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Paper terrorism in your mailbox

Could an angry defendant come after you personally?



BY DAVID COOK

Who are your defendants? The average personal-injury defendant, with defense and indemnity provided courtesy of an insurance carrier, presents little if any personal risk to the plaintiff's attorney. Some defendants, however, are individuals who engaged in stupid, malicious, foolish or even criminal conduct which injured, fleeced or killed someone.

Your client is the person in the wheelchair, the person with deep emotional scars from a rape, or the executor of an estate. Your defendant lacks insurance, or the loss is excluded from coverage because of an intentional act, but the defendant has assets. At the end of the rainbow – the verdict – that check is not going to fall from the sky. You are going to pull teeth to collect the judgment.

In about 99 percent of the cases, the defendant is going to sober up, file bankruptcy, sell some property and try to make a deal, or engage in a massive fraudulent conveyance. These are all settled expectations.

What about the 1 percent? Who are they? These are the dangerous people whose DNA permeates your hard-won

judgment. These judgments are coiled snakes waiting to strike at plaintiff's counsel.

The ABC's of liens

The weapon of choice is a paper lien. Expect terror lurking in the County Recorder, Secretary of State, or your home mailbox. So let's learn basic indexing. These individual files, or records, a financing statement or sworn affidavit of liens with the County Recorder or the Secretary of State are indexed as follows:

Lien Debtor: Larry Litigator.

Lien Creditor: Joe Vindictive ("Filer"):

Collateral: 100 Oaks Street, Anytown, California; and all personal and real property of Larry Litigator.

The UCC permits anyone to file

Article 9 of the Uniform Commercial Code is "open drawer." What does that mean? The filing offices of the Secretary of State and County Recorders do not screen filings. The UCC (Division 9 of the California Commercial Code) authorizes a secured creditor to file, or record, the UCC #1 without the actual "wet" signature of the debtor. UCC § 9-509(a) does not compel the filing

agencies to verify whether a debtor presumptively authorizes the creditor to file or record the financing statement or other lien. The Filer can record or file a UCC#1 that names the client, attorney, spouses, law firm, partners, associates or paralegals as "lien debtors" in the financing statement and the Filer who would be the "lien creditor." The Filer can list the collateral simply as the "personal property" or "real property" of the lien debtors.

Recorded documents are even more damaging

The County Recorder works off the grantor/grantee index of real property transactions. This is how a recorded bogus financing statement appears in the recorder's office:

Larry Litigator is the "Grantor."

Fred the Filer is the "Grantee."

The County Recorders are open to the public and most are online.

The UCC filing is not the sole weapon. The Filer can record a "Claim of Lien Affidavit" or "Affidavit of Lien" with the County Recorder. The typical language is the following:



Litigator, Litigator & Litigator, Attorneys, and Larry Litigator, Esq. is the grantor
Fred the Filer is the Grantee.

Open the mail at your own peril

The County Recorder might mail the lien notices to the “lien debtor” at the address listed in the Affidavit of Lien. The Filer also might mail the “lien notices.” Family members who open them may flip out, leading to such ultimatums as “...and don’t come home until you straighten this out!”

Be proactive and protect yourself

High-conflict attorneys should suspect a campaign of liens. If an attorney is engaged in a high risk or combative practice, prudence dictates running regular searches through the Secretary of State and County Recorder on a periodic basis to ferret out these paper liens. The Secretary of State is online, but requires a small fee. Commercial services likewise offer low-cost search services.

The recorder’s office may or may not be online, but commercial services such as Lexis Nexis, Westlaw and D&B all offer low-cost access to the County Recorder grantor and grantee index for major California counties.

What are the damages?

So, what if you find liens placed against you, your business, your employees or family members? These liens hobble any credit transaction, the refinancing of a home, or loans to buy a new home.

Some Filers insert the “lien debtor’s” residential address and property description in the “collateral box” which replicate viable fixture filings under UCC §§ 9501(a)(1) and 9503(b)(3) [“ . . . Description of the real property to which the collateral is related.”] Cautious title companies might hesitate in insuring title in favor of the buyer. These liens, no matter how fraudulent, might obstruct the sale of real estate; they damage title to real property and render some title unmarketable.

These liens are retaliatory and intimidating. Once it becomes known that retaliatory liens have been filed against the parties or their attorneys, the fear of additional liens spreads and may deter others from participating in the litigation.

UCC § 9518 abandons you to the wolves

Article 9 of the UCC does not offer self help to remove the liens. At best UCC § 9518 offers the “lien debtor” an opportunity to explain the bogus filing but not expunge the lien. *Gruber v. Tilton* (No. 09-17228 (9th Cir. Dec. 8, 2010)) explains this dilemma as follows:

There is no procedure for revoking or removing a UCC-1. The form stays filed over its life, typically five years, and Vasquez’s office retains it for an additional year after that. A UCC-1 can be continued in a six-month window prior to its expiration date. A person can file a termination statement stating a lien has been terminated, but the original UCC-1 is still retained on record. A UCC-3 is an amendment document that can be used to continue the lien for an additional five years, to file a termination statement, to file an assignment, or to file a change in collateral. A UCC-5 is a correction statement filed by a person who believes the record is either in error or false.

While the filing or recording of the UCC-3 or UCC-5 filings would ameliorate the initial fraudulent recordings, these filings do not expunge the fraudulent UCC’s per UCC § 9518(c).

In other words, you have to sue! The court may well award big-time monetary damages, an order of expungement and injunction, but this lawsuit will run up a big bill; and many Filers are indigent which renders the litigation financially futile.

Nobody is coming to rescue you

The recording of a false or fraudulent lien is a crime under California Penal Code section 115; however, “Recording a false or forged instrument is not

actionable under Penal Code section 115 if the instrument was not legally entitled to be recorded” (*People v. Hassan* (2008) 168 Cal.App.4th 1306, 1316). Penal Code section 531(a) criminalizes false document affecting title to property.

California Penal Code section 115.5 protects the property owner if “. . . Any false or forged document or instrument with the County Recorder which affects title to, places an encumbrance on, or places an interest secured by a mortgage or deed of trust on, real property . . .”

Summary

Article 9 “cannot provide a satisfactory or complete solution to problems caused by misuses of public records. The problem of “bogus filings” is not limited to the UCC filings but extends to real-property records as well.” The awkward and expensive remedy is the civil action to expunge the liens, enjoin further liens and award damages – but at a steep cost.

UCC § 9518 (n.3) expresses the UCC’s antipathy toward screening bogus filings by the Secretary of State or a County Recorder. The UCC §9518 donut hole endangers litigators and their clients because the Secretary of State and County Recorder offer an open draw filing system which invites paper terrorism.



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