

TAKE STOCK

BEFORE TAKING STOCK

Practical considerations for execution on corporate shares, tangible and intangible assets

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Step One - Assess the Debtor and the Claim

As the life of a claim continues, the chances of recovery diminish.....

As litigators and asset recovery specialists, we must have the most comprehensive vetting and asset search capabilities in order to keep up with debtors.

This includes asking questions and looking for the potential for investment assets of a personal guarantor at the pre-judgment and post-judgment stage.

At placement, take the time to vet the debtor and possible sources of recovery

- ▶ Immediately assess the debtor's business and potential assets and personal assets of the principal(s) if possible
 - ▶ Understand the business and what can be liquidated
- ▶ Identify assets that may require pre-judgment remedies and clarifying what post-judgment and enforcement options are available.
 - ▶ Advise your client of the costs, issues and procedures for seeking expedited hearings, relief and then following through with the execution after an favorable Order

Step Two -Evaluate Your Time and the Options for Recovery

- ▶ Can I realistically provide services on a Contingency, Modified Contingency, Time Billing Basis based on the debtor's known or potential assets with a cost estimate that is acceptable for the client?

- ▶ Time vs. Recovery vs. Costs

What assets are involved?

- ❑ Do those assets have special protections that limit seizure, recovery, or sale before or after judgment?
- ❑ Do we need to recommend pre-judgment remedies that require immediate or expedited equitable relief/action?

Advise your client of the costs, issues and procedures for seeking expedited hearings and relief and then following through with the execution after an favorable Order

Step Three - Recommend

What is the client/creditor's expectation? what did I discover by vetting this debtor and claim and how can I provide the best and most practical legal services under the circumstances?

Share Information and Recommend:

Make a realistic recommendation and set expectations

Expectations:

What am I being asked to do?

- ▶ i.e., "Please file suit and attach the debtor's bank account"
 - ▶ i.e., "Please garnish the debtor's wages"
 - ▶ i.e., "I know the debtor has stock certificates and a mutual fund, I want them ... and I want him to experience pain"
- ▶ Can I do that?

NUMBER
GOOG 8225

Google™

DELIVERY
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GOOGLE INC.

INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE

CUSIP 38259P 50 8

SEE REVERSE SIDE FOR CERTAIN RESTRICTIONS

THIS CERTIFICATE IS TRANSFERABLE IN CANTON, MA, JERSEY CITY, NJ OR NEW YORK, NY

THIS CERTIFIES THAT

*****1*****
*****1*****
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IS THE OWNER OF

ONE

FULLY PAID AND NON-ASSESSABLE SHARES OF CLASS A COMMON STOCK, PAR VALUE \$0.001 PER SHARE, OF

GOOGLE INC.

transferable only on the books of the Corporation by the holder hereof in person or by duly authorized Attorney upon surrender of this certificate properly endorsed. This certificate is not valid until countersigned and registered by the Transfer Agent and Registrar.

WITNESS the facsimile seal of the Corporation and the facsimile signatures of its duly authorized officers.

Dated:

30-DEC-2008

Larry Page

PRESIDENT AND ASSISTANT SECRETARY



Sergey Brin

PRESIDENT AND ASSISTANT SECRETARY

COUNTERSIGNED AND REGISTERED
BY: *Stephan Carr*
EQUISERVE TRUST COMPANY, N.A.
TRANSFER AGENT AND REGISTRAR
AUTHORIZED SIGNATURE

So what are my options?

- ▶ Enjoin the Holder or Owner from Transfer*
- ▶ Move to Reassign Stock Ownership*
- ▶ Move to Compel the Debtor to Surrender Stock Certificates*
- ▶ Levy the Stock in the Possession or Control of the Owner
- ▶ Levy the Stock in the Possession or Control of the Holder
- ▶ Levy the Stock in the Possession or Control of a Third-Party
- ▶ Garnish or Attach Stock held in the Debtor's Brokerage Account
- ▶ Move to Reassign Stock Ownership, Open a Brokerage Account and Sell Stock*
- ▶ Levy and/or Attach and/or Move for an Order to Liquidate Specific Stock held by a Broker
- ▶ After Levy, Sell Stock Certificates

Stock Defined

- ▶ The Stock of a Corporation is the equity stake of its owners or the capital raised by a business or corporation through the issue and subscription of shares.
 - ▶ Because corporations are created and governed largely by state statute, the ability to transfer, assign, execute and sell stock is also guided by state statutes that evolved from common law, were codified in the Uniform Transfer Stock Act, and then further developed by the U.C.C.

COMMON LAW PROBLEMS

1. Corporate books were generally the sole and controlling evidence of ownership as certificates were not always issued.
2. Ownership in a corporation was considered an intangible “chose in action” that was not subject to legal process, so creditors were left to pursue an equitable action through a “creditors bill” to reach property that could not be levied and sold under existing execution law.

COMMON LAW FIX REQUIRE ISSUANCE OF STOCK CERTIFICATES AND LEVY BY NOTICE

1. Courts recognize the certificate of stock as evidence of a corporate ownership interest and create statutes that enable judgment creditors to begin legal process, i.e.; writ of execution, attachment, levy, and garnishment.
2. Levy by Notice to the corporation - A typical state statute provided specific directions for legal process on stock or corporate surrender of stock, i.e.; the appropriate party to serve and where to serve that party, the direction for the sheriff to levy or seize the shares and sell the shares at public auction; and directions for the corporate officer to issue a new certificate of shares to the new owner and cancel the judgment debtor's shares.

Problems with the Common Law Fix

- ▶ Corporations did not always issue the physical certificates and certain state courts did not recognize the physical certificate as evidence of ownership
- ▶ Stock certificates were issued and/or held by the corporation in a foreign jurisdiction or simply recorded on corporate books and records
 - ▶ Lack of physical possession allowed debtors to transfer, pledge or sell stock to unknowing third parties
 - ▶ Third-party purchasers were not always able to verify stock ownership as purchasers and lenders often had no standing or legal right to examine corporate records to verify ownership.

So without more protection for third-party purchasers and lenders, there was no clarity as to whether they were purchasing or receiving good title to stock.

The Uniform Stock Transfer Act

- ▶ As the volume of stock and related transactions increased, in 1909, the U.S.T.A. was created to provide protection to Purchasers and Lenders
 - ▶ The U.S.T.A. establishes evidence of ownership of stock by giving stocks negotiability and creates another market for shares
 - ▶ The U.S.T.A. includes “a share or shares of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this act”
 - ▶ For creditors, the U.S.T.A. expands execution options beyond “levy by notice” to the corporation.
 - ▶ U.S.T.A. creditors remedies for a valid levy or attachment include:
 - ▶ 1. Seizure of the stock certificate by officer making the levy or attachment
 - ▶ 2. Seizure of the stock certificate upon the issuing corporation
 - ▶ 3. Enjoining the stock certificate holder from transferring the certificate
- ▶ So under the U.S.T.A., in most cases, judgment creditors did not have to obtain physical possession of the stock certificate

More Money...More Problems with the U.S.T.A.

- Negotiability, levy, and Attachment do not mix -
 - Sale of uncertificated stock or certificated stock without any reference to corporate books and records creates uncertainty again for buyers and corporations
 - ❑ Judgment debtors enjoined from the transfer of their stock were still able to sell stock to bona fide purchasers in the ordinary course of business after an order enjoining them from the sale
 - ▶ These provisions effectively nullified the additional option of enjoining transfer of stock

More Money...More Money... More Problems with the U.S.T.A.

- The U.S.T.A. was not uniformly adopted by States.....thank you Delaware and California
- Conflicts between jurisdictions arose and the application of what law to apply was called into questions based on language on a certificate, statutory language and domicile of the debtor

DELAWARE U.C.C. Article §8-102

Investment Securities

- ▶ (15) "Security," except as otherwise provided in Section [8-103](#), means an obligation of an [issuer](#) or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer:
 - ▶ (i) which is represented by a [security certificate](#) in [bearer](#) or [registered form](#), or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;
 - ▶ (ii) which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and
 - ▶ (iii) which:
 - ▶ (A) is, or is of a type, dealt in or traded on securities exchanges or securities markets; or
 - ▶ (B) is a medium for investment and by its terms expressly provides that it is a security governed by this Article.

DELAWARE UCC Article § 8-102(9)

Financial Asset Defined

"Financial asset," except as otherwise provided in Section 8-103, means:

- ▶ (i) a security;
 - ▶ (ii) an obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or
 - ▶ (iii) any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this Article.
- ▶ As context requires, the term means either the interest itself or the means by which a person's claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.

DELAWARE UCC Article §8-102(a)(3)

BROKER DEFINED:

- ▶ "Broker" means a person defined as a broker or dealer under the federal securities laws, but without excluding a bank acting in that capacity.

DELAWARE U.C.C. Article 8 sec. 103

Security or Financial Asset

- ▶ (a) A share or similar equity interest issued by a corporation, business trust, statutory trust, joint stock company, or similar entity is a security.
- ▶ (b) An "investment company security" is a security. "Investment company security" means a share or similar equity interest issued by an entity that is registered as an investment company under the federal investment company laws, an interest in a unit investment trust that is so registered, or a face-amount certificate issued by a face-amount certificate company that is so registered. Investment company security does not include an insurance policy or endowment policy or annuity contract issued by an insurance company.
- ▶ (c) An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by this Article, or it is an investment company security. However, an interest in a partnership or limited liability company is a financial asset if it is held in a securities account.
- ▶ (d) A writing that is a security certificate is governed by this Article and not by Article 3, even though it also meets the requirements of that Article. However, a negotiable instrument governed by Article 3 is a financial asset if it is held in a securities account.
- ▶ (e) An option or similar obligation issued by a clearing corporation to its participants is not a security, but is a financial asset.
- ▶ (f) A commodity contract, as defined in Section 9-102(a)(15), is not a security or a financial asset.
- ▶ (g) A document of title is not a financial asset unless Section 8-102(a)(9)(iii) applies.

DELAWARE U.C.C. Article § 8 -106

Control of Uncertificated Stock

- ▶ (c) A purchaser has "control" of an uncertificated security if:
 - ▶ (1) the uncertificated security is delivered to the purchaser;
 - ▶ (2) the issuer has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner; or
 - ▶ (3) the issuer, the registered owner, and the purchaser have authenticated a record that (i) is conspicuously denominated a control agreement, (ii) identifies the uncertificated security in which the purchaser claims an interest, and (iii) contains 1 or more provisions addressing instructions relating to the uncertificated security or the right to originate instructions relating to the uncertificated security.

DE UCC Article § 8-112

Creditors Legal Process

- ▶ (a) Except to the extent otherwise provided or permitted by §§ 169 and 324 of Title 8, §§ 365, 366 and Chapter 35 of Title 10, and subsection (d) hereof, the interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy. However, a certificated security for which the certificate has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.
- ▶ (b) Except to the extent otherwise provided or permitted by §§ 169 and 324 of Title 8, §§ 365, 366 and Chapter 35 of Title 10, and subsection (d) hereof, the interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer at its chief executive office in the United States.
- ▶ (c) The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in (d).
- ▶ (d) The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.
- ▶ (e) A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.

DE UCC Article §8-115

Securities intermediary and others not liable to adverse claimant

- ▶ A securities intermediary that has transferred a financial asset pursuant to an effective entitlement order, or a broker or other agent or bailee that has dealt with a financial asset at the direction of its customer or principal, is not liable to a person having an adverse claim to the financial asset, unless the securities intermediary, or broker or other agent or bailee:
 - ▶ (1) took the action after it had been served with an injunction, restraining order, or other legal process enjoining it from doing so, issued by a court of competent jurisdiction, and had a reasonable opportunity to act on the injunction, restraining order, or other legal process; or
 - ▶ (2) acted in collusion with the wrongdoer in violating the rights of the adverse claimant; or
 - ▶ (3) in the case of a security certificate that has been stolen, acted with notice of the adverse claim.

§ 8-301 Delivery vs. Common Law Delivery

(a) Delivery of a certificated security to a purchaser occurs when:

- ▶ (1) the purchaser acquires possession of the security certificate;
 - ▶ (2) another person, other than a securities intermediary, either acquires possession of the security certificate on behalf of the purchaser or, having previously acquired possession of the certificate, acknowledges that it holds for the purchaser; or
 - ▶ (3) a securities intermediary acting on behalf of the purchaser acquires possession of the security certificate, only if the certificate is in registered form and is (i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or (iii) specially indorsed to the purchaser by an effective indorsement and has not been indorsed to the securities intermediary or in blank.
- ▶ (b) Delivery of an uncertificated security to a purchaser occurs when:
- ▶ (1) the issuer registers the purchaser as the registered owner, upon original issue or registration of transfer; or
 - ▶ (2) another person, other than a securities intermediary, either becomes the registered owner of the uncertificated security on behalf of the purchaser or, having previously become the registered owner, acknowledges that it holds for the purchaser.

McAllister v. Kallop, Del.Ch., C.A. No. 12856-NC, 1995 WL 462210 (July 28, 1995)

- ▶ The Delaware Court of Chancery held that a constructive delivery of the stock certificate of McAllister Towing was adequate to vest the title to the share of stock in the corporation.
- ▶ Constructive delivery was:
- ▶ A one-page Letter Agreement from Kallop to McAllister Towing. It states:
- ▶ I believe that it will be in the best interest of McAllister Towing and Transportation Company, Inc. (the "Company") and will contribute to its success and future growth if I contribute one share of Common Stock of the Company owned by me to its capital. Accordingly, I hereby give, transfer and deliver to the Company one share of Common Stock as a contribution to capital. At the request of the Company, I shall execute such further documentation, if any, as may be necessary or desirable to fully effectuate such transfer.
- ▶ The court found the above to satisfy delivery and endorsement requirements of the UCC, despite the fact that certificated stock was held with bailee, Citibank.

Stock Ownership - Actual or Constructive Delivery

- ▶ *Equitable Trust Co. v. Gallagher*, Del.Ch., 67 A.2d 50
- ▶ (1949). At common law, a gift of stock ownership could be completed by "actual or constructive delivery" and, in certain circumstances, a writing alone could suffice to transfer shares of stock even if there was no physical delivery of the stock certificate.
- ▶ Constructive delivery of corporate stock, under the common law, is sufficient in instances when actual transfer of physical possession is impractical. See 4 Pomeroy's Equity Jurisprudence § 1149, at 397-98 (5th ed.1941). It requires an unmistakable intention to transfer title without transferring possession, *citing Corporation Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108, 1117 (S.D.N.Y.1978) (citations omitted).

Does the issuing corporation need to record a stock transfer?

- ▶ Failure of the Corporation to record a transfer of stock does not affect the validity of a transfer as to the parties to the transaction. *Allen v. Stewart*, Del.Ch., 44 A. 786, 788 (1895); I. Folk, *The Delaware General Corporation Law*, § 159.5 (3d ed., 1995); see 6 Del.C. § 8-309 (requiring indorsement and delivery before a transfer of stock becomes valid).

Purchasers with Control

- ▶ **§ 8-302 Rights of purchaser.**
- ▶ (a) Except as otherwise provided in subsections (b) and (c), a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer.
- ▶ (b) A purchaser of a limited interest acquires rights only to the extent of the interest purchased.
- ▶ (c) A purchaser of a certificated security who as a previous holder had notice of an adverse claim does not improve its position by taking from a protected purchaser.
- ▶ 5A Del. C. 1953, § 8-301; 55 Del. Laws, c. 349; 64 Del. Laws, c. 152, § 6; 71 Del. Laws, c. 75, § 1; 72 Del. Laws, c. 401, § 23; 74 Del. Laws, c. 332, § 42.
- ▶ **§ 8-303 Protected purchaser.**
- ▶ (a) "Protected purchaser" means a purchaser of a certificated or uncertificated security, or of an interest therein, who:
 - ▶ (1) gives value;
 - ▶ (2) does not have notice of any adverse claim to the security; and
 - ▶ (3) obtains control of the certificated or uncertificated security.
- ▶ (b) In addition to acquiring the rights of a purchaser, a protected purchaser also acquires its interest in the security free of any adverse claim.

EXEMPTIONS

ERISA Qualified Retirement Accounts

Employment Retirement Income Security Accounts

- ▶ Employer Sponsored 401(k) Plans, Deferred Compensation Plans, and Profit Sharing Plans
 - ▶ To Qualify, some of the main factors of the plan must:
 - ▶ Require the account to be set-up and maintained by your Employer or a separate employee organization (or both), and
 - ▶ Provide for payment of retirement income to participating employees; and
 - ▶ Prohibit voluntary transfer by the participating employees of their interest in the benefits plan, “anti-alienation” - this prevents you from freely transferring rights in your benefits to someone else or from your rights to those benefits being taken away
 - ▶ Guaranty benefits to employees upon their retirement, termination of the plan or employment

EXCEPTIONS

ERISA ACCOUNTS ARE NOT FULL-PROOF FROM CREDITORS

- ▶ Civil or criminal judgments that involve an ERISA account beneficiary who violated the terms of the plan
- ▶ IRS and Federal Tax Debts
- ▶ Domestic/Family Court Orders with/from a spouse or ex-spouse that may entitle you to your spouse's interest or may be the only source of child support income

ERISA ACCOUNT DISTRIBUTIONS

Federal Circuit Courts are split on this issue because of state exemptions

ERISA benefits may be subject to creditors execution process after judgment:

Example: If you obtain a distribution from a qualified ERISA account, and deposit it into a bank, your creditor file a garnishment or attachment and obtain the deposit.

STATE LAW EXEMPTIONS

- ▶ Some states have full or partial exemptions for certain common non-ERISA retirement accounts
 - ▶ These include full exemptions for specific non-ERISA retirement accounts
 - ▶ These also include exemptions that limit protection of specific non-ERISA retirement accounts by:
 - ▶ Protecting a certain dollar amount, i.e. \$500,000
 - ▶ Protecting “reasonable and necessary” income from the account to support yourself and/or family
 - ▶ Bankruptcy also protects certain common retirement accounts up to a certain dollar amount, while allowing you to obtain relief from creditors