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The judgment is the easy part – collecting it from an LLC poses problems

■ KALLIE COX

Plaintiff attorneys across all civil practices are facing a common problem in Missouri and nationwide. Collecting judgments from Limited Liability Companies (LLCs) is a time intensive, difficult process that leaves attorneys and their clients frustrated.

These attorneys say that winning a case can be the easy part when dealing with these companies. Collecting the judgments is a long, painstaking process riddled with bureaucratic red tape and hurdles for lawyers to navigate.

LLCs are easy and cost-effective to set up in most states. The business structure shields its owners from personal liability in the event of litigation, meaning that their personal assets are not connected to the business's debts.



Kathleen Schin McLeroy

Kathleen Schin McLeroy, an attorney with Carlton Fields in Tampa, Florida, is an expert in judgement collections. She spoke on an American Bar Association panel on the topic and said she has a few main take aways for attorneys struggling in this area.

"First, judgment enforcement is sort of a long game and not a short game. (...) You may spend a number of

years researching and collecting information over time before you actually find assets that can be applied to the judgment," McLeroy said. "And I say that because the fact that you obtained a judgment and that the person or entity against whom you got the judgment didn't consensually pay you, means that there's work ahead in order to get it done and sometimes you're operating without a lot of information about where assets might be. You've got to develop that information and then determine effective ways to capture the assets."

The second thing attorneys should keep in mind is to use their judgment with respect to the money they spend on researching and investigating while trying to obtain the judgment.

"There's no guarantee you can collect and so sometimes you need to be somewhat measured by how much additional money you spend in researching, both in attorney's time and in actual out of pocket costs in trying to determine next steps, because judgments are good for a number of years," she said. "For instance, I practice in Florida, and judgments in Florida are good for 20 years, so sometimes it makes sense to wait some time, particularly if the entity has gone through difficulties financially, to wait for them to recover before you can find assets."

Attorneys need to be realistic about what might be available to collect, she added. Arguing that it would not make sense to spend more money in costs than one could ever hope to recover if they non-consensually captured assets.



Natalie Shkolnik

Natalie Shkolnik, a partner in Wilk Auslander's New York office, also spoke on the ABA panel alongside McLeroy. Her firm started a judgment enforcement practice in 2004, pioneering legal decisions in the area.

Shkolnik said the hardest judgments to collect are those against individuals instead of companies.

"Because it's easier for an individual to disappear," she said.

In Missouri, LLCs are not obligated to file an annual report with the state and don't have to provide the company's operating agreement. Errors in the legal names for LLCs and their owners are common, Missouri attorneys say, and taken together the lack of state reporting and errors in filing make it difficult to determine the company's assets or true owners.

Missouri Lawyers Media spoke with national experts and Missouri attorneys on how they are navigating the

muddy water created by LLCs when collecting judgments.

THE PROBLEM WITH LLCs

Gregory Leyh, who owns his practice in Kansas City, knows first-hand the difficulties of collecting judgments from an LLC.



Gregory Leyh

Leyh led a class-action lawsuit on behalf of the tenants of Ruskin Place apartments in Kansas City and won a \$62 million judgment for uninhabitable living conditions, emotional damages and punitive damages. But this judgment was never paid.

KM-T.E.H. Realty 8 LLC was one of the defendants in the original suit, as was Michael Fein, a manager and a member of the company, Missouri Lawyers Media reported. Months before the judgment was rendered, the company sold its assets and stripped the LLC of its value and Fein fled the country.

Despite the setback, Leyh and his law partners Nicholas Leyh and Andrea Knernschild refused to give up and registered the judgment in New York, Pennsylvania, Oklahoma and Indiana, all states which they believed KM-T.E.H. Realty or its related entities held property. Tracking these entities, their owners and insurers was difficult, and at one point, the group had 24 separate LLCs.

"We litigated in New York for a while, litigated in Pennsylvania, and we had \$15,000 from a bank in New York. But that's it," Leyh said. "So, we then sued some associated LLC companies that were associated with (KM-T.E.H.), and we got maybe another couple of \$100,000 in settlements

from them. We then filed an equitable garnishment claim seeking insurance company funds to partially satisfy this judgment, by which I mean (KM-T.E.H.) was insured and we finally got the information we needed to identify the insurance companies."

Leyh said they identified six defendants in the equitable garnishment claim. Of these, three insurance companies – Colony Insurance Company, Starstone Specialty Insurance Company and Liberty Insurance Underwriters – are part of this \$2.75 million settlement.

Recently, Leyh also settled with additional insurance companies. In November, a judge granted final approval on his settlement with Allied World, which he says was one of the last of five insurance companies to settle. This amount was \$1,675,000. The judge also entered an order permitting him to begin distributing funds from another settlement that settled for \$1,450,000.

"We had one round of settlement checks that went out in the rough amount of \$20,405. They were all distributed to the class. The second round from Hallmark is \$10,006 for each class member," he said.

But these settlements aren't the end of the road, Leyh said. It's just where they are in the process now.

"We are continuing to explore the identity of insurance companies that may have insured the two judgment debtors against whom we got the original 2020, judgment KM-T.E.H and Michael Fein," he said. "So, there may be additional insurance companies that we are in the process of attempting to identify."

While this class action is unique, Leyh said the LLC structure is designed to protect individuals and shield them from judgment collections.

"What the LLC structure permits is a lot of very bad behavior by the LLC. And with a little bit of planning, they can eliminate their assets, get rid of their assets, transfer their wealth, dump property and therefore the ability to collect a judgment, holding them accountable for the very bad behavior is difficult, sometimes impossible," Leyh said.

Ronald J. Eisenberg, a St. Louis attorney who also operates his own practice, has experience litigating against and on



Ronald J. Eisenberg

behalf of LLCs. The LLC company structure has become increasingly popular in recent years because of how easy they are to set up, he said.

"They don't require annual reporting to the state of Missouri – to the secretary of state – and the information as far as the ownership of the LLC is not generally public record," Eisenberg said. LLCs are particularly common in landlord-tenant cases.

Because LLCs are so inexpensive and simple to set up, the companies that create them don't necessarily have large assets.

"If you're in litigation against an LLC, sometimes, or a lot of times, getting the judgment is the easy part, but collecting the judgment is the hardest part," he said.

The easiest way to collect is if you know where the LLC has a bank account; this makes it possible to garnish the account, Eisenberg said. If the LLC owns real estate, you can also put a lien on the property. The caveat to these tactics is that if the LLC is in debt or owes money on a property, the judgment and attorney have to get in line after the other lenders.

Finding an LLC's assets isn't necessarily the hardest part of collections, but finding the correct name of the entity or owner can be.

"A lot of parties are not precise when they file a lawsuit about properly naming the business defendant. So, if there's an LLC called 'ABC LLC,' then ABC LLC should only be doing business as ABC LLC and not signing contracts or doing business as 'ABC,'" he said.

To be able to use a shortened name, the business would have to file a fictitious name with the secretary of state. If a business fails to do this, then it may be an individual who signs the document or contract and is now on the hook as the party responsible for paying judgment.

"What I see a lot of times, especially with leases, is that the name of the landlord is not 'ABC, company LLC,' it's just some name of the apartment complex," Eisenberg said. "But when you file a garnishment to try to collect the judgment, you have to list who the entity is. So if the name of the apartment complex is not a legal entity, even if there's some bank account, you know the bank account is not held in the name of the apartment complex, which is a nonexistent entity, then (...) you're not going to collect from the bank account."

As an attorney who also defends LLCs, Eisenberg's biggest piece of advice for the companies is not to co-mingle funds and to keep the company's money in a completely separate bank account not attached to their personal finances.

"If they treat the entity separately and only do business under the proper name of the LLC, then the individual who's getting sued would have a much better chance of getting the case dismissed," he said.

THE SOLUTION FOR ATTORNEYS

The investigation process must start before an attorney attempts to collect a judgment, Shkolnik said.

"If the LLC doesn't have assets, then a lot of times, people give up and are not sure what to do," she said. "So, what you need to do in those cases is you need to come up with a strategy on how you could potentially get to the members of the LLC assuming they have assets."

One of the steps Shkolnik and her team have taken in the past is what they call "piercing the veil." This means that you as a creditor are asking the court to disregard the LLC's legal identity and hold the members personally liable.

"There's a bunch of factors that the courts take into consideration in determining whether to pierce the veil, and it's going to vary from state to state. But generally, they look at whether the LLC is undercapitalized, whether the members were commingling funds between the company and their own funds, whether the corporate formalities were ignored — so the LLC, for example, doesn't have records (or) doesn't have operating agreements — (and) certainly if the LLC was used to commit a fraud or some other form of injustice," she said. "If you have those factors, then you can try to pierce the corporate veil and get to the assets of the members."

Similar to the actions Leyh took in his case, McLeroy advises attorneys to record the judgment, make it a public record and place a lien on the assets of an LLC anywhere they may be held including other states and overseas.

"Then the next step is to determine whether or not you want to take formal discovery or not, from the judgment debt or entity basically serving them

interrogatories," she said. "Sometimes you would do that, sometimes you would choose not to and instead, potentially hire (an) investigator (or) search the public records to locate assets, bank accounts or real property that might belong to the judgment debtor that you can seize or attach to help collect the judgment."

One of the most common mistakes attorneys make when trying to collect from an LLC is not thinking about the long game and submitting their discovery too soon.

"Sometimes that tips them off and by the time you get the answers back from them, they've, for instance, closed all the bank accounts that they've told you about," McLeroy said. "So sometimes it's not strategic to send a discovery, because it basically puts the judgment debtor on notice (about) what you're going to do next."

The second most common mistake is to be too eager to collect a judgment and to take every step at once, spending more client funds in what may be a fruitless effort, she said.

There are steps the state legislature could take to make collecting judgments from LLCs easier.

Eisenberg suggests changing existing state law so that the identities of LLC members are public record.

Leyh said the legislature could require that LLCs pay their judgments.

"They could require that they pay judgments or hold the individuals accountable (...). If the LLC doesn't have the assets to pay a judgment, then turn that responsibility or that liability over to the head of the LLC," he said. "They could limit the immunity that the individuals have who are creating these LLCs and protect, in fact, the public that is harmed by the bad acts of the LLC."