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WHEN IS A RIGHT OF PUBLICITY LICENSE GRANTED TO A LOAN-OUT CORPORATION A FRAUDULENT CONVEYANCE?

David J. Cook*

Abstract

This article answers the question whether a creditor of the talent, who rendered services through a loan-out corporation [or limited liability company],[1] can directly reach the talent's[2] revenue stream paid by the studio [or other obligor] due the loan-out.[3] Some talents have left a trail of multi-million dollar obligations, including spousal and child support, unpaid taxes, tort claims, and debts that arise from an extravagant lifestyle. Seeking payment of these large-dollar obligations, these creditors draw a bead on revenue stream payable to the loan-out. More than one celebrity or sports star finds himself or herself on the "top-ten list of bad boy or bad girl" debtors. Given these considerations, the better question is whether a talent's execution of a license that transfers the talent's right of publicity to the loan-out corporation is a fraudulent conveyance. The Uniform Voidable Transactions Act[4] (UVTA) answers this question.

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[1] The common term is "loan-out corporation." A "corporation," for the purposes of this article, is any entity that is a legally separate entity, properly formed, and remains in good standing for the local secretary of state, including a limited liability company or other like entity, depending on the state (even if incorporated elsewhere). Many LLC's and corporations are formed in Nevada given the low tax rate, however, these same entities might be re-registered in California.

[2] For purpose of efficiency and brevity, "talent" includes any artist, celebrity, performer, athlete, when applicable, musician, band, singer, movie or television star, reality TV star, stunt person, director, among others. The entity paying might range from a studio, record label, book publisher, sports team, production company, or other entity, but for purpose of brevity, these entities are called the "studio."

[3] "Studio" referenced herein includes entity paying might range from a studio, record label, book publisher, sports team, production company, or other entity.

[4] Uni. Voidable Transaction Act § 4 (formerly Uni. Fraudulent Transfer Act) (amended 2014).

OJ Simpson's Right to Publicity Discusses this Riddle.

During the summer of 2006, Fred Goldman, a creditor of O.J. Simpson, attempted to reach OJ Simpson's right of publicity, name, and likeness for the purpose of satisfaction of Fred Goldman's $38,000,000 wrongful death judgment.[5] Goldman's filings ignited a broadcast, print and digital media, legal and academic firestorm.[6] Goldman lost the seizure, but after the adverse ruling become final. Regan Book, an imprint of Harper Collins, announced the publication of *If I Did It*, which bore the moniker of "O.J. Simpson" as the author, but actually ghost written by Pablo Fenjves. The owner of book rights was Lorraine Brooke Associates Inc., a Florida corporation ("LBA"). Lorraine and Brooke were the middle names of Mr. Simpson's two children with the late Nicole Brown Simpson, one of the murder victims. LBA was an unabashed loan-out corporation that held the Simpson's "right of publicity" and non-exclusive license for purposes of publication of the book.

Upon learning that the Harper Collins paid a large advance to LBA, Goldman commenced collection proceeding in the Los Angeles County Superior Court (Santa Monica), which included enforcement directed against the book itself, the advance, and any potential royalties.[7] Goldman levied on Harper Collins to reach the

[5] The license transfers to LBA Simpson's right of right of publicity, among other related rights. *In re Lorraine Brooke Associates, Inc.*, No. 07-12641-BKC-AJC, 2007 WL 7061312, at *2 (Bankr. S.D. Fla. July 2, 2007) [Objection Order] [This author was lead enforcement counsel for Fred Goldman and participated in the subsequent bankruptcy proceedings.] [Goldman filed a proof of claim in the LBA bankruptcy. LBA objected to the proof of claim of Goldman that led to this unpublished opinion by the Honorable A. Jay Cristol).

[7] The book becomes vulnerable to enforcement because Harper Collins, facing a public outcry and media repudiation from outlets such as Bill O'Reilly, declined to put the book out for sale and pulped all printed copies. As a result of its cancellation, the book rights reverted to LBA. Squeezing "The Juice": Can the Right of Publicity be used to Satisfy a Civil Judgment*? Journal of Intellectual Property,* Law Fall, 2007 15 J. Intell. Prop. L. 143, "What's In a Name? Fred Goldman's Quest to Acquire O.J. Simpson's Right of Publicity and Suit's

reversionary rights which were due LBA.[8] In the enforcement proceedings, the court granted Goldman an order that declared LBA to be the surrogate to Mr. Simpson, which enabled Goldman to enforce his judgment against the book rights.[9] Based on the levy of the book's reversionary rights through the Sacramento sheriff, Goldman set the book rights for a sheriff's sale on April 17, 2007. After a last ditch, unsuccessful effort by the Brown Family on April 13, 2017, LBA filed a Chapter 7 bankruptcy in the United States Bankruptcy Court (Southern Florida).[10] During the bankruptcy proceeding and based on Goldman's non-avoidable levy interest, Goldman and the Trustee entered into an agreement whereby the trustee assigned all book rights directly to Goldman,

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Implication for Celebrities" *Pepperdine Law Review*, January, 2008, 35 PeppL. Rev. 347; Squeezing "The Juice": Can the Right of Publicity be used to satisfy a Civil Judgment? *Journal of Intellectual Property Law,* Fall 2007, 15 J. Intell Prop L. 143; Squeezing The Juice: The Failed Attempt to Acquire O.J. Simpson's Right of Publicity, and Why It should have succeeded? *Cardoza Arts and Entertainment Law Journal*, 2008, 26 Cardoza Arts & Ent. L.J. 165; Post Judgment Remedies in Reaching Patents, Copyrights and Trademarks, *Northwestern Journal of Technology & Intellectual Property,* Fall, 2010, 9 Nw. J. Tech Intell Prop 128 [David J. Cook is the author]; Celebrity Rights of Publicity: For Sale, but not Necessarily Available for Creditors. Intellectual Property and Technology Law Journal, March 2007, 19 No 3 Intell Prop. & Technology L. J. 7; Refashioning The Right of Publicity: Protecting the Right to Use Your Name after selling a persona. name trademark, *Cardoza Arts and Entertainment Law Journal*, 2013, 31 Cardoza Arts & Ent. L.J. 893. This list excludes newspaper articles, editorials, blogs and attorney articles that only appear online.

[8] " . . .Simpson transferred to the Debtor, and thereafter the Debtor owned, all right, title and interest in and to the Book and all related rights, including without limitation, the right to utilize Simpson's intellectual property rights, consisting of Simpson's name, facsimile signature, nickname, likeness, life story, right of publicity and auto biographical sketch on or in connection with the writing and publishing of the Book. *In re Lorraine Brooke Associates, Inc.*, supra, at page*2. ["Objection Order]. As Fred Goldman's enforcement attorney, I undertook the levy on the reversionary rights. The agent for service of Harper Collins was CSC with its offices in Sacramento, California.

[9] "Thereafter, pursuant to the Surrogate Order, the California State Court clarified that "Lorraine Brooke Associates, Inc. be and the same is deemed, adjudicated, and held to be a surrogate of ORENTHAL JAMES SIMPSON ... but limited to the aforementioned Book Rights." *In re Lorraine Brooke Associates, Inc. , supra,* at page *3 [Objection Order]

[10] The authorized appeared at the hearing for a stay brought by Brown Family.

which included the Simpson's right of publicity license in exchange for a percentage of the proceeds and an affirmative mandate to actually publish the book. Goldman's purchase of the "book rights" from the trustee provided him, in part, Simpson's right of publicity that was otherwise foreclosed by the California state court in the summer of 2006.[11] Goldman formed Ronald Goldman, LLC to be the holder and owner of the rights to the *If I Did It* book. This was a seminal milestone in publishing when the entity causing the publication of a murder bore the name of the victim.

The *Lorraine Brooke* case raised the issue whether the right of publicity license issued by Simpson and transferred to LBA (a clear loan-out corporation) was a fraudulent conveyance. The debtor and Goldman litigated these precise issues arising from an objection to Goldman's proof of claim filed in the LBA bankruptcy.[12] After a detailed evidentiary hearing, which consisted of witnesses, documentary evidence, and briefs, the court made the following findings: Simpson was facing the $38,000,000 judgment owed to Fred Goldman who sought to enforce the judgment;[13] Simpson's daughter Arnelle (from a prior marriage) was president of Lorraine Brooks Associates and aware of the Goldman judgment and Goldman's attempt in collecting the judgment;[14]

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[11] "The Court finds that the sale of the Book Rights and the assumption and assignment of the HC Contract to the Purchaser under the Settlement Agreement is within the "sound business judgment" of the Trustee . . . *In re Lorraine Brooke Associates, Inc.,* supra, at page *4.[Sale Order]

[12] A creditor may file a proof of claim. The trustee, debtor, or an interested party can file an objection to the proof of claim. A proof of claim is generally deemed to be a civil complaint and the objection to the claim is the "answer." When the claim objection comes to trial, the claimant bears the affirmative burden of proof by a preponderance of the evidence. Conversely, the debtor, or trustee as the case may be, can raise any affirmative defense to the claim. Claim objection proceedings closely track general civil litigation in which parties offer live testimony, documentary evidence, briefs, findings, a ruling on the objection, and the aggrieved party has a right of appeal.

[13] Prior to the Chapter 7, Goldman had cycled through significant enforcement including assignment orders and other relief.

[14] "Arnelle Simpson also testified that she was aware of the Goldman Judgment and the efforts by Goldman to collect on the Judgment against Simpson before and after the creation of LBA." *In re Lorraine Brooke Associates, Inc.*, supra, at page*2. [Objection Order]

Simpson negotiated his own deal with Harper Collins and needed to get his money upfront; LBA did not pay anything to Simpson or anyone else in exchange for the book rights or the licenses that accompanied the book rights; and the debtor had no financial investment in the debtor (other than organizational costs at best).[15] The court squarely held the transaction, which included the transfer of the right of publicity license, between Simpson and LBA was a fraudulent conveyance.[16]

Lorraine Brooke frames the issue in this article whether or not a right of publicity license is a fraudulent conveyance.

A Loan-out Corporation Monetizes the talent's Right of Publicity.

A loan-out corporation delivers the talent's right of publicity to the studio, which enables the studio to exploit in every medium, including but not limited to, music, film, television, social media, or the entire digital world (internet, app's, downloads etc.). This right of publicity is a well entrenched, viable, and valuable right.[17] Loan-out corporations are commonplace platforms that enable the studio to reach the right of publicity and in turn remit the revenue stream to the loan-out. A loan-out corporation is a legal fiction employed for the financial benefit of successful artists and entertainers. It is a duly organized corporation [or LLC],

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[15] *In re Lorraine Brooke Associates, Inc.*, supra, at page*2.[Objection Order]

[16] "It is clear from the HC Contract and the Simpson Letter that it is a contract between HarperCollins and Simpson. The facts and circumstances of this case are that the Debtor is nothing more than a nominee of and for Simpson. As a result, this Court finds that this entire structure and series of transactions between Simpson and the Debtor was a scheme and a device of Simpson and others to hinder, delay and defraud creditors, specifically Goldman." *In re Lorraine Brooke Associates, Inc.,* supra, at page *5.

[17] " . . ."Often considerable money, time and energy are needed to develop one's prominence in a particular field. Years of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion. [Citations.] For some, the investment may eventually create considerable commercial value in one's identity." (Citation omitted) *Comedy III Prods., Inc. v. Gary Saderup, Inc., (2001)* 25 Cal. 4th 387, 399 ["Saderup"]; See *Lugosi v. Universal Pictures,* (1979) 25 Cal. 3d 813.

typically wholly owned by an artists, the sole function is to 'loan-out,' the services of the artist to producers and other potential employees.[18] "When an individual is hired by a producer to work on a production, the individual informs the producer he or she has a loan-out corporation. Then, three-way contracts are entered into in which the loan-out corporation agrees to furnish the services of its owner and sole employee to the producer; the producer agrees to pay the loan-out corporation for the owner/employee's services; and the owner/employee agrees to the arrangement. The loan-out corporation itself does not participate in any way in the production after the loan-out agreement is signed except to receive payment for its owner/employee's services."[19] Loan-out agreements are part of the recording industry.[20] Loan-out agreements are common in the film industry.[21]

The loan-out corporation necessarily compels the talent to license his or her right of publicity to the loan-out corporation who offers the services of the talent to the studio. The studio pays the loan-out corporation who in turn compensates the talent. Absent third parties' rights or interest (i.e., claims due creditors) a loan-out corporation is *de rigueur* in the entertainment and sports. The question, of course, is that the talent, like OJ Simpson, might bear significant financial obligations that are owed to creditors who are actively enforcing their judgments, which includes family law, tort and tax creditors.[22]

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[18] *Bozzio v. EMI Grp. Ltd.,* 811 F.3d 1144, 1147 (9th Cir. 2016) citing Aaron J. Moss & Kenneth Basin, *Copyright Termination and Loan–Out Corporations: Reconciling Practice and Policy,* 3 Harv. J. Sports & Ent. L. 55, 72 (2012).

[19] *Caso v. Nimrod Prods., Inc.*, (2008) 163 Cal. App. 4th 881, 885.

[20] "The Loan–Out Agreement is between Capitol and Missing Persons, Inc., and substituted Missing Persons, Inc. as the contracting party in place of the individual band members." *Bozzio v. EMI Grp. Ltd.,* No. 12-CV-2421 YGR, 2013 WL 968261, at *1 (N.D. Cal. Mar. 11, 2013), rev'd, 811 F.3d 1144 (9th Cir. 2016)

[21] [Walter] Matthau also received compensation through certain "loan-out" companies through which he rendered his acting services, and these companies likewise paid William Morris commissions on monies they received for Matthau's acting services." *Matthau v. Superior Court*, 151 Cal. App. 4th 593, 597, 60 Cal. Rptr. 3d 93, 96 (2007)

[22] Family law and tax creditors predominate in sports.

Defining a Fraudulent Conveyance in the Modern Era.

Most states have adopted the current Uniform Voidable Transactions Act (UVTA), which is the successor to the Uniform Fraudulent Transfer Act.[23] Fraudulent conveyances date back to the reign of Queen Elizabeth I.[24] The Elizabethan fraudulent conveyance statute has resonated down the centuries and is good law today in various, but clearly identifiable, incarnations.[25] UVTA transfers take many forms including cashing out bank accounts and open new accounts to "throw off the scent" of the creditor, including converting checks to cash, converting money into cashier's checks, altering financial records to hide obligation due from related entities or insiders, among endless variations.[26]

Generally. fraudulent conveyance law offers two separate sets of statutory rights. For instance, California's adoption of the UVTA, Civil Code Section 3439.05, sets aside a transfer if it is made without reasonably equivalent consideration when the debtor was insolvent or rendered insolvent.[27] This type of fraudulent conveyance is called a "balance sheet test" and does not depend upon the mental state of the parties. On the other hand, Section 3439.04 sets aside a transfer by the debtor if made with the intent to hinder, delay, and defraud, and where the transfer would leave

[23] See generally California Civil Code Section 3439 seq.

[24] "One of the first bankruptcy acts, the Statute of 13 Elizabeth, has long been relied upon as a restatement of the law of so-called fraudulent conveyances (also known as "fraudulent transfers" or "fraudulent alienations")." *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1587, 194 L. Ed. 2d 655 (2016).

[25] "Every American bankruptcy law has incorporated a fraudulent transfer provision"); Story § 353, at 393 ("[T]he statute of 13 Elizabeth ... has been universally adopted in America, as the basis of our jurisprudence on the same subject" . . .*Husky Int'l Elecs., Inc. v. Ritz*, supra, at page 1587.

[26] *In Re Wilbur* 211 B.R. 98, 104 (USBC, M.D. Fla, 1997); *In Re High Strength Steel Inc.* 269 B.R. 560 (USBC, D. De, 2001); *In Re Pullman* 279 B.R.916 (USBC, M.D. Ga, 2002); *In Re Schafer* 294 B.R. 126, 128 (USDC, ND, CA 2003); I*n Re Marra* 308 B.R. 628, 629 (USDC, D. Conn., 2004) *In Re Perpinan* 2007 WL 2345019 (BAP, 9th Circuit, 2007); *In Re Ryan* 2009 W.L. 2822452 at *1 (USBC, ND, CA, 2009). *Hines vs. Marchetti* 436 B.R. 159, 162-163 (USDC, M.D. Alabama, 2010); In Re Haag 2012 WL 446535 (P. *2) (BAP, 9th Circuit, 2012). *In Re Caimano* 2013 WL 2016406 (P. *8) (USBC D. South Carolina, 2103); *In Re Nascarella* 492 B.R. 914, 915-916 (USBC M.D., Fla, 2013.

[27] California Civil Code Section 3439.05.

the debtor with unreasonably small capital or where the debtor would incur debts beyond the debtor's ability to pay.[28] California has codified the "badges of fraud," which would support a fraudulent conveyance based on the debtor's intent to hinder, delay, or defraud any creditor.[29] Section 3439.05 protects creditors already in existence at the time of the conveyance. Further, Section 3439.04(a) protects any current or future creditors.

The focal point of relief under Section 3439.04(a) is that a future creditor can seek relief, even though the debtor was not "targeting" the particular creditor.[30] The fact that a future creditor can vacate pre-existing transactions brings unknown "strangers" to the table of any every transaction because these "strangers" have the ability to rewrite the mental state of the parties, the transaction as a whole, the financial of the transferor, and the overall fairness of the transaction itself. Financial planners, family law attorneys, trust attorneys, transactional attorneys must necessarily grip that a current and bona fide transaction might topple at the hands of a latter creditor if the transaction left the debtor without adequate capital or funds on hands to pay maturing liabilities. For talent that might wish to live lavishly (i.e., gambling), make foolish investments or loans, or just beyond their means, or talents who might leave a trail of offspring or spouses, every transaction is subject to excruciating rigor because creditors can "back to the future."[31]

A fraudulent conveyance is more than an outright transfer from the debtor to a third party. Under Section 3439.04(a)(1) a fraudulent conveyance is any transfer the debtor makes with the intent to hinder, delay, or defraud the creditor even though the debtor still has custody, control, and access to the asset.[32] *In Re*

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[28] California Civil Code Section 3439.04(a)(1)(2).

[29] California Civil Code Section 3439.04(b)

[30] "A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows . . .Section 3439.04(a)

[31] Civil Code Section 3439.04(a)(2)(A)[inadequate capital] (B) [inadequate income to pay for accruing liabilities]

[32] A fraudulent conveyance transforms title to an asset thereby rendering the asset more difficult to reach. An abstract of judgment (i.e., a lien

Bernard, the court held that a debtor who cashed checks and emptied out bank or stock accounts in the face of a prejudgment restraining order committed a fraudulent conveyance even though the debtor still had custody and possession of the money.[33] This finding for fraudulent conveyance turned on the fact that the funds in the hands of the debtor were more difficult to reach.[34]

Bernard teaches that a transformation of property that makes the property more difficult to reach through legal process is a fraudulent conveyance even though the debtor's net worth remains the same. For example, in *High Strength Steel*, the corporate parent owed a large sum to the corporate subsidiary that was in a bankruptcy.[35] The corporate principal of both entities caused the corporate subsidiary to "write off" the receivable due from the corporate parent.[36] The fact that a corporate insider of both entities caused the debtor to "write-off" the receivable due the debtor made collection more difficult given the necessity of reconstructing the corporate records, much less confirming the existence of the debt.

The *Bernard* holding transforms the asset (checks in an account) into another medium (cash in hand), which is far more

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on real property) reaches the real property in the name of the defendant. C.C.P. Section 697.340(a) ["A judgment lien on real property attaches to all interests in real property in the county where the lien is created (whether present or future, vested or contingent, legal or equitable) that are subject to enforcement of the money judgment against the ***judgment debtor*** . . . ..]

[33] *See In re Bernard*, 96 F.3d 1279, 1282 (9th Cir. 1996) ("If, as the legislative history indicates, depositing money into a bank account is a transfer, then later withdrawing money from that account should be a transfer, too-it ought to be a two-way street").

[34] "When they withdrew from their accounts, they exchanged debt for money (which, more than incidentally, was more difficult for the Sheaffers to acquire). Thus, when the Bernards made their withdrawals they parted with property, satisfying the Code's definition of transfer. Because they parted with their claims against the bank to hinder the Sheaffers, the Bernards violated § 727(a)(2)(A), warranting denial of discharge." *In re Bernard,* supra, at page 1283. [The debtor cashed checks and emptied out accounts in the face of active pre-judgment remedies.]

[35] *Re High Strength Steel Inc.* 269 B.R. 560 (USBC, D. De, 2001)

[36] " We conclude, as a matter of law, that the reconciliation was a transfer, as defined by the Code [Bankruptcy Code Section 548 which is the bankruptcy version of the UVTA] *In re High Strength Steel, Inc.,* supra at page 568.

difficult to reach. A creditor can readily garnish a bank account given that the sheriff need only serve a bank with a garnishment.[37] However, the *Bernard* debtor cashed checks and liquidated an account. Only with much greater effort, expense and risk can a creditor reach those cash proceeds from the liquidation of the check account by hailing the debtor into court for a debtor's examination and at the conclusion seeking a turnover order.[38] However, as judicially noted, some debtors are less than fully forthcoming at a debtor's examination.[39] A plaintiff must personally serve the debtor with the order for examination.[40] Chasing the down the debtor down for purpose of an debtor's examination, along with the time, effort and expenses of proceeding with the examination is manifold more arduous than have the sheriff, or better yet a private process server, serve the bank.[41] The injury arising from a fraudulent conveyance under Section 3439.04(a) is the deterrent imposed by the debtor when rendering the assets more expensive, difficult, or time consuming to reach by the transformation of the asset. By converting the check and accounts into cash, the debtor increased the creditor's expenses and effort in reaching, if possible, the proceeds. Should the debtor have expended the funds on perishables or consumables, the funds would be lost forever that would degrade any prospect of collection.

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[37] Code of Civil Procedure Section 704.140(a) [service upon the garnishee with a copy of the writ of execution and notice of levy]. Upon receipt of the levy package, the bank (or other garnishee) would pay over the funds held on deposit to the sheriff. Section 701.010(b)(1)[turn over funds held on account to the sheriff]

[38] C.C.P. Section 708.110(a) [Debtor's examination], and turnover order C.C.P. Section 708.205(a). Judgment debtor examinations serve an important function in our judicial system. They are intended to "leave no stone unturned in the search for assets which might be used to satisfy the judgment." "*Jogani v. Jogani,* (2006)141 Cal. App. 4th 158, 172, *as modified on denial of reh'g* (July 27, 2006)

[39] See the following: "And the sanctity of the oath, by itself, does not ensure that all judgment debtors will be completely forthcoming during a judgment debtor examination." *Jogani v. Jogani, supra, at page* 188.

[40] Personal service is required. C.C.P. Section 708.110(d).

[41] Private process servers can serve the garnish. C.C.P. Section 699.080.

A Right of Publicity License to a Loan-Out Corporation Constitutes a Fraudulent Conveyance.

The *Lorraine Brooke* case supports this conclusion. In arriving at this conclusion, three questions are asked: First, is the license property? Second, is the license in which the talent transfers his right of publicity to a loan-out corporation a transfer under the UVTA? Third, does the license and ensuing loan-out corporation make the asset (i.e., the monetized right of publicity), or better stated, the cash proceeds arising from the asset, more difficult or arduous to reach?

Under the standard loan-out corporation scenario, the licensor (also the debtor) licenses his or her right of publicity to the loan-out corporation who turn sells the services of the licensor to the studio. The licensee transforms of the debtor's "*Saderup*" personal right of privacy (i.e., the right of publicity) into a commercial license in the name of the loan-out corporation who monetizes the talent's rights of publicity in the ensuing contract with the studio.[42] The license itself therefore would constitute an asset of the debtor.[43] This transformation from a Constitutional right of privacy into a commercial license in favor of the loan-out corporation is the *Bernard* transformation.[44] The license transforms the talents' personal right of publicity from himself or herself to another entity reduces the right of privacy into a salable contractual right, capable of monetization, and warehoused by a loan-out corporation whose contract with the studio fixed the price.[45] The license and loan-out corporation affixed a price to the right of publicity to the "penny."

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[42] A license is a mode of transfer under Civil Code Section 3439.01(a)(8)

[43] See Civil Code Section 3439.01(a)(1).

[44] A transfer is defined in Civil Code Section 3439.01(a)(8), which includes every mode of disposing of or parting with an asset, and includes payment of money, release, lease, *license,* and creation of a lien or encumbrance. The amendments to the fraudulent conveyance law which converted the UFTA into the UVTA specifically inserted the word "license"" as a method of transfer. Under the UVTA, a license is a statutory defined transfer In this article, the fact that the UVTA specifically labels a license as a transfer further supports the conclusion here that the talents licensing his right of publicity is a transfer.

[45] In *Mejia vs. Reed* (2003) 31 Cal. 4th 657, the court held that marital settlement agreement, even if approved by the family law court, could might

Bernard deemed the conversion of checks and an account a fraudulent conveyance because the creditor was deprived the ease of reaching the fund through a bank levy, as opposed to—although not stated—the rigor of compelling the debtor to turn over the funds at a debtor's examination. *Bernard* necessarily weighed the relative burdens of the debtor and found a fraudulent conveyance in light of the great burden. In determining whether the licensing of the right of publicity in favor of the loan-out is a fraudulent conveyance requires of the consequences. Had the talent directly contracted with the studio, the studio, like a bank, would directly owe money to the talent whether a salary, percentage of the gross or net, residuals or other financial benefits.[46] The judgment creditor would only have to serve upon the studio a notice of levy and writ of execution.[47] Studios are typically large public entities that would be served readily through their corporate agent.[48] The garnishee would face personal liability for the failure to faithfully honor a garnishment including attorneys' fees.[49]

If the holder of the right of publicity (i.e., licensee) is the loan-out corporation, the obligation arising from the talent's services are in the name of the loan-out corporation, and not the name of the talent. Literally, the license enables the talent to drape the veil of the loan-out corporation over his or her right of publicity that prevents the creditor from a direct levy of the revenue stream due from the studio arising from the license and contract with the loan-out corporation. This is precisely the purpose of a loan-out corporation: to transfer from the obligator (person owed the money for the services of the talent) from the

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constitutes a fraudulent conveyance if the community property was reposed with the wife, and the husband (a philandered) was left with a worthless medical practice. The MSA was the "transfer" because the MSA transformed the husband (a doctor) in a virtual pauper in the face of large claims asserted by the mother of his child].

[46] Residuals are paid through Screen Actors Guild.

[47] C.C.P. Section 700.170 [Sheriff would serve notice of levy and writ of execution along with a memorandum of garnishee. These are pre-printed forms, available on line, and drafted by the California judicial council].

[48] C.C.P. Section 684.010(a)(1) Service tracts service of a summons and complaint]

[49] C.C.P. Section 701.020(c) [liability for attorney's fees]

talent to the loan-out corporation.[50] Had the creditor levied on the studio, the studio would decline payment under the levy even though the talent is the judgment debtor, because the loan-out corporation as the contracting party and not the talent directly is entitled to payment for the talent's services. *Bernard* asks for more than just a transformation. *Bernard* compels the creditor to prove how this transformation increased the creditor's burden. Aside from the fact that simply levy would not reach the obligation owed by the studio to the talent, is that the creditor would have to garnish the loan-out corporation, which is typically owned and controlled by the talent who might be a recluse save well guarded public appearances.[51] Sufficient life experience would suggest talent who would be pushing back from payment of a debt (particularly a family law judgment) would likewise push back from responding to a levy even in the face of attorney's fees or any other legal process.[52] Service of a levy on the loan-out corporation is not the same as service of process upon a Fortune 50 Company.

Getting the loan-out corporation, under the tutelage of a recalcitrant debtor to voluntarily turn over its records, much less hand over the money paid by the studio might require near herculean effort (other remedies abound, but each with their own "drama").[53] The creditor could serve the loan-out corporation with a direct levy, but if the funds have been disbursed, the levy is

[50] *Caso v. Nimrod Prods., Inc.*, (2008)163 Cal. App. 4th 881, 885 [" . . .the producer agrees to pay the loan-out corporation for the owner/employee's services . . ."]

[51] " [Loan-out corporation are] typically wholly owned by an artists, the sole function is to 'loan-out,' the services of the artist to producers and other potential employees." See *Bozzio vs. EMI*, supra.

[52] See, e.g., *In re Marriage of Dick*, (1993) 15 Cal. App. 4th 144 which chronicles stupendous efforts by the debtor to avoid payment of family law obligations.

[53] "Prying from my cold dead hand" is a well known strategy in fending off any discovery, no matter how righteous. Not quite a discovery case, *Cockroft v. Moore*, 638 F. Supp. 2d 1024, 1030 (W.D. Wis. 2009), illustrated the commonlity of this expression: "Plaintiff told defendant he could obtain the firearms instructor range books when he "pried them from [plaintiff's] cold dead hands."

ineffective.[54] As indicated above, an order of examination directed at the third party and turnover order is viable, assuming that the creditor can timely serve the talent (or agent), and conduct a meaningful examination, along with still having funds available and not already disbursed.[55] In the face of enforcement, money held in an account "grows" wings or feet.[56] The creditor could file a creditor's suit on the basis that the loan-out corporation still has funds on hand.[57] A creditor could seek an assignment order that would reach all accounts and obligations owed by the loan-out to the talent and even subject to a formal restraining order that must be personally served which is only worthwhile if funds have not been disbursed.[58] Of course, the creditor would reach the debtor's interest in the corporation by seizing share of stock assuming that the loan-out corporation has assets (i.e., the funds).[59] The creditor could reach the interest of the debtor in an LLC through a charging order but if the funds have been disbursed, the loan-out LLC is an empty shell.[60]

Given the burden and serendipity of enforcement that is directed at the loan-out corporation to reach the funds on hand due the talent, in comparison to a direct levy upon the studio, the fact of the increased burden and risk meets the third test of *Bernard* transformation. *Bernard* found a fraudulent conveyance because the transformation increased the creditor's burden and risks in reaching the asset.

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[54] "In order to be subject to garnishment, it must definitely appear that a debt or credit actually exists. The attaching creditor can acquire no greater right in the attached property than the debtor has at the time of the levy." *First Cent. Coast Bank v. Cuesta Tit. Guarantee Co.*, (1983) 143 Cal. App. 3d 12, 16.

[55] C.C.P. Section 708.120(c) [right of lien], and turnover order. C.C.P. Section 708.205(a)

[56] As discussed later, Harper Collins immediately disbursed advance payments upon announcement of the book. The records of LBA, and related parties, show a contemporaneous wire transfer of these funds to Simpson and related parties through various intermediaries. Harper Collins did not wire any funds directly to Simpson.

[57] C.C.P. Section 708.210 [Reaches only funds on hand and not future funds]

[58] C.C.P. Section 708.510 (a) and Section 708.520(a)

[59] C.C.P. Section 700.130 and Commercial Code 8112.

[60] C.C.P. Section 708.310, and Corporations Code Sections 15907.3, 16504, 17705.03.

The other major hurdle is that the creditor confronts *Postal Instant Press Inc. vs. Kaswa Corporation* ("*Kaswa*")that holds that a creditor cannot reverse pierce the corporate veil by seeking to affix liability upon the loan-out corporation for the individual shareholder's (i.e., talent's) debts.[61] *Kaswa* raised the issue that the corporation might have other shareholders whose equity interests and creditors whose claim for payment would be degraded, if not destroyed, should a creditor of one shareholder levy the corporation's assets and "empty out" the corporation.[62] Handing over the assets of a corporation to pay one shareholder's debt (i.e., a civil judgment) would render vulnerable, if not imperil, the other shareholders, vendors, taxing authorities and employees of corporation to the financial viscitudes of an errant shareholder.[63] The *Kaswa* court declined relief given that the creditor had not exhausted other enforcement remedies.[64] On the other hand, if the corporation is a shell entity that warehouses a significant asset, lacks other shareholders (other than the defendant), or any bona fide vendors (i.e., creditors), and whose sole function is to hold title to a "static asset," the unreported cases enable a creditor to "reverse pierce" the corporate veil and reach the asset, given the lack of prejudice to third parties.[65]

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[61] *Postal Instant Press Inc. vs. Kaswa Corporation* (2008) 162 Cal. App. 4th 1510 ("Kaswa")

[62] *Kaswa, supra., page 1524.*

[63] Vendors would have a difficult time in assessing creditworthiness of a corporation or LLC if the assets were vulnerable to claims of creditors of the shareholders where the claims do not appear in any credit report of financial statement of the corporation or the public record. Absent the bizarre, a creditor who has a claim to the assets of a corporation (or LLC), would file a financing statement that evidences a perfected security interest under Article 9 of the U.C.C. (adopted in every state). With knowledge of the UCC filings, the creditor would make a considered decision whether to extend credit, demand payment on delivery (C.O.D.), decline the sale completely or demand adequate security or a personal guaranty to assure payment of the credit.

[64] *Kaswa, supra., page 1525*

[65] Gaggero v. Knapp, Petersen & Clarke, No. B241675, 2014 WL 5786705, at *9 (Cal. Ct. App. Nov. 7, 2014) [explanation that ban on reverse piercing protects innocent investors and creditors); *Envtl. World Watch, Inc. v. Walt Disney Co.*, No. CV0904045DMGPLAX, 2013 WL 12075368, at *6 (C.D. Cal. Aug. 2, 2013), aff'd in part, vacated in part, remanded sub nom. *Envtl. World Watch v. Walt Disney*, 630 F. App'x 687 (9th Cir. 2015) [District court case

This is the nub of the transformation burden that is required by *Bernard.* The Bernard transformation renders the asset more difficult, more expensive, more remote, more in accessible and more improbable to reach by the creditor. The loan-out corporation is not the talent per se and potentially immune from a reverse alter ego claim depending on the facts.[66] Yet, reverse piercing has its adherents. The Ninth Circuit in *In Re Schwarzkopf* determined a limitation to "reverse piercing," using the "resulting trust theory" to reach property held in the name of another entity (i.e., a trust) in the satisfaction of a creditor's claim.[67] A creditor could circumvent the ostensible ban on reverse piercing if the creditor can prove that the corporation (the target of the reverse piercing motion) received property that the judgment debtor (the individual) fraudulently conveyed under the UVTA.[68]

These remedies require the services of competent counsel to engage in time-consuming and sometimes expensive post

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allowed reverse piercing given that the remedy coincided with fraudulent conveyance relief, conversion and other intentional misconduct. The court declined to be bound by *Kaswa* given the equities of the specific facts.] *Hi-Tech Const. Inc. v. Ma,* No. A126752, 2011 WL 664657, at *8 (Cal. Ct. App. Feb. 23, 2011) (Court imposed liability by correcting identifying the liable party on the basis that the corporation and the individual were "one in the same," in dealing with the creditor.)

[66] While reverse piercing the corporate veil has not been reviewed by the California Supreme court, *Postal Instant Press Inc. vs. Kaswa Corporation* is favorably cited.

[67] *In re Schwarzkopf,* 626 F.3d 1032 (9th Cir. 2010). See also, *Fid. Nat. Title Ins. Co. v. Schroeder*, 179 Cal. App. 4th 834, 847, 101 Cal. Rptr. 3d 854, 864 (2009), in which the court stated as follows: "A resulting trust arises by operation of law from a transfer of property under circumstances showing that the transferee was not intended to take the beneficial interest. [Citations.] Such a resulting trust carries out and enforces the inferred intent of the parties. [Citations.]"

[68] "At the end of trial, Garcia conceded she could not proceed on an alter ego theory. She argued instead that the Uniform Fraudulent Transfer Act (UFTA) (Civ.Code, § 3439 et seq.)[2] applied, and she should prevail because she proved Palmer "fraudulently transferred assets, benefits and services to Seychelle," and "Palmer with Seychelle's consent, conspired to carefully provide a structure under which [he] would forgo any direct compensation or benefit in return from Seychelle." *Garcia v. Palmer*, No. D062116, 2013 WL 6147111, at *2 (Cal. Ct. App. Nov. 22, 2013) ("*Palmer*")

judgment process.[69] These remedies, although statutorily allowed, might require filings motions, applications, motions and other papers that implicate judicial and not clerical attention. All of these remedies "nibble" around the "center". The "center" is a direct levy on the stream of income generated by the studio based on the talent's efforts (i.e., the movie, song, book, performance). Instead of hitting the bull's eye by a direct levy, the creditor has to cycle through the complexities of the post judgment enforcement. *Bernard* held that the efforts and expense inherent in the potential exercise of other post judgment remedies to reach the assets of the debtor constituted the burden caused by debtor in hindering, delaying or defrauding" the creditor (i.e., cashing check and bank account, all converted to cash in hand). Applying *Bernard* here, the licensing of the right of publicity to the loan-out renders the ability of the creditor to reach the revenue stream more difficult due the talent and owed by the studio.[70]

Converting a valuable right of publicity into a license in favor of loan-out corporation is the expected and routine practice in entertainment, music, sporting events, and other venues. Nothing is wrong with a license and the ancillary loan-out corporation, until the talent runs up a slew of debts, or judgments and fails to come to grips with a potential insolvency. These creditors will seek to enforce their claims (through prejudgment remedies) and judgment through post judgment remedies. Finding that the debtor licensed his or her valuable rights of publicity, reposed with a loan-out corporation, in the face of these debts and judgment, a court could readily find the license and loan-out a

[69] A sheriff is prepaid for enforcement costs and expenses. C.C.P. Section 685.100(a)(1)

[70] Upon becoming aware of these risks, the Studio would be well advised to obtain personal guaranties of the performance by the talent, the contractual compliance by the loan -out, and a personal indemnity executed by the talent, which is another form of guaranty) by the talent in favor of the Studio. Such guaranties or indemnities must be in writing and spelled out the in enormous detail. Civil Code Section 1624(b) " *Pearl v. Gen. Motors Acceptance Corp.*, 13 Cal. App. 4th 1023, 1032, (1993) "As the *Gradsky* court stated, "[i]n absence of an explicit waiver, we shall not strain the instrument to find that waiver by implication."

fraudulent conveyance.[71] What makes this outcome more treacherous to an entire class of interested parties is that a right of publicity license, regular on its face to a bona fide loan corporation, might find itself in the blinkers of some aggrieved future (or current) creditor who might well claim that the transformation of the talent's rights of publicity into a commercial license with a loan-out corporation. Better yet, this creditor has the right of a jury trial.[72]

For attorneys with an entertainment or sports practice, the risk is that later or current creditors might cry foul and cry loudly. The remedies of these creditors are to execute directly on the revenue stream, even if the name of the loan-out corporation, which is the outcome of *Palmer*, but face a third party claim of ownership asserted by the loan-out corporation.[73] The creditor can sue and enjoin payment due the loan-out corporation or seek the appointment of a receiver.[74] The creditor can even seek an attachment against the loan-out corporation.[75]

Is Enforcement directed against the Loan-out Corporation really Viable?

Upon execution of the right of publicity license and the ensuing contract of the loan-out corporation with the studio, the creditor would be able to file suit against the debtor, the loan-out corporation, and necessarily the studio, to enjoin payment, unless already paid. The creditor would claim that the entire transaction is a fraudulent conveyance.[76] The creditor would demand that the

[71] *In Re Lorraine Brooks Associates Inc., supra.*
[72] *Wisden v. Superior Court,* (2004) 124 Cal. App. 4th 750 and *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989).
[73] A judgment creditor can proceed with a direct levy under C.C.P. Section 3439.07(c). See C.C.P. Section 720.320 for burden of proof in a third party claim. See also, *Whitehouse v. Six Corp.* (1995) 40 Cal.App.4th 527 [burden of proof of fraudulent conveyance by a preponderance of evidence, and borne by the creditor].
[74] Civil Code Section 3439.07(a)(3)(A)[injunction]&(b)[receiver]
[75] Civil Code Section 3439.07(a)(2) [right of attachment for all assets]
[76] Civil Code Sections 3439.05 and 3439.04(a). The statute of limitations is found in Civil Code Section 3439.09 [four year, but a statute of repose of 7 years.]

court impound all funds due the loan-out corporation by way of an injunction under Civil Code Section 3439.07(a)(3)(A) [injunction].[77] Alternatively, the creditor could directly levy upon the studio on the basis that the creditor can disregard the fraudulent conveyance.[78] Likewise, the creditor could obtain an order directing the loan-out corporation to remit all proceeds to the creditor, and not the talent.[79] Among other remedies is a creditor's suit directed at the loan-out corporation, studio and talent.[80]

Do these remedies work? Should the creditor have succeeded in locking down the revenue stream money due the loan-out corporation, and collaterally the talent, the talent does have recourse that is the "nuclear option." What is the nuclear option? The talent threatens a walk out, a slow down, or an "illness," if the studio fails to honor the contract with the loan-out corporation. Walking might well be an unabashed breach of contract that would entitle the studio to a stupendous damage award against the talent. Little doubt that the judgment against the talent might broach the nine -figure mark or more. In the day and age of hundred million dollar movie budgets, the risk of a walk out by the major talent is destabilizing, at best, and might even cause a ripple in the studio's stock that is listed on the NYSE. The studio's budget might equal or exceed $100,000,000. Million dollar contracts have been signed for domestic and foreign distribution. This risk also causes bad buzz, if coming to light, post social media. Worse for the studio, an empty judgment against the talent is not the functional equivalent of $300,000,000, or a lot more, payday from a hit movie.

Again, *Lorraine Brooks* answers cuts the Gordian Knot. Simpson knew that Goldman would take immediate action to reach advance and royalties due from Harper Collins, even though the book rights were in the name of LBA. To mitigate these risks, Harper Collins paid the advances due LBA upfront that was almost

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[77] See Civil Code Section 3439.07(a)(3)(A). Likewise, the creditor could seek a receivership. See Civil Code Section 3439.07(a)(3)(B).

[78] See Civil Code Section 3439.07(c). See also, *Palmer, supra.*

[79] This would be an assignment. See C.C.P. Section 708.510. Alternatively, the creditor might be able to obtain a turnover order, assuming service a debtor's exam. C.C.P. Section 708.205.

[80] C.C.P. Section 708.210.

contemporaneous with the public announcement of the book and execution of the Harper Collins publishing contract. By the time of the first levy upon Harper Collins, the money due LBA was long gone.[81]

Should the money have been paid by the studio to the loan-out corporation, who in turn remitted the total to the talent, the "horse is out of the barn" comes to mind, which means that all of these remedies would be futile. However, the creditor might have a claim against other parties who might be deemed conspirators.[82]

Should the studio have furnished "value" in exchange of the license, the studio would have a defense based upon "safe harbor."[83] Safe harbor enables a transferee to avoid liability if the transferee acquired the property in good faith and reasonably equivalent value.[84] Therefore Safe harbor enables the Studio to monetize and exploit the license (sporting event, entertainment, social media, digital production) with complete immunity from a fraudulent conveyance action sought to reach the actual license and its products. However, the cash proceeds, i.e., the revenue stream, due from the Studio to the loan-out that arise from the licensing are subject to enforcement under the UVTA.[85] This conclusion requires dissecting. The talent, hounded by creditors, lands the zillion dollars, and well publicized, deal with the Studio. Upon inking the mega deal, the talent fears that every creditor will glom on the revenue stream due from the Studio, if directly due to the talent in his or her name. The talent forms a loan-out as his or

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[81] I did the levy.

[82] *Cardinale v. Miller*, 222 Cal. App. 4th 1020, 166 Cal. Rptr. 3d 546 (2014) [compensatory and punitive damage award, along with fees against co-conspirator of fraudulent conveyance.]

[83] Safe harbor would immunize the transfer of liability. Civil Code Section 3439.08(a)

[84] See Civil Code Section 3439.08(a) for all transfers under Civil Code Section 3439.04(a). See *Annod Corporation v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286.

[85] See Civil Code Section 3439.08(b)(1)(A)& (B). See also, *Flowers & Sons Dev. Corp. v. Mun. Court* (1978) 86 Cal. App. 3d 818, 825 [court can award damages for the value of the asset which has been fraudulently conveyed if the asset is no longer available and that the conveyee bears liability for the money damages]. ("*Flowers*")

her surrogate. The Talent licenses his right of publicity to the loan-out and executes an employment agreement in which the loan-out is the employer (i.e., independent contractor, no less). This is a 100% pure *Bernard* transformative fraudulent conveyance by cloaking the right of publicity and anticipatory services in the name of the loan-out. Vested with these rights, the loan-out contracts out the services (and right of publicity) of the talent in favor of the Studio. The contract by the loan-out with the Studio itself is free of a fraudulent conveyance claim based on the safe harbor.[86] The creditor cannot latch onto the actual rights handed over by the loan-out to the Studio.[87] However, the creditor can reach the *Flowers* proceeds, which consist of the receivables, contract revenue stream, or anticipatory profits, and proceeds due the loan-out. The revenue streams are the *Flowers* profits and proceeds from the loan-out monetizing the right of publicity and ensuing employment agreement.

Creditors have another trick up their sleeve. Should the creditor have been lucky enough to serve the talent with an order for examination (debtor examination also known as the OEX), the service of the OEX imposes a lien the talent's personal property.[88] The right of publicity license, itself a *Bernard* transfer, and the employment agreement (another *Bernard* transfer) in favor of the loan-out are without consideration and between related parties, i.e., the talent and his alter ego, the loan -out. A transfer of personal property remains subject to the OEX lien, unless the transferee is a bona fide acquirer and without notice of the lien.[89] Liens follow transferred personal property.[90] While the transfer to the bona

[86] Surely, the Studio is aware that the talent is debt, and that the loan-out seeks to insert its name on the contract to present creditor from launching a direct levy on the revenue stream.

[87] Code Section 3439.08(a)

[88] C.C.P. Section 708.110(d) ("Service of the order creates a lien on the personal property of the judgment debtor for a period of one year from the date of the order unless extended or sooner terminated by the court.")

[89] C.C.P. Section 697.740(a) (" A person who acquires an interest in the property under the law of this state for reasonably equivalent value without knowledge of the lien.")

[90] C.C.P. Section 695.070(a) "Notwithstanding the transfer or encumbrance of property subject to a lien created under this division, if the property remains subject to the lien after the transfer or encumbrance, the money judgment may

purchaser without notice might extinguish the OEX lien, the OEX lien reaches the cash proceeds if in fact the property of the debtor. Here, the talent, as the debtor, will claim that the proceeds are due the loan-out and therefore outside the scope of the OEX lien, which is limited to the assets of the debtor. The creditor could circumvent this artifice should the creditor secure a turnover order, or order declaring that the loan-out is a surrogate, alter ego and agent for the talent and therefore one in the same.[91]

OJ Simpson Solves the Riddle

The right of publicity licenses and loan-out corporations work and work well, given their ubiquitous name and predominance in entertainment and sports. Whether for tax, management, risk, liability management, or just clear familiarity with a process that succeeds, when success is never in doubt, rights of publicity and the loan-out corporations will never wilt nor fade away. The settled expectations at every level of entertainment is that studios will contract with a loan-out corporation, and nothing will change given even subtle third party UVTA risks, save and except as the article starts out, another OJ Simpson.

Lorraine Brooke answers the question posed in the title of this article by holding that a loan-out corporation, which possesses the right of publicity license, might be a fraudulent conveyance, and that Civil Code Section 3439.01(a)(8) states that a license is a transfer.

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be enforced against the property in the same manner and to the same extent as if it had not been transferred or encumbered." An OEX lien is an enforcement lien, and survives a transfer save the immunities under C.C.P. Section 695.070(a), C.C.P. Section 697.910-697.920..

[91] The creditor can examine the loan-out as a third party obligator. C.C.P. Section 708.120(a). If truly a surrogate, agent and shell on behalf of the talent, at the conclusion of the third party OEX, the court can enter a turnover over directly that all funds due the loan-out are payable to the creditor on the basis that the loan-out is a surrogate, alter ego and agent for the debtor. C.C.P. Section 708.205(a)