The Most Dangerous Collection Tactic You've Never Heard of: The Chose in Action

BY KEVIN JOHNSON, ESQ.

There is an old parable of one man who owed another a vast sum. He was shown mercy and his creditor did not throw him into the debtors' prison for the debt he owed. This man quickly forgot this kindness and set out to collect other debts owed to him. Cornering another who owed him comparatively very little, he demanded payment of this debt immediately. When word of this cruelty reached the man's creditor, the hypocrisy outraged him. He had the debtor thrown in prison immediately. There are many morals of this story, the most obvious being the central importance of having "clean hands" when taking action against another. The modern-day legal equivalent of this comeuppance is the "chose in action."

The Unexpected Value of a "Thing in Action."

When it comes time to collect on a judgment, most practitioners think of real property, garnishments, bank accounts and other obvious tangible assets that can be seized by a constable. When defending a client against collection efforts, these are the assets most attorneys think of and act to protect. However, both sides often forget what could be the debtor's most valuable asset: their claims in a pending lawsuit, also known as a "chose (or thing) in action." Few attorneys know that a cause of action can be seized by a creditor. Even fewer realize that the creditor can be the opposing party in a lawsuit who then dismisses their case.

Most attorneys will practice for years before they encounter a "chose in action" in the wild. Most will only learn about them the hard way. They often come as a nasty surprise in the heat of litigation when a client, wondering what it is, sends the attorney a writ of execution, which was served on the client. The attorney then discovers that the promising case has been executed against using a judgment against his or her client that the attorney didn't even know existed. The client now faces a conundrum: pay off the judgment or lose control of their case.

This scene is likely to happen more frequently with recent amendments to the Nevada Rules of Civil Procedure (NRCP). NRCP 54(b) once again allows for certification of an judgment

as final as to any "party **or claim.**"[1] Accordingly, parties who can win early summary judgment motions as to any one of their claims or counter claims and gain certification under NRCP 54(b) will be able to execute against the remaining claims, ending the case. The opposing party will be powerless to stop this result unless they can pay off the judgment. This practice will not be limited to causes of action within the same case. Any party can purchase a judgment from another and use that judgment to execute against their opponent's case. Effectively, any judgment against your client, new or old, puts their case at risk.

While this situation might seem inequitable, and it is undoubtedly controversial, executing on a chose in action is firmly rooted in basic notions of Nevada's and nearly every other states' property law. A lawsuit is personal property of the plaintiff. In bankruptcies, probates, receiverships and other areas of law, it is treated the same as any other asset a party may have and can be transferred or seized accordingly. They can be collateral for loans or sold outright to a third party. A lawsuit in many circumstances is treated no differently than a car or a house.

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This reality has a firm basis in Nevada statute and case law. Nevada Revised Statute (NRS) 21 states that "all goods, chattels, money and other property, or any interest therein of the judgment debtor not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution."[2] Nevada law further defines personal property as "money, goods, chattels, ***things in action*** and evidences of debt."[3]

Based upon this statutory authority, the Nevada Supreme Court has expressly condoned execution upon a chose in action. Finding in pertinent part that "Based on … [this] statutory authority, we conclude that rights of action held by a judgment debtor are personal property subject to execution in satisfaction of a judgment."[4] This conclusion has been reaffirmed by the supreme court.[5] Further, the supreme court has clarified that a creditor who executes against a chose in action "stands in place of the debtor,"[6] that the original plaintiff no longer has standing to pursue their case[7] and that the creditor can then dismiss this case or appeal.[8] However, as a defense by definition is not "an action to recover a debt, money, or things" it is not a chose in action that can be executed against.[9] This is the only limitation recognized by Nevada's courts on the ability to execute on a chose in action to date.

What does this mean for my clients?

As this process becomes more common, practitioners will need to adjust. Plaintiffs' attorneys will need to verify that their clients do not have outstanding judgments that will be used against them in the future. Clients who ignore a judgment will need to understand that this judgment could cost them in the future, even if they are otherwise uncollectible. A previously uncollectable party, upon filing an unrelated case, may suddenly have an asset of value to execute against.

Defendants will file summary judgment motions earlier and seek Rule 54(b) certification early in cases in order to execute against the remaining causes of action. Judges will undoubtedly have the possibility of a chose in action in mind as they rule on these motions for Rule 54(b) certification.

Judgment holders who previously held uncollectible judgments will be approached by parties interested in purchasing their judgments for strategic reasons. All parties will become more mindful of their prior conduct and will need to make greater efforts to clean up judgments before they come back to haunt them.

Finally, clauses prohibiting assignment of judgments will likely become more common in settlement agreements and other stipulated judgments as a protection against future execution by third parties. In short, any increase in the number of chose in actions being executed against will have widespread effects on how we practice.

It is incumbent upon us as attorneys to make sure that our clients understand that their past, like the debtor of old, can come back to haunt them.

1. NRCP 54(b), post 2019 revisions.
2. NRS 21.080(1)
3. NRS 10.045, NRS 10.010 provides that this definition applies to the entire statutory titled, including NRS 21.080.
4. *Gallegos v. Malco Enters. Of Nev.,* 127 Nev. 582, 255 P.3d 1287, 1289 (2011).
5. *Butwinick v. Hepner,* 128 Nev. 718, 291 P.3d 119 (2012).
6. *First 100, LLC v. Ragan*, 382 P.3d 499, 2016 Nev. Unpub. LEXIS 645, 2016 WL 4546783 (Nev. August 26, 2016).
7. *Manko Holdings, Ltd. v. Reno Project Mgmt., LLC,* 385 P.3d 43, 2016 Nev. Unpub. LEXIS 795, 2016 WL 5820407 (Nev. Sept. 27, 2016).
8. *Antonio Nev. LLC v. Rogich,* 2015 Nev. Unpub. LEXIS 625, 2015 WL 3368808 (Nev. May 20, 2015).
9. *Butwinick v. Hepner,* 128 Nev. 718, 291 P.3d 119 (2012).

KEVIN JOHNSON grew up in Las Vegas before getting a degree in Latin American studies and Spanish from BYU. He then attended law school at UNLV's Boyd School of Law. He is an associate attorney with Cohen Johnson Parker Edwards, where he focuses on civil litigation, collections, estate planning and gaming. When not working, Kevin enjoys spending time with his wife and children.