

10672 PROTECTION OF AGENCY’S INTEREST, COLLECTION OF MONETARY JUDGMENTS AND DERIVATIVE LIABILITY

10672 Protection of Agency’s Interest, Collection of Monetary Judgments and Derivative Liability

10672.1 Pleading Appropriate Business or Union Entity

Although it is always important to properly state the full corporate name of the respondent in unfair labor practice litigation, it is particularly important that the proper corporate name is utilized in the caption when it is necessary to commence collection proceedings to enforce a liquidated backpay judgment. Failure to correctly name the respondent may seriously impede or nullify the effectiveness of collection actions under the Federal Debt Collection Procedures Act (FDCPA) (28 U.S.C. §§ 3001–3307). Accordingly, Regions should check with corporation division officials at the appropriate Secretary of State office, either electronically using the intranet or database search service (AutoTrak), or telephonically, before submitting a supplemental backpay order for enforcement. The Regions should also periodically check with state corporation officials to determine the continued existence or change in name, of corporate respondents.

The same holds true for partnerships and sole proprietorships. Care should be used in fully naming the partnership and its general and managing partners. Partnership records, like corporate records, may be obtained from the appropriate Secretary of State office. For sole proprietorships, both the full trade name (including all “doing business as” designations) and the name of the owner of the business should be accurately stated in the caption.²¹⁷

10674 Prejudgment Protection of Respondent’s Assets From Sale, Transfer, Fraudulent Conveyance, or Dissipation of Respondent’s Assets

10674.1 Overview

When financial liability is asserted and there is reason to believe the Agency’s ability to collect may become impaired for any reason, steps should be taken immediately and before entry of a judgment liquidating backpay to protect the Agency’s claim. See Section 10508.6 for a list of such triggering actions (for example, close of business, sale of major assets and starting up a new business providing same services). See Section 10678 regarding post judgment procedures.

The Region should take all necessary steps, consistent with the need for prompt judicial relief, to determine whether the respondent is engaging in actions for the purpose, or with the foreseeable effect, of impairing the Agency’s ultimate ability to collect its judgment. The investigation should generally be directed not only at the respondent, but also at any third parties (who often are more forthcoming) that may have relevant documentary and testimonial evidence. See Section 10626 regarding investigation of assets and ability to pay as well as Section 10618.

10674.2 Injunctive Relief/Protective Restraining Orders

²¹⁷ Many counties and local jurisdictions also require noncorporation businesses using any name other than the owner’s to file an alias affidavit with their recording offices.

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Following a determination to issue a complaint and at reasonable intervals thereafter, the Region should assess the likelihood of the respondent rendering itself, or otherwise becoming incapable, of complying with the monetary provisions of an eventual Board order or court judgment. Section 10508.4. The respondent's financial condition should be closely monitored, particularly in those cases involving previous use of alter egos or other manipulations of corporate form to evade liability; cases involving a number of closely held corporations formed for similar business purposes and controlled by the same owners; or cases involving threats to cease or relocate operations in response to organizing campaigns, union demands for recognition, investigative inquiries, or litigation. When it appears that a respondent may be in the process of rendering itself incapable or significantly less capable of complying with the monetary provisions of an existing or potential Board order or court judgment, or is otherwise attempting to render such provisions ineffective, the Region should, after appropriate investigation, recommend that injunctive relief be sought against such conduct pursuant to Section 10(e) or (j) of the Act. The following factors should be considered.

10674.3 Availability of Relief

Injunctive relief against dissipation of assets or similar conduct is available at any stage of a case following issuance of an unfair labor practice complaint. Generally, relief is sought under Section 10(j) from issuance of a complaint to issuance of a Board order; thereafter, relief is sought under Section 10(e).²¹⁸ Depending on circumstances, available relief includes: asset freezes, limiting the use of the respondent's assets to specified purposes;²¹⁹ injunctions against specific transactions or types of transactions; as well as other less intrusive forms of relief such as monitoring and reporting requirements.²²⁰

10674.4 Criteria for Seeking Injunctive Relief/Consideration of Alternative Strategies for Protecting Claims

Generally, whenever there is reasonable cause to believe that a respondent is attempting to evade existing or potential backpay liability and injunctive relief would preserve the status quo and permit effectuation of meaningful relief, it would be appropriate to recommend that injunctive relief be sought.²²¹ Examples of appropriate circumstances for seeking relief would include:

- sales, auctions, closings, foreclosures, or liquidations of a respondent's business that are undertaken without provision for satisfying potential monetary liability under the Act,

²¹⁸ *Maram v. Alle Arecibo Corp.*, 110 LRRM 2495 (D.P.R. 1982) (Sec. 10(j)); *NLRB v. Kellburn Mfg. Co.*, 149 F.2d 686, 687 (2d Cir. 1945) (Sec. 10(e)).

²¹⁹ Asset freezes are typically tailored to minimize interference with a respondent's legitimate operations, and generally permit unfettered use of assets once the respondent provides security, usually in the form of a bond or escrow account, for its extant or potential liability. *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982); *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1351 (2d Cir. 1974), cert. denied 417 U.S. 932 (1974); *SEC v. Manor Nursing Centers*, 458 F.2d 1082, 1106 (2d Cir. 1972); *NLRB v. A. N. Electric Corp.*, 141 LRRM 2386 (2d Cir. 1992); *Aguayo v. Chamtech Service Center*, 157 LRRM 2299 (C.D. Cal. 1997); *NLRB v. Horizons Hotel Corp.*, 159 LRRM 2449 (1st Cir. 1998).

²²⁰ See generally *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291–292 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395, 397–398 (1946); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287–290 (1940). For prejudgment garnishment protection under the Federal Debt Collection Procedures Act, see *NLRB v. Westchester Lace*, 178 LRRM 2815 (D.N.J. 2005).

²²¹ *Maram v. Alle Arecibo Corp.*, supra at fn. 1 (Sec. 10(j)); *Auto Workers (Ex-Cell-O Corp.) v. NLRB*, 449 F.2d 1046, 1050–1051 (D.C. Cir. 1971) (Sec. 10(e)).

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- actual or potential distributions of the respondent's assets to its principals or insiders,
- asset transactions between a respondent and affiliated businesses or relatives, friends, or close business associates of the respondent's officers or principals,
- any other circumstances suggesting the possibility of fraud or deliberate measures designed to render a respondent judgment-proof, or unable to comply.

Injunctive relief generally is either inappropriate or of limited utility in cases involving assets already in the control of the court such as bankruptcy, probate or receivership cases. Furthermore, injunctive relief may be of limited benefit in cases where the respondent's assets have already disappeared, unless such relief is ancillary to contempt proceeding or supplementary administrative proceedings that implead previously unnamed derivatively liable parties. In these latter circumstances, the Region should consider the potential effectiveness of initiating contempt proceedings, proceedings seeking prejudgment relief under the FDCA in district court, supplementary administrative proceedings against derivatively liable persons, or proceedings to set aside fraudulent conveyances.²²²

Special considerations apply in bankruptcy because of the automatic stay provisions of the Bankruptcy Code (11 U.S.C. § 362). Nonbankruptcy injunctive relief relating to a bankrupt respondent's use of its assets is generally inappropriate because of the stay. However, at least in cases when ongoing financial misconduct of a debtor's management threatens to frustrate compliance, limited injunctive relief to freeze assets of the respondent with a receiver or court appointed officer may be excepted from the stay and therefore appropriate.²²³ Moreover, the automatic stay applies only to actions taken against the respondent; generally speaking, therefore, actions against correspondents or third parties that have not filed for bankruptcy are not automatically stayed. The Contempt Litigation & Compliance Branch should be consulted for guidance or assistance in this area.

In assessing the appropriateness of recommending injunctive relief, it should be recognized that, in many cases, injunctive relief is more likely to ensure prompt success in achieving ultimate compliance than most post judgment measures.

10674.5 Submitting the Recommendation

Recommendations for protective order injunctive relief should be promptly submitted, as indicated below, with a copy to the Division of Operations-Management:

²²² *NLRB v. C.C.C. Associates, Inc.*, 306 F.2d 534, 539–540 (2d Cir. 1962) (use of supplementary administrative proceedings, including investigative subpoenas, to establish derivative liability of corporate principals); *Concrete Mfg. Co.*, 262 NLRB 727, 727–729 (1982) (use of supplementary proceedings after liquidation of backpay to determine derivative liability); *U.S. v. Neidorf*, 522 F.2d 916, 917–920 (9th Cir. 1975), cert. denied 423 U.S. 1087 (suit against fraudulent transferees of corporate assets); *In re Kaiser*, 722 F.2d 1574, 1582–1583 (2d Cir. 1983) (attack on fraudulent bankruptcy).

²²³ The stay excepts from its operation certain exercises of police and regulatory power (11 U.S.C. § 362(b)(4)). These exceptions permit nonbankruptcy injunctive relief that affects a debtor's assets in some cases. See *CFTC v. CO Petro Marketing Group*, 700 F.2d 1279, 1283–1284 (9th Cir. 1983); *SEC v. First Financial Group of Texas*, 645 F.2d 429, 437–440 (5th Cir. 1981); *FTC v. R. A. Walker & Associates*, 37 B.R. 608, 610–612 (D.D.C. 1983).

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- from issuance of complaint to issuance of Board order-Division of Advice (Associate General Counsel and Assistant General Counsel, Injunction Litigation Branch),
- from issuance of Board order to issuance of court judgment-Division of Enforcement Litigation, Appellate Court Branch (Deputy Associate General Counsel),
- after issuance of a court judgment-Division of Enforcement Litigation, Contempt Litigation & Compliance Branch (Assistant General Counsel).

A special problem arises when a Board order or court judgment has issued against a respondent, but interim relief appears to be warranted against one or more previously unnamed third parties, as to whom liability could be determined in either a supplemental administrative proceeding or in a contempt proceeding. In this situation, the Region should submit its recommendation to all of the above branches with a recommendation that they consult as to the appropriate course of action.

10674.6 Form and Content of Recommendation

As time is of the essence, the appropriate branch or division should be advised telephonically that a recommendation is forthcoming. Generally, the respondent should not be given advance notice of the Region's intention to make such a recommendation because of the limited deterrent value of such notification and because experience indicates that notification may impede the Board's ability to obtain relief, for example, by causing a respondent to accelerate its evasive conduct or by compromising confidential sources. The recommendation should be submitted as expeditiously as possible and include the following:

- A description of the status of the case, including citations to any reported Board or court decisions or the docket numbers, dates of issuance, and copies of any unreported decisions.
- A narrative outline of the conduct giving rise to the recommendation, based on as thorough an investigation as time permits.
- Any relevant exhibits or available affidavits²²⁴ of witnesses, including Regional personnel if based on firsthand knowledge; the names, addresses, and telephone numbers of sources utilized in the Region's investigation of the conduct.
- The name, address, and telephone number of the respondent's counsel and, if appropriate, the names, addresses, and telephone numbers of other parties to any transaction or potential transaction involved in the recommendation or those of their counsel, if known.
- An affidavit of the Compliance Officer setting out an estimate of the respondent's current backpay liability, including accumulated interest.

10674.7 Regional Role During Pendency of Injunctive Proceedings

²²⁴ Under 28 U.S.C. § 1746, an unsworn declaration, made under penalty of perjury in the form prescribed in that statute, may be used in any Federal court proceedings in lieu of a sworn affidavit. References to affidavits herein shall include such declarations.

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In view of the time sensitivity of injunctive litigation involving Headquarter braches, their requests to Regions for further investigation, either prior to initiating or during litigation, should be handled as expeditiously as possible.

Respondents who are subject to injunctive proceedings may resist cooperation with the Agency. Thus, a Region should not presume that any respondent will respect the pendency of injunction proceedings, or the issuance of an injunction itself, by refraining from evasive conduct. Accordingly, the Region should thoroughly monitor the respondent's activities to ensure that it does not take further steps to evade compliance.

Following issuance of the injunction, the Region should closely monitor the respondent's compliance with all injunctive provisions, particularly those requiring disclosure of information to the Region, turnover of documents or establishment of escrow accounts or other forms of security. Such monitoring may include requests to third parties for appropriate information; subpoenas may be served on recalcitrant third parties.²²⁵ The Regions should promptly report any failure or refusal to comply with any provision to the appropriate Washington office.

10674.8 Notice and Constructive Notice to Third Parties of Protective Restraining Orders

Notice of Board and related proceedings should be given to all third parties actually or potentially involved in any significant asset transaction with a respondent, inasmuch as derivative liability against third parties unrelated to the respondent may depend on their having actual notice.²²⁶ Similarly, *Golden State* successorship liability²²⁷ and, of equal practical importance, an acquiring entity's ability to arrange with the original respondent for indemnification for such liability, also may turn on notice of the dispute. Section 10632.8. Accordingly, in any case in which it appears that actual or potential third parties are or may be engaging in significant asset transactions with a respondent, the following procedures should be followed.

On learning of the involvement of a third party in a current or potential transaction with a respondent that may impair the Board's ability to obtain compliance, the Region should ordinarily serve the third party with copies of the pleadings in the case (particularly the complaint or compliance specification and any decisions), as well as of any restraining orders in effect. An accompanying transmittal letter should set forth, briefly and in an impartial and nonadversarial manner, the reasons for service and a short statement of the third party's potential exposure, such as the amount or estimated amount of backpay due. Service should be by certified mail, return receipt requested, or by some other method that permits verification of delivery, including service by a Board agent.²²⁸

The intent of the letter should not be to impair the transactions, but rather to give notice of the pending proceedings and of the requirements of any existing restraining order (for example, that funds not be paid over to respondent) and of the recipient's

²²⁵ If an injunction has been issued and contains a discovery provision, discovery may be had thereunder. In any event, investigation may be conducted by Section 11 subpoena. See Section 10618.1 regarding investigative subpoenas.

²²⁶ See and compare, Fed.R.Civ.P. 65(d), under which injunctions are binding "upon the parties to the action, their officers, agents, servants, employees, and attorneys," without regard to notice.

²²⁷ *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184-185 (1973).

²²⁸ If time is of the essence, the material, or at least the essential portions of it, should be served by fax if possible.

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potential liability for violating such an order. Care should be taken not to state or imply that the recipient will be held to be a successor, but rather to put the party on notice of pending proceedings and, if applicable, of the existence and requirements of any existing restraining order. See Section 10632.10 for notice in contempt cases. A sample letter is found in Appendix 22.

If the Region believes that, because of unusual circumstances notice should not be given, it should seek clearance from the Contempt Litigation & Compliance Branch, with a copy to the Division of Operations-Management.

The Region should continue to serve such documents, notwithstanding a third party's claim of lack of relationship to the respondent. Threats by the respondent or a third party to initiate litigation against the Board or its representatives on the basis of such notice (for example, a threat to initiate a suit based on tortious interference with contractual advantage or to seek from a bankruptcy court an order approving a free-and-clear sale), should be referred to the Contempt Litigation & Compliance Branch, with a copy to the Division of Operations-Management. In the absence of contrary instructions, however, such threats should not deter efforts to make or continue service of such notices.²²⁹

10674.9 Use of Lis Pendens, Notice of Pendency, Notice of Interest or Similar Devices For Giving Constructive Notice, in Cases Involving Real or Personal Property

When the Agency has initiated an action seeking relief relating to a respondent's disposition of real property, the Region should, if state law permits, docket or record a notice of the pendency of such proceedings against the property involved. Generally, such notices are permissible only where there is an action pending that affects title to the property.²³⁰ Under 28 U.S.C. §1964, it is incumbent on parties litigating in Federal district courts to comply with the requirements of state law authorizing such notice (with the significant exception that agencies of the United States are exempted from bonding requirements by 28 U.S.C. §2408). Therefore, when the need arises, Regions should thoroughly familiarize themselves with lis pendens laws in all states within their respective jurisdictions, determine the requirements for filing such a notice, and seek clearance from the Division that is processing the injunction proceedings prior to filing or recording such notice.

A notice of pendency, when permissible by law, serves as constructive notice to all subsequent purchasers and encumbrancers of the property, thereby tending for practical reasons to preserve the status quo during litigation and limit a respondent's ability to dispose of real property to bona fide purchasers. In addition, a notice of pendency may, in some states, be the only way to register an injunction.

Some jurisdictions also permit such notice to be utilized in actions affecting certain types of personal property; however, such notice is, like that applying to real property, inappropriate unless the litigation involved seeks to reach specific personal

²²⁹ See Federal Tort Claims Act, 28 U.S.C. §§ 2671, et seq., 2680(h).

²³⁰ See 51 Am.Jur.2d Lis Pendens Sec. 21 (1970); *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1319-1321 (3d Cir. 1982); *Cayuga Indian Nation v. Fox*, 544 F.Supp. 542, 547-548 (N.D.N.Y. 1982).

10676 PREJUDGMENT WRITS OF GARNISHMENT, ATTACHMENT, RECEIVERSHIP, AND SEQUESTRATION

assets.²³¹ Where available, the use of such notice relative to personal property is subject to the same instructions as set forth above for real property.

As noted further below, in Section 10676, the FDCPA contains provisions for obtaining prejudgment relief, including prejudgment attachment. Under 28 U.S.C. § 3102(f), such attachment will create a lien in favor of the United States upon levy on the property pursuant to a writ of attachment. Regions should consult with the Contempt Litigation & Compliance Branch prior to initiating prejudgment actions under the FDCPA. Section 10674.5.

10674.10 Recording Unliquidated Judgments or Board Orders

The proceedings discussed above are generally required to protect Board monetary claims in the absence of a supplemental judgment liquidating backpay. If permitted by state statute, however, the Region may record unliquidated judgments or Board orders under applicable state law, which, at the very least, may provide notice to third parties who may have potential derivative liability.

10676 Prejudgment Writs of Garnishment, Attachment, Receivership, and Sequestration

The Federal Debt Collection Procedure Act (FDCPA), U.S.C. §§ 3101–3105, includes provisions for prejudgment relief, including, prejudgment garnishment (§ 3104), attachment (§ 3102), receivership (§ 3103), and sequestration (§ 3105) where the respondent is about to leave the jurisdiction of the United States (§ 3101(b)(1)(A)), has or is about to assign, dispose, remove, conceal, or destroy property (§ 3101(b)(1)(B)), has or is about to convert the debtor’s property into money, securities, or evidence of debt (§ 3101(b)(1)(C)), or has evaded service of process by concealing himself (§ 3101(b)(1)(D)) with the effect of hindering, delaying, or defrauding the United States in its effort to recover a debt. See discussion in post judgment section. Sample forms can be found on the Contempt Litigation & Compliance Branch site on the intranet. Regions should consult with Contempt prior to initiating prejudgment actions under FDCPA.

10678 Post Judgment Collection of Monetary Judgments

10678.1 Overview

In cases where backpay has been liquidated in a court judgment, the Region has primary responsibility for collection. The Contempt Litigation & Compliance Branch will provide any needed advice and assistance to the Region.

The FDCPA provides uniform, nationwide procedures which the Agency, as a part of the U.S. Government, must follow when initiating collection proceedings on debts owed by respondents. This statute generally supersedes the patchwork of state collection procedures that previously governed. Backpay is covered by the FDCPA’s use of the term “debt” (28 U.S.C. § 3002(3)). The FDCPA’s provisions for post judgment remedies (including establishment of judgment liens, garnishment, execution, and installment payment orders) are found at 28 U.S.C. §§ 3201–3206.

10678.2 Advantages of Using Collection Proceedings

²³¹ See generally 51 Am.Jur.2d Lis Pendens (1970).

Collection proceedings generally are a quicker means than contempt for obtaining satisfaction of a backpay judgment and should be used in most cases when respondents fail to voluntarily pay a backpay judgment or when the Region and the respondent are unable to reach a time payment settlement. In deciding whether to undertake collection proceedings, the Region should carefully consider the types of post judgment proceedings available under the FDCPA (garnishment, attachment, execution, foreclosure, and installment order) and the likely impact of such proceedings on the respondent.

Collection proceedings may also be used in conjunction with contempt proceedings when the respondent has violated both the monetary and nonmonetary provisions of the judgment.

Post judgment collection proceedings cannot be used until backpay has been liquidated in a supplemental judgment. Section 10624.1. But, in appropriate circumstances, such as when the named respondent or those acting on its behalf have hidden or fraudulently transferred assets or have created alter egos, disguised continuances, or single integrated enterprises, both before or after the entry of a backpay judgment, contempt proceedings may be warranted. In such circumstance prejudgment restraints (protective orders and prejudgment garnishment, attachment, receivership, and sequestration) on previously unnamed parties may be available. Section 10674.

10678.3 Conduct of Collection Proceedings

Collection proceedings generally are to be conducted by the Region. Regions should contact the Contempt Litigation & Compliance Branch for any necessary advice and assistance. Regions should consult with Contempt before initiating FDCPA post-judgment proceedings involving execution or installment payment orders (Sections 10678.6 and 10678.7). Additionally, prior consultation with Contempt is required before initiating any FDCPA proceeding in which a new party is being implied for the purpose of establishing the derivative liability of such a party, or where the Agency will be seeking interim pendente lite relief (such as a PRO), pursuant to 28 U.S.C. § 3013.

When there is a likelihood that collection procedures could result in substantial cost to the Agency—for example, foreclosure of real estate or seizure and sale of equipment where the Agency is responsible for the cost of maintaining seized property—clearance should be obtained from the Division of Operations-Management.

10678.4 Post Judgment Writs of Garnishment, Execution, and Installment Payments

Once the Region has located assets from which the judgment can be satisfied, it should, barring bankruptcy or where the respondent's financial condition is so precarious that collection actions would greatly reduce the chance of obtaining any significant recovery, use one or more of the post judgment remedies available under the FDCPA: Garnishment (§ 3205), execution (§ 3203), and installment payment orders (§ 3204).

10678.5 Garnishment

In a garnishment, the court directs a third party having possession, custody, or control of property (money) of the respondent to pay to it the Agency. A writ of garnishment served on the garnishee (the person holding the property) immediately freezes such property owed by the garnishee to the debtor). This remedy is particularly

useful to seize respondent's funds held in financial accounts, account receivables (including rent) owed to respondent and other money owed to respondent. As the "templates" used for FDCPA garnishment pleadings are periodically amended or updated as a result of new precedent and/or case handling experiences, Regions should consult the Contempt Litigation & Compliance Branch intranet site or the Contempt Branch to ensure that the most current versions are utilized. As in other contexts, Contempt is available for advice and assistance; telephonic and e-mail inquiries are encouraged.

10678.6 Execution

In an execution, the court directs the United States marshal to seize and sell real or personal property belonging to the debtor and to pay the net, nonexempt proceeds to the Agency for disbursement to the discriminatees. Caution must be exercised in utilizing execution procedures because, unless appropriate arrangements are made in advance, the Agency may incur significant costs relating to the use of these procedures. Regions should consult with the Contempt Litigation & Compliance Branch prior to initiating any FDCPA action seeking an execution order. As the "templates" used for FDCPA execution pleadings are periodically amended or updated as a result of new precedent and/or casehandling experiences, Regions should consult the Contempt intranet site or Contempt to ensure that the most current versions are utilized.

10678.7 Installment Payment Orders

Where a respondent's assets are difficult to identify, a court may issue an installment order directing respondent to make specified periodic payments to the Agency, based on respondent's lifestyle and spending patterns. This procedure is particularly useful where a respondent is self-employed or in a position to manipulate corporate or family assets to avoid paying backpay while meeting personal expenses. Sample installment payment order papers are available on the Contempt Litigation & Compliance Branch intranet site or directly from Contempt. Contempt should be consulted prior to initiating any FDCPA action seeking an installment payment order.

10680 Protective Restraining Orders

See discussion for prejudgment remedies at Section 10674.

10680.1 Obtaining Judgment Liens Against Real Property

In most cases, the first step in collection of a backpay judgment where a respondent owns real property should be to immediately obtain a judgment lien against respondent's real property under 28 U.S.C. § 3201(a) by filing a certified copy of an abstract of the liquidated backpay judgment in the manner provided for filing a tax lien under 26 U.S.C. § 6323(f)(1) and (2). Section 10636. These provisions essentially require that real property liens be recorded in the manner prescribed under state law. Accordingly, each Region is responsible for knowing the practice and procedure for recording liens against real property in each state in which the Region has occasion to record a lien. Unless a respondent expeditiously complies fully with a supplemental judgment liquidating a monetary remedy, the Region should request the Contempt Litigation & Compliance Branch to obtain certified copies of the judgment or certified abstracts of judgment from the court of appeals.

10680.2 Registration of Judgments in U.S. District Court

In addition to placing a lien on respondent's real property (see Section 10680.1), in cases of noncompliance with a supplemental judgment, the Region should also register as expeditiously as possible, normally within five (5) days of receipt by the region of certified copies of the judgment, a certified copy of the judgment in the U.S. district court for the district in which the respondent resides, transacts business, or owns property in order to give that court jurisdiction over collection proceedings (garnishment, attachment, execution, foreclosure, and installment order) under the FDCPA and/or discovery under Fed.R.Civ.P. 69(a).²³² 28 U.S.C. § 1963 provides that a judgment "returned in favor of the United States may be so registered at any time after the judgment is entered." The Contempt Litigation & Compliance Branch will provide the Region with a certified copy of the judgment to enable the Region to register the judgment in district court. If a district court clerk refuses to register a backpay judgment, the Region should immediately notify Contempt, which will provide the necessary assistance.

When the district court clerk registers the judgment, it will be assigned a docket number, probably on the court's miscellaneous docket and, pursuant to 28 U.S.C. § 1963, "shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner."

Should register the judgment in an appropriate district court or courts under 28 U.S.C. 1963, as expeditiously as possible, normally within five (5) days of receipt by the region of certified copies of the judgment.

²³² It will be necessary to register the judgment in only one district because the FDCPA's nationwide service of process provision, 28 U.S.C. § 3004(b), permits process of the court in which the collection action is commenced to be served "in any State." However, under Fed.R.Civ.P. 45(a)(2) (applicable through Fed.R.Civ.P. 69(a)), a subpoena compelling production of documents from, or attendance by, a nonparty shall issue from the court for the district in which the production or deposition is to take place.

10682 Derivative Liability

10682.1 Overview

As used in this manual, derivative liability refers to the liability for remedying a violation of the Act that may be imposed on a person or entity other than the one that committed the unfair labor practice under any of several theories, including but not limited to disguised continuances, alter ego, piercing the corporate veil, single employer, and successor liability. The Contempt Litigation & Compliance Branch is available to provide assistance with respect to derivative liability investigations.

10682.2 Forms of Business Organization

Business activities generally are organized as corporations, partnerships, and sole proprietorships. Labor organizations are unincorporated associations; for purposes of liability they are treated as corporations. A basic tenet of corporate law is the concept of limited liability—that shareholders normally may not be held personally liable for the debts of the corporation. However, in the case of a partnership or a sole proprietorship, the partners or the proprietor are legally indistinguishable from the business entity and the business' remedial obligations, including backpay, may be imposed on the general or managing partners or the proprietor directly without resort to principles of derivative liability. It is important that the Region, before issuing a complaint, seeking enforcement or issuing a compliance specification, identify the respondent's business form and plead it accurately. If the business is a sole proprietorship, the complaint or compliance specification should name the individual proprietor/owner as respondent. If the business is a partnership, the complaint should name all of the general or managing partners. Questions concerning business forms, particularly limited partnerships, limited liability companies and limited liability corporations can be directed to the Contempt Litigation & Compliance Branch.

10682.3 Others Who May Be Responsible

Other persons and/or entities may stand in such a relation to the respondent committing the unfair labor practice that such additional parties may be held responsible for remedying the violation—that is, they may be derivatively liable. Various related theories of derivative liability may apply to remedial obligations under the Act.

A. A nominally distinct entity may be liable as an alter ego or disguised continuance of the person or business entity committing the unfair labor practice.²³³

B. The person or business entity committing the unfair labor practice may be part of an affiliated group of business entities which constitute a single employer or joint employer for purposes of the Act. A finding of single or joint employer status may permit the imposition of certain remedial obligations on the affiliates, including liability for backpay.²³⁴

²³³ See *Watermelon Plus*, 29-CA-27150, ALJ affirmed by Board on 9/12/07.

²³⁴ See generally *Centurion Auto Transport, Inc.*, 329 NLRB 394 (1999); *Naperville Ready Mix, Inc.*, 329 NLRB 174 (1999); *V & S Progalv, Inc.*, 323 NLRB 801 (1997); *Rebel Coal Co.*, 279 NLRB 141, 143 (1986); *Truck & Dock Services*, 272 NLRB 592 fn. 2 (1984); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 551 (3d Cir. 1983), cert. denied 464 U.S. 1039 (1984); *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255, 256 (1965).

C. Where the respondent's operations are the subject of an arms length transfer to new ownership and the business continues in substantially unchanged form, certain remedial obligations may be imposed on the acquiring entity as a *Golden State* successor, if it can be shown that the transferee acquired the business with knowledge of unremedied unfair labor practices.²³⁵

D. In cases involving a corporate respondent, it may be possible to pierce the corporate veil and hold one or more corporate shareholders derivatively liable for unfair labor practices. Generally speaking, the corporate fiction may be disregarded if its observance would produce injustice or inequitable consequences—for example, where the corporate form is used to perpetrate fraud or evade statutory obligations, or where the corporate principals have intermingled their personal (both individual and other owned corporations) and corporate assets and affairs to the detriment of creditors, or have used the corporation as a mere shell to advance their own purely personal rather than corporate ends.²³⁶

E. A corollary of the doctrine of piercing the corporate veil is the direct participation theory of intercorporate liability—when a parent or affiliated corporation disregards the separateness of its subsidiary or affiliated corporation(s) and exercises direct control over a specific transaction(s), derivative liability for the subsidiary's or affiliated corporation's unfair labor practices will be imposed on the parent or affiliated corporation(s).²³⁷

F. Rule 65(d). The language of Board orders binding “officers, agents, successors, and assigns” is understood to be coextensive with the reach of Fed.R.Civ.P. 65(d), which provides that injunctions are binding on “the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order.” Thus, for example, an officer of a corporation who fails to cause a corporation to comply with an enforced Board order may be liable in contempt. Similarly, an owner/officer who, following entry of an unliquidated make-whole order, takes steps to disable the corporation from complying, may be individually liable. In addition, a third party such as a customer or supplier may be held liable as a “person in active concert or participation” if it, with knowledge of the judgment, shifted its business dealings from the named respondent to an alter ego or affiliated business entity.²³⁸

²³⁵ *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1975); *Coastal Derby Refining Co. v. NLRB*, 915 F.2d 1448, 1452 (10th Cir. 1990); *NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135, 138–139 (3d Cir. 1976); *NLRB v. Interstate 65 Corp.*, 453 F.2d 269, 272–273 (6th Cir. 1971); *NLRB v. Boston Needham Industrial Cleaning Co.*, 526 F.2d 74, 77 (1st Cir. 1975); *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 4 (1st Cir. 1976); *NLRB v. Hot Bagels & Donuts*, 622 F.2d 113, 1115 (2d Cir. 1980). *D.L. Baker, Inc. t/a Baker Electric and its Alter Ego and/or Successor Baker Electric, Inc. and Daniel L. Baker and Maggie Barry, Individual*, 351 NLRB No. 35 (2007).

²³⁶ *White Oak Coal Co.*, 318 NLRB 732 (1995), enfd. 81 F.3d 150 (4th Cir. 1996), *AAA Fire Sprinkler*, 322 NLRB 69 (1996), *Genesee Family Restaurant*, 322 NLRB 219 (1996), enfd. 129 F.3d 1264 (6th Cir. 1997). *Bufco Corp.*, 323 NLRB 609 (1997), enfd. 899 F.2d 608 (7th Cir. 1990). *In re Paolicelli*, 325 NLRB 194 (1997), affirmed 190 F.3d 1191 (11th Cir. 1999). *Reliable Electric Co.*, 330 NLRB 714 (2000). *D.L. Baker, Inc. t/a Baker Electric and its Alter Ego and/or Successor Baker Electric, Inc. and Daniel L. Baker and Maggie Barry, Individual*, id. (2007).

²³⁷ *American Electric Power Co.*, 302 NLRB 1021, 1023 (1991), enf. mem. 976 F.2d 725 (4th Cir. 1992).

²³⁸ *Wilson v. U.S.*, 221 U.S. 361, 376–377 (1911) (“A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action with their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt.”)

G. Fraudulent Transfer—If a named respondent gratuitously transfers an asset during the pendency (or in anticipation) of litigation, the transfer may be fraudulent under the version of the Uniform Fraudulent Transfer Act applicable in the state where the violation occurred and/or the fraudulent transfers provision of the Federal Debt Collection Procedures Act, 28 U.S.C. § 3304. In such circumstances, the person to whom the asset was transferred can be named as a respondent, and a return of the asset (or its dollar equivalent) sought as a judicial remedy. Whether such a transfer can be set aside typically depends on such factors as when the transfer was made, to whom it was made, whether the debtor received value for the transfer and whether the debtor knew or should have known that its assets would be insufficient to satisfy a potential or current debt.²³⁹

10682.4 Alternate Theories

It is important to remember that there is considerable overlap among the legal theories discussed above and that alternative theories of derivative liability often should be alleged and litigated in a single proceeding. Regions may obtain assistance from the Contempt Litigation & Compliance Branch with respect to these matters.

10682.5 Identifying Remedial Objective(s) and Appropriate Theory

Different legal consequences flow from application of the various theories of derivative liability. It is therefore important to determine, as an initial matter, what the remedial objective is (for example, whether respondent continues to violate the Act using a disguised form as opposed to when respondent's operations are continued by a *Golden State* successor) and then to ensure that the proper theory or theories are pled and factually supported.

10682.6 Applicable Circuit Court Law

When drafting pleadings and formulating litigation strategy in a particular case, attention should also be paid to the law of the circuit court in which the Board's order is likely to be reviewed. The derivative liability case law in certain circuits may contain formulations of a legal standard that differ to some degree from the Board's formulation. Pleadings should be prepared and a record developed at hearing, with the goals of satisfying both Board and circuit court formulations of the applicable theories of derivative liability.

10686 Respondent's Inability to Pay or Comply

At the time the backpay judgment is being registered in district court, the Region should, in consultation with the Contempt Litigation & Compliance Branch, investigate the liquid and fixed assets of respondent directly and through third parties. Listed below are several areas to explore. The Board's Section 11 subpoena authority and/or Rule 69

²³⁹ *Zahra Spiritual Trust v. U.S.*, 910 F.2d 240 (5th Cir. 1990) (transfer of property not for valuable consideration where made for no monetary compensation; relevant inquiry is whether taxpayer received monetary rather than spiritual consideration); *Indiana National Bank v. Gamble*, 612 F.Supp. 1272 (D.C. Ill 1984) (transfer of residence by minister to church, where property purchased for \$127,000 but transferred for \$10); *Dardanell Co. Trust v. U.S.*, 630 F.Supp. 1157 (D. Minn. 1986) (transfer of property with tax value of \$59,800 where taxpayers received "nothing" or worthless trust certificates not for fair consideration); *Advest v. Rader*, 743 F.Supp. 851 (S.D. Fla. 1990) (funds in individual accounts transferred to accounts jointly owned with wife); *U.S. v. Taylor*, 688 F.Supp. 1163 (E.D. Tex. 1987) (transfer of property to daughter was for no consideration and parents retained possession and use of property); *U.S. v. Christenson*, 751 F.Supp. 1532 (D. Utah 1990) (transfer to real property to near relatives for no consideration whatsoever, and transferor retained continued use of property).

district court subpoenas should be fully utilized, as necessary, to conduct such investigations:

| <u>Asset</u> | <u>Investigative Sources of Information</u> |
|---------------------|--|
| Financial Accounts | <ul style="list-style-type: none"> • Respondent's bank records (generally the best source of financial information) • Cancelled payroll checks from discriminatees • Database search service (AutoTrak) for evidence of line of credit (financing statement) from respondent's bank • Payroll checks from respondent • Respondent's checks to suppliers • Endorsements on cancelled checks from customers of respondents |
| Accounts Receivable | <ul style="list-style-type: none"> • Cancelled payroll checks from Respondent's customers deposited in respondent's bank • Respondent's tax returns |
| Accounts Receivable | <ul style="list-style-type: none"> • Cancelled payroll checks from Respondent's customers deposited in respondent's bank • Respondent's tax returns • Respondent's financial statements • Respondent's bank loan files • Respondent's application to bonding company |
| Real Property | <ul style="list-style-type: none"> • Database search service (AutoTrak) • County Assessor/Recorder Records |
| Vehicles/Equipment | <ul style="list-style-type: none"> • Database search service (AutoTrak) |
| Inventory | <ul style="list-style-type: none"> • State Department of Motor Vehicles • Secretary of State Security Agreements/Financing Statements |

Compulsory discovery is not necessary if information can be obtained through third parties or through voluntary cooperation of respondent. Where a money judgment has been registered in a district court, discovery can be conducted pursuant to Fed.R.Civ.P. 69(a), from respondent and third parties (financial institutions, customers, suppliers, accountants, and bonding companies).²⁴⁰ In some cases, however, the notice requirement of Fed.R.Civ.P 30(b) (depositions) and 45(b) (production of documents by nonparty), if followed, will compromise any necessary confidentiality. In these situations, the Region, where otherwise appropriate (Section 10618), should proceed using Section 11 subpoenas, for which notice to respondent is not required.²⁴¹

Special care should be taken when subpoenaing the financial records of non-corporations. The Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq. (RFPA) prohibits the Government from obtaining a "customer's" financial records from a financial institution, unless certain prior notification procedures are followed or unless certain exceptions apply. For purposes of the RFPA, a "customer" is defined as an

²⁴⁰ No accountant's privilege is recognized under Federal law. See *U.S. v. Arthur Young & Co.*, 465 U.S. 805 (1984).

²⁴¹ *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984).

individual or a partnership of five or fewer individuals. Similarly, the notice requirements of the RFPA are not applicable to a subpoena issued pursuant to Fed.R.Civ.P. 69 and 45, where the customer whose records are being sought is a named respondent (12 U.S.C. § 3413(e)), because any need for notice to the respondent is satisfied by the notice requirement of Rule 45(b).

There are also situations where the Agency can delay notification. Under 12 U.S.C. § 3409, the Agency can ask a district court to permit withholding of notice to the customer for a renewable 90-day period under exigent circumstances. The Region should consult with the Contempt Litigation & Compliance Branch prior to utilizing this provision, and are encouraged to consult Contempt regarding any matters involving the RFPA with respect to which advice or assistance may be needed.

In the event that the Region is unable to locate assets to commence collection proceedings, the Region should fully investigate all potential bases upon which derivative liability might be based, such as single employer, single integrated enterprise, alter ego, disguised continuance, piercing the corporate veil, fraudulent transfer, and *Golden State* successor theories, using the same investigative techniques used to locate assets above. The Contempt Litigation & Compliance Branch will, upon request, provide assistance with respect to these matters, and telephonic and e-mail inquiries are encouraged. The results of such investigation will determine whether further proceedings—administrative, collection, or contempt—are warranted or whether, alternatively, the case should be closed without compliance.