



by Joseph Chora

Judgment WAY

Examinations, liens, turnover orders, levies, and investigative techniques are among the tools available to compel judgment debtors to meet their obligations

WHILE A COURTROOM VICTORY is pleasing, any judgment is only as good as its ability to transform the words on the judgment order into money in the pockets of clients. Attorneys should therefore understand the basics of judgment enforcement. Once a judgment is entered, enforcement concerns finding, chasing, and taking the debtor's assets. Through meticulous and diligent pursuit of a judgment, a client may obtain restitution.

The first and most important step in judgment enforcement is the creation of the judgment. Accurately naming the debtor in the judgment is critical.¹ Misspelling the debtor's name or transposing a given and surname can cause unnecessary expense and confusion.² Failing to designate a legal entity correctly can also be fatal to a judgment, and is at the least a costly error.³ Two rules of thumb apply: 1) be as exact and complete as possible with spelling, punctuation, and entity type; include Jr., Sr., and the full business name or full personal name of the debtor and akas,

and 2) be over-inclusive: name all parties, businesses, insurance carriers, individuals, spouses, and others that are legally responsible for the claim.⁴

The content and layout of a judgment are also critical. Findings of fact and conclusions of law are critical to a good judgment.⁵ If properly laid out, a trial court's findings can be used to great effect in bankruptcy court, should the debtor decide to file bankruptcy. A special verdict form that satisfies each element of a cause of action can save tens of thousands in legal fees by allowing a creditor to succeed in a motion for summary judgment rather than having to relitigate in bankruptcy court. It should be noted that in some areas the bankruptcy code imposes heightened findings for fraud and other intentional torts. For these reasons, a well-crafted judgment should lay out the gravamen and the dispositive facts of the case.

Default judgments require additional consideration; they are technical and must be

perfected.⁶ Normally, default judgments cannot be entered for an amount greater than the amount stated in the complaint.⁷ A plaintiff who seeks a default judgment for personal injury or wrongful death must serve a statement of damages and may not state damages in the complaint.⁸ A plaintiff seeking a default judgment for punitive damages must serve a statement of punitive damages.⁹ Failure to follow these rules can cause headaches for the creditor and needless expenses defending attacks against the judgment.

Another general rule to remember is that judgments in California are valid for 10 years from date of entry; they must be renewed within 10 years, or they cease to exist.¹⁰ Judgments can be renewed after five years from date of entry, and in order to compound

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interest it makes sense to renew a judgment every five years.¹¹

Locating Assets

Even before trial, assets should be located. While professional investigators are valuable, not every case may justify the use of professionals to obtain the information needed to proceed with an asset investigation. Under Sections 708.10 to 708.30 of the Code of Civil Procedure, interrogatories can be propounded and documents can be demanded of the debtor postjudgment in the same manner as prejudgment discovery. In fact, interrogatories and demand for production are the only available applications of the Civil Discovery Act postjudgment.¹² The interrogatories and demand for production must take place prior to a debtor examination, or at least 120 days after an examination.¹³ A debtor's examination—also called an ORAP or OEX—is a powerful method to obtain information.¹⁴

An ORAP is filed *ex parte* by filing Judicial Council Form AJ-138/EJ-125.¹⁵ Each courthouse in Los Angeles County may follow slightly different rules, so it is best to speak to the clerk regarding specific requirements for an ORAP. Personal service of an ORAP upon the debtor creates a secret lien on all the personal property of the debtor that relates back to the date of issuance of the order, and exists for one year unless extended.¹⁶ A debtor must be personally served at least 10 days prior the date of the examination. In addition, it is good practice to serve a subpoena *duces tecum* with an ORAP to compel the debtor to bring documents, such as a Social Security card, driver's license, bank statements, credit card statements, checkbooks, business records, contracts, and ownership documents of vehicles or businesses. Sections 1985 to 1997 of the Code of Civil Procedure govern subpoenas and apply normally to subpoenas served postjudgment.

A court reporter or videographer is useful to memorialize testimony for future motions or impeachment, just as in depositions. However, an ORAP is not a postjudgment deposition; it is a proceeding before the court, and as such takes place at the courthouse unless otherwise ordered by the court.¹⁷ Debtors are required to answer all questions regarding their assets and finances to aid in enforcement of the money judgment. It is imperative to prepare for an ORAP to identify areas of the debtor's finances that may hold key information about the debtor's assets. If a debtor refuses to answer a question about assets or finances, intervention from the court may be sought, and the judge may compel the debtor to answer or face contempt. Debtors can be asked to empty and inventory a wallet or purse and list the purpose of each

and every key on debtor's key chain.¹⁸

Debtor examinations can be taken of third parties, as well. Under Section 708.120 of the Code of Civil Procedure, an examination can be taken of anyone who possesses or controls at least \$250 of the debtor's assets, or owes a debt to the debtor for at least \$250. Similar to an examination of the debtor under Section 708.110, a lien is created on the debtor's interest in the property in the possession or control of the third party.¹⁹ Most of the bench officers in the 58 counties in California allow creditors to examine third parties who do not control any assets of the debtor or do not owe any debt to the debtor; rather, they are required to appear as a witness "in the same manner as upon the trial of an issue."²⁰ However, a small minority of courts read Section 708.130 as not applicable to third-party witnesses but rather as a limitation to the scope of examinations under Sections 708.110 and 708.120. There are currently no published cases on this point.²¹ The creditor should keep this in mind when attempting to summon a third party for examination.

In addition to an examination, there are gumshoe techniques to locate assets. These include taking trash that has been deposited curbside; talking to neighbors, landlords, employers, friends and relatives; and searching state and county public records online or in person for corporate interests, trademark and patent registrations, aircraft registrations, SEC filings, and real estate records. Former spouses, business partners, and employees can offer a wealth of information regarding the debtor's finances and assets. Court records—particularly divorces and bankruptcies—can provide valuable information about assets owned or controlled by the debtor. A lifestyle analysis is another way to find a debtor's assets by examining the debtor's residence, spending habits, associations, credit report, expenses and the like.²²

Bank Accounts

Federal law prohibits tricking (also known as pretexting) a bank to reveal banking information about a debtor.²³ With a few exceptions²⁴ that do not apply to private citizens, there are only four ways legally to obtain banking information from a bank: 1) debtor's consent, 2) subpoena, 3) court order, and 4) search warrant.²⁵ Nevertheless, there are other ways to get banking information, such as a debtor's exam, legal dumpster diving, or speaking to associates or vendors who have received check payments. If a person who has purchased an item from a debtor's business with a check can be found, often the processed check will have valuable banking information about the debtor's bank.

Once the assets are found, the next step is taking them. One of the most efficient

methods of separating a debtor from his or her assets is the turnover order, which takes two statutorily different forms.²⁶ The first provides that, at the conclusion of a debtor's exam, a debtor can be ordered to turn over property that typically is identified at the examination, but may have been previously identified.²⁷ This can be jewelry the debtor is wearing, cash in a wallet, a vehicle driven to the examination, a grand piano, or stock shares. The onus is placed on the debtor to turn the property over to the levying officer (typically the sheriff in state court, or the marshal in federal court) for liquidation at an auction. The second type of turnover order requires a writ of execution and a showing of need. This can be brought as a noticed motion or *ex parte*. The court's order must be personally served upon the debtor.²⁸

Similar to the turnover order is a levy.²⁹ A levy is the most common and most versatile remedy.³⁰ The first step is to obtain a writ of execution by filing Judicial Council form EJ-130. A levy takes place when a judgment creditor, in possession of a valid writ of execution, directs the sheriff to seize the property of the debtor and sell that property at auction.³¹ Personal and real property, but not intellectual property, can be reached via a levy. Property can be seized from the debtor, a third party or even from the levying officer.³² Houses, businesses, cars, boats, helicopters, airplanes, negotiable instruments, documents of title, cash in deposit accounts, safe deposit boxes, accounts receivable, property in a pending action, and final money judgments are some examples of the property that can be levied.³³

In addition to a levy, another element of judgment enforcement is a keeper, a person who may maintain a presence at the debtor's business and collect all the payments for goods or services made by customers.³⁴ A similar remedy is a till tap. The levying officer may enter the debtor's business and remove all cash from the debtor's cash register.³⁵ Wage garnishments are a levy on a debtor's earnings and can be used to take up to 25 percent of a debtor's wages, subject to considerations of the debtor's ability to provide for necessities for the debtor and the debtor's family.³⁶ If 25 percent is not enough, an assignment order can divert more than 25 percent of the nonwage income streams the debtor receives.³⁷ The Code of Civil Procedure defines "wages" as earned from "personal services," and gives examples of nonwage income streams.³⁸ As a practical matter, if there is a question as to the characterization of the income stream, the wage garnishment and assignment order remedies should both be employed.

Another approach is warranted if the assets are to be found in an LLC. The legis-

MCLE Test No. 254

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1. Divorce filings are a not good place to look for a debtor's assets because in a divorce proceeding individuals often misrepresent their assets and liabilities.
True.
False.
2. Section 708.120 of the Code of Civil Procedure provides for the creation of a lien on real property, not personal property.
True.
False.
3. Turnover orders can be made immediately after a debtor exam, without meeting ex parte notice requirements, as long as a writ of execution has been filed with the court.
True.
False.
4. Liens created on personal property can only be effective if they are placed in sequential order, placed after all liens on real property.
True.
False.
5. Postjudgment, the creditor can use the Civil Discovery Act to propound special and form interrogatories and demands for production to the debtor.
True.
False.
6. Once a debtor moves funds offshore, they may be collected by applying for a writ of execution and then for a charging order, which can be used to levy on foreign bank accounts in cooperative countries.
True.
False.
7. An ORAP lien is a powerful lien that attaches to both tangible and intangible personal property of any kind.
True.
False.
8. Creditors must ask permission from the court after an ORAP is issued if the creditor wants to expand the scope of questions to ask the debtor about the debtor's assets, liabilities, and finances.
True.
False.
9. Assignment orders affect wages earned by "personal service" and are also known as wage garnishment orders and may divert more than 25 percent of the wages that would normally flow to a debtor.
True.
False.
10. Creditors must be cognizant of the enforcement actions brought to bear against the debtors, as the litigation privilege does not apply to postjudgment enforcement actions.
True.
False.
11. Personally serving an ORAP upon a debtor creates a secret lien that relates back to the date on which the order to appear was signed.
True.
False.
12. There is little benefit to the psychological aspect of judgment enforcement; creditors must focus on simply meeting legal requirements.
True.
False.
13. Levies can be effectively used to take possession of real or personal property from judgment debtors and third parties in possession or control of real property or personal property that belongs to the judgment debtor.
True.
False.
14. A keeper and a till tap are remedies at law that allow a creditor to place a lien on and take possession of motor vehicles of all kinds, including boats and airplanes.
True.
False.
15. If a defendant has not been put on notice of potential liability via the complaint or a statement of damages prior to a default, default may be set aside any time after the entry of default judgment.
True.
False.
16. Judgments in California are only good for 10 years and cannot be renewed unless the creditor initiates a new suit to extend the judgment another 10 years.
True.
False.
17. Debtors' banking information is protected under the Graham-Leech-Bliley Act and can only be obtained from a bank by 1) consent, 2) subpoena, 3) court order, 4) a search warrant.
True.
False.
18. A creditor must show that other remedies have failed before the court will consider the use of a receiver to enforce a judgment.
True.
False.
19. A lien is considered seasoned if it has been in place for 91 days; a seasoned lien is considered a secure debt in a bankruptcy action, effectively making a previously unsecured creditor a secured creditor.
True.
False.
20. A judgment for ordinary costs and attorney's fees is automatically stayed when an appeal is filed.
True.
False.

MCLE Answer Sheet #254



JUDGMENT WAY

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ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

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3. True False
4. True False
5. True False
6. True False
7. True False
8. True False
9. True False
10. True False
11. True False
12. True False
13. True False
14. True False
15. True False
16. True False
17. True False
18. True False
19. True False
20. True False

lature has deemed the charging order the sole method of diverting income streams originating from a California LLC or partnership.³⁹ A charging order charges the judgment debtor's membership interest in the LLC or partnership and allows the creditor to receive any distributions due to the member because of that interest in the LLC or partnership. In addition, the court may order the liquidation of the debtor's interest in the LLC or partnership.

Another method of seizing the debtor's assets is to place liens on real and personal property of the debtor. Liens are some of the easiest and most cost-effective forms of passive enforcement.⁴⁰ An abstract of judgment creates a lien on all real property in a given county and attaches to any real property interest, whether present or future, vested or contingent, legal or equitable.⁴¹ In addition, if the debtor later acquires a real estate interest, the lien created by an abstract of judgment attaches to the interest when it is acquired.⁴² To be perfected, abstracts require a two-step process. They are first filed with the court, then recorded with the county recorder.⁴³ Liens created by an abstract of judgment are good for 10 years from the date of entry of the judgment; therefore, when a judgment is renewed, the abstract of judgment also needs to be renewed.⁴⁴ The JLPP or J1 lien is filed with the secretary of state and attaches to personal property of a business nature.⁴⁵

One of the most powerful liens for a judgment creditor is the ORAP lien.⁴⁶ As discussed above, a lien is created when the debtor is served with an ORAP.⁴⁷ The ORAP lien is a secret lien, meaning it is perfected without recording or notice to the debtor or anyone else; instead, it is perfected when served upon the judgment debtor or on a third party who possesses or controls property of the debtor.⁴⁸ The ORAP lien attaches to both tangible and intangible personal property of the debtor. It remains in effect for one year from the date the ORAP was issued by the court, but can be extended by either serving the debtor with another ORAP or by order of the court.⁴⁹

A receiver is a court-appointed representative empowered by the court to take some measure of control from the debtor over the assets controlled by the debtor, where the appointment of a receiver is a reasonable method to enforce a judgment, considering the interests of both the debtor and creditor.⁵⁰ Receivers are appointed by the court as representatives of the court, to insure an efficient and effective satisfaction of a judgment. Typically, a creditor will move for appointment of a receiver and suggest a list of receivers. However, the court may ignore the creditor's suggestions and appoint a receiver of its own choosing or solicit an additional list from the debtor or creditor. Receiverships

are a powerful and flexible remedy which can be tailored to enforce a judgment. While some judicial officers view receivers as a remedy of last resort, there is no support for that thinking within either the Code of Civil Procedure or controlling case law.⁵¹

Since the adoption of the Enforcement of Judgment Law in July of 1983, a receivership is no longer a remedy of last resort.⁵² It should be noted, however, that receivers can be very expensive to the debtor. Because a receivership is intrusive to a business at best and fatal at worst, judicial officers may weigh competing interests before ordering a receiver to be used. A receiver's powers can be limited or wide-ranging. A receiver may be appointed only to determine the income of a recalcitrant debtor who is the sole owner of a closely held corporation, or to take over the legal capacity of a the debtor. Some assets, such as liquor licenses and intellectual property, may require a sale by a receiver.⁵³ Receivers can be appointed via noticed motion or ex parte if circumstances warrant, and the filing of an application may be enough to motivate a debtor to settle.

Another important aspect of taking assets is psychology. The creditor must make it clear to the debtor that the creditor has the money, the will, and the expertise to collect the judgment. Delay, misdirection, misrepresentation, and noncooperation are the defenses of the debtor who has the money to satisfy a judgment but is unwilling to do so. The creditor must show the debtor that his or her assets have been identified, that the remedies at law will be used, and that any attempt to hinder, delay, or defraud the creditor will not be tolerated.

Chasing the Assets

Some debtors engage in evasive actions, such as fleeing the jurisdiction, filing bankruptcy, or appealing the judgment and postjudgment rulings. There have been cases of debtors' using bank accounts in the name of dead relatives, liquidating assets into diamonds and fleeing the country, filing and dismissing bankruptcy several times, and allowing defaults to be taken only to argue that their due process rights were violated. Debtors will often transfer assets to friends, family members, long-term employees, or corporate entities. Depending on how the assets are held, an ORAP and turnover order against the third party may be sufficient to put a lien on and recover the transferred assets. However, depending on how the transfer was made, it may be necessary to initiate a fraudulent transfer action.⁵⁴ The definitions of "transfer" and "claim" are quite broad, and reviewing the relevant statutes may give a creditor more options when seeking to unwind or obtain a judgment for the value

transferred to the transferee.⁵⁵

Some debtors may seek bankruptcy protection.⁵⁶ While many judgments can be discharged in bankruptcy, some can be disputed and rendered nondischargeable.⁵⁷ An adversary proceeding in bankruptcy court is a new lawsuit in the bankruptcy court, in this case to determine if the judgment will be discharged or determined to be nondischargeable. A creditor can ask the bankruptcy court to dismiss debtor's bankruptcy altogether if the debtor is found to have engaged in conduct in violation of the Bankruptcy Code.⁵⁸ Liens that have been placed on the debtor's property and have remained for 91 days or more are considered seasoned and outside the bankruptcy preference period. As such, the creditors holding those liens are considered secured creditors⁵⁹ entitled to full payment up to the equity in the personal or real property above any exemptions.⁶⁰

A debtor may seek relief from enforcement actions by filing an appeal. While a judgment for ordinary costs and attorney's fees is automatically stayed on the appeal,⁶¹ there is no automatic stay of enforcement during an appeal for money judgments, costs under Section 998 of the Code of Civil Procedure, or costs awarded under Section 1141.21. For these judgments, a debtor must post a bond or deposit cash in lieu of a bond to obtain a stay of enforcement.⁶² The bond for a stay of enforcement must be 1.5 times the judgment amount from an admitted carrier, or two times the amount from a nonadmitted carrier.⁶³

A debtor may attempt to forestall enforcement by suing a creditor for its legitimate enforcement actions, in an attempt to drive up the expense, intimidate the creditor into settlement, or abate collection efforts altogether. Legitimate collection efforts are considered petitioning actions and, as such, an anti-SLAPP special motion to strike is an effective and appropriate response to such frivolous litigation.⁶⁴ Successful use of an anti-SLAPP motion to strike will dismiss the debtor's lawsuit against the creditor and add another separate judgment for attorney's fees. In addition, collection actions are also covered under the litigation privilege, which adds another layer of protection for attorneys who enforce judgments.⁶⁵

A debtor may flee the jurisdiction moving to another state or out of the country. However, the location of the assets is more important than the location of the debtor, as assets can still be seized without the debtor's presence in the state.⁶⁶ Effective judgment enforcement against an absent debtor is possible if the creditor has been diligent in asset investigation, creating liens and utilizing the remedies at law to seize the debtor's assets. Debtors may also place assets offshore in an attempt to thwart judgment enforcement, yet may

still have access to the assets offshore via debit cards linked to the debtor's accounts. These cards leave a trail of recorded banking information when purchases are made. Once the accounts are identified, a turnover order can issue where the court orders the debtor to repatriate the funds or face contempt.⁶⁷

An accurate, valid judgment, a thorough asset location search, and a clear understanding of the remedies at law to seize and pursue assets will give a judgment creditor the tools needed to convert a paper judgment into real money. With these tools, assets may be found, chased, and taken to satisfy the debtor's obligation to the client. ■

¹ Orr v. Byers, 198 Cal. App. 3d 666 (1988); Meller & Snyder v. R & T Props., 62 Cal. App. 4th 1303 (1998).
² Manson, Iver & York v. Black, 176 Cal. App. 4th 36 (2009).
³ L.A., CAL. CODE §198; CODE CIV. PROC. §680.135.
⁴ Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp., 75 Cal. App. 4th 110 (1999).
⁵ Lange v. Waters, 156 Cal. 142 (1909); FED. R. CIV. P. 52(a).
⁶ CODE CIV. PROC. §§585-587.
⁷ CODE CIV. PROC. §580.
⁸ CODE CIV. PROC. §425.11.
⁹ CODE CIV. PROC. §425.115.
¹⁰ CODE CIV. PROC. §683.020.
¹¹ CODE CIV. PROC. §683.110.
¹² CODE CIV. PROC. §2016.070.
¹³ CODE CIV. PROC. §§708.020, 708.030.

¹⁴ CODE CIV. PROC. §708.110.
¹⁵ See <http://www.lacourt.org/division/civil/CI0025.aspx>.
¹⁶ CODE CIV. PROC. §708.110(d).
¹⁷ CODE CIV. PROC. §708.110(a).
¹⁸ CODE CIV. PROC. §708.110; Kyne v. Eustice, 215 Cal. App. 2d 627 (1963); Troy v. Superior Court, 186 Cal. App. 3d 1006 (1986).
¹⁹ CODE CIV. PROC. §708.120(c).
²⁰ CODE CIV. PROC. §708.130.
²¹ 1538 Cahuenga v. Fabe, 2015 Cal. App. Unpub. LEXIS 6259 (unpublished).
²² TRACY COENEN, LIFESTYLE ANALYSIS IN DIVORCE CASES: INVESTIGATING SPENDING AND FINDING HIDDEN INCOME AND ASSETS (2014).
²³ Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338 (1999).
²⁴ 12 U.S.C. §3403(c), (d); 12 U.S.C. §3414.
²⁵ Right to Financial Privacy Act, 12 U.S.C. §§3401, 3402.
²⁶ CODE CIV. PROC. §708.205; CODE CIV. PROC. §699.040.
²⁷ CODE CIV. PROC. §708.205.
²⁸ CODE CIV. PROC. §699.040.
²⁹ CODE CIV. PROC. §687.010.
³⁰ CODE CIV. PROC. §§700.010-700.200.
³¹ CODE CIV. PROC. §699.530.
³² CODE CIV. PROC. §§700.015, 700.030.
³³ CODE CIV. PROC. §§700.010-700.200.
³⁴ CODE CIV. PROC. §700.070.
³⁵ *Id.*
³⁶ CODE CIV. PROC. §706.050.
³⁷ CODE CIV. PROC. §708.510.
³⁸ CODE CIV. PROC. §§706.011(b), 708.510.
³⁹ CODE CIV. PROC. §708.310.
⁴⁰ CODE CIV. PROC. §§697.310, 697.510.
⁴¹ CODE CIV. PROC. §697.340(a); Judicial Council

Form EJ-001.
⁴² CODE CIV. PROC. §697.340(b).
⁴³ CODE CIV. PROC. §697.310(a).
⁴⁴ CODE CIV. PROC. §§697.310(b), 683.180.
⁴⁵ CODE CIV. PROC. §§697.510-697.550; Secretary of State Form JLI.
⁴⁶ Southern Cal. Bank v. Zimmerman (In re Hilde), 120 F. 3d 950 (1997).
⁴⁷ CODE CIV. PROC. §708.110.
⁴⁸ CODE CIV. PROC. §708.110(d); CODE CIV. PROC. §680.290.
⁴⁹ CODE CIV. PROC. §708.110.
⁵⁰ CODE CIV. PROC. §708.620.
⁵¹ CODE CIV. PROC. §708.620; RN's "Ask the Receiver" Expert Answer Man Peter Davidson Surveys Use of Receiverships in Non Traditional-Settings, RECEIVERSHIP NEWS 4 (Winter 2008).
⁵² CODE CIV. PROC. §§680.010-724.260.
⁵³ CODE CIV. PROC. §§708.620, 708.630, 699.720; Office Depot, Inc. v. Zuccarini, 596 F. 3d 696 (2010).
⁵⁴ CIV. CODE §3439.01(b), (i).
⁵⁵ CIV. CODE §3439.01.
⁵⁶ 11 U.S.C. §524.
⁵⁷ 11 U.S.C. §523.
⁵⁸ 11 U.S.C. §727.
⁵⁹ 11 U.S.C. §547.
⁶⁰ CODE CIV. PROC. §704.080.
⁶¹ Chapala Management Corp. v. Stanton, 186 Cal. App. 4th 1532 (2010).
⁶² CODE CIV. PROC. §917.1.
⁶³ CODE CIV. PROC. §917.1(b).
⁶⁴ CODE CIV. PROC. §425.16.
⁶⁵ Rusheen v. Cohen, 37 Cal. 4th 1048 (2006).
⁶⁶ Shaffer v. Heitner, 433 U.S. 186 (1977); 2 WITKIN CAL. PROC. JURIS. §254 (2008).
⁶⁷ FTC v. Affordable Media, LLC, 179 F. 3d 1228 (1999).

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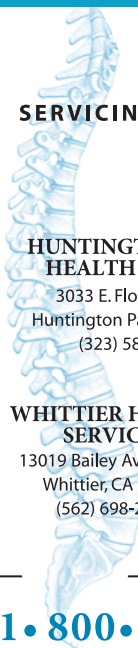
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