

## **Texas Debt Collection Laws**

Submitted by M. H. Cersonsky of Cersonsky, Rosen & Garcia, P.C.

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*The firm of Cersonsky, Rosen & Garcia, P.C. ("CRG") has represented creditors, secured and unsecured, commercial and consumer, for over 30 years. The length of our relationship with major creditors speaks well of our commitment to excellence and positive results. We have represented credit unions, medical providers to hospitals and other healthcare facilities, as well as small and medium size creditors such as contractors, manufactures and distributors. The firm works hard to settle cases but is prepared to go to trial, and we then excel at post judgment remedies.*

*M. H. Cersonsky taught creditors rights and remedies at the University of Houston Law School from 1994-2000. He has spoken at collections seminars sponsored by the University of Houston Law School, State Bar of Texas and the Houston Bar Association. Since 2008, he has been on the Planning Committee and a speaker for the State Bar of Texas Collections and Creditors' Rights Courses 2009-2012. In 2012, he was the Course Director for the State Bar of Texas Collections Course 101, as well as a speaker at the advanced course.*

*The firm of can handle high volume, i.e., over 5,000 cases for the Department of Justice, or work with creditors with a smaller number of cases, always providing the highest quality of legal representation.*

### **I. Texas Collection Law in General**

#### **A. Statutes of Limitations – Accounts and Contracts**

Texas has a four-year statute of limitations for claims based on either an account or contract. [Tex. Civ. Prac. & Rem. Code § 16.004\(c\)](#). If the elements of a formal contract cannot be proved, a creditor might still recover under common law theories such as (1) quantum meruit, four years, (2) unjust enrichment, four years, (3) or money had and received, 2 years, (see *Tanglewood Terrace, Ltd. vs. City of Texarkana*, 996 S.W.2d 330, 342 (Tex. App-Texarkana 1999, no pet.)) or 4 years, (see *Amoco Prod. vs. Smith*, 946 S.W.2d 162, 165 (Tex. App. El Paso 1997, no writ)) or conversion, 3 years, [Tex. Bus. & Com. Code §3.118\(g\)](#). Last, Promissory Notes have a 6-year statute of limitations. [Tex. Bus & Com. Code §3.118\(a\)](#)

#### **B. Domestic Judgments**

Domestic or Texas judgments are valid for 10 years. The judgment may be renewed before the end of the 10-year period by attempting execution of the judgment by a sheriff or constable, and the officer returns the writ "nulla bono" (no good), and then files for a new writ of execution to be issued. The judgment

should be abstracted and filed of record in the real property records, in order to create a lien on any non-exempt property.

If a judgment goes dormant, it may be renewed by either a scire facias proceeding, requiring the debtor to show cause why the plaintiff bringing the judgment claim should not have the right to enforce it.

Alternatively, the judgment can be revived by filing an Action of Debt no later than two years after the judgment became dormant. [Tex. Civ. Prac. & Rem. Code § 31.006](#).

### **C. Foreign Judgments**

Foreign judgments, or judgments from other states, may be brought to Texas and enforced as Texas judgments. See [Tex. Civ. Prac. & Rem. Code § 35.003](#) and *BancorpSouth, N.A. vs. Prevot*, 256 S.W.3d 719 (Tex. App. – Houston [14<sup>th</sup> Dist.] 20008 no pet.) (a case handled by Cersonsky, Rosen & Garcia, P.C.) Two points should be noted:

1. the foreign judgment may be registered in Texas so long as it is still a valid judgment in the state where the judgment was rendered; and
2. once the judgment is registered in Texas, it is a Texas judgment and can be enforced and renewed like any other Texas judgment.

There is a general statute of limitations on foreign judgments. [Tex. Civ. Prac. & Rem. Code. § 16.066](#).

This statute bars enforcement of a judgment that is barred in the state of origination. It also bars a judgment against a person who has resided in Texas for 10 years prior to the initial action being filed and brought to Texas. Under certain circumstances, properly renewed judgments from other states can be brought to Texas, even if the judgment is more than 10 years old. See *Prevot* above.

### **D. Bad Check Laws and Civil Penalties**

There is no unique private cause of action for writing a bad check. Instead there are criminal statutes that apply. See [Tex. Penal Code §§ 31.03, 31.06](#) and [32.41](#). Most counties have specific policies and forms that merchants can use when given a bad check. A civil suit may be filed for a bad check, but the legal theory would be money had and received, breach of contract, sworn account, or quantum meruit. Attorney's fees are allowed for breach of contract, sworn account or quantum meruit.

### **E. General Garnishment Exemption and Execution**

Welcome to Texas, a debtor's haven. Texas exemptions regarding garnishment and writs of execution are numerous and generous compared to other states. Here is a quick review:

1. **Wage Garnishment** - Not allowed for creditors, but allowed for child support claims.
2. **Bank Garnishment** – Allowed, but not as to funds that can be traced to an exempt source, i.e., Social Security or Retirement money.

3. **Homesteads** – Generally 100% exempt, except for: (1) purchase money liens, (2) mechanic's and materialman's liens for work on that property, and (3) taxes. Urban homesteads shall not exceed 10 acres and Rural homesteads 200 acres for a family, or 100 acres for a single adult.
4. **Automobiles** – Generally 100% exempt from the claims of third party creditors.
5. **Pensions and Retirement Accounts** – Exempt
6. **Tools of the Trade** – Exempt, i.e., tools, equipment, books, machines used in a trade or profession.
7. **Jewelry** – not to exceed 25% of the dollar limit for personal property - \$60,000.00 for a family, \$30,000.00 for a single adult.
8. **Various other items** – Exempt: home furnishing, heirlooms, food farming and ranching vehicles, firearms, sporting equipment and certain animals.
9. **A dollar cap on exempt personal property:** \$60,000.00 for a family and \$30,000.00 for a single adult.

## **II. Debt Collection Licensing, Bonds and Other Regulations**

### **A. Overview**

Texas does not heavily regulate debt collectors. Texas does regulate various types of lending activities, which is beyond the scope of this paper. Any out-of-state lender should thus consult Texas counsel before operating in Texas. For example, see [Chapter 342 of the Texas Finance Code](#), which governs Secondary Mortgages.

### **B. Laws Affecting Debt Collectors**

#### **1. Laws Affecting Both In-State and Out-of-State Collectors**

The main law affecting debt collectors in Texas is the Texas Debt Collection Act ("TDCA") [Tex. Fin. Code §392](#). This Act is similar to the Federal Fair Debt Collection Practices Act ("FDCPA"), especially as to what is prohibited. Two main differences between the TDCA and FDCPA are:

- a. a creditor collecting its own debt is covered by the TDCA, whereas under the FDCPA only third-party debt collectors are covered; and
- b. the TDCA requires all collectors to have a bond in place for \$10,000.00 in favor of anyone damaged by a TDCA violation and in favor of the State for the benefit of those damaged under the TDCA. See [Tex. Fin. Code § 392.101](#) for the bonds specific requirement.

#### **2. Laws Affecting only Out-of-State Collectors**

If a creditor or collector does not have an office in Texas, such foreign entity must register with the Texas Secretary of State to do business in Texas. See Code [Tex. Bus. Orgs. Code §9.001](#). If the business will be conducted using an assumed name, an assumed name certificate should be filed. [Tex. Bus. & Com. Code §71.101](#). Residential loan servicers must register pursuant to [§ 158.051 of the Texas Finance Code](#), and comply with a bond requirement, i.e., at [§158.055](#). For more information see the Texas Savings and Mortgage Lenders website at [www.sml.texas.gov](http://www.sml.texas.gov).

### 3. **Debt Buyers and Out of State Lawyers**

Texas has no specific statute regulating debt buyers. Out-of-state lawyers should proceed with caution because:

- a. they likely do not have the required bond, and
- b. they run the risk of:
  - i. being perceived to be practicing law without a license in Texas, or
  - ii. even if they try to disclaim they are acting as an attorney, they run a real danger of violating the FDCPA and TDCA by causing confusion as to their authority to bring suit in Texas, or whether they have authority to file suit. See *Gonzales vs. Kay*, 577 F. 3d 600 (5<sup>th</sup> Cir. 2009) (a suit from Texas) and *Leshner vs. Law Offices of Mitchell N. Kay, P.C.*, 650 F. 3d 993 (3<sup>rd</sup> Cir. 2011).

## **III. Overview of Collection Practices**

### **A. Commercial Collections vs. Consumer Collections**

Commercial collections differ from consumer collections in Texas. First, neither the FDCPA nor TDCA apply to commercial collections. Second, none of the laws that protect a consumer's property, such as the homestead law or wage garnishment ban, apply to commercial debtors who are not individuals. Thus, if the debtor is a corporation, limited liability company, or a partnership in which assets are held in the partnership's name, the vast blanket of debtor protections do not apply. Last, if the debtor is still in business, a receiver can be appointed to take over the assets of that business to help satisfy the judgment.

However, commercial claims do have challenges. For example, often a business has closed or the assets have been sold. The threat of a fraudulent conveyance claim can be rebuffed easily, because Texas law allows assets to be sold without any obligation to pay the seller's creditors. Only if no adequate consideration was paid after the debtor was insolvent would there be a basis for a fraudulent conveyance claim. Such claims require far more work than a suit on an account. Thus, many attorneys want a different compensation arrangement for a fraudulent conveyance claim, as opposed to a claim on an account or

contract alone. (To protect itself, a creditor whenever possible, should perfect a security interest in some or all property of the debtor).

## **B. Consumer Collections**

Consumer collections in Texas are difficult. Not only are there numerous protections provided by Texas law, but Texas judges are reluctant to enforce their own orders, which debtors disobey, such as an order to appear at a deposition or produce documents. Holding a judgment debtor in contempt and having the debtor arrested is very rare in state court.

Secured debts are discussed below, but judges will sign sequestration orders ordering a constable or sheriff to seize an automobile or other personal property covered by a security agreement.

Bank garnishments can be effective, but require the filing of a new lawsuit against the garnishee bank and the creditor is responsible for the bank's legal fees in answering the garnishment action. However, if there is little or no money in the debtor's account, many banks will waive their attorney's fees if the creditor will agree to dismiss the garnishment action.

## **C. Secured vs. Unsecured Debts**

### **1. Unsecured Matters**

An unsecured debt is collected by a personal judgment for the amount due, which may then be enforced as any other money judgment – by execution on non-exempt assets of the judgment debtor, by garnishment of a bank or other financial institution account, by appointment of a receiver over the assets of a business, or other collection activity, as allowed by law. The main difference between unsecured and secured matters is that an unsecured debt does not have a specific property securing its payment – collection arises out of a judgment against the general assets of the debtor.

### **2. Secured Matters**

Courts often are more reluctant to grant judgments on commercial matters, as compared to consumer matters (usually because commercial debtors hire attorneys and thus put up more defenses). Our firm has had great success securing judgments on behalf of businesses and financial institutions that are secured by collateral.

Most security agreements give secured creditors the option of proceeding against the collateral or seeking a money judgment (the remedies are cumulative). Usually, however, when a debt is secured by collateral that is worth recovering, our recommendation is to take back or repossess the collateral first, dispose of the collateral as allowed under the Texas Business and Commercial Code (Texas UCC), and then file suit for the deficiency remaining after the foreclosure sale.

The first step for a secured creditor would be to conduct an appraisal of the value of the secured asset to determine if the cost of repossessing it, storing it, and taking the necessary steps to conduct a judicial or non-judicial foreclosure sale, justifies the cost of repossessing and selling it at a commercially reasonable sale. The initial demand letter usually provides that the debtor, after default, should assemble the collateral and return it to the secured creditor at the debtor's expense. Since that is rarely done, the next step is to repossess or take back the collateral (including making it unusable). While repossession may be accomplished by agreement, since that rarely occurs, the creditor should take the necessary steps to legally repossess the collateral. However, care must be taken so as not to breach the peace during repossession.

Following the repossession, the creditor must then provide all required notices and advertisements so that the sale will be upheld as commercially reasonable under the Texas UCC. As noted, the collateral will be sold, either at a public or private sale (depending on who will sell – whether an auction company, which usually conducts a public sale, or if the creditor is in contact with someone who may want to buy the collateral, at a private foreclosure sale). After the sale and the giving of an accounting to the debtor, the creditor may bring suit for the remaining deficiency.

The best position for the creditor is to recover the entire debt from the proceeds of the foreclosure sale. Failing that, the next best position is for the creditor to recover a significant sum from the foreclosure sale, while preserving its right to pursue a deficiency claim against the debtor and any guarantors, to recover the remaining amount due. The deficiency judgment, once obtained, can be collected against any non-exempt assets of the debtor. (Recall corporations, LLC's and certain partnerships do not have exempt property; only individuals do).

The most important aspect of this section, or the “take-away,” is that our firm can analyze, with assistance from the client, the relative costs between taking the secured asset back and selling it at a foreclosure sale, or proceeding to recover a money judgment.

#### **IV. and V. Combined: Costs Related to Court Filing Fees and Process-Serving Options and Costs**

##### **Costs by County, a Sampling of 8 Counties, and Costs for Debtor Exams**

Texas has 254 counties. Consequently, fees from only eight counties will be provided on the attached Exhibit A.

Debtor exams ( usually called post judgment depositions in Texas courts) can be done in two ways: (1) with a court reporter, called stenographically, or (2) without a court reporter, called non-stenographically. If a court reporter is used, there are two charges. The first charge is for the attorney's time, unless the fee

agreement is contingent. The second charge is for the court reporter, who charges on a per page basis, usually \$3 to \$4 a page.

A Court Reporter charges a flat fee of \$75 to \$100 for a Certificate of Non-Appearance, if the debtor does not appear. In addition, there might be other charges if the attorney has to go to court for a motion to compel appearance or compliance with a request for documents. This would depend on the type of fee arrangement with the attorney. If the debtor exam is done without a court reporter, which then requires the use of a tape recorder, no court reporter fees will be incurred.

#### **VI. Significant Cases Brought by the State Attorney General**

None.

#### **VII. Significant Case Law - Beware of the Bond Requirement and Texas Usury Law**

No particular cases can be found in Texas that are unique and different from collection cases in other states. However, as noted in Section II, one should be aware of the bond requirement for consumer debts. Also, be aware of Texas' strong usury laws. Be sure that the interest charge is within Texas' limits for the transaction involved, or that you have a good contract allowing another state's interest rate to apply, namely a contract that will pass muster under Texas law. Please note that Texas does allow usury violations to be cured, but the cure provisions must be strictly followed, so contact a Texas attorney for assistance.

#### **VIII. State Supreme Court Opinions on Ethics and Debt Collection**

None, though collectors who violate either the FDCPA or TDCA are subject to damage claims and attorney fee claims. Furthermore, for the most egregious conduct, the tort of intentional infliction of emotional distress was applied to impose punitive damages in collection cases before the passage of the TDCA.

#### **IX. Additional Case Law— Proving Attorney's Fees in Court and Texas Does Not Recognize Collection Costs for Non-Attorney Debt Collectors**

At the outset, it should be noted that collection costs, such as a contingent fee for a collection agency or forwarder will be not be recognized in Texas. However, a creditor can recover its reasonable and necessary attorney's fees.

A recent case from the Texas Supreme Court reiterates an old requirement that a plaintiff wanting an award of attorney's fees in a contingent fee case must keep time records to prove its reasonable and necessary attorney's fees; and further, the fees must be reasonable in light of the amount of recovery. See *El Apple I. Ltd v. Olivas*, 370 S.W.3d 757 (Tex. 2012). This means the prudent attorney will now keep time records from the beginning of any contingent fee case, thus requiring more work from the attorney and the attorney's staff. This recent case adopted the federal "lodestar method," which requires detailed time records, exercise of good billing judgment (i.e., don't over work the case), and a comparison to the amount recovered. In selecting counsel, a creditor should use counsel with a demonstrated capability of keeping proper time records or face the consequence of not being able to recover one's attorney fees.

*Please be advised that this is not intended as legal advice. Changes to laws, statutes, regulations and costs can and do occur. We recommend that you contact an attorney for advice specific to your legal matters and your state.*

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