CREDITORS’ RIGHTS COURSE

INTRODUCTION

Do not let the name mislead you. This course is really about rights and remedies of both creditors and debtors. For every right a creditor may have, a failure to follow the law regarding that right creates a right or remedy for the debtor. For example, while a creditor has the right to foreclose on real property, the failure to correctly foreclose will create causes of action for the debtor such as conversion or wrongful foreclosure. Similarly, a creditor may assign a debt to an attorney or collection agency for collection, but to collect the debt attorney or collection agency must comply with the Federal Fair Debt Collection Practices Act, as well as the Texas Debt Collection Statute if the debt is a consumer debt.

Moreover, in commercial or consumer litigation there is generally no insurance to pay a judgment. Often the real battle begins after the judgment is taken when the creditor tries to collect the judgment. Texas is the most difficult state in the United States to collect judgments. In this course we will explore how a successful plaintiff, be it consumer, financial institution or small business, can attempt to collect its judgment.

COURSE TOPICS

In this course we will learn how to collect on debts secured by real or personal property, as well as unsecured debts. We will review both the Texas Property Code, the Texas version of the Uniform Commercial Code. In addition, we will learn what property is exempt from collection so as to know what a creditor can or cannot seize. As noted above we will cover the Federal Fair Debt Collection Practices Act and the Texas Debt Collection Act. We will study the specific tools used to enforce judgments such as writs of execution, writs of garnishments, turnover orders and receiverships. We will conclude the course by covering fraudulent conveyances and post judgment discovery which includes unique depositions and jail time for those refusing to obey a court’s order.

HIGHLIGHTS

The course begins with a review of the basic elements of a real estate mortgage arrangement. If you don’t know the difference between a Warranty deed and deed of trust this course is for you. (I know, I graduated without knowing the difference and imagine the shock when my first employer asked me to review some real estate papers). Also, besides learning to find assets to satisfy a judgment, we will learn how a wrongful foreclosure on a motor home worth less than $15,000 led to a $307,000 settlement against a credit union.

Should you have any questions about the course please feel free to contact me, M. H. “Butch” Cersonsky at 713-600-8500 or at mhcersonsky@law-crg.com. If using e-mail please reference the Texas Creditor’s Rights course.
I. Debts Secured by Real Property

1. Texas Property Code §51.002
   Texas Property Code §51.003
   Texas Property Code §51.005


3. *Harwath v. Hudson*, 654 S.W.2d 851 (Dallas 1983, writ ref’d n.r.e.)


5. 26 U.S.C. §7425


II. Unsecured Debts


10. *FDIC v. McCrory*, 977 F.2d 192 (5th Cir. 1992)


17. *RTC v. Camp*, 965 F.2d 25 (5th Cir. 1992)


**Defense of Payment**


21. *S.W. Fire & Casualty Co. v. LaRue*, 367 S.W.2d 162 (Tex. 1963)

22. *Naylor v. Gutteridge*, 430 S.W.2d 726 (Tex.Civ.App.—Austin 1968, writ ref’d n.r.e.)

**Guarantor Cases**


**Duty of Good Faith & Fair Dealing - Guarantors & Obligors**


**Impairment of Collateral**


28. Bus. & Comm. Code §3.605(e), (f) & (g)

**Material Alteration**


III. Collecting Debts Secured by Personal Property - Don’t Breach the Peace


32. MBank El Paso, N.A. v. Sanchez, 836 S.W.2d 151 (Tex. 1992)

33. Godwin v. Stanley, 331 S.W.2d 341 (Tex.Civ.App.—Amarillo 1959, writ ref d n.r.e.)

34. Duke v. First National Bank, 698 S.W.2d 230 (Tex.App.—Beaumont 1985, no writ)


35a. Invoking the Court’s Assistance
   1. Pre-Judgment writ of sequestration
   2. Pre-Judgment writ of attachment
   3. Inj./Order

Disposing of the Collateral - The Types of Collateral


37. Tanenbaum v. Economics Laboratory, Inc., 628 S.W.2d 769 (Tex. 1982)


Public Sale v. Private Sale

40. See 9.504(c) (Already copied)

41. Valley Acceptance Co. v. Durfey (waiver of notice), 800 S.W.2d 672 (Tex.App.—Austin 1990, writ denied)

42. MBank Dallas, N.A. v. Sunbelt Mfg., Inc., (notice to debtor), 710 S.W.2d 633 (Tex.App.—Dallas 1986, writ ref d n.r.e.)

43. Barry v. White Oak State Bank, (notice to other lienholders), 677 S.W.2d 707 (Tex.App.—Tyler 1984, writ ref d n.r.e.)

44. 26 U.S.C. §7425 (Already copied)
Commercially Reasonable Disposition.

45. Tex. Bus. & Comm. Code §9.504(c) (Already copied), and §9.507(a)


47. Gordon & Assoc. v. Cullen Bank/City West, 880 S.W.2d 93 (Tex.App.—Corpus Christi 1994, no writ)


49. Tex. Bus. & Comm. Code §9.507(a) and (b) (Collateral sold in a recognized market)


Deficiency Suit Requirements


Accounting for Expenses & Applying Proceeds

54. See Gordon (#47 above)

Limitations


IV. Exemptions - Real Property

62. Texas Constitution Art. XVI, §50

63. Texas Property Code, 41.001 et seq., including Art. 41.,002(a)(b)(c)

64. Harlan v. Schulze, 94 P. 379, 7 Cal.App. (1908)

65. RTC v. Oliveras, 29 F.3d 201 (5th Cir. 1994)


68. Johnson v. Proper State Bank, 125 S.W.2d 707 (Tex.Civ.App.—Dallas 1939), aff’d. 134 Tex. 677, 138 S.W.2d 1117 (1940)


70. Spikes-Nashco v. Manning, 204 S.W. 374 (Tex.Civ.App.-Texarkana 1918, no writ)

71. Alexander v. Lovitt, 69 S.W. 68 (1902)


73. O’Brien v. Johnson, 148 N.W.2d 357, 275 Minn. 305 (1967)

74. Swayne v. Chase, 30 S.W. 1649 (Tex. 1895)
MHC: Personal Note, see p. 460-462 old text

75. RTC v. Oliveras [Type of interest in property required for Homestead Exemption]

76. Matter of England, 975 F.2d 1168 (5th Cir. 1992) [Case on proceeds from sale of homestead]

Exemptions - Personal Property

A. Texas Property Code - Art. 42.001 et seq.

Current wages
Health Aids
Commissions for personal services
Home furnishings
Provisions for consumption
Fanning or ranching vehicles/implements
Trade or professional items
Weaming apparel
Jewelry
Firearms
Athletic and sporting equipment
Family vehicles
Critters for farm or ranch
Critters for the house
Cash value of life insurance
Retirement plan contributions

Benefits Exempt

<table>
<thead>
<tr>
<th>Item</th>
<th>Code/Section</th>
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<tbody>
<tr>
<td>Worker’s compensation</td>
<td>Labor Code §408.201 Labor</td>
</tr>
<tr>
<td>Unemployment Benefits</td>
<td>Code §207.075(b) Insurance</td>
</tr>
<tr>
<td>Health/Life/Accident Insurance</td>
<td>Code §21.221</td>
</tr>
<tr>
<td>Crime Victim benefits</td>
<td>Code of Crim. Pro. §56.49(a)</td>
</tr>
</tbody>
</table>

B. Federal Exemptions

2. Veteran’s benefits                             | 38 U.S.C. §3101                       |
4. Seamen’s (Longshoreman’s) benefits             | 46 U.S.C. §11108 and §11109          |
   (Consumer Credit Protection Act)                |                                       |

Wearing Apparel


78. In Re: Richards, 64 F.Supp. 923 (S.D. Tex. 1946)

79. Matter of Fernandez, 855 F.2d 855 (5th Cir. 1988)

Tools. Equipment Used in a Trade or Profession In Texas

81. *McMillan v. Dean*, 174 S.W.2d 737 (Tex.Civ.App.—Austin 1943, writ ref'd w.o.m.)


84. *In Re: Legg*, 164 B.R. 69 (Bankr. N.D. Tex. 1994)


86. *Phillips v. C. Palomo & Sons*, 270 F.2d 791 (5th Cir. 1959) MHC: Old Text, P. 478-482

V. Wage Garnishment

A. In Texas

87. Texas Property Code §42.001 (b)(1) (Already copied)

88. Texas Civil Practice & Remedies Code §31.0025


90. *Brink v. Ayre*, 855 S.W.2d 44 (Tex.App.—Houston [14th Dist.] 1993, no writ)

B. Garnishment Outside of Texas


C. When Do Wages Lose Exempt Status


93. *Gaddy v. First National Bank*, 115 Tex. 393, 283 S.W. 2d 472 (1926)

Challenging Exemptions

A. Non-Bankruptcy

96. Property Code §42.003(b) (Already copied) MHC: On your draft insert p. M-5 of Chip Mathews Article


100. *In Re: Young*, 166 B.R. 854 (E.D.Tex. 1994) (Insurance Proceeds)

    **Conversion of Non-Exempt Property to Exempt Property**

101. Property Code §42.004 (MHC: See C. Mathews Article p. M-5)

102. *In Re: Driscoll*, 142 F.Supp. 300 (S.D. Cal. 1956) (The general rule ok to transfer, i.e. pay off insurance policy and then file BKA)

103. *Phillips v. C. Palomo & Sons*, 270 F.2d 791 (5th Cir. 1959) (Already copied)

104. *Kangas v. Robie*, 264 F.2d 92 (8th Cir. 1920) - Wrong Cite, ask Librarian for Help.

105. *Hanson v. First Nat I Bank in Brookings*, 848 F.2d 866, 869 (8th Cir. 1988)


107. *First Texas Savings Association v. Reed*, 700 F.2d 986 (5th Cir. 1983)

108. *Ford v. Poston*, 773 F.2d 52 (4th Cir. 1985) -

    MHC: Move Fraudulent Conveyance discussion here. Just a Thought.
Claiming Exemptions

A. Dollar Limitation

Dollar Limitations - Family 42.001(a)(1)
Dollar Limitations - Single Adult 42.001(a)(2)

B. Exclusions from Cap

1. Current wages & health aids 42.001(b)
2. Any exemption not referenced in 42.002 42.001(a)
3. Insurance proceeds, annuities, cash surrender value Insur. Code §1.22, §1


D. Ways to Claim Homestead Exemptions & Statute

1. 
2. 
3. 

MHC: See Mathews Article p. M-4

E. Ways to Claim Personal Property Exemption

1. Property Code §42.001(a), 42.002 and 42.003

MHC: See Mathews Article p. M-4
VI. Debt Collection

A. State Court Common Law Restraints


2. *Santiesteban v. Goodyear Tire & Rubber Co* 306 F.2d 9 (5th Cir. 1962)


4. *Bast v. Ford Motor Credit*, 631 F.2d 508 (7th Cir. 1980)


B. Federal Fair Debt Collection Practices Act


3. What is a debt? §1692a(5)
   a. Old Test - *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3rd Cir. 1987)

4. Who is a debt collector - §1692a(6)
   a. 1 Heintz’s letter
       b. *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103 (6th Cir. 1996)
       d. *Taylor v. Perrin Landry, deLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997) [Both creditor and its attorneys violated act]
5. Examples of Violations of FDCPA
      (Improper Notice Case)

6. Overshadowing
   a. *Swanson v. Southern Oregon Credit Service, Inc.*, 869 F.2d 1222 (9th Cir. 1988)
   b. *Chauncey v. JDR Recovery Corporation*, 118 F.3d 516 (7th Cir. 1997)
   c. *Terran V. Kaplan*, 109 F.3d 1428 (9th Cir. 1997)
   d. *Gammon v. G. C. Serv. Ltd. Pshp.*, 21 F.3d 1254 (7th Cir. 1994) (7th Cir. Test)
      (overshadowing and confusion on amount owed)

7. Attorney Review of files & Attorney Liability
   b. *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996)
   c. *Smith v. Transworld*, 953 F.2d 1025 (6th Cir. 1992)
   d. *Hubbard V. National Bond & Collection Ass 'n, 126 B.R. 422 (D. Del.*
      , aff'd without opinion, 947 F.2d 935 (3rd Cir. 1991)"

8. Bona Fide Error Defense
   b. 15 U.S.C. 1692k(c)
      1. Unintentional
2. Resulted from bona fide error
3. Resulted notwithstanding procedures adapted to avoid such errors

e. De Mininis error - yes - Library
f. De Mininis error - no - Library

9. Venue - 15 U.S.C. 1692i(1) and (2) - *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 507 (9th Cir. 1994)

9.1 Vicarious Liability - Is Creditor liable for Debt Collector’s Actions

a. *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507, 1516 (9th Cir. 1994)
b. *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103,106-108 (6th Cir. 1996)
   (Already copied)

9.2 Limitations

a. *Mattson v. U S. West Communications, Inc.*, 967 F.2d 259 (8th Cir. 1992)

10. Damages

a. 15 U.S.C. 1692k(a), 1692k(b)
b. *Johnson v. Eaton*, 80 F.3d 148 (5th Cir. 1996)
e. *Wright v. Finance Service of Norwalk, Inc.*, 22 F.3d 647 (6th Cir. 1994)
   [Limitations on damages]
g. Defendant’s damages - 15 U.S.C. §1692k(a) - A case may be added here.
h. Attorney’s Fees - *Zagorski v. Midwest Billing Services, Inc.*, 128 F.3d 1164 (7th Cir. 1997)

VII. Texas Debt Collection Act

a. Finance Code §392.001 et seq., formerly V.A.C.S. Art. 5069 - 11.01 et seq.

b. *Catherman v. First State Bank*, 796 S.W.2d 299 (Austin 1990, no writ)
   [Are attorneys covered by Act?]


VIII. Executions

A. The Procedure

1. Tex. R. Civ. P. 621 and 628 (General Authority and time of issuance)
2. Tex. R. Civ. P. 629-633
3. Tex. R. Civ. P. 636-639 (Officer’s procedure when serving writ)
4. Tex. R. Civ. P. 646a-652 (Sale of real and personal property)

B. Dangers of Execution

1. Nulla Bona
3. Wrongful Execution - Southwestern Bell Telephone v. Wilson, 768 S.W.2d 755 (Tex.App.—Corpus Christi 1988, writ denied)

C. Sale of the Property

2. Real Property, Tex.R.Civ.P. 646a, 647
4. How Proceeds of Sale Applied - Byrd supra
5. Costs of Moving and Storage
6. Fraudulent Conveyance Example - Donovan & Rankin, 768 S.W.2d 443 (Tex.App.—Houston [1st Dist.] 1989, writ denied)
Abstracts of Judgment

1. Texas Property Code §52.001 - 52.007, Judgment Liens


3. Revival & Dormancy
   Civil Practice & Remedies Code §34.001 Civil Practice & Remedies Code §31.006


Writs of Garnishment

A. Pre-Judgment

1. Civil Practice & Remedies Code §63.001 et seq.


3. Tex. R. Civ. P. 658a


B. Post Judgment

1. Civil Practice & Remedies Code §63.001

2. Tex. R. Civ. P. 658
   a. Application for writ

3. Tex. R. Civ. P. 662-3
   a. Service of the writ on garnishee


   Answer date


5. Reply Bond - Tex. R. Civ. P. 664

6. Order to Disburse

7. Motion to Dissolve - Tex. R. Civ. P. 664a
   a. *Black Coral Inv. v. Bank of the Southwest*, 650 S.W.2d 135 (Tex.App.—Houston [14th Dist.] 1983, no writ)

   b. *Swiderski* (Already copied)


   e. *Brooks v. Sherry Lane Natl Bank*, 788 S.W.2d 874 (Tex.App.—Dallas 1990, no writ) (Req’d to be sworn to, but is failure to do so fatal?)

8.  Controverting Affidavit
   a.  Tex. R. Civ. P. 673, 674, 675
   b.  **A. Wolfson’s Inc. v. First State Bank**, 152 S.W.2d 614 (Tex.App.—Corpus Christi 1988, writ denied)

9.  Offset
   a.  **San Felipe Natl Bank v. Caton**, 668 S.W.2d 804 (Tex.App.—Houston [14th Dist.] 1984, no writ)
       824 S.W.2d 557 (Tex. 1992)

10. Garnishee’s Attorney’s Fees
    a.  Tex. R. Civ. P. 677
    b.  **City of Houston v. Blackbird**, 658 S.W.2d 269 (Tex. App.—Houston [1st Dist.] 1983, no writ) [Can’t defeat claim by non-suiting]

11. Wrongful Garnishment
        [Types of damages avail - losst bus. opp. and interest at legal rate of money wrongfully retained]
12. What Can be Garnished - That which is not exempt.


**Turnover Orders**

A. Civil Practice & Remedies Code §31.002 - 31.0025

B. *Childre v. Great Southwest Life Ins. Co.*, 700 S.W.2d 284 (Tex.App.—Dallas 1985, no writ) (Timing—can be sought as soon as judgment signed)

C. *Hennigan v. Hennigan*, 666 S.W.2d 322 (Tex.App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.) [No need to exhaust other remedies]

D. Types of Property which can be reached

   To be covered by lecture

F. *Ex parte Buller*, 834 S.W.2d 622 (Tex. App.—Beaumont 1992, no writ)

G. *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317 (Tex.App.—Dallas 1997, no writ)

H. *Schultz v. Cadle Co.*, 825 S.W.2d 151 (Tex.App.—Dallas 1992, writ den. with per curiam opinion) 852 S.W.2d 499

**Receivers**


B. *Childre v. Great Southwest Life Ins. Co.*, 700 S.W.2d 284 (Tex.App.—Dallas 1985, no writ) (Already copied)

C. *Huston v. FDIC*, 800 S.W.2d 845 (Tex. 1990)

D. *Schultz v. Cadle* (Already copied)
   [Factors to balance as to whether to appoint receiver]

E. *Newman v. Toy*, 926 S.W.2d 629 (Tex.App.—Austin 1996, writ denied)
F. Bond Required or Not
   Harmon v. Schoellpple, 730 S.W.2d 376 ([14th Dist.] 1987, no writ)

G. Receiver’s Comp.
   Bergeron v. Sessions, 561 S.W.2d 551 (Tex.Civ.App.--Dallas 1977, writ ref d n.r.e.)

H. Enforcement by Contempt - Add Santibanez?

Fraudulent Conveyances


B. BMG Music v. Martinez, 74 F.3d 87 (5th Cir.1996) (Badges of Fraud - Family)

C. Owen v. Vibrosearch Exploration, Inc., 694 S.W.2d 421 (Tex.App.—Houston [14th Dist.] 1985, writ ref d n.r.e.)

D. Thomas v. Casale, 924 S.W.2d 433 (Tex.App.—Ft. Worth 1996, writ denied)

E. Airflow Houston, Inc. v. Theriot, 849 S.W.2d 928 (Tex.App.—Houston [1st Dist] 1993, no writ)

F. Englert v. Englert, 881 S.W.2d 517 (Tex.App.—Amarillo 1994, no writ)
   [Preference for creditor allowed]
   [Fraudulent intent must be shown by evidence]

G. In Re: WCC Holding Corp., 171 B.R. 972 (Bankr. N.D. Tex. 1994) [Rbly Equivalent Value]

H. In Re: Sherman, 67 F.3d 1348 (8th Cir. 1995) [Badges of Fraud in Bkrcy]
   Copy only p. 1348-1355

I. Limitations - §24.010

Post Judgment Discovery

A. Location of Assets - Non Judicial

B. Location of Assets - Judicial Means - Tex. R. Civ. P. 621a
   L. Tex. R.Civ. P. 168 - Interrogatory
   2. Tex. R.Civ. P. 167(1) - Request for Production
   3. Tex. R.Civ. P. 167(4) - Motion for Production
4. Tex. R. Civ. P. 200, 202 - Depositions
5. Tex. R. Civ. P. 166C
6. Checklist - Post Judgment Questions

C. Sanctions

1. Tex. R. Civ. P. 215
3. In Re: Roberts, 584 S.W.2d 925 (Tex.Civ.App.—Dallas 1979, no writ)
4. Ex parte Vetterick, 744 S.W.2d 598 (Tex. 1988)
5. Ex parte Johnson, 654 S.W.2d 415 (Tex. 1983)
6. Ex parte Herring, 438 S.W.2d 801 (Tex. 1964)
7. Ex parte Conway, 419 S.W.2d 827 (Tex. 1967)
8. Ex parte Kottwitz, 8 S.W.2d 508 (Tex. 1928)
9. Ex parte Johnson, 669 S.W.2d 869 (Tex.App.—Austin 1984, no writ)
10. Examples of Discovery Violations

Arndt v. Farris, 633 S.W.2d 497 (Tex. 1982)

D. Motions for Protection

1. Dresser Industries, Inc. v. Soldo, 668 S.W.2d 893 (Tex.App.—Houston [14th Dist.] 1984, no writ)
2. Downer v. Aqua Marine, 701 S.W.2d 238 (Tex. 1985) cert, denied 106 S.Ct 2279