▶ CONSUMER LAW

Collecting the Uninsured Judgment

By Edward L. Robinson

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Introduction

In a perfect world, defendants would always have plenty of insurance and we would not have to worry whether our client's case will become a judgment that is worth less than the paper it is printed on. Unfortunately, we do not live in a perfect world.

In reality, many claims — such as fraud and other intentional torts — are either underinsured or excluded from coverage by law. The challenge then becomes how to make our clients whole without insurance.

In many cases, merely getting the final judgment is a feat in itself, and the thought of chasing a judgment debtor can feel daunting. Turning the case over to a collections attorney may seem like a good alternative, but most collections lawyers work in volume and may not have the time or inclination to pursue a hard-to-collect judgment. And because most collections cases are handled on a high contingent fee, this may not be a realistic option.

As a result, many of our would-be clients are turned away because the prospect of recovery seems low and there may be other insured cases waiting for our attention. This does not have to happen. Uninsured cases — while certainly more challenging — should not be dismissed out of hand in favor of lower-hanging fruit. Those clients with uninsured claims are many times most in need of justice.

This article will set forth a process for evaluating, prosecuting and collecting uninsured and underinsured cases. It is not exhaustive, as all the aspects of handling such cases could fill several volumes. Nevertheless, this provides a roadmap that hopefully will help in your next case.

Evaluating the Case

Charting a successful path to recovery begins as soon as insurance coverage is in question, which many times is before the case is accepted. While it is important to bring covered claims if possible, it can be equally important to bring certain uninsured claims that can survive bankruptcy or other evasive maneuvers.

■ Determining the Nature and Extent of Coverage

The question of coverage is sometimes a tough one, and often involves the insurer defending on a reservation of rights.[1] In other cases, the question is easy.

For example, Kansas law has clear prohibitions against insuring against intentional acts, so claims for fraud, battery and other intentional torts will not be covered by insurance.[2] And many insurance contracts have exceptions for simple breach of contract. Therefore, it is important to advance all plausible theories at the outset and withdraw such claims that later become strategically unnecessary or factually unsupported.

■ Avoiding Discharge in Bankruptcy

If a claim is not covered by insurance, the defendant's strongest refuge is bankruptcy. Your client may have a multi-million dollar claim, but it may be worth

nothing if the defendant can discharge it in bankruptcy. As a result, it is critical to know whether bankruptcy is a risk. This involves two related inquiries. First, can the defendant discharge the judgment in bankruptcy? And if he can, what is the likelihood that he will?

The United States Bankruptcy Code is specific about what claims can be excepted from discharge in bankruptcy.[3] The list includes:

- Any debt for money, property or services obtained by false pretenses, a false representation, or actual fraud;[4] and

- Any debt for willful and malicious injury by the debtor to another entity or to the property of another entity.[5]

These sections have been used to prevent discharge of judgments for fraud and battery, and judgments under the Kansas Consumer Protection Act. [6]

This does not mean the judgment or claim will automatically be excepted from discharge; instead, it means your client can file an adversary action within the bankruptcy to prevent the claim from being discharged. If the defendant cannot discharge the claim in bankruptcy, the only obstacle between your client and getting paid is finding and seizing the defendant's assets.

The second question is whether a defendant is likely to file bankruptcy, even if the claim could be discharged. This is more a practical consideration than a legal question, but is still important. For example, a defendant may stand to lose more in bankruptcy than by paying the judgment. Not everyone wants a bankruptcy trustee nosing around their finances, so knowing your defendant can help you decide if bankruptcy is a practical risk.

Prosecuting the Case

If bankruptcy is not a legal or practical threat, you still must prosecute the case in a way that will maximize the prospects for collection. Being mindful during the litigation of your inevitable task of collection can help along the way.

■ Pleading the Case

The fruits of evaluating the case will determine which claims to plead, and the focus will be on claims that are unlikely to be dischargeable in bankruptcy and minimize the defendant's incentive for evasion.

One of the most effective tools is the Kansas Consumer Protection Act (KCPA). While it is expressly limited to "consumer transactions," the KCPA is fairly broad in its scope and provides for attorney's fees and costs.[7] This can include post-judgment fees for collecting the judgment.

Other intentional torts should also be pursued. While they do not expressly provide for attorney's fees, they do provide the opportunity for punitive damages, which can be an avenue for recovering attorneys' fees. Keep in mind the special rules for pleading punitive damages.[8]

■ Tying Bad Actors to the Company

Cases involving fraud or other intentional torts by a company employee present unique challenges. Many times the employee has few or no recoverable assets, so the focus shifts to the company. However, for a company to be liable for the intentional torts of its employee, the employee must have been acting "within the scope of his employment or in furtherance of his employer's business, and not with a purpose personal to the employee."[9] This can be a critical area for discovery during the litigation.

■ Minimizing Expense

Having a claim that cannot be discharged in bankruptcy is not a license to go all-out against the defendant; quite the contrary. Especially in KCPA cases, it is critical to try to settle the case if possible and be mindful of all fees and expenses, because these will all come into play when a court evaluates a fee request.[10]

Collecting the Judgment

Aside from the few points mentioned above, there are few differences between an insured claim and an uninsured claim until the verdict is rendered. Once the verdict is rendered, time is of the essence and strategic planning is critical.

■ Post-Trial, Pre-Judgment

After the verdict comes down, there will likely be a few weeks or months before the final judgment is rendered. During this time, the court will consider any fee requests and calculate any punitive damages. Use this time wisely to position your case for collection.

First, ask the defendant in writing to pay the judgment voluntarily. Don't expect a favorable response, but make sure it is also in writing. This will be important for your post-judgment fee request. Second, make sure the journal entry of judgment includes your pre-judgment and post-judgment attorney's fees, if possible, as well as post-judgment interest.

Third, hire the best private investigator you can find and find as many of the defendant's assets as possible. Private investigators have access to databases that are not generally available to the public or attorneys, and a good PI can help find businesses, properties and accounts that would otherwise go unknown. You should also expect the defendant to start squirreling away his assets, if he has not already done so.

Finally, volunteer to prepare the Journal Entry of Judgment. Send it to the defendant's counsel and get his signature first. When you get it back, sign and send it to the Court for filing. Follow up regularly with the judge's assistant so you know the exact date it is filed.

The court clerk is obligated to notify all parties within three days of the judgment being filed, but failure of the clerk to notify does not affect the judgment.[11] You should not expect the clerk to notify the parties when the judgment is filed, and you have no obligation to notify the defendant if the clerk fails to do so.

■ Post-Judgment: The 14-Day Waiting Period

You cannot take any formal action to collect your client's judgment until

14 days after the judgment is entered.[12] During this time, you should finalize any asset investigations and prepare to seize all known property on Day 15.

The most valuable tool at this time is a Writ of General Execution.[13] You may not execute on the judgment until Day 15, but you can draft the Writ and have the trial judge sign it during the 14-day waiting period, so long as the writ is clear that it will not be valid until Day 15.

You should also prepare any pleadings that will be filed in other jurisdictions and any other papers you plan on serving the defendant or his employer, such as garnishments and business records subpoenas.

Finally, you should coordinate with your private investigator to ensure you have adequate resources to complete all your tasks on Day 15.

■ Day 15: Unleash the Hounds

On Day 15, you should have completed all your asset research, have a Writ of Execution ready for service, and have your private investigator or other resources prepared to seize all known assets at once. This may include:

- Recording your judgment in all the other counties in which the defendant owns real property;[14]
- Having process servers physically seize all of the defendant's real property other than his homestead;[15]
- Serving a writ of general execution on the defendant, seizing all of his assets, including business interests, and removing all non-exempt property from his person;[16]
- Serving a charging order upon the defendant for any LLC business interests;[17]
- Having tow trucks ready to remove all but one of the defendant's vehicles;[18]
- Notifying others, including lenders, who have any interest in any of the defendant's property, business or assets;
- Recording the bank account information from the defendant's checkbook and garnishing the bank the following business day;
- Serving the defendant with a Notice of Hearing in Aid of Execution;[19]
- Serving any of the defendant's business entities with business records subpoenas for financial records pertaining to the defendant;[20] and
- Serving any wage and non-wage garnishments on defendant's employer or any other entity from which the defendant receives compensation.[21]

The effect of these actions is multifold. First, it will tie up all the defendant's known assets at one time, preventing him from doing anything further with them, and interrupt his future cash flow. Next, it will show the defendant that your client is not going away quietly. And finally, it will require the defendant to post a superseadeas bond to release these assets during any appeal.[22]

While the sheriff of the local county can assist with many of these matters,[23] a private investigator will likely be better versed in collections procedures and be more aggressive (such as emptying the defendant's pockets).

If the Journal Entry of Judgment did not include an itemization of costs, you should file a Bill of Costs with the clerk of the court, who can then tax those costs as part of the judgment.[24]

■ Day 16 and Beyond: Leveraging or Selling Seized Assets

The actions taken on Day 15 will tie up many of the defendant's assets, but should be considered just a first step. A hearing in aid of execution will enable you to learn the location of the defendant's bank accounts, and garnishments should be prepared in advance to serve immediately upon all identified banks and prevent the defendant from withdrawing funds.[25]

If the defendant's seized assets are encumbered by any loans, you have the right to sell the assets subject to the lender's security interest.[26] Many lenders will not want to put their collateral in jeopardy and get in the middle of a post-judgment collection, so the lenders will likely put pressure on the defendant to satisfy the judgment.

If the defendant's seized assets are not encumbered by any loans, you can proceed with the sale of those assets. Kansas law has specific procedures for the sale of real property and personal property.[27] If the assets include shares of stock, they are personal property and can be sold as such.[28]

If the business entity is an LLC, it cannot be sold; instead, the charging order allows the judgment creditor to receive all earnings that the defendant would receive from the LLC until the judgment is satisfied, at which point the charging order must be lifted and the LLC interest restored to the defendant.[29]

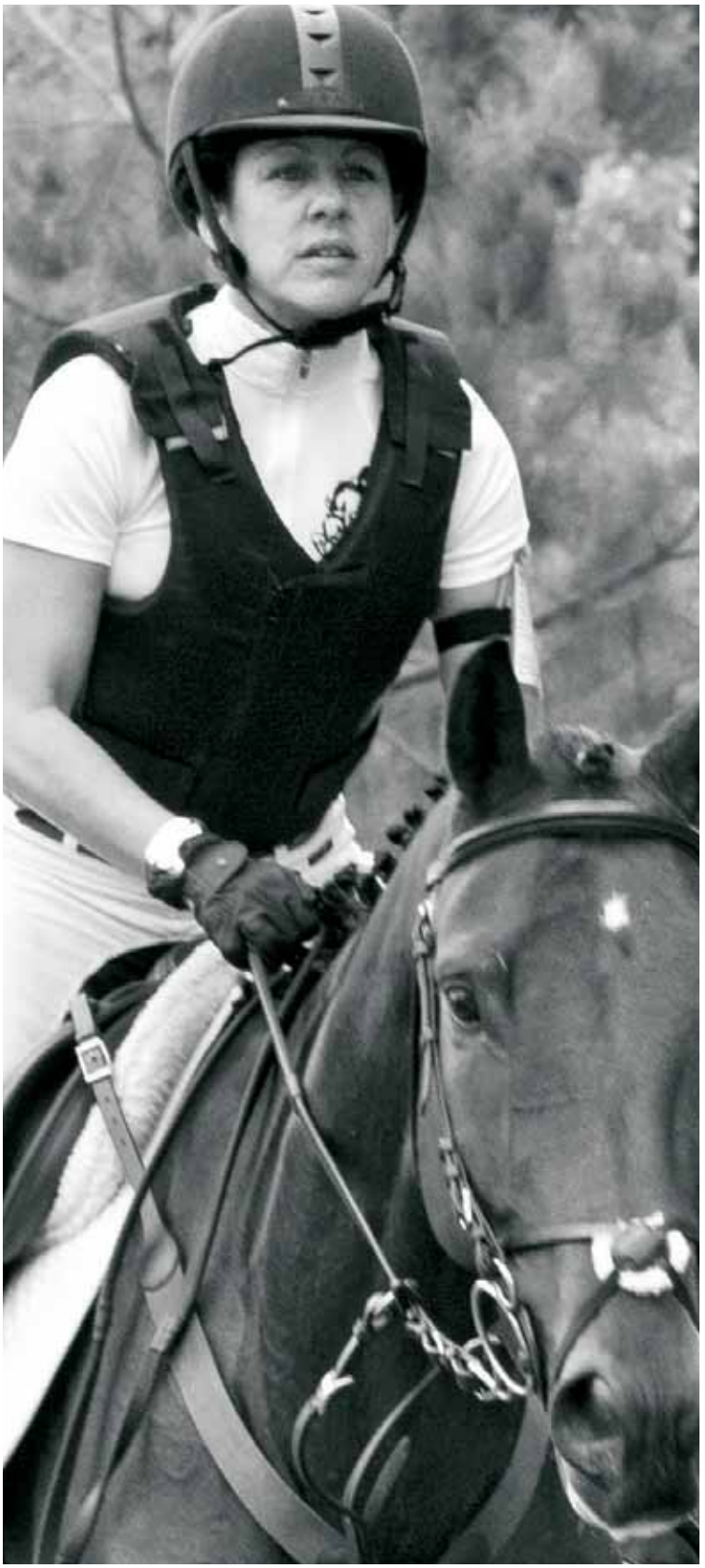
Learning the extent of the defendant's assets can be like peeling back the layers of an onion, revealing more and more information. Be prepared to issue additional garnishments and business records subpoenas.

As each asset is sold, you should prepare and file a Partial Satisfaction of Judgment showing the application of the asset proceeds to the judgment.

■ Winding Down the Case

The effort of preparing for and engaging in post-judgment collections efforts can be time-intensive and expensive, which is why an award of post-judgment attorney's fees and costs is so important and why you should make a record of trying to get the defendant to pay the judgment voluntarily.

These post-judgment amounts are subject to approval by the district court, just like pre-judgment amounts,



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and therefore it is important to be as economical as possible, not expend undue effort, but record the defendant's evasive actions.

If you are able to get the judgment satisfied or settled, the defendant will likely request that you file a Satisfaction of Judgment or dismiss the case with prejudice. If you are unable to satisfy the judgment, it is valid for five years and can then be renewed.[30]

Conclusion

If justice is truly blind, it does not know whether a defendant has insurance. And if we are to obtain justice for our clients, we should not let the absence of insurance prevent us from advocating on behalf of those who are the victims of the worst, and therefore uninsurable, conduct.

Kansas law has procedures in place for collection uninsured judgments. When used appropriately, they can allow victims of intentional conduct to be made whole. ▲

ENDNOTES

1 The duty of an insurer to defend is broader than the insurer's duty to pay. *See, e.g.*, *Miller v. Westport Ins. Corp.*, 288 Kan. 27, 33, 200 P.3d 419 (2009). When coverage is in question, the insurer may issue a reservation of rights letter to the insured, setting forth the insurer's position.

2 *See, e.g.*, *Thomas v. Benchmark Ins. Co.*, 285 Kan. 918, 922, 179 P.3d 421 (2008) (citing *Shelter Mut. Ins. Co. v. Williams*, 248 Kan. 17, 28, 804 P.2d 1374 (1991) and *Spruill Motors, Inc. v. Universal Underwriters Ins. Co.*, 212 Kan. 681, 686, 512 P.2d 403 (1973)).

3 *See* 11 U.S.C. § 523.

4 *Id.* § 523(a)(2)(A).

5 *Id.* § 523(a)(6). For the personal injury practitioner, it also excepts from discharge "any debt . . . for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance." *Id.* § 523(a)(9).

6 *See, e.g.*, *Farmer's State Bank v. Diel*, 277 B.R. 778 (2002); 4 Collier on Bankruptcy ¶ 523.12[2] (15th ed. rev. 2008); *In re Bradbury*, 4 Bankr. Ct. Dec. 263 (1978).

7 K.S.A. 60-634(e)(1).

8 K.S.A. 20-209(b).

9 *Farris v. Bd. of County Comm'rs*, 924 F.Supp. 1041 (D. Kan. 1996) (citing *Williams v. Comm. Drive-In Theater, Inc.*, 214 Kan. 359 Syl. ¶ 3, 520 P.2d 1296 (1974)). *See also Commerce Bank of St. Joseph v. State of Kansas*, 251 Kan. 207, 833 P.2d 996 (1992); *Wayman v. Accor N. Amer., Inc.*, 2011 Kan. App. LEXIS 59 (Kan. Ct. App. Mar. 18, 2011); *Hauschulz v. Gobble*, 35 Kan. App. 2d 97, 128 P.3d 424 (2006); *Prugue v. Monley*, 29 Kan. App. 2d 635, 28 P.3d 1046 (2001).

10 The discretion of a trial court in determining whether to award attorney's fees cannot be understated. *See, e.g.*, *Louisburg Bldg. & Dev. Co., L.L.C. v. Albright*, 45 Kan. App. 2d 618, 652-54, 252 P.3d 597 (2011).

11 K.S.A. 60-258.

12 K.S.A. 60-262.

13 *See* K.S.A. 60-2401 *et seq.*

14 See K.S.A. 60-2202(a) ("An attested copy of the journal entry of the judgment, together with a statement of the costs taxed against the judgment debtor in the case, may be filed in the office of the clerk of the district court of any other county upon payment of the fee prescribed by K.S.A. 28-170 and amendments thereto, and the judgment shall become a lien on the real estate of the debtor within that county from the date of filing the copy.")

15 K.S.A. 60-2301.

16 K.S.A. 60-2401 *et seq.*

17 K.S.A. § 17-76,113.

18 K.S.A. 60-2304(c).

19 K.S.A. 60-2419.

20 K.S.A. 60-245a.

21 K.S.A. 60-2310.

22 K.S.A. 60-2103(d).

23 K.S.A. 60-2401(d); K.SA. 60-706(a).

24 K.S.A. 60-2002(c).

25 K.S.A. 60-2419.

26 K.S.A. 60-2406.

27 *See generally* K.S.A. 60-2401 *et seq.* (setting forth the procedure for all sales of real and personal property under execution).

28 *Hunt v. Eddy*, 150 Kan. 1, 17, 90 P.2d 747 (1939).

29 K.S.A. § 17-76,113.

30 K.S.A. 60-2403.