

PROBLEMS: Unsecured Creditors

Resources:

You should consult the below listed resources as part of your consideration of these problems (in addition to prior cases cited in the outline explaining how to collect an unsecured judgment). These resources are not exhaustive, but should get you started. Particularly for the case law, start by doing a quick read to determine what principle of law the case stands for and think about how that principle might apply to one or more of the problems. For the FTC materials, focus on the Fair Debt Collection Practices Act. You can find copies of the articles and comment online with a simple google search. Cases may be found on LEXIS or WESTLAW.

Federal Trade Commission Materials:

FTC website link [<http://www.ftc.gov/os/statutes/fdcpajump.shtm>]

Supreme Court Cases:

Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969)

D. H. Overmyer Co., Inc. of Ohio v. Frick Co., 405 U.S. 174 (1972)

Fuentes v. Shevin, 407 U.S. 67 (1972)

Connecticut v. Doehr, 501 U.S. 1 (1991)

Heintz v. Jenkins, 514 U.S. 291 (1995)

Other Case Law:

Armond v. Brincefield, Hartnett & Associates, P.C., 175 F. 3d 1013 (4th Cir.1999)

Atlas Auto Rental Corp. v. Weisberg, 281 NYS 2d 400 (1967)

Smith v. Computer Credit, Inc., 167 F.3d 1052 (6th Cir. 1999)

Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997)

Florida Law (of all sorts, including the UCC):

Florida Constitution, Article X, s 4.

Florida Statutes, Title XV, chap 222

Florida Statutes, Title VI, Chap. 55, s 55.05

Florida Statutes, Title XXXIII, Chap. 559, Part VI, ss 559.55-559.785

UCC ss 1-102(3), , 1-201(9), 1-201(19) [1-201(2)], 1-203, 1-208 [1-309], 2-103(b) [1-102(2)], 2-403

Articles and Comments:

Carolyn M. Edwards, Article 3 Demand Notes and the Doctrine of Good Faith, 74 Marquette Law Review (1991) [[LINK](#)]

Comment, Jurisdictional Facts in Enforcement Actions on Cognovit Judgments of Sister States—The Voluntary Waiver, 22 The American University Law Review 765 (1973) [[LINK](#)]

William H. Lawrence & Robert D. Wilson, Good Faith in Calling Demand Notes and in Refusing to Extend Additional Financing, 63 Indiana Law Journal (1988)

Problem:

Ashley is an attorney who represents Local Bank. Carl is a consumer who has a checking account with Local Bank. Carl wrote 24 checks on this account to various stores for the purchase of goods and services. All these checks bounced for insufficient funds in the checking account for which Carl owed Local Bank \$1,200 in charges (i.e. a fee of \$50 for each returned check). (These sorts of returned checks are sometimes known as “NSF” checks—NSF standing for “not sufficient funds”.) The charges represent fees charged by Local Bank to its customers for returned checks; the amount of the checks written were much higher in amount than the \$1,200 in charges. Local Bank asked Ashley to begin collection efforts against Carl to recover these charges.

Ashley's legal practice is mixed; she spends approximately 50% of her time representing creditors in bankruptcy proceedings, with the balance of her practice devoted to debt collection and the occasional representation of a criminal defendant when the court appoints her as counsel for indigents.

Ashley recently sent the following demand letter to Carl (who is not currently represented by counsel—i.e. Carl is *pro se*):

March 1, 2012

Re: Demand of Local Bank for Payment

Dear Carl:

I am an attorney for Local Bank, with whom you maintain a checking account. I am writing this letter to you to collect a debt in the amount of \$1,200.00 for bank charges in connection with 24 NSF checks that were written by you between November 1 and December 31 of last year which Local Bank did not honor due to insufficient funds. Any information obtained from you will be used for the purpose of collecting the debt in question.

Your failure to pay Local Bank the \$1,200.00 it is owed is a very serious matter and should be cleared up immediately. In order to avoid civil and criminal action, please bring cash to our office or send a money order for the entire amount of the debt no later than one week from the date you receive this letter. Or, you could work out a payment plan with Local Bank and/or post valuable collateral to support your obligation. If we must contact your employer and garnish your wages, we will do so. We will not rest until payment in FULL.

Very truly yours,

/s/ Ashley

Ashley

In response to the letter, Carl called Ashley on the phone and told her to “bug off—don't bother me any more—I expect to catch some sushi grade tuna soon in my new fishing business and when I sell it to local distributor I will pay off the charges easy—just chill out.” Ashley called a few more times, early in the morning and late at night, waking Carl up each time.

After Ashley sent the letter, Local Bank learned that Carl had recently purchased a boat which he keeps on a trailer in his driveway—also by writing a check which Local Bank dishonored, payable to Marine Works, for the purchase price of the boat. Local Bank told Ashley to wait a week and then hire a towing company and take the boat to obtain leverage against Carl—hoping that he would pay or that they could at least realize some value from the boat.

Ashley hired a towing company as instructed and, after taking possession of the boat, Local Bank discovered ice chests full of recently caught tuna on board. Ashley called the local fish market and sold the fish for \$1,000, which Local Bank applied to Carl's debt. Assume the sale price for the tuna was fair. Later that day, Marine Works approached Local Bank and demanded that Local Bank turn over possession of the Boat to it because Local Bank had dishonored the check and Marine Works was still owed the purchase price.

Questions:

1. Is Ashley's collection letter legally sufficient? Why or why not? What additions or modifications would you recommend making to the letter? Does it appear that Local Bank or Ashley violated any laws?
2. Would your answer change in any way if Local Bank knew Carl was represented by counsel?
3. How should Ashley have handled Local Bank's request to hire a towing company and take the boat?
4. Does Local Bank have any legitimate claim to the seized tuna or the proceeds received from the sale of the tuna? To the boat?

5. Does Marine Works have any legitimate claim to the seized boat under any circumstances? Could Marine Works have legitimately seized the boat from Carl's driveway if Local Bank's towing company had not taken the boat first?

Problem:

You are a lawyer in the State of Sunshine. Robert, a lawyer in the State of Tennessee, sends you for collection a \$25,000 Tennessee judgment against Darla Debtor, a Sunshine resident. Darla is a self employed independent insurance adjuster who works throughout Sunshine for various out-of state insurance companies. Darla has a vacation home in the State of Sunshine, which is up for sale. There are no non-exempt Debtor assets in the State of Sunshine known to Robert—but he is not sure.

[Exempt assets are assets of a Debtor which are exempt from the reach of legal process by execution and levy. You should read Florida Statutes, Title XV, Chap. 222 to learn about the types of property that states may render exempt from creditor process. You should also look at the Florida Constitution, Article X, sec. 4, which provides a constitutional (and not merely a statutory) basis for the Homestead Exemption. When the problem says that Robert does not know about any non-exempt assets, it means that Robert is not aware of any assets for which a writ of execution might properly issue as a step to collecting on the debt.]

Questions:

Why would Robert send you the Tennessee judgment and what would you like to know about the judgement, if anything?

What can you do to enforce this judgment? Describe the steps you might take, and the alternatives available. Assume that the laws in Sunshine mirror those in Florida.

Before answering the questions posed by the problem, you might read the below discussion (parts of which have been adapted from materials prepared by the Commercial Collection Agency Association [<http://www.ccaacollect.com/images/enforcing.pdf>] and a short article in Primerus by Paul R. Yagelski and Robert A. Galanter [<http://www.primerus.com/business-law-articles/uniform-enforcement-of-foreign-judgments-act-2242011.htm>]). You should also consult the Resources listed following the Discussion.

Discussion:

There are two reasons why a creditor may seek to enforce a judgment in a state other than the state where the judgment was originally obtained:

1. The judgment debtor has moved to another state, and there are no assets available to satisfy the judgment in the original judgment state.
2. The debtor may not have moved, but it is learned there are assets available to

satisfy the judgment in another state.

Under the United States Constitution, a judgment obtained in one state is to be given full faith and credit in other states of the United States. Article 4, Section 1 of the Constitution states:

“...full faith and credit shall be given in each State of the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe that manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”

However, this does not mean that a judgment of one state can automatically be enforced in another state.

Generally, judgments across state lines can be enforced in one of two ways:

1. A new law suit may be filed based on the judgment.
2. Alternatively, in those states that have adopted the Uniform Enforcement of Foreign Judgments Act (the Act), a foreign judgment (defined as a judgment of any state or federal court) may be registered by filing an exemplified copy of the foreign judgment with the appropriate office of the Court and notifying the debtor of the filing.

An exemplified judgment is a copy of the judgment to which a certificate has been attached and signed in three places, once by the judge and twice by the clerk, attesting to the authenticity and validity of the judgment. It is frequently called a judgment that has been authenticated pursuant to an Act of Congress. The Act sets forth the technical procedure that must be followed to register the judgment.

A judgment that has been registered is viewed as a judgment issued out of the Court in which the foreign judgment was filed and all local enforcement procedures would be available to the creditor. A word of caution—the Act is not uniform in all states. Some states, such as New York and Connecticut, will not allow the registration of a default judgment in which case a new law suit must be filed to enforce the judgment.

By way of background, the Act was first propagated by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 1948. It was a response to the problem of courts having to give debtors who had already had a trial in the origin state a second full-scale trial in the execution state.¹ This was causing congestion in the courts.² The 1948 Act provided a summary judgment procedure for actions on foreign judgments.³

The current, revised Act was released in 1964, modeled on 28 U.S.C. §1963, the procedure used in the Federal courts for inter-district enforcement of judgments.⁴ It provides a swift and economical method of enforcing foreign judgments without the

cost of further litigation in the execution state.⁵

The Act has been enacted by all states with the exception of California and Vermont, plus the District of Columbia, U.S. Virgin Islands, and Puerto Rico.

A judgment entered in a United States Federal Court may be enforced in a State Court the same as any other sister state judgment. In addition, it may be registered and enforced in any other Federal District. The procedure to register a federal judgment in another Federal District requires that the Clerk of the Court complete a Court form entitled: "Certification of Judgment for Registration in Another District" to which the Clerk of the Court will attach a certified copy of the judgment. This is then filed in the Federal District Court where the creditor seeks to enforce the judgment. The filing fee is minimal and no notice of the filing is required to be given to the judgment debtor.

Upon filing, the judgment becomes a judgment of that District and the creditor can immediately seek to enforce the judgment. Federal Court judgments are enforced in accordance with the legal procedures authorized by the laws of the state where the Federal District Court is located.

The Uniform Enforcement of Foreign Judgments Act does not apply to judgments of foreign countries. A court of the United States will enforce a judgment of a foreign country based upon either treaty or comity. The United States and some countries have entered into a treaty for the enforcement of judgments. Comity is simply the idea that if a country enforces a judgment of the United States, the Courts of the United States will reciprocate.

Problem:

Brett Bikenut is the owner and sole employee of Bikearama, Inc., which sells new and used bicycles. Several months ago, on a Saturday afternoon, Harold Smooth came into Bikearama' store and admired a used racing bike priced at \$1500. Smooth offered to buy the bike, tendering his personal check. Brett refused to sell Smooth the bike because the check was not certified and Smooth said he had forgotten his driver's license.

Brett says Smooth stayed around for a while, chatting knowledgeably about bikes, and finally asked if he could at least take the racing bike out for a test drive. Brett agreed, and Smooth rode off on the bike, never to return. Meanwhile, Brett says he found Smooth's check on a chair in his office. The check was imprinted "Harold Smooth, Used Bikes and Cycle," and Brett deposited it the following Monday. The bank returned it, stamped "No funds."

At that point, Brett reported the incident to police. A few days later, Brett found an ad on the Web posted by Charles Fence for a bike that sounded just like the one

Smooth had taken. Brett quickly called Fence, a used sporting goods dealer in a nearby town, Fence said he had bought the bike Saturday evening from a man named Smooth for \$ 1000, but had already resold it to another bike dealer for \$1300. Fence said he paid Smooth \$500 in cash and Smooth was to return sometime later for the other \$500. Fence also claimed he had bought two other bikes from Smooth about a year ago, but that he did not know how to contact him. Smooth never returned to Fence for the other \$500, and his whereabouts are unknown. Bikearama filed suit against Fence for conversion of the bike. Fence' answer insists that Fence got good title to the bike, on two theories. First, Fence says that Brett's OK of the test drive gave Smooth "voidable title" to the bike, and that Fence, as an innocent buyer, got good title. Second, Fence says Brett "entrusted" the bike to Smooth, and that allowed Smooth to transfer good title to Fence, a subsequent buyer without knowledge of Bikearama' rights.

Explain who should prevail and why. [Hint: look closely at Atlas Auto Rental to start.]

Problem:

Rhonda Rimney is an elderly socialite from a wealthy family that has fallen on hard times. She lives in the State of Sunshine. She has tried to maintain her lifestyle despite significant losses in her portfolio of stocks—which keep going down in value and which she periodically sells portions of to finance her lifestyle (currently, the stocks in her portfolio have not paid dividends in over 10 years—all start up or growth companies which have yet to show a profit—but which still have a speculative market value).

She had borrowed \$15,000 from Local Bank on two separate notes: the first in the principal amount of \$8,000 to pay for a cruise to the Bahamas for her grandchildren—never telling them or Local Bank that she was close to broke; the second in the principal amount of \$7,000 to pay for horse boarding and jockey fees for her racehorse, Royal Gimp (about which more below). The note evidencing her \$8,000 obligation to Local Bank was a “demand” note, whereas the note evidencing her \$7,000 obligation had a 3 year maturity date, but allowed Local Bank to accelerate its maturity if Local Bank became concerned about repayment.

Following an article published in the the Coconut Beach Tattler which described the financial fall of the Rimney fortune (but did not mention Rhonda specifically), Local Bank demanded immediate payment on both notes from Rhonda—however, Rhonda did not pay despite repeated phone calls from her personal service representative at Local Bank (some calls being made at 6 am—others at midnight).

Local Bank hired an attorney, Max Muscle, to pursue its remedies against Rhonda. Max continued the pattern of phone calls for one week—plus he suggested to her that

her pets might mysteriously die because of a voodoo curse he paid a witch to cast on her. These tactics did not move Rhonda to pay. She repeatedly told Local Bank and Max to stop bothering her, that they should not listen to malicious gossip and that Local Bank had no business demanding payment from her at this time. “Shame on them.” Finally, Max took legal action against Rhonda on behalf of Local Bank to collect both notes.

After obtaining judgments in state court in the State of Sunshine in the total amount of \$15,000 against Rhonda, Max records the judgments, sends Rhonda (now known as the “judgment debtor” interrogatories in aid of judgment), and learns the following: (1) the judgement debtor is a 70-year-old widow whose only income is Social Security (and whose only real income has been Social Security for the past 10 years); (2) the debtor's assets consist of a home (valued at \$1,200,000 with no mortgage), (3) bank accounts (with an approximate total balance of \$40,000--\$1,000 at Local Bank and \$39,000 with other banks); (4) a securities account with Feral Finch Brokerage Service (holding shares of speculative growth stocks worth, perhaps, \$10,000 after all the prior sales made by Rhonda); (5) a motor vehicle (valued at \$20,000, owned free and clear of all encumbrances), (6) miscellaneous personal property (valued at approximately \$10,000, including the family silverware, a collection of animal trophy heads, a Nordic track and various horse racing saddles) and (7) a race horse (valued at approximately \$5,000) and located in another state named “Royal Gimp”. Rhonda has entered Royal Gimp in a race to take place next week at Tennesseetucky Downs—ever hopeful that one big win by Royal Gimp will restore her fortunes.

The State of Sunshine recognizes all applicable federal, non-bankruptcy exemptions and the following State exemptions:

Homestead--unlimited

One motor vehicle--\$5,000

Tools of the trade--\$2,000

Bank accounts--\$10,000

Miscellaneous personal property--\$5,000

The two promissory notes which Rhonda Rimney signed and delivered to Local Bank appear below:

DEMAND COGNOVIT PROMISSORY NOTE

Date: July 1, 2012

ON DEMAND, I, the undersigned Rhonda Rimney, promise to pay to the Order of

LOCAL BANK, its successors or assigns, the sum of EIGHT THOUSAND DOLLARS (\$8,000), with interest at 10.0% per annum commencing from the date of this Note, with interest payable on the first business day of each month, commencing on August 1, 2012.

After said obligation becomes due, in the event of default of payment for monies owed to LOCAL BANK, I hereby authorize any Attorney at Law to appear in any Court of Record in the United States and waive the issuing and service of process and confess a Judgment against me, in favor of the Holder thereof, for the principal amount then appearing due with the interest thereon as aforementioned, together with the costs of suit and attorney's (collection) fees of 25% of the total balance due (as prayed in the Ad Damnum) and thereupon to release all errors and waive all right of appeal.

IN WITNESS WHEREOF, I, Rhonda Rimney have set my hand and seal on the above date in Coconut Beach, State of Sunshine.

/s/ Rhonda Rimney [SEAL]

Rhonda Rimney

* * *

TERM PROMISSORY NOTE

Date: March 1, 2012

I, the undersigned Rhonda Rimney, promise to pay to the Order of LOCAL BANK, its successors or assigns, the sum of SEVEN THOUSAND DOLLARS (\$7,000), on March 1, 2015, with interest thereon at 10.0% per annum commencing from the date of this Note, with interest payable on the first business day of each quarter, commencing on June 1, 2012.

LOCAL BANK has the right to demand payment of the principal amount outstanding, together with any unpaid interest thereon prior to the maturity of the principal amount thereof on March 1, 2015, at any time if LOCAL BANK deems itself insecure with respect to the payment hereunder.

IN WITNESS WHEREOF, I, Rhonda Rimney have set my hand and seal on the above date in Coconut Beach, State of Sunshine.

/s/ Rhonda Rimney [SEAL]

Rhonda Rimney

* * *

Questions:

1. What steps could or should Local Bank or Max have taken against Rhonda prior to legal action to collect the debt? Were the actions taken appropriate or not under existing law? Assume the State of Sunshine has laws identical to the laws of Florida. Does the Fair Debt Collection Practices Act apply to the collection of either note? Is there any analogous state law (in Florida) that might apply to protect Rhonda?

Consider various provisional writs and other actions that might be taken. Among other things, consider whether Local Bank might have obtained a lis pendens or obtained a pre-judgment writ of garnishment.

2. What is a demand note and how does it differ from a term note with a specified maturity date? Did Local Bank have the right to demand payment from Rhonda after it read the article in the Coconut Beach Tattler on either the \$8,000 note or the \$7,000 note? How does a note that provides for payment if the lender feels insecure differ from a demand note?

3. How does the process for reducing the claims of Local Bank to a judgment differ under the terms of the Demand Cognovit Promissory Note from the Term Promissory Note. Is the confession of judgment provision of the Cognovit Note enforceable and, if so, with what caveats and procedures? Would it make any difference if the confession of judgment provisions appeared in the term note rather than in the demand note? If the notes had been specifically governed by the laws of the State of Ohio? Of Florida? Of New York? Why?

4. How should Max proceed to collect on his client's \$8,000 and \$7,000 judgments against Rhonda? Consider whether, and to what extent, the different identified assets owned by Rhonda might be available to satisfy the judgment and what would be necessary to realize on that property. After doing the problem using the State of Sunshine's exemptions, do the same exercise using the laws of Florida.

5. Are there any different, additional or special procedures that Max would need to use to realize value from Royal Gimp?

6. Does Local Bank have a lien on any of Rhonda's assets and, if so, at what time did the lien attach? Assume that the State of Sunshine's laws are the same as those in Florida. Answer the same question, but apply the laws of the State of New York.

Problem:

Mr. Juan "Hideki" Palmero (Palmero) is a fast food entrepreneur who has developed a new food concept. He operates a mobile food cart called Chez Zen Burrito, which sells Tex-Mex and sushi food from a cart everyday at lunchtime in a downtown parking lot. Juan started the business four years ago, registering the name Chez Zen Burrito, LLC (Chez Zen) with the appropriate state authorities. Palmero has complied with all applicable state laws and as of today Chez Zen, LLC is in good standing with the appropriate authority. The bill of sale for the cart names Palmero as the purchaser. Chez Zen borrowed money and executed a promissory note and security agreement in favor of LoneStar Bank (LoneStar) for \$10,000. In the security agreement Chez Zen granted LoneStar a security interest in "all assets" of Chez Zen, specifically listing the mobile food cart as collateral for the loan. No certificate of title governs the cart, and a search of the appropriate public records has turned up no

filings or other information on the cart. The cart has depreciated significantly from heavy use and is currently worth no more than \$5,000. Chez Zen currently owes LoneStar \$5,000 and the loan is not in default.

To finance the daily operations of Chez Zen, Palmero obtained a line of credit in his name from Beans Bank (Beans). Palmero owes \$15,000 on the line of credit, and Beans has properly declared the loan in default and accelerated. Chez Zen has a deposit account at Beans and Beans' records show that as of today Chez Zen has a balance of \$5,000 in its checking account at Beans Bank. Palmero continues to operate Chez Zen. However, a recent food poisoning scare has left him with only a dozen or so customers each day. The most recent financial statement of Palmero that Beans has shows that Mr. Palmero has only three other debts, each for less than \$500 and owed to his brothers. The financial statement showed that Palmero has prepaid an order for \$5,000 in brand new restaurant equipment for his cart to demonstrate to customers that his food is prepared safely. The equipment will be delivered in one month. Chez Zen has only one unsecured creditor, a food supply company, which is owed \$1,000. This food supply account is 180 days past due. Mr. Palmero owns no real property, and in announcing the terms of a recent divorce decree, the judge summarized the property division as basically requiring Palmero to give his wife "everything but the clothes [on his] back." Applicable state law permits a debtor to exempt only four things: one piano, clothes, perishable food, and one vehicle. Beans Bank has asked you to outline the recovery options available to it to collect the debt that Palmero owes it. Specifically, Beans Bank wants to know:

- (a) What assets are available to satisfy its debt? If certain assets are not available, please briefly explain why.
- (b) What is the procedure that it must follow to obtain these assets?
- (e) Is bankruptcy available and useful as a tool to help it collect?