

I'VE GOT A JUDGMENT, NOW WHAT?

TURNING YOUR JUDGMENT INTO CASH!

BY
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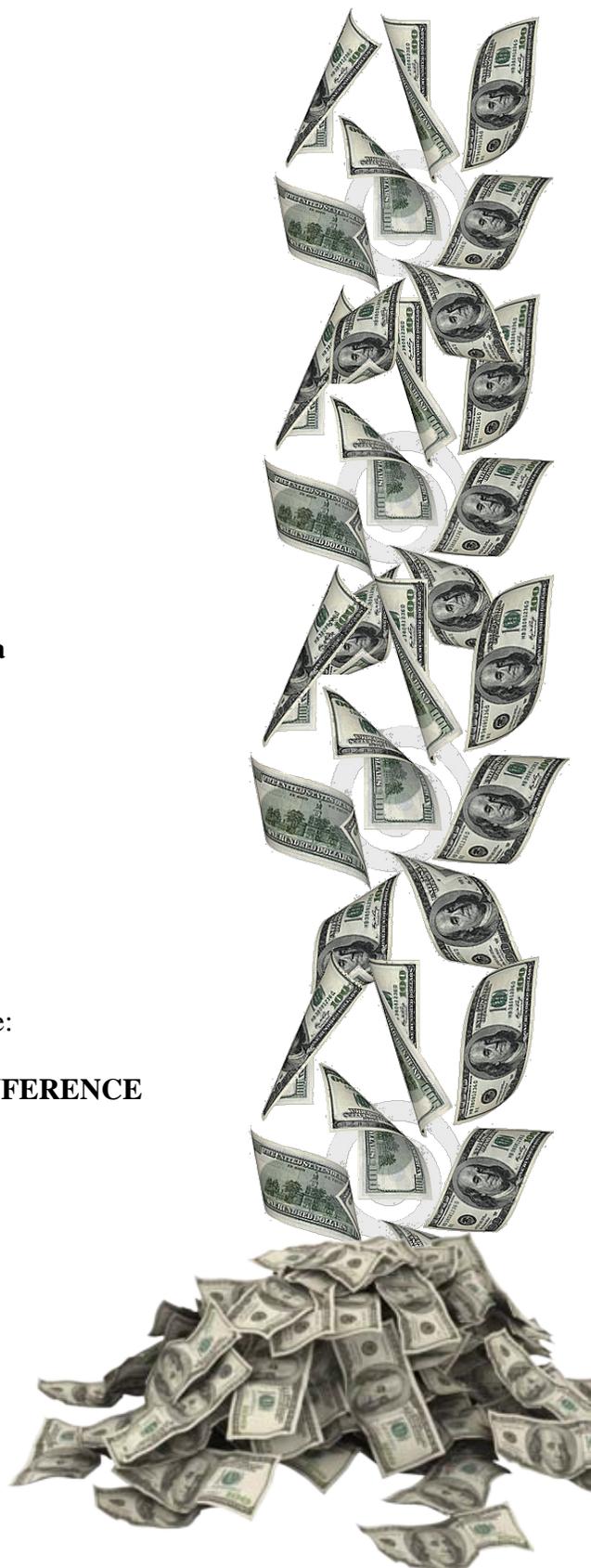


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POST-JUDGMENT REMEDIES IN TEXAS

A. THE JUDGMENT

1. Generally

Before a creditor can collect a judgment, it must obtain a judgment. The size of judgments range from the \$1 awarded to the United States Football League following its anti-trust lawsuit against the National Football League in 1989 (which by the way was trebled to an astonishing \$3), all the way to the \$13 billion judgment awarded in the Pennzoil / Texaco case. Even the most valuable multibillion-dollar judgment is, however, nothing more than a piece of paper. In essence, it is the creditor that determines the true value of the judgment by either collecting it or simply framing it for display. An effective plan to collect a judgment should be formulated with the aims of:

1. Locating available assets of the debtor;
2. Imposing judicial liens on such assets at the earliest possible time; and
3. Selecting the proper enforcement methods to reach particular assets.

2. Interest

Judgments also increase in value after they are obtained, through post-judgment interest. Where the judgment concerns a contract that provided the post-judgment interest rate, the court will allow post-judgment interest to accrue at a rate equal to the lesser of (1) the rate specified in the contract or at (2) 18% a year. TEX. FIN. CODE ANN. § 304.002 (Vernon 2003).

Where the contract does not provide the post-judgment rate, courts will apply a rate equal to the prime rate as published by the Federal Reserve Bank of New York and then subject that rate to Texas floor and ceiling limitations. TEX. FIN. CODE ANN. § 304.002 (Vernon 2003). If the prime rate is less than 5%, then the post-judgment rate will be 5% per annum. If the prime rate is

more than 15%, then the post-judgment rate will be 15% per annum. TEX. FIN. CODE ANN. § 304.003(c) (Vernon 2003).

3. Duration

A judgment is valid and enforceable for ten years after the rendition of the judgment. A writ of execution must be issued within ten years from the date the judgment is rendered or it will become dormant under Texas law. TEX. CIV. PRAC. & REM. CODE ANN. § 34.001 (Vernon 2009). If a judgment becomes dormant, it may be revived by an application for a writ of *scire facias* or by an independent action of debt brought within two years of the date the judgment became dormant. TEX. CIV. PRAC. & REM. CODE ANN. § 31.006 (Vernon 2010).

B. THE JUDGMENT DEBTOR

Judgment debtors range from individual persons to multibillion-dollar, multinational corporations. As a creditor, understanding the identity of the debtor is key to formulating a plan to discover that debtor's assets.

1. Individuals: It is unlikely that an individual debtor will have extensive assets, with the obvious exception of Donald Trump, Bill Gates and the like. As a general rule, a corporation will have more assets than an individual, making a judgment against an individual somewhat less valuable than a judgment against a corporation. In addition, an individual debtor may be much more difficult to track down if he or she decides to avoid paying a judgment. Private investigators, which we will discuss later, may prove invaluable to satisfying a judgment in such cases. The types of assets individuals may own are virtually limitless, ranging from jewelry, clothes, and vehicles to partnership interests, patents, shares of stock, and real estate. However, it is important to remember that many of these types of assets are exempt and not

available for collection at least up to a certain dollar amount. TEX. CONST. ART. XVI; TEX. PROP. CODE ANN. § 41.001 (Vernon 2002).

2. Business Entities: Corporate debtors (or partnerships, LLC, etc.) may have more extensive assets, and may be easier to find, but also may have more sophisticated methods of secreting away assets. Corporations may have subsidiaries, shares of stock in other corporations, and may own valuable patents, copyrights, and trademarks. Although the corporate form protects the assets of individuals in corporations, there are some situations where those assets may be reached, such as when the corporate form is used to achieve an unfair result, or when the corporate charter has been revoked due to failure to pay franchise tax. TEX. TAX CODE ANN. § 171.252 (Vernon 2002). Furthermore, simple partnerships do not have protections from liability for their member partners, so a judgment against a partnership may be satisfied by assets owned by the individual partners.

C. LOCATING ASSETS

The phrase “information is king” is perhaps nowhere more applicable than in collecting judgments. Many times the most difficult aspect of collecting a judgment is finding the non-exempt assets from which to obtain recovery. A common misconception among creditors is that once the judgment is in hand, the money will somehow miraculously appear. Unfortunately, this is rarely the case. Once a creditor discovers the location of the judgment debtor’s bank account, the location of real property owned by the debtor, or the location of an airplane in the name of the debtor, as a practical matter the war is won. The actual collection process then becomes nothing more than mere legal maneuvering and logistics.

1. Post-Judgment Discovery

a. Private Investigators and Asset Search Firms

Information about the location of available, nonexempt assets may be obtained through informal investigation before, during and after the lawsuit. Much of this informal investigation can be performed by the creditor by using informational sources available on the internet, public records, or simply by reviewing the creditor's file on the matter. A quick review of the creditor's file and the attorney's file on the matter can often reveal useful information that may have been overlooked during the litigation since the focus was on the merits of the claim, not the collectibility of the judgment. For example, these files might contain a credit application which may include a financial statement or identify a bank account. These files may also contain returned checks or credit reports which can be used to identify assets. A creditor can help limit the collection cost by performing the informal investigation him/herself.

For some additional cost, creditors may employ a private investigator or asset search firm to locate debtors, assets, or persons with knowledge of either. Asset search firms generally perform different types of public records searches in various degrees of depth and detail depending on how much money the judgment creditor would like to spend. These searches have the advantage of a quicker turnaround (from 3 days up to two weeks, as compared with a turnaround of over a month for formal discovery procedures through the Court). Also, since the debtor is not providing the information, this method often turns up assets that would remain hidden otherwise. A typical "skip trace" fee for locating a missing debtor is \$100 - \$200, and most private investigators will not assess a fee if the subject of the search is not found. Many firms charge less the more information the creditor provides about the debtor. Asset searches

can be more expensive, running from \$125 for a simple employment search up to several thousand dollars for a comprehensive search including, among others, a motor vehicle record search, bankruptcy record search, real property search, liquid asset search, and an assumed name search often in several states or nationwide.

b. Bank Account Searches

Another way to find out information about debtors' assets is to inquire from financial institutions with which the debtor may have dealings. However, an imprudent creditor may run afoul of federal privacy laws by the use of false pretenses. Title 15, Section 6821(a) of the United States Code provides that a person violates the statute if he or she attempts to obtain or attempts to disclose "customer information of a financial institution relating to another person...by making a false, fictitious, or fraudulent statement or representation to an officer, employee, agent, ...(or) customer of a financial institution, or by providing any document to an officer, employee, or agent of a financial institution, knowing that the document is forged, counterfeit, lost, stolen, was fraudulently obtained, or contains a false, fictitious, or fraudulent statement or representation." 15 U.S.C.A. § 6821(a). Furthermore, a creditor that requests a person to obtain information from a financial institution, knowing that the person will use one of the above methods to do so, is just as liable as the person attempting to obtain the information. Thus, the common creditor ploy of calling a bank, claiming possession of a check and confirming that the account has sufficient funds for the check to clear is clearly prohibited by the statute. The penalties for violating this statute include fines and/or imprisonment for up to five years.

c. Formal Discovery

The three most common tools used in discovering what assets the debtor has to pay the judgment are depositions, interrogatories and requests for production of documents. These formal discovery methods may produce more information and are Court-enforceable, but also are more expensive and may “tip off” the debtor that the creditor is aggressively pursuing collection, leading to the debtor concealing or transferring assets.

i. Post-Judgment Depositions

Once the Court signs the judgment, assuming no supersedeas bond is filed to prevent collection efforts pending appeal, the creditor can notify the judgment debtor of its intention to take the debtor’s post-judgment deposition. If the judgment debtor is a corporation, the person deposed is usually the president or a financial officer. The purpose of the deposition is to discover what assets are available to satisfy the Judgment.

In a post-judgment context, the deposition is taken pursuant to the same rules and procedures as in ordinary litigation, except that there is no time limit set on a post-judgment deposition. TEX. R. CIV. P. 621(a). A copy of a notice of post-judgment deposition is attached as Exhibit “1.” The deposition notice is served on the deponent and the deposition is scheduled to be taken before a court reporter. The scope of questioning in a post-judgment deposition is broad. The creditor can ask questions that are reasonably calculated to lead to the discovery of assets or the location of assets to satisfy the judgment. Examples are questions about future employment prospects, questions about future or contingent interests in property, and questions about future plans for a business (mergers, acquisitions, etc.).

Although the standard evidentiary privileges (self-incrimination, attorney-client, trade secrets) do apply to post-judgment depositions, there is no right of privacy a debtor may claim to avoid responding to a creditor's questions about the debtor's assets. *Collier Services Corp. v. Salinas*, 812 S.W.2d 372, 377 (Tex. App.—Corpus Christi 1991, no writ). The *Collier* case illustrates this point well: it involved a creditor filing a motion to compel a debtor corporation to respond to post-judgment discovery about its directors' other business interests. The debtor corporation claimed that disclosing such information would violate a right of privacy held by it and its directors. The Court of Appeals disagreed, reasoning that the creditor's right to discover any possible transfer of assets overrides any possible societal interest in protecting the disclosure of business interests. Thus, the Court held that the debtor had no right of privacy that would protect it from disclosing the business interests of its directors.

In addition, a creditor may take the deposition of third parties (such as nondebtor spouses) who have knowledge of the debtor's assets or are in possession or control of property in which the debtor has an interest, or who owe money to the debtor. A creditor may take the deposition of *any* third party which may have knowledge leading to enforcement of the judgment. Examples of such third parties are accountants, bookkeepers, banks, title companies, insurance companies, law firms, partnerships, brokerage firms, and trustees.

ii. Post-Judgment Interrogatories

A creditor can also send post-judgment interrogatories to a judgment debtor. Interrogatories are written questions designed to discover certain financial information of the debtor. While during pre-trial discovery a party may only send twenty-five (25) interrogatories, in the post-judgment context there is no limit to the number of interrogatories that may be sent. This is because post-judgment discovery is not limited by Rule 190. A judgment debtor has

thirty (30) days to return written answers to the interrogatories. Unlike depositions, interrogatories may not be sent to third persons. TEX. R. CIV. P. 197.1. Interrogatories may request any information to aid in enforcement of the judgment. TEX. R. CIV. P. 621a.

Post judgment interrogatories should, at a minimum, request:

- The name and address of the judgment debtor's spouse and employer;
- The debtor's and spouse's respective income and expenses;
- Identifying information about the debtor;
- A description, value, and location of all of the debtor's and spouse's real and personal assets;
- The name and address of all other creditors of the debtor and spouse, the amounts owed to them, and whether they have any liens or encumbrances on the debtor's property; and
- The present value, description, and location of all real and personal assets valued at over \$200 transferred by the debtor or the spouse to third persons in the last three to five years, and what was paid for each such transfer.

iii. Post-Judgment Requests for Production of Documents to the Debtor

In addition, a creditor can send post-judgment requests for production of documents. These requests require the debtor to produce various categories of documents that will reflect what assets the debtor owns. Rule 196.1 of the Texas Rules of Civil Procedure administers the procedure and rules relating to a "Request for Production and Inspection to Parties." TEX. R. CIV. P. 196.1 (West 2010). Under the Rules, a request must, "specify the items to be produced or inspected, either by individual item or by category, and describe with reasonable particularity each item and category." *Id.* at subsection (b). Just like post-judgment interrogatories, there are no applicable discovery timetables. However, Rule 196.1(b) does state that the "request must specify a reasonable time and place for production." *Id.*

iv. Post-Judgment Requests for Production of Documents to Third-Parties

A creditor also has the ability to serve post-judgment requests for production of documents on non-party, third-party persons. TEX. R. CIV. P. 205.2. Third-party respondents can include accountants, title companies, partnerships, law firms, banks, etc. After providing the debtor with ten (10) days notice, the creditor can then serve a subpoena and written request compelling production of those documents to the third-party. If the third-party fails to respond to the request, the creditor may file a Motion to Compel with the court to obtain a Court Order requiring the third party to produce the documents.

iv. Motions to Compel and Motions for Contempt

If a debtor refuses to appear at his or her post-judgment deposition, to answer the requested interrogatories, or to produce the requested documents, the creditor can file a motion with the Court seeking to compel the debtor's compliance with the discovery request. TEX. R. CIV. P. 215. Following a hearing, the creditor will receive a Court order that "orders" the judgment debtor to comply with the discovery request. If the judgment debtor continues to refuse to comply, the judgment creditor can file a motion for contempt and seek to have the judgment debtor held in "contempt of court" for failing to obey the court's previous order. Although there is no debtor's prison for failing to pay a debt, there is a county jail in which a judgment debtor can be placed if he or she fails to obey a Court order to comply with a legitimate discovery request. Additionally, the Court can award the creditor its attorneys' fees incurred in compelling the debtor to comply with the discovery.

In addition, an order finding a debtor in contempt of court can result in hefty fines, as in *O'Connor v. Sam Houston Medical Hospital, Inc.* In *O'Connor*, a debtor failed to comply with a Court order compelling him to respond to a creditor's discovery requests seeking disclosure of the debtor's assets. As a result, the Court held the debtor in contempt and ordered that he adequately respond by a set date or face a \$1000-per-day fine for each day he did not respond after that date. Not surprisingly, the debtor promptly responded to the discovery. *O'Connor v. Sam Houston Medical Hospital*, 802 S.W.2d 247, 248 (Tex. App.–Houston [1st Dist.] 1990), rev'd on other grounds, 807 S.W.2d 574 (Tex. 1991).

2. Assets to Target

It is important to carefully consider all the possible assets a debtor may own which may be subject to enforcement of the judgment. Such assets include, but are not limited to:

- a. Land;
- b. Leaseholds;
- c. Rents;
- d. Mineral rights;
- e. Shares of stock;
- f. Interests in partnerships;
- g. Insurance policies;
- h. Other judgments;
- i. Trust interests;
- j. Commissions;
- k. Inheritances, bequests, and devises;
- l. Copyrights, trademarks, and patents;
- m. Vehicles, vessels, and aircraft;
- n. Cash;
- o. Bank accounts;
- p. Other personal property.

D. ENFORCING JUDGMENTS

In almost all situations, the first step in collecting a judgment is to perfect the judgment lien. Priority among property liens is generally controlled by the “first in time, first in right”

rule, so a judgment creditor that dallies in filing a judicial lien risks its interest being subordinated to previously created and filed liens on the property.

1. Abstract of Judgment Lien on Real Property

Once a Judgment is obtained a judgment creditor may immediately “abstract” the judgment and file the abstract in the real property records of each county in the state of Texas in which the creditor thinks the debtor might own real property. A form abstract of judgment is attached as Exhibit “2.” The county clerk will charge a small fee to prepare the abstract and to record the abstract in the real property records. Once recorded, the abstract (by operation of law) creates a judgment lien upon all non-exempt real property owned *or later acquired* by the judgment debtor in the county where the abstract is recorded. TEX. PROP. CODE ANN. § 52.001 (Vernon 2003). This lien continues for ten (10) years from the date of recordation and indexing, so long as the judgment does not become dormant or is not otherwise satisfied. § 52.006.

The main advantages of the judgment lien are that it is fast, cheap, and it is less disruptive to the debtor’s affairs, and is thus less likely to trigger a bankruptcy filing. Nonetheless, some debtors still may use bankruptcy to prevent abstracts of judgment from tying up all of their real property, as Texaco did in the Texaco / Pennzoil case. In addition, abstract of judgment liens are only useful to reach a debtor’s interests in real property, not personal property.

While the clerk of the Court may prepare the abstract, it is *extremely important* for either the judgment creditor or its attorney to carefully review the abstract to ensure it complies with the Texas Property Code. Section 52.003(a) of the Property Code mandates that an abstract of judgment must show:

- (1) The names of the plaintiff and defendant;
- (2) The birth date and driver’s license number of the defendant, if available to the clerk or justice;
- (3) The number of the suit in which the judgment was rendered;

- (4) The defendant's address, or if the address is not shown in the suit, the nature of citation and the date and place of service of citation;
- (5) The date on which the judgment was rendered;
- (6) The amount for which the judgment was rendered;
- (7) The amount of the balance due, if any, for child support arrearage; and
- (8) The rate of interest specified in the judgment.

If the abstract does not include the information listed above, it may not create a judgment lien. This was the case in *Texas American Bank v. Southern Union Exploration*. In that case, the abstract did not state the address of the defendant, the nature of the citation, the date of service, the place of service, or the amount of the judgment. The Court of Appeals in *Texas American Bank* reasoned that since the right to a judgment lien is purely statutory, failure to comply completely with the statute means that the lien cannot attach. *Texas American Bank v. Southern Union Exploration*, 714 S.W.2d 105, 107 (Tex. App.–Eastland 1986, writ ref'd n.r.e.).

An abstract should be recorded in all counties where the debtor owns real property as well as the debtor's county of employment, the debtor's county of residence, and even any county where the debtor's family resides, based on the possibility that the debtor could receive an inheritance. Although an abstract may be prepared and recorded before the judgment becomes final,¹ it is important to note that the abstract may not create a judgment lien, if the judgment debtor timely appeals the judgment and posts a proper supersedeas bond.

a. Homestead

The judgment lien created by the recorded abstract will not attach to a debtor's homestead. However, once the debtor ceases to use the property as his or her homestead, the abstract will attach. It is important to determine if the property is in fact the debtor's homestead. While a recorded judgment lien will not attach to the homestead, it can still create a cloud of title on the debtor's property. In such cases, the debtor may have a cause of action against a creditor

¹ A judgment becomes final thirty (30) days after it is signed by the Court (assuming no Motion for New Trial is filed and no Appeal is taken).

who refuses to release the lien on the homestead. *See Tarrant Bank v. Miller*, 833 S.W.2d 666, 667-68 (Tex. App.—Eastland 1992, writ denied).

Section 52.0012 of the Texas Property Code sets-out the procedure for releasing a lien on a homestead property. In order to have a lien released, the judgment debtor must file an affidavit in the real property records of the county where his homestead is located. TEX. PROP. CODE ANN. § 52.0012(b) (Vernon 2003). Thirty (30) days prior to filing, the debtor must mail the creditor a letter stating his intent to file the affidavit with a copy of the affidavit. TEX. PROP. CODE ANN. § 52.0012(c) (Vernon 2003). Once filed, the affidavit effectively releases the judgment lien held on the property. TEX. PROP. CODE ANN. § 52.0012(c) (Vernon 2003). However, if the creditor responds prior to the filing, challenging the veracity of the affidavit, the debtor’s affidavit will not release the lien on the homestead. TEX. PROP. CODE ANN. § 52.0012(e) (Vernon 2003).

Generally, a homestead is an interest in land that is exempt from seizure. Where a debtor sells his homestead, the proceeds from that sale are not available for collection purposes for six (6) months after the date of sale. Tex. Prop. Code §41.001(c). In other words, Texas law affords the debtor up to six months to reinvest the funds into another property allowing the debtor to maintain his “homestead” classification on the new property.

2. Writ of Execution

A writ of execution is a writ that is issued from the Court that rendered the judgment, which instructs the sheriff or constable to levy upon the debtor’s non-exempt property. TEX. R. CIV. P. 637. Pursuant to the writ, the sheriff or constable will take possession of any non-exempt assets and conduct a sale of the assets and the proceeds will be sent to the judgment creditor to be applied toward satisfaction of the judgment. A form writ of execution is attached as Exhibit “3.” A writ of execution will not be issued until thirty (30) days after the judgment is signed.

TEX. R. CIV. P. 627. A writ may be issued prior to this thirty-day period if the creditor files an affidavit stating that the judgment debtor is about to remove non-exempt personal property from the county or the judgment debtor is about to transfer or secrete personal property for the purpose of defrauding creditors. TEX. R. CIV. P. 628.

a. Real Property

If the debtor has real property in the county that is non-exempt and unsecured, the sheriff or constable will conduct a sale of the property and apply the proceeds to the judgment. The sale will occur at the county courthouse between 10:00 a.m. and 4:00 p.m. on the first Tuesday of the month. TEX. R. CIV. P. 646(a). Notice of the sale is published in the county newspaper where the real property is located once a week for three consecutive weeks before the sale. *Id.* The first of these advertisements cannot be distributed less than twenty days prior to the sale. *Id.* Additionally, the creditor must serve the defendant or the defendant's attorney with written notice of the sale, by mail or in person. Tex. R. Civ. P. 647. Notice given to the debtor must "substantially conform" to the specific requirements set out by the rules on the content of the advertisement. *Id.* The advertisement must provide:

- (1.) a statement of the authority by which the sale will be made;
- (2.) the time of the levy;
- (3.) the time and place of sale
- (4.) a brief description of the property;
- (5.) the number of acres, original survey, and location in the county; and
- (6.) the name by which the land is most generally known.

b. Personal Property

If the debtor has personal property that is non-exempt and unsecured, the sheriff or constable will take possession of this property and, after providing ten (10) days notice to the judgment debtor or the person entitled to possession, conduct a sale and apply the proceeds to the judgment. Tex. R. Civ. P. 649. Notice of the sale must be posted in the preceding ten days

immediately before the sale, at the courthouse door of any county and at the place where the sale is to be made. Tex. R. Civ. P. 650. The sale is to take place at the location where it was taken in execution, courthouse door of the county in which it is located, or another location that may be more convenient to exhibit due to the nature of the property.² Tex. R. Civ. P. 649. Where notice has not been properly given and the property is sold in a manner other than what is provided for in the rules, the officer may be liable for actual damages and the sale can be set aside. A sale can also be set aside on a showing by the debtor that the bid price was grossly inadequate and that there were irregularities involved with the sale. *See Collum v. DeLoughter*, 535 S.W.2d 390, 392-93 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.) (failure to notify defendant of sale, failure to allow defendant to designate property to be sold, and misdescription of property were sufficient irregularities).

c. Secured Property

Property that is secured by a mortgage or a pledge can be sold on execution subject to the mortgage or pledge. TEX. R. CIV. P. 643. However, a prior secured creditor can take possession of its collateral even after the levy and before the sale pursuant to its security agreement. *Grocers Supply Co. v. Intercity Inv. Properties, Inc.*, 795 S.W.2d 225, 227 (Tex. App.—Houston [14th Dist.] 1990, no writ). If the prior secured creditor does not choose to exercise its rights, the constable can proceed to sell the property subject to the mortgage. The purchaser is then entitled to possession subject to the mortgage or pledge. TEX. R. CIV. P. 643.

d. Property Exempt from Execution

Certain property is exempt from execution under the laws of the State of Texas.

i. Homestead. A debtor's homestead is exempt. A "rural" homestead includes up to 100 acres (or 200 acres in the case of a family homestead), contiguous or not, in

² This does not include shares of stock or livestock running at large on the range).

an area not served by municipal utilities, fire or police protection. TEX. PROP. CODE ANN. §§ 41.001, 41.002 (Vernon 2005). An “urban” homestead includes one or more lots totaling ten acres or less. *Id.*

ii. Personal Property. The following personal property is exempt:

- Current wages for personal services;
- Personal property in the aggregate amount of \$30,000 (or \$60,000 in the case of a family) which includes – furniture, clothes, jewelry (not to exceed 25% of the exemption limit in value), sporting equipment (but not large items such as jet skis, sailboats, power boats, etc.)³, food, tools, equipment, books, farming and ranching equipment, two firearms, unpaid commissions for personal services, a wheeled motor vehicle, and the following animals:
 - Two horses, mules or donkeys and a saddle, blanket, and bridle for each;
 - 12 head of cattle;
 - 60 head of other type of livestock;
 - 120 fowl;
 - Household pets;
- Unlimited insurance benefits;
- Professionally prescribed health aids of a debtor or debtor’s dependent;
- Alimony, support, or separate maintenance received or to be received by the debtor
- Retirement plans, including individual retirement accounts;
- College savings plans;
- Social security benefits; and
- Veteran’s benefits.

TEX. PROP. CODE ANN. § 42.001 (Vernon 2005).

³ See *In re Crockett*, 158 F.3d 332 (5th Cir. 1998) (jet skis); *In re Gibson*, 69 B.R. 534, 535 (Bankr. N.D. Tex. 1987) (power boats); *In re Griffin*, 139 B.R. 415, 417 (Bankr. W.D. Tex. 1992) (sailboats).

3. Writ of Garnishment

One of the most effective remedies available to a creditor in collecting a debt is a post-judgment garnishment action. A garnishment action is a separate lawsuit against a third party, known as the “garnishee.” Through this suit the creditor claims the right to payment from the garnishee, who is indebted to the judgment debtor. A creditor can garnish both money and property of the debtor that are held by a garnishee. For example, if the judgment debtor has deposited funds into a bank and the bank holds those funds in an account, the bank is indebted to the judgment debtor. The judgment creditor files the garnishment action against the bank to garnish the bank account.

An example of a garnishment action can be found in the case of *Frankfurt’s Texas Investment Corporation v. Trinity Savings and Loan Association*. In *Frankfurt’s*, a creditor investment corporation held a judgment against a debtor to whom it had loaned money. The debtor placed the borrowed funds in an account with a savings and loan association. The creditor, after learning that the debtor did not have any property subject to execution that would satisfy the judgment, sought to garnish the savings and loan account. The Court of Civil Appeals held for the creditor and ordered the account garnished to satisfy the judgment. However, it is interesting to note that because two other creditors had perfected security interests in the account funds *prior* to the garnishment action, they were able to receive distributions from the account before the investment corporation could garnish the account. *Frankfurt’s Texas Inv. Corp. v. Trinity Sav. & Loan Ass’n.*, 414 S.W.2d 190, 192 (Tex. Civ. App.–Dallas 1967, writ ref’d n.r.e.).

a. Procedure for Obtaining a Writ of Garnishment

To obtain a writ of garnishment, the creditor must file an application for writ of garnishment that is supported by an affidavit. In a post-judgment context, the affidavit must

establish that within the creditor's knowledge, the debtor does not possess property in Texas subject to execution sufficient to satisfy the judgment. TEX. CIV. PRAC. & REM. CODE § 63.001 (Vernon 2010); *Thompson v. Harco Nat'l Ins. Co.*, 997 S.W.2d 607 (Tex. App.–Dallas 1998, pet. denied), *disapproved of on other grounds*, 58 S.W.3d 738, 741 (Tex. 2001). To obtain a post-judgment garnishment, the creditor must have a valid subsisting judgment. *Amato v. Hernandez*, 981 S.W.2d 947 (Tex. App. – Houston [1st Dist] 1998, pet. denied) (judgment that was void due to lack of personal jurisdiction could not support writ of garnishment). A judgment is “valid and subsisting” on the day it is signed, unless a supersedeas bond is filed. TEX. R. CIV. P. 657. A bond is required only in a pre-judgment context to protect the debtor if the writ is wrongfully asserted. TEX. R. CIV. P. 658(a).

The writ of garnishment is issued by the Court “ex parte,” meaning without notice to the judgment debtor. It is first served upon the garnishee (i.e. the party who owes the money or property to the judgment debtor). As a practical matter, if the judgment debtor discovers that the Court is issuing the writ of garnishment, he or she may immediately withdraw the funds from the bank or recover possession of the property that is the subject of the garnishment. Thus, once the assets are discovered in the hands of the third party, a garnishment action requires a certain degree of stealth and speed. After the writ is served upon the garnishee, service is immediately made upon the judgment debtor.

After receiving notice of the garnishment, the judgment debtor has an opportunity to file an answer and post a bond to recover the property or funds that are the subject of the garnishment action. If the garnishee does not hold the property or funds alleged by the creditor, the garnishee can file an answer supported by an affidavit attesting to such facts. The garnishee will then be discharged by the Court from further action.

b. Motion to Dissolve

The judgment debtor or any intervening party claiming an interest in the garnished funds or property may file a motion to dissolve or modify the writ of garnishment. TEX. R. CIV. P. 664(a). For example, a bank may have a right of offset against the garnished funds related to a debt the judgment debtor owes the bank. Similarly, a creditor may claim a security interest in the garnished funds or property that is superior to that of the judgment creditor (e.g. if the funds or property were collateral for some previous debt). If a motion to dissolve is filed, the Court will conduct a hearing to consider evidence on the propriety of the garnishment application and the competing claims.

c. The Garnishment Judgment

If the garnishee answers that he or she is indebted to the judgment debtor, the Court will enter a judgment against the garnishee for such amount, unless the amount exceeds the amount of the creditor's judgment. TEX. R. CIV. P. 668. The garnishee must pay the garnishment judgment or be subject to execution by the creditor. TEX. R. CIV. P. 668. The garnishee is entitled to recover attorney's fees, which are normally deducted from the garnished funds prior to being paid to the creditor. *Pan American National Bank v. Ridgeway*, 475 S.W.2d 808 (Tex. Civ. App. – San Antonio 1972, writ ref'd n.r.e). If the garnishee fails to file an answer, the Court may enter a judgment against the garnishee for the full amount of the creditor's judgment, plus interest and costs, *even if* the judgment amount is greater than the amount the garnishee owes to the debtor. TEX. R. CIV. P. 667. Even a defective answer from the garnishee will defeat a default judgment – *Thompson v. Harco Nat'l Ins. Co.*, 120 S.W.3d 511, 514 (Tex. App.—Dallas 2003, pet. Denied).

4. Turnover

The Texas turnover statute provides a judgment creditor with a remedy to obtain assistance from the Court in collecting its judgment by means of a turnover proceeding. Tex. Civ. Prac. & Rem. Code §§ 31.002-.0025, 31.010. A turnover proceeding can be helpful in situations where the debtor owns property that cannot voluntarily be attached or levied through a traditional legal avenue. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 224 (Tex. 1991); *Hennigan v. Hennigan*, 666 S.W.2d 322, 323 (Tex. App.—Houston [14th Dist.], writ ref'd n.r.e.). What is unique about a turnover procedure is that it orders the debtor to deliver the documents or property needed to satisfy the judgment to the Sheriff or Receiver.

a. Procedure for Obtaining a Turnover Order

A judgment creditor is entitled to aid from the Court to obtain satisfaction of the judgment if the judgment debtor owns property, including present or future rights to property that:

- Cannot readily be attached or levied on by ordinary legal process; and
- Is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.

TEX. CIV. PRAC & REM. CODE § 31.002(a) (Vernon 2005).

Once an application for turnover is filed, the Court, after notice and a hearing, may:

- Order the judgment debtor to turnover nonexempt property that is in the debtor's possession or is subject to the debtor's control, together with all documents or records related to the property, to a designated sheriff or constable for execution;
- Otherwise apply the property to the satisfaction of the judgment;
- Enjoin the debtor, and in some instances third parties, from transferring nonexempt property; or
- Appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.

TEX. CIV. PRAC. & REM. CODE ANN. §31.002(b) (Vernon 2005).

b. Property Subject to Turnover

The following property may be the subject of a turnover order:

- Accounts receivable;
- Stock in closely held corporations;
- Notes receivable;
- Cash;
- Interest in an estate possessed or controlled by the debtor;
- Commissions;
- Causes of action;
- Contract rights;
- Stock certificates;
- Royalty checks;
- Income to be received by the debtor from a limited partnership, a contract, a bankruptcy, or the sale of real or personal property;
- Non-exempt vehicles;
- Rents; and
- Property outside the state of Texas.

c. The Current Wages Exception

It is important to note that the court cannot order the turnover of wages (paychecks). TEX. CIV. PRAC & REM. CODE ANN. § 31.002(f); *Caulley v. Caulley*, 806 S.W.2d 795, 797-98 (Tex. 1991). Once a paycheck is deposited into the debtor’s bank account, however, the funds are no longer exempt as current wages and the bank account may be garnished. *Smith v. Bradshaw*, 105 S.W.2d 340 (Tex. Civ. App.–Dallas 1937), writ dismissed and aff’d, 130 Tex. 180, 108 S.W.2d 200 (1937).

i. Loss of “Current Wages” Status

An example of the effectiveness of the Texas turnover statute is evident from a review of the decision in *Schultz v. The Cadle Company*, 825 S.W.2d 151 (Tex. App.–Dallas 1992, writ denied). In that case, the Cadle Company (“Cadle”), a judgment creditor, sought to collect a judgment in the amount of \$43,725.08. The judgment debtor, a wealthy doctor, refused to pay the judgment. Cadle filed an application for turnover seeking to obtain an order from the Court

ordering Schultz to turn over certain income received by Schultz from his professional association. Schultz was receiving checks in the amount of approximately \$11,500.00 every two weeks. Schultz deposited these checks into a limited partnership account and he and his wife wrote checks on that account. Schultz argued that these checks were his “paychecks” and thus were exempt from a turnover order as wages. Cadle argued the property subject to turnover was income from a limited partnership and thus was a “non-exempt” asset. Both the Trial Court and the Court of Appeals ruled in favor of Cadle because they saw no difference between a debtor placing wages into a bank account, thus creating the relationship of debtor-creditor, and a debtor placing wages into a partnership account, thus creating the relationship of partner-partnership.

d. Enforcement of the Turnover Order

If the judgment debtor refuses to comply with the turnover order, the judgment creditor may move the court to enforce its order through contempt proceedings. TEX. CIV. PRAC & REM. CODE ANN. §31.002(c).

5. Charging Orders

To reach a debtor’s limited partnership interest, the creditor must obtain a court order charging such interests with the amount of the judgment TEX. REV. CIV. STAT. ANN. art 6132a-1, § 7.03; *Dispensa v. University State Bank*, 951 S.W.2d 797 (Tex. App.–Texarkana 1997, pet. denied). A charging order is obtained via an application to the court. The effect of the order is to give the creditor the rights of an assignee of the interest, which only entitles the creditor to receive the distributions and allocations of income, gain, credit, and similar items to which the limited partner debtor would be entitled. TEX. REV. CIV. STAT. ANN. art. 6132a-1, § 7.03.

6. Fraudulent Transfers

In certain situations, creditors may challenge and avoid a judgment debtor's transfer of assets to third persons as a means of collecting a judgment. Under the Uniform Fraudulent Transfer Act, creditors may attack transfers made by a debtor (a) with an actual intent to hinder, delay or defraud any creditor (b) while insolvent, without receiving a reasonably equivalent value in exchange for the transfer, and (c) while insolvent to an insider. TEX. BUS. & COM. CODE §§ 24.005, 24.006.

Under the first category, a creditor whose claim arose before or within a reasonable time after the debtor's transfer took place can avoid a transfer made with the actual intent to hinder, delay, or defraud the creditor, provided that the creditor can prove the debtor's *actual intent* was to hinder, delay, or defraud creditors. Generally, however, a debtor's decision simply to pay off one creditor while ignoring others does not constitute "intent to hinder, delay or defraud," and will not constitute a fraudulent transfer. *See Hawes v. Central Texas Production Credit Ass'n*, 503 S.W.2d 234 (Tex. 1973); *see also Englert v. Englert*, 881 S.W.2d 517 (Tex. App. – Amarillo 1994, no writ).

The court may consider several factors when evaluating a debtor's intent, including whether (a) the transfer was made, directly or indirectly, to an insider, (b) the debtor retained possession or control of the property after the transfer, (c) the transfer was concealed, (d) the debtor had been sued or threatened with suit before the transfer was made, (e) the debtor absconded, (f) the debtor removed or concealed assets, (i) the debtor was insolvent or became insolvent shortly after the transfer, (j) the debtor was related to the transferee, and (k) the value of the assets transferred greatly exceeded debts assumed by the transferee. TEX. BUS. & COM. CODE § 24.005; *see also Texas Sand Company v. Shield*, 381 S.W.2d 48, 52-53 (Tex. 1964).

However, if the transferee can show that it took the asset in good faith and for reasonably equivalent value, it can successfully defeat a suit to avoid the transfer. TEX. BUS. & COM. CODE § 24.009(a).

Under the second category, even if a creditor cannot show intent to defraud, it can still attack a transfer if the debtor makes it while insolvent (or becomes insolvent as a result of the transfer) and does not receive reasonably equivalent value. In other words, if a debtor has greater debts than it does assets and is generally not paying its debts as they become due, and transfers assets for a value for which the transferor would not have sold the assets in an arm's length transaction, the creditor can attack the transfer as fraudulent. *See* TEX. BUS. & COM. CODE §§ 24.005.

Under the third and final category, a transfer may be fraudulent if it is made while the debtor is insolvent to an "insider." An "insider" includes, for individual debtors, relatives, general partners, partnerships in which the debtor is a general partner, general partners in such partnerships, and corporations controlled by the debtor. For corporations, an "insider" includes directors, officers, persons in control, partnerships of the corporation, general partners in such partnerships, and relatives of general partners, directors, officers, or persons in control. For partnerships, an "insider" includes general partners, relatives of general partners, and other partnerships in which the debtor is a partner, along with such partnerships' general partners. In addition, affiliates, insiders of affiliates, and managing agents are deemed insiders. *See* TEX. BUS. & COM. CODE § 24.005. An insider can successfully defend against an action brought under the UFTA if it proves that it gave "new value" to the debtor and that the transfer was made in the ordinary course of the debtor's business affairs. *See* TEX. BUS. & COM. CODE § 24.009 (f).

If a creditor prevails in a suit to avoid a transfer under the UFTA, it may obtain (a) avoidance of the transfer to the extent necessary to satisfy its claim (b) an attachment against the asset transferred *or other property of the transferee that is subject to attachment*, (c) execution of a judgment on the asset *or its proceeds*⁴, and possibly (d) extraordinary relief such as an injunction, an appointment of a receiver to take charge of an asset, or other relief that the circumstances may require.

E. PRACTICAL CONSIDERATIONS FOR COLLECTING JUDGMENTS

Collecting information at the beginning of the relationship with the debtor will make post-judgment collection efforts much more successful. If the creditor has a current financial statement that lists real property and bank accounts of the debtor, the creditor can quickly determine the best collection strategy.

Once a creditor determines that a debtor is financially unstable, the creditor should make copies of the debtor's checks that are used to pay the account. With a copy of the debtor's check in hand, garnishment of the account is a routine procedure.

In a post-judgment context, it is true that "the early bird gets the worm." There is a high likelihood that there are other creditors seeking similar relief. By moving quickly, the judgment creditor may be in a position to obtain assets that would not otherwise be available. Good luck "turning your judgments into CASH!"

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⁴ "Proceeds" is not defined in the UFTA, but is defined in another section of the Business and Commerce Code as "whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral." TEX. BUS. & COM. CODE ANN. § 9.102(65)(A).