confession of judgment with the court and pursues execution on the judgment.

B. Confession of Judgment Can Be Used With or Without a Lawsuit.

RCW 4.60.050 allows a confession of judgment either before an action is filed or after. If the confession of judgment is employed prior to the time a lawsuit is filed, the creditor will be required to pay the standard civil case filing fee in the event the confession of judgment is entered with the court. If the confession of judgment occurs after the complaint is filed, the confession of judgment cannot exceed the relief demanded in the complaint. RCW 4.60.010. In this context, the confession of judgment can be entered prior to the defendant's answer. RCW 4.60.010.

C. Requisites For Confession of Judgment.

RCW 4.60.060 requires that the confession of judgment must contain a statement signed and verified by the defendant stating the following items:

(1) Authorizing the entry of a judgment for a specific amount;

(2) If the judgment is for money then due or which will become due, stating the facts out of which the indebtedness arose and that the sum is then due or will become due.

D. Entry of Confession of Judgment With The Court.

The confession of judgment with the defendant's signed and verified statement acknowledging the debt and the calculation of the amount must be presented to the Superior Court and approved by a judge who shall order that the judgment be entered by the clerk. Once entered, the confession of judgment is enforceable like any other Superior Court judgment.

XVI. ATTORNEY FEES AND COSTS IN CASES OF BAD CHECKS

A. In General.

A sizeable percentage of all collection actions involve checks that have been dishonored. In these cases, Washington law provides a tool to creditors to recover reasonable attorney fees and other collection costs if the creditor complies with providing certain warnings within time limitations imposed by the statute. RCW 62A.3-515. The creditor in a case of a dishonored check must send written notice to the drawer of the check at her last known address (I recommend that the notice be sent by both regular and certified mail) putting the drawer on notice that, unless the check is paid within fifteen (15) days of the postmark on the letter, the creditor will be entitled to its reasonable attorney fees, interest at the rate of 12% from the date of dishonor, and $300.00 or three (3) times the amount of the check, whichever is less. In addition to sending the notice of dishonor of check, the creditor must also attach to the notice an affidavit of service by mail. The statutory form of the notice of dishonor and the certificate of mailing can be found at RCW 62A.3-520, -522.

The debtor can avoid paying actual reasonable attorney fees and limit its exposure to the payment of other court costs by paying to the plaintiff, prior to judgment, the face amount of the check, a reasonable handling fee, accrued interest, and collection costs equal to the lesser of the face amount of the check or $40,00, plus all court costs, service of process costs, and statutory attorney fees ($125.00).

B. Consequences For Creditor's Failure To Fully Comply With Requirements.

If the creditor demands in the Notice of Dishonor of Check interest or collection costs in excess of that allowed by statute, or demands interest or collection costs prior to the expiration of the fifteen-day period, or demands attorney fees without having the fees set by the court, or prior to the expiration of the fifteen-day period, the creditor will not be allowed an award of interest, collection costs, and attorney fees, except a handling fee.