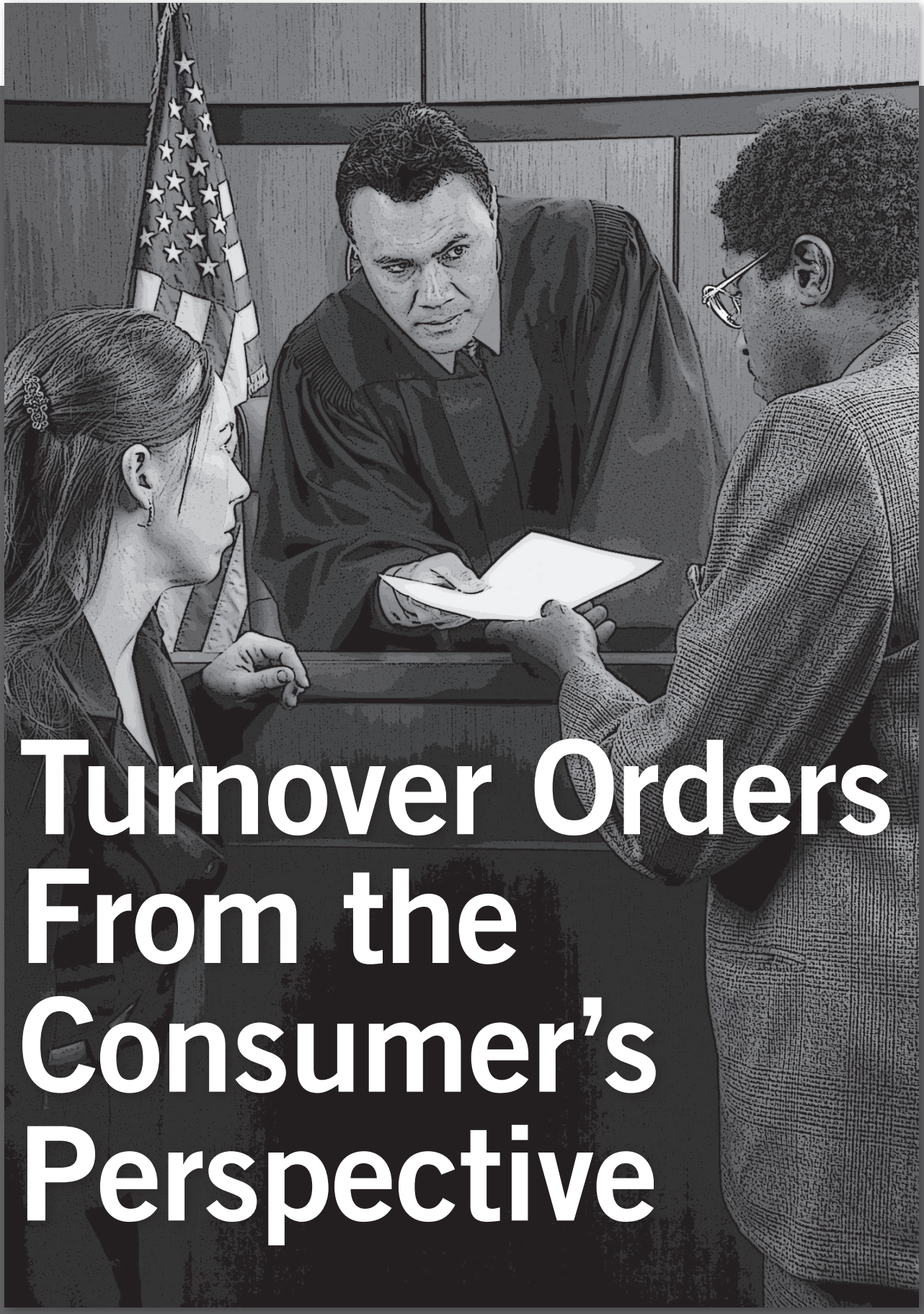


Turnover Orders From the Consumer's Perspective

By Jerry J. Jarzombek*

This article provides a general discussion of the Texas turnover statute.

I. SCOPE

This article provides a general discussion of the Texas turnover statute, Civil Practice & Remedies Code section 31.002. It is not an in-depth study of the turnover statute or turnover receiverships, but a basic treatment of the issues that arise in the trial courts from the perspective of a lawyer who has dedicated his practice to helping consumers. These issues include an examination of the turnover application, the hearing, property that may be subject to turnover, enforcement of the order, motions for new trial and appellate review. Finally, this article discusses how the consumer's attorney might get paid for beating the turnover order.

II. APPLICABLE STATUTES

The turnover statute found at Texas Civil Practice & Remedies Code section 31.002 has recently been amended; the amendment was effective as of June 15, 2017, and amends Section 31.002(a), to delete existing text providing that a judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on 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.* These changes apply to the collection of any judgment, regardless of whether the judgment was entered before, on, or after the effective date. The deleted text is shown below.

Tex. Civ. Prac. & Rem. Code § 31.002

Sec. 31.002. COLLECTION OF JUDGMENT THROUGH COURT PROCEEDING.

(a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that:

~~(1) cannot readily be attached or levied on by ordinary legal process; and~~

~~(2)~~ is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.

(b) The court may:

(1) order the judgment debtor to turn over 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;

(2) otherwise apply the property to the satisfaction of the judgment; or

(3) 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.

(c) The court may enforce the order by contempt proceedings or by other appropriate means in the event of refusal or disobedience.

(d) The judgment creditor may move for the court's assistance under this section in the same proceeding in which the judgment is rendered or in an independent proceeding.

(e) The judgment creditor is entitled to recover reasonable costs, including attorney's fees.

(f) A court may not enter or enforce an order under this section that requires the turnover of the proceeds of, or the disbursement of, property exempt under any statute, including Section 42.0021, Property Code. This subsection does not apply to the enforcement of a child support obligation or a judgment for past due child support.

(g) With respect to turnover of property held by a financial institution in the name of or on behalf of the judgment debtor as customer of the financial institution, the rights of a receiver appointed under Subsection (b)(3) do not attach until the financial institution receives service of a certified copy of the order of receivership in the manner specified by Section 59.008, Finance Code.

(h) A court may enter or enforce an order under this section that requires the turnover of nonexempt property without identifying in the order the specific property subject to turnover.

1. Why was there a need to change the statute

Below is the "Author's/Sponsor's Statement of Intent" regarding the amendment. It is not a model of clarity. The turnover statute is a post-judgment remedy enacted to shift the burden of disclosure of assets from the judgment-creditor to the judgment-debtor. Despite the 2005 amendment's adding paragraph h to eliminate the problem, at least two recent lower court decisions appear to require property subject to turnover to a court-appointed receiver to be specifically identified by the creditor in the application for a turnover order and to prove that the property exists. The rulings make the turnover procedure ineffective in that the debtor is advised in the turnover application and at the hearing what property the receiver intends to take possession of seize and gives the debtor an opportunity to dispose of the property even before a receiver can be appointed. Further, in the event specific assets are unknown at the time of the application to the court, a creditor would be precluded from utilizing the statute. Imagine entering a property with a constable and spotting a $40,000 bulldozer, but being unable to seize it.

Recent cases also require a plaintiff to prove that defendant has non-exempt assets that cannot be readily levied upon: often impossible because defendants hide or refuse to disclose assets. The cases also deny Receivers the right to sell real property because real property can be readily sold at the courthouse steps. This opinion not only violates common practice and understanding, it results in much lower sales prices.

2. Why the reasoning of the author/sponsor is flawed

As someone who has dealt with these issues more than once, some of the reasons given for the amendment seem to escape logic. Here are two examples of the flawed logic:

a. Paragraph h [Tex. Civ. Prac. & Rem. Code § 31.002(h)]

The author/sponsor complains that two recent lower court decisions require the turnover order to specifically identify the non-exempt property subject to turnover, contrary to Tex. Civ. Prac. & Rem. Code § 31.002(h). Essentially the complaint is that these lower courts have chosen not to follow the law and abuse their discretion. Generally, the test for abuse of discretion is whether the trial court acted without reference to any guiding rules and

principles or whether the trial court acted arbitrarily and unreasonably. *See McDaniel v. Yarbrough,* 898 S.W.2d 251, 253 (Tex.1995). However, a trial court has no discretion in determining what the law is and applying the law to the facts. *See Gonzalez v. Reliant Energy, Inc.,* 159 S.W.3d 615, 623-24 (Tex.2005). A failure by the trial court to analyze or apply the law correctly is an abuse of discretion. *Id.* If the author/sponsor is referring to two appellate court decisions, then this would appear to be ripe for consideration by the Texas Supreme Court. *See* Tex. Gov't Code § 22.001(a)(2), (3).

b. Disclosure to the debtor

The author/sponsor complains that the "debtor is advised in the turnover application and at the hearing what property the receiver intends to take possession of seize and gives the debtor an opportunity to dispose of the property even before a receiver can be appointed." But such a disclosure is not required, and usually is not provided. The turnover statute itself does not require notice and a hearing prior to issuance of a turnover order. *See* Tex. Civ. Prac. & Rem. Code § 31.002 ; *see Ex parte Johnson,* 654 S.W.2d 415, 418 (Tex.1983) (stating that notice and hearing prior to issuance of the turnover order was not required under predecessor statute); *Sivley v. Sivley,* 972 S.W.2d 850, 860 (Tex. App. - Tyler 1998, no pet.) ("The statute itself does not provide for notice or a hearing to be afforded a judgment debtor in a turnover proceeding."). The hearing is usually *ex parte,* and the receiver is appointed at the hearing.

3. Where we are as a result of the amendment.

Be mindful that cases which set out the requirements for turnover will incorporate the law prior to the June 15, 2017 effective date, and would apply to a turnover order issued prior to the effective date. A turnover order entered prior to June 15, 2017 will be subject to the prior version of the statute. A turnover order issued on or after June 15, 2017 will be subject to the amendment regardless of when the judgment was entered. The amendment eliminates the requirement that an asset "cannot readily be attached or levied on by ordinary legal process" for turnover to apply. In the most common practice situations, this would seem to eliminate any argument as to the creditor's use of turnover as compared to garnishment in the seizure of accounts at financial institutions.

III. PURPOSE OF TURNOVER

The apparent purpose of the turnover statute is to aid the collection of final money judgments. *Schultz v. Fifth Judicial Dist. Court of Appeals at Dallas,* 810 S.W.2d 738, 739 n. 3 (Tex.1991). The purpose of the turnover statute is to aid diligent judgment creditors in reaching certain types of property of a judgment debtor. *Main Place Custom Homes, Inc. v. Honaker,* 192 S.W.3d 604, 628 (Tex. App. - Fort Worth 2006, pet. denied). The turnover statute is purely procedural; its purpose is to ascertain whether an asset is either in the judgment debtor's possession or subject to her control. *Id.*

IV. TURNOVER RECEIVERSHIP AS COMPARED TO GARNISHMENT

In the world of consumer debt collection, especially collection of credit card debt by both creditors and debt buyers, there has been a surge in the use of turnover receiverships. Consider the filing requirements and the cost, the potential for additional expenses, and the notice requirements.

A. Filing requirements

For turnover relief, a "judgment creditor may move for the court's assistance under this section in the same proceeding in which the judgment is rendered or in an independent proceeding." Tex. Civ. Prac. & Rem. Code § 31.002(d). Garnishment is a "separate suit brought to enforce the judgment." *See Henry v. Ins. Co. of N. Am.,* 879 S.W.2d 366, 368 (Tex. App. - Houston [14th Dist.] 1994, no writ); the ancillary garnishment suit "takes its jurisdiction from the main suit." *Baca v. Hoover, Bax & Shearer,* 823 S.W.2d 734, 738 (Tex. App. - Houston [14th Dist.] 1992, writ denied). An application for turnover relief is brought as a motion, while a garnishment proceeding is a new lawsuit – which requires a filing fee and service on the debtor's bank by a constable.

B. Additional expenses

A garnishment suit requires the payment of a filing fee. If the judgment creditor intends to garnish a financial institution, service of the writ must be by a sheriff or constable. Tex. R. Civ. P. 662. In a turnover, the financial institution will may turn over assets to a receiver upon the receiver presenting a certified copy of the court's order; attorney's fees are awarded to the institution only if there is a contest. Tex. Civ. Prac. & Rem. Code § 31.010.

In a garnishment suit, the garnishee's attorney always gets paid. If the garnishee is discharged upon its answer, the compensation to the garnishee is taxed to the plaintiff/garnishor; in the event of a contest, the court decides which party is responsible for the fees of the garnishee. Tex. R. Civ. P. 677. In a turnover, the financial institution will assess an administrative fee against the judgment defendant's funds, but there will not be an attorney fee for appearing in the case.

C. Applicability to more than one account

A garnishment suit is brought against a single financial institution; a receiver would be able to levy on each bank where the judgment debtor has an account.

D. Longevity

A garnishment suit is brought against a single financial institution, and that's it. If the court finds that the garnishee is indebted to the defendant in any amount, or was so indebted when the writ of garnishment was served, the court shall render judgment for the plaintiff. Tex. R. Civ. P. 668. The funds captured by the writ of garnishment are those held by the garnishee in the account of the judgment debtor on the date the writ is served, and any additional funds deposited through the date the garnishee is required to answer. *Newsome v. Charter Bank Colonial,* 940 S.W.2d 157, 164 (Tex. App. - Houston [14th Dist.] 1996, writ denied). A receivership continues until the judgment is satisfied, or the receivership is closed.

E. Notice

The writ of garnishment, the application and any supporting affidavits must be served on the judgment debtor "as soon as practicable following the service of the writ." Tex. R. Civ. P. 663a. While there is no set time in the rule, fifteen days has been held to be too long. *Lease Finance Group, LLC v. Childers,* 310 S.W.3d 120, 126 (Tex. App. - Fort Worth 2010, no pet.). Section 31.002 requires neither notice nor a hearing before the court is-

The turnover statute gives the court the power to "order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control."

sues a turnover order. *See Ex Parte Johnson,* 564 S.W.2d 415, 418 (Tex. 1983) (stating that notice and hearing prior to issuance of the turnover order is not required).

V. AN OVERVIEW OF THE TURNOVER PROCESS

The turnover statute gives the court the power to "order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control." Tex. Civ. Prac. & Rem. Code § 31.002(b)(1).

A. Discretionary

The statute provides: "The court ***may*** order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control ..." (emphasis added). Tex. Civ. Prac. & Rem. Code § 31.002(b)(1)-(3). The language, therefore, is discretionary, as opposed to mandatory. The requested turnover relief is directed to the sound discretion of the trial court. *Barlow v. Lane,* 745 S.W.2d 451 (Tex. App. - Waco 1988, writ denied). Often creditors claim that they are *entitled* to turnover relief, because the statute says so in 31.002(a). However, the cases interpreting the language come down on the side of turnover relief being discretionary.

B. An injunction

Texas courts have concluded that turnover orders are final, appealable orders because they are analogous to mandatory injunctions requiring a judgment debtor to turn over property. *Schultz v. Fifth Judicial Dist. Court of Appeals at Dallas,* 810 S.W.2d 738, 740 (Tex.1991) (orig. proceeding) ("The turnover order at issue in this case resolved the property rights issues and acted as a mandatory injunction as to the judgment debtor Schultz and the receiver. We therefore hold that the turnover order was in the nature of a mandatory injunction and was appealable."), abrogated on other grounds by *In re Sheshtawy,* 154 S.W.3d 114 (Tex. 2004) (orig. proceeding). A turnover order normally acts as a mandatory injunction since it directs the judgment debtor to undertake some act. *Bahar v. Lyon Fin. Serv., Inc.,* 330 S.W.3d 379, 386 (Tex. App. - Austin 2010, pet. denied).

1. What about Justice Courts issuing turnover orders?

As creatures of statute, justice courts are governed by a legislative grant of jurisdiction. *Color Tile, Inc. v. Ramsey,* 905 S.W.2d 620 (Tex. App. – Houston [14th Dist.] 1995, no writ). The extraordinary remedies of a justice court are stated in the Texas Government Code. "A justice of the peace may issue writs of attachment, garnishment, and sequestration within the justice's jurisdiction in the same manner as judges and clerks of the district and county courts." Tex. Gov't Code § 27.032. There is no statutory authority that permits a justice court to appoint a receiver and issue a turnover order. In the judicial system of this state, a justice of the peace cannot exercise the extraordinary powers of equity jurisdiction in granting injunctions, mandamus and like equitable processes; such powers are conferred exclusively on the district courts. The justice courts, by statute, are given exclusive jurisdiction in certain classes of cases to give relief against wrong and injustice, but they are not granted the power to issue writs of injunctions and mandamus. *L. W. Crawford v. J. Q. Sandridge,* 75 Tex. 383, 12 S.W. 853; *Poe v. Ferguson,* Tex. Civ. App., 168 S.W. 459; *Kieschnick et ux. v. Martin et al.,* Tex. Civ. App., 208 S.W. 948; *Houston Heights Water & Light Ass'n et al. v. Gerlach et al.,* Tex. Civ. App., 216 S.W. 634.

Some justice courts will issue a turnover order, while others will not. My experience has been that some justice courts feel this is an unsettled area of the law, that is to say that some justice courts believe that the statute allows the issuance of turnover orders, while others do not. But, interpretation of a statute is a pure question of law over which a judge has no discretion. *See Mitchell Energy Corp. v. Ashworth,* 943 S.W.2d 436, 437 (Tex.1997). Thus, a trial court has no discretion in determining what the law is or applying the law to the facts. *See Huie v. DeShazo,* 922 S.W.2d 920, 927 (Tex.1996). Consequently, a trial court's erroneous legal conclusion, even in an unsettled area of law, is an abuse of discretion. *See id.* at 927-28. Although a turnover order is not reviewed under a sufficiency of the evidence standard, the lack of any evidence to support a turnover order is a relevant factor in determining whether the trial court abused its discretion in entering it. *See Beaumont Bank, N.A. v. Buller,* 806 S.W.2d 223, 226 (Tex.1991).

a. Justice Courts have issued turnover orders

The Corpus Christi Court of Appeals determined that a turnover order issued by a justice court was voidable (and not void), and not subject to collateral attack. *In re Wiese,* 1 S.W.3d 246, 250–51 (Tex. App. - Corpus Christi 1999, orig. proceeding) (turnover order failed to include evidentiary findings relating to amount of property to be seized and whether debtor owned sufficient property to satisfy judgment and failed to make provisions for debtor's reasonable and necessary business expenses). While the court in *Wiese* gave several reasons for why a judgment is void, stating "a judgment is void if it is apparent that the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to render the judgment, or no capacity to act as a court," (*Id.* at 250), it never considered whether the justice court had jurisdiction to issue a turnover order and appoint a receiver.

A Houston Court of Appeals held that the failure to timely prosecute a direct appeal of the turnover order or seek injunctive or mandamus relief prohibiting the execution of the turnover order was fatal to the defendant's appeal. *Davis v. West,* 317 S.W.3d 301, 310 (Tex. App. - Houston [1st Dist.] 2009, no pet.).

b. Proof of facts is a court of no record?

Upon proof of the necessary facts, section 31.002 authorizes the trial court to order affirmative action by the judgment debtor and others to assist the judgment creditor in subjecting such nonexempt property to satisfaction of the underlying judgment. *Schultz v. Fifth Judicial Dist. Court of Appeals at Dallas,* 810 S.W.2d 738, 740 (Tex. 1991). How can there be proof of necessary facts in a court without a court reporter? The application

for turnover order and the arguments of counsel are not evidence upon which the trial court could have based its order. *See McCain v. NME Hospitals, Inc.,* 856 S.W.2d 751, 757 (Tex. App. - Dallas 1993, no writ); *Delgado v. Kitzman,* 793 S.W.2d 332, 333 (Tex. App. - Houston [1st Dist.] 1990, no writ). When there is no indication the trial court was presented with or considered any evidence to support the requirements of section 31.002 of the Texas Civil Practice and Remedies Code when it made its ruling, a reviewing court will conclude the trial court abused its discretion in granting the turnover order. *HSM Dev., Inc. v. Barclay Props., Ltd*., 392 S.W.3d 749, 752 (Tex. App. - Dallas 2012, no pet.).

C. Turned over to whom?

The debtor may be ordered to turn over nonexempt assets to a sheriff or constable, to pay into the registry of the court for satisfaction of the judgment, or the court may appoint a receiver. Tex. Civ. Prac. & Rem. Code § 31.002(b)(1)-(3). Property is not to be turned over directly to the judgment creditor. The potential for error or abuse where turnover is ordered directly to judgment creditors is obvious, considering that the statute allows ex parte entry of the order without notice and hearing. *Ex parte Johnson,* 654 S.W.2d 415, 418 (Tex. 1983).

D. Nonexempt property

Only nonexempt property is subject to turnover. Texas courts have struggled with the issue of what types of property are subject to turnover. *Ex parte Prado,* 911 S.W.2d 849, 850 (Tex. App. - Austin 1995, orig. proceeding). For example, courts cannot order the turnover of "current wages," which are exempt from seizure under the property code. *See* Tex. Prop. Code § 42.001(b)(1) (current wages exempt except to enforce child support). Courts have, however, ordered the turnover of paychecks on the theory that they were no longer exempt as "current wages" once they had been paid to, and received by, an employee who was a judgment debtor. *See, e.g., Schmerbeck v. River Oaks Bank,* 786 S.W.2d 521, 522 (Tex. App. - Texarkana 1990, no writ). Similarly, courts had ordered the turnover of retirement paychecks on the theory that retirement benefits were no longer exempt once they had been paid to, and received by, a judgment debtor. *See, e.g., Cain v. Cain,* 746 S.W.2d 861, 864 (Tex. App. - El Paso 1988, writ denied).

In 1989, however, the legislature overruled this line of cases by amending the turnover statute to provide that a court may not enter or enforce an order that requires a judgment debtor to turn over the proceeds of, or disbursements of, property that is exempt under any statute (except to enforce child support obligations). *See* Tex. Civ. Prac. & Rem. Code § 31.002(f). This amendment was intended, in part, to prevent turnovers of paychecks, retirement checks, and other similar types of assets after a judgment debtor received them. House Comm. On The Judiciary, Bill Analysis, Tex. H.B. 1029, 71st Leg., R.S. (1989). Thus, even when property is no longer exempt under any other statute, if it represents proceeds or disbursements of exempt property, it is not subject to a turnover order. *See Caulley v. Caulley,* 806 S.W.2d 795, 798 (Tex.1991); *Bergman v. Bergman,* 888 S.W.2d 580, 586 (Tex. App. - El Paso 1994, no writ).

E. Attorney's fees

The judgment creditor is entitled to recover reasonable costs, including attorney's fees. Tex. Civ. Prac. & Rem. Code § 31.002(e).

VI. THE APPLICATION FOR TURNOVER

A. What should the application for turnover include?

There is little authority of what has to be in an application for turnover. Here is what the judgment creditor should probably include:

- Facts concerning the original judgment;
- An itemization of the property, documents or records to be turned over;
- A suggestion of where and how the property, documents or records should be stored;
- If a receiver is to be appointed, the application may suggest the appointment of a certain receiver and include a statement of his/her qualifications in light of the nature of the judgment debtor's business or assets.

See David Hittner, *Texas Post-Judgment Turnover and Receivership Statutes,* 45 Tex. B.J. 417, 417-18 (1982).

B. What is often included (whether or not it is correct)

I have seen all sorts of things in applications for turnover relief and requests for an appointment of a receiver. Some things are logical; others make no sense:

- Applications that seek only accounts at financial institutions (prior to June 15, 2017);
- Applications which seek turnover because garnishment is too expensive (prior to June 15, 2017);
- Affidavits that swear to the nonexempt status of bank accounts (that contain proceeds of exempt property);
- Applications that specify the receiver AND the hourly rate at which the creditor's attorney will be paid by the receiver;
- Applications which claim that the receiver is employed by the creditor's attorney;
- Applications and affidavits that claim the debtor owns nonexempt property but fails to identify any;
- Applications and affidavits that claim the debtor never answered post-judgment discovery, when no post-judgment discovery was ever sent;

VII. THE TURNOVER HEARING

The purpose of the hearing is to make a showing to the court. Remember, "upon proof of the necessary facts, it authorizes the trial court to order affirmative action by the judgment debtor and others to assist the judgment creditor in subjecting such nonexempt property to satisfaction of the underlying judgment." *Schultz v. Fifth Judicial Dist. Court of Appeals at Dallas,* 810 S.W.2d 738, 740 (Tex. 1991). It is an abuse of discretion for a trial court to enter a turnover order without any evidence to support the order. *Clayton v. Wisener,* 169 S.W.3d 682, 684 (Tex. App. - Tyler 2005, no pet.). Evidence of nonexempt assets must be admitted into evidence before the trial court can enter a turnover order. *Id.* Motions and arguments of counsel are not evidence. *Id.* Accordingly, before a trial court may grant relief under section 31.002(b), the conditions of section of 31.002(a) must exist, namely,

(1) the entity that is to receive aid must be a judgment creditor;

(2) the court that would grant aid must be one of appropriate jurisdiction;

(3) the aid to be given must be in order to reach property to obtain satisfaction on the judgment; and

(4) the judgment debtor must own property (including present or future rights to property) that:

(a) cannot be readily attached or levied on by ordinary legal process and

(b) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities. *[Note that (4)(a) will not apply to*

an application on or after June 15, 2017, regardless of the date of the underlying judgment]

Tanner v. McCarthy, 274 S.W.3d 311, 322 (Tex. App. – Houston [1st Dist.] 2008, no pet.). There is an exception to the requirement of the trial court receiving evidence at the turnover hearing. In *Sivley v. Sivley,* 972 S.W.2d 850 (Tex. App. - Tyler 1998, no pet.), "the trial court had already heard on at least three occasions evidence and arguments on the contested issues which culminated in the turnover order. Thus, we conclude that the trial court's decision to grant the turnover order without a hearing or the presentation of evidence was not unreasonable or arbitrary and was not an abuse of discretion." *Id.* at 862.

A. Must be a judgment creditor

While this seems relatively straightforward, remember the trial court "must have some evidence before it that establishes that the necessary conditions for the application of 31.002 exist." *Tanner,* 274 S.W.3d at 322. Importantly, section 31.002 does not specify or restrict the manner in which evidence may be received in order for a trial court to determine whether the conditions of 31.002(a) exist, nor does it require that such evidence be in any particular form, that it be at any particular level of specificity, or that it reach any particular quantum before the court may grant relief under section 31.002. *Tanner,* 274 S.W.3d at 322. In *Henderson v. Chrisman,* 05-14-01507-CV, (Tex. App. – Dallas 4-27-2016, no pet.)(mem. op.), the Chrismans attached an affidavit to their motion for post-judgment turnover stating, in part, that the agreed judgment obtained on September 20, 2013 between the parties was "in all things final, valid, subsisting, unpaid, and is unsatisfied" in the amount of $245,686. They attached the agreed judgment as an exhibit to the affidavit. Thus, the trial court had some evidence before it satisfying this necessary condition."

B. Must be a court of appropriate jurisdiction

1. The court that rendered the judgment

The judgment creditor may move for the court's assistance under this section in the same proceeding in which the judgment is rendered or in an independent proceeding. Tex. Civ. Prac. & Rem. Code § 31.002(d). After its plenary power has expired, a trial court retains the inherent power to enforce its judgments. "The court shall cause its judgments and decrees to be carried to execution … and in such case may enforce its judgment by attachment, fine and imprisonment." Tex. R. Civ. P. 308. The general rule is that every court having jurisdiction to render a judgment has the inherent power to enforce its judgments. *Arndt v. Farris,* 633 S.W.2d 497, 499 (Tex. 1982). In *Haden v. David J. Sacks, P.C.,* 332 S.W.3d 523 (Tex. App. - Houston [1st Dist.] 2009, pet. denied), a Houston court of appeals determined that the "court of appropriate jurisdiction" was initially the trial court. *Id.* at 531.

2. The bankruptcy court

When the debtor filed his petition for bankruptcy, the only court in which the law firm could pursue relief in order to obtain satisfaction of the judgment thus became the bankruptcy court; the bankruptcy court became the only possible "court of appropriate jurisdiction" in which the law firm could pursue its execution efforts. *Id.*

3. An independent proceeding

This would require that the new court have jurisdiction over the parties and over the subject matter. This would limit post-judgment discovery, as discovery must be initiated and maintained in the same trial court where the judgment was rendered. *See* Tex. R. Civ. P. 621a.

C. To reach property to obtain satisfaction on the judgment

This requires a factual showing that the debtor owns assets. This could be that the defendant owns bank accounts, has accounts receivable, rental income, etc. What usually happens is that the application is supported by a conclusory affidavit that makes a statement, often on information and belief and without foundation, as to what the defendant owns. The affiant is not present at the hearing, and frequently the applicant has no other witness who can testify to the defendant's assets, and submits no evidence.

D. The property is not exempt from attachment, execution, or seizure for the satisfaction of liabilities

This requires a factual showing that the assets that the debtor owns are not exempt property, or proceeds of exempt property. In 1991, the Texas Supreme Court interpreted Tex. Civ. Prac. & Rem. Code § 31.002(f) in *Caulley v. Caulley,* 806 S.W.2d 795 (Tex. 1991):

> By prohibiting the turnover of the proceeds of property exempt under any statute, this section necessarily prohibits the turnover of the proceeds of current wages. Tex. Prop. Code § 42.002(8) (listing current wages as one of the personal property items exempt from attachment, execution, and seizure by creditors). *Id.* at 798.

The 1989 amendment was intended, in part, to prevent turnovers of paychecks, retirement checks, and other similar types of assets after a judgment debtor received them. House Comm. On The Judiciary, Bill Analysis, Tex. H.B. 1029, 71st Leg., R.S. (1989). Thus, even when property is no longer exempt under any other statute, if it represents proceeds or disbursements of exempt property, it is not subject to a turnover order. *See Caulley v. Caulley,* 806 S.W.2d 795, 798 (Tex.1991); *Bergman v. Bergman,* 888 S.W.2d 580, 586 (Tex. App. - El Paso 1994, no writ).

Frequently, creditors and their attorneys will argue that once a paycheck is deposited into the defendant's bank it is no longer exempt because it was no longer "current wages." *In the past* Courts had ordered the turnover of paychecks on the theory that they were no longer exempt as "current wages" once they had been paid to, and received by, an employee who was a judgment debtor. *See, e.g., Schmerbeck v. River Oaks Bank,* 786 S.W.2d 521, 522 (Tex. App. - Texarkana 1990, no writ). Similarly, courts had ordered the turnover of retirement paychecks on the theory that retirement benefits were no longer exempt once they had been paid to, and received by, a judgment debtor. *See, e.g., Cain v. Cain,* 746 S.W.2d 861, 864 (Tex. App. - El Paso 1988, writ denied).

In 1989, *the legislature overruled this line of cases by amending the turnover statute* to provide that a court may not enter or enforce an order that requires a judgment debtor to turn over the proceeds of, or disbursements of, property that is exempt under any statute (except to enforce child support obligations). [emphasis added]. *See* Tex. Civ. Prac. & Rem. Code § 31.002(f).

1. When "wages" are not exempt

a. *Hennigan v. Hennigan,* 666 S.W.2d 322 (Tex. App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.)

> "Can an attorney's fee for legal services rendered or to be rendered in a single case, or in the transaction of a single matter, or in the transaction of any amount of legal business, in any manner be correctly termed "current wages," where he has not been hired for his services by the day, week, or month, to be paid at the

expiration of the time for which he was hired, and not in proportion to the business done? We think not." *Id.* at 324. An attorney engaged in private practice is an independent contractor and does not receive current wages. *Id.* at 324-25.

b. *Brasher v. Carnation Co.,* 92 S.W.2d 573 (Tex. Civ. App. - Austin 1936, writ dism'd)
Cases have developed the concept of "current wages" and have settled on the opinion that the term "implies a relationship of master and servant, or employer and employee, and excludes compensation due to an independent contractor as such." *Id.* at 575.

c. *Stanley v. Reef Securities, Inc.,* 314 S.W.3d 659 (Tex. App - Dallas 2010, no pet.)
Under appropriate circumstances, however, an agreement for compensation, express or implied, will be enforced. But the appropriate circumstances generally require a showing that the partner seeking compensation devoted time and attention to the partnership that was not anticipated at the time the partnership was formed. We do not have those circumstances here. R.H.S.'s restated and amended partnership agreement does not contain any provision for compensating Stanley, previous years' tax returns indicate that Stanley was never treated as an employee before or paid compensation, and there is no evidence that Stanley has devoted any more time or attention to the business than was anticipated at its formation. Because the undisputed evidence shows that Stanley is not R.H.S.'s employee, we conclude that the trial court did not abuse its discretion by concluding that the payments Stanley receives and will receive from R.H.S. are distributions of the partnership and not exempt wages. *Id.* at 668.

2. Other nonexempt assets

a. *Europa Int'l, Ltd. v. Direct Access Trader Corp.,* 315 S.W.3d 654 (Tex. App. - Dallas 2010, no pet.)
At a hearing, Briggs testified Direct Access Trader Corp. owned one hundred percent of the stock in InvestIn Securities Corp. He admitted there is "stock responsive to the turnover order." He further stated InvestIn Securities Corp. is a separate corporation from Direct Access Trader Corp. with separate books and records. Based on this testimony, appellant established appellee, as the judgment debtor, owns property. The burden then shifted to appellee to prove the property is exempt from attachment. This it failed to do. Appellee presented no evidence during the hearing or in any other filing to the court to establish an exemption. To the contrary, Briggs agreed the stock at issue did not meet any of the criteria for exemption under the property code. *See* Tex. Prop. Code § 42.001(a), (b) (describing property exempt from garnishment, attachment, execution, or other seizure). *Id.* at 656-57.

3. Proceeds of a spendthrift trust are exempt

a. *Burns v. Miller, Hiersche, Martens & Hayward, P.C.,* 948 S.W.2d 317 (Tex. App. - Dallas 1997, writ denied)
Allowing the turnover of spendthrift trust distributions would not thwart the trust code or the historical purpose of protecting spendthrift trusts. Nevertheless, the plain language of section 31.002(f) provides that the proceeds or disbursements of property exempt under "any statute" are not subject to a turnover order. Therefore, because spendthrift trust assets are exempt under the trust code, we are constrained to conclude that proceeds and disbursements from such trusts are not subject to turnover orders. *Id.* at 323.

VIII. BEATING THE TURNOVER ORDER

Knowing what the creditor must show to be entitled to turnover relief enables you determine what was not shown. As a general rule, turnover orders are final, appealable orders, *Burns v. Miller, Hiersche, Martens & Hayward, P.C.,* 909 S.W.2d 505, 506 (Tex. 1995) (per curiam), and, therefore, must be attacked on direct appeal. "A direct attack is a proceeding instituted for the purpose of correcting the earlier judgment. It may be brought in the court rendering the judgment or in another court that is authorized to review the judgment on appeal or by writ of error." *Austin Indep. Sch. Dist. v. Sierra Club,* 495 S.W.2d 878, 881 (Tex. 1973). A direct attack can be in the form of a motion for new trial, appeal, or bill of review. *PNS Stores, Inc. v. Rivera,* 379 S.W.3d 267, 275 (Tex. 2012). A restricted appeal is a direct attack on the trial court's judgment and is limited to errors that are apparent on the face of the record. *Alexander v. Lynda's Boutique,* 134 S.W.3d 845, 848 (Tex. 2004); *Quaestor Invs., Inc. v. State of Chiapas,* 997 S.W.2d 226, 227 (Tex. 1999).

A turnover order can be collaterally attacked, but it can only succeed if the turnover order is void. *Browning v. Placke,* 698 S.W.2d 362, 363 (Tex. 1985) (per curiam) (orig. proceeding). A judgment is void only if the court had no jurisdiction over the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court. *Id.* All other errors make the judgment merely voidable, and may only be corrected through a direct attack. *Id.*

Mandamus is the proper method by which to attack a void judgment. *See Gem Vending, Inc. v. Walker,* 918 S.W.2d 656, 658 (Tex. App. - Fort Worth 1996, orig. proceeding); *see also Buttery v. Betts,* 422 S.W.2d 149, 151 (Tex. 1967) (orig. proceeding); *J.A. Bitter & Assocs. v. Haberman,* 834 S.W.2d 383, 384 (Tex. App. - San Antonio 1992, orig. proceeding). Mandamus relief is usually not available if the order complained of is appealable, because an appeal is almost always an adequate remedy at law. *See Republican Party v. Dietz,* 940 S.W.2d 86, 88 (Tex. 1997) (orig. proceeding). "But on rare occasions an appellate remedy, generally adequate, may become inadequate because the circumstances are exceptional." *In re Masonite Corp.,* 997 S.W.2d 194, 197 (Tex. 1999) (orig. proceeding) (holding that mandamus relief is appropriate where trial court's actions show such disregard for guiding principles of law that resulting harm is irreparable).

Note that the proper vehicle to challenge a post-judgment order appointing a master in chancery is a petition for writ of mandamus. *See Simpson v. Canales,* 806 S.W.2d 802, 812 (Tex. 1991); *Bahar v. Lyon Fin. Servs., Inc.,* 330 S.W.3d 379, 388 (Tex. App.—Austin 2010, pet. denied) (post-judgment order appointing master in chancery, even one that is embedded in a turnover and receivership order, is interlocutory and unappealable but may be challenged by mandamus), *Sheikh v. Sheikh,* 248 S.W.3d 381, 394 (Tex. App.—Houston [1st Dist.] 2007, no pet. The First Court of Appeals has held that they do not have appellate jurisdiction to consider an order appointing a master in chancery, even when such order is embedded within a turnover-and-receivership order, and that the proper challenge is by mandamus. *Id.*

A. Initial considerations

Because turnover relief may be sought ex parte, and because most receivers will levy against bank accounts, a consumer will most likely learn of a 'problem' when their debit card does not

work while they are in the checkout line at the grocery store. The consumer will call their bank and be told that their account is on hold because of a 'receiver.' Some banks will tell their frantic customer to call a lawyer; others will give them the phone number of the receiver.

Perhaps one of the most important considerations here is *timing,* to determine whether the turnover order is subject to a motion for new trial, restricted appeal or a bill of review. Another important consideration is whether the underlying judgment is void or voidable.

1. Void or voidable

The court of appeals reversed the judgment on which the turnover order is based. *See Matthiessen v. Schaefer,* 900 S.W.2d 792, 798 (Tex. App. - San Antonio 1995, writ denied). "If the underlying judgment is reversed on appeal, then the turnover order must be reversed also." *Matthiessen v. Schaefer,* 915 S.W.2d 479, 480 (Tex.1995). "Without a final judgment, a turnover order is void, and mandamus relief lies to vacate the void order." *In re Alsenz,* 152 S.W.3d 617, 620 (Tex. App. - Houston [1st Dist.] 2004, orig. proceeding).

In *Enis v. Smith,* 883 S.W.2d 662 (Tex.1994), the underlying Nevada judgment was determined to be void for lack of jurisdiction, after a turnover order had been issued in Harris County. The Nevada court vacated its judgment more than thirty days after the Houston trial court granted the turnover motion. When Enis filed a motion to reconsider his motion for new trial in the Harris County court (which was after the Nevada judgment had been vacated), that court overruled it. The trial court abused its discretion in continuing to enforce the turnover order. A void judgment will not support a turnover order. *Id.* at 663.

2. Availability of a direct attack

Most often consumers will be frantically searching for a lawyer when their access to cash has been eliminated. Usually this happens with an inoperable debit card. If the receiver has acted expeditiously, there is probably time for a motion for new trial. If for some reason that is not the case, then it might be necessary to determine if the extended periods in Tex. R. Civ. P. 306a(4) apply, or the attorney should consider a restricted appeal or a bill of review.

B. Challenges to the underlying judgment

1. Plea to the jurisdiction

This would be applicable when, for example, pleadings in a justice court case exceed the jurisdictional limits, but the judgment is within those limits. Another example is when the applicant for turnover relief is a different person or entity from the original judgment creditor.

A judgment or part of a judgment of a court of record or an interest in a cause of action on which suit has been filed may be sold, regardless of whether the judgment or cause of action is assignable in law or equity, if the transfer is in writing. The transfer may be filed with the papers of the suit if the transfer is acknowledged or sworn to in the form and manner required by law for acknowledgement or swearing of deeds. *See* Tex. Prop. Code § 12.014.

"An assignment is a manifestation by the owner of a right of that person's intention to transfer such right to the assignee." *Hermann Hosp. v. Liberty Life Assur. Co. of Boston*, 696 S.W.2d 37, 44 (Tex. App. — Houston [14th Dist.] 1985, writ ref'd n.r.e.). To recover on an assigned cause of action, the party claiming the assigned right must show that the cause of action being assigned existed and was assigned to the party alleging assignment occurred. *Allodial Ltd. P'ship v. N. Tex. Tollway Auth.*, 176 S.W.3d 680, 683 (Tex. App. — Dallas 2005, pet. denied); *Tex. Farmers Ins. Co. v. Gerdes*, 880 S.W.2d 215, 217 (Tex. App. — Fort Worth 1994, writ denied) (to recover on assigned cause of action, party claiming assigned rights must prove cause of action existed that was capable of assignment and cause was assigned to party seeking recovery); *see also John H. Carney & Assocs, v. Tex. Prop. & Cas. Ins. Guar. Ass'n*, 354 S.W.3d 843, 850 (Tex. App. — Austin 2011, pet. denied) (assignee "stands in the shoes" of assignor but acquires no greater right than assignor possessed) (quoting *Deer Park Bank v. Aetna Ins. Co.*, 493 S.W.2d 305, 306 (Tex. Civ. App. - Beaumont 1973, no writ); *Pape Equip. Co. v. I.C.S., Inc.*, 737 S.W.2d 397, 399 (Tex. App. — Houston [14th Dist.] 1987, writ ref'd n.r.e.) (to recover on assigned cause of action, one must plead and prove "a cause of action capable of being assigned *existed and was assigned*" to party alleging theory of assignment).

A trial court must have subject-matter jurisdiction to decide a case. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). A plaintiff bears the initial burden of alleging facts that affirmatively demonstrate the trial court's subject-matter jurisdiction over the suit. *Id.* at 446. A defendant may challenge the trial court's subject-matter jurisdiction through a plea to the jurisdiction. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

The purpose of a plea to the jurisdiction is to "defeat a cause of action without regard to whether the claims asserted have merit." *Id.* It does not authorize delving into the merits of the plaintiff's claims, but rather, examining the preliminary issue of whether the merits of those claims should be reached. *Id.* Accordingly, in reviewing the trial court's ruling on a plea to the jurisdiction, a reviewing court will construe the pleadings liberally in favor of the plaintiff and determine if the plaintiff has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Villarreal v. Harris Cnty.*, 226 S.W.3d 537, 541 (Tex. App. — Houston [1st Dist.] 2006, no pet.).

If the pleadings lack sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not reveal incurable jurisdictional defects, the issue is one of pleading sufficiency, and the trial court may either afford the plaintiff

It is well established that strict compliance with the rules of service must be evident from the face of the record for a reviewing court to uphold a default judgment.

an opportunity to amend or await further development of the case's merits. *Miranda*, 133 S.W.3d at 226-27; *Villarreal*, 226 S.W.3d at 541. Conversely, if the pleadings affirmatively negate the existence of jurisdiction, the trial court may grant the plea to the jurisdiction without providing the plaintiff an opportunity to amend. *Miranda*, 133 S.W.3d at 227; *Villarreal*, 226 S.W.3d at 541.

If a plea to the jurisdiction challenges the existence of jurisdictional facts, the reviewing court will consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised. *Miranda*, 133 S.W.3d at 227; *Bland*, 34 S.W.3d at 555 (confining evidentiary review to evidence relevant to jurisdictional issue). If the evidence creates a fact question regarding the jurisdictional issue, then the movant has failed to establish its right to dismissal. *See Miranda*, 133 S.W.3d at 227-28. However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the plea to the jurisdiction may be ruled on as a matter of law. *Id.* at 228.

2. Service?

"Jurisdiction over a defendant must be established in the record by an affirmative showing of service of citation…" *Wright Bros. Energy, Inc. v. Krough,* 67 S.W.3d 271, 271 (Tex. App. – Houston [1st Dist.] 2001, no pet.). Lack of proof of proper service constitutes error on the face of the record that defeats the trial court's jurisdiction. *Hubicki v. Festina,* 226 S.W.3d 405, 407 (Tex. 2007); *Primate Construction, Inc. v. Silver,* 884 S.W.2d 151, 152 (Tex. 1994).

It is well established that strict compliance with the rules of service must be evident from the face of the record for a reviewing court to uphold a default judgment. *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (citations omitted). If strict compliance is not shown, the service of process is "invalid and of no effect." *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985) (per curiam). Further, in contrast to the usual rule that all presumptions will be made in support of a judgment, when a default judgment is challenged, "[t]here are no presumptions in favor of valid issuance, service, and return of citation. . . ." *Primate Constr.*, 884 S.W.2d at 152. It is the responsibility of the party who obtains the default judgment to see that service of process is properly accomplished, *see* Tex. R. Civ. P. 99(a), and the responsibility "extends to seeing that service is properly reflected in the record," independent of recitals in the default judgment. *See Primate Constr.*, 884 S.W.2d at 153; *Hunt v. Yepez*, No. 03-04-00244-CV, 2005 Tex. App. LEXIS 6964, at *7-8 (Tex. App.-Austin Aug. 24, 2005, no pet.) (mem. op.).

Rule 107 of the Texas Rules of Civil Procedure governs the return of service and provides in relevant part as follows:

> The return of the officer or authorized person executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person. The return of citation by an authorized person shall be verified.

Tex. R. Civ. P. 107. The return of service is not a trivial or merely formulaic document. *Primate Constr.*, 884 S.W.2d at 152. If any of the requirements of Rule 107 are not met, the return is ***fatally defective*** and will not support a default judgment under direct attack. [emphasis added] *See Travieso v. Travieso*, 649 S.W.2d 818, 820 (Tex. App. - San Antonio 1983, no writ); *Rowsey v. Matetich*, No. 03-08-00727-CV, 2010 Tex. App. LEXIS 6532, at *19 (Tex. App.-Austin Aug. 12, 2010, no pet.) (mem. op.).

Most recently I have had a consumer be subjected to post-judgment collection, who is wheelchair bound and unable to speak as the result of a stroke. The process server in the underlying collection suit claims to have personally served him at an address where he has not lived for six years, and describes my Pilipino client as African American.

3. Lack of notice of trial

Constitutional due process requires a party to be served with process and to receive notice of an action to which it is an interested party. *See Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1027 (5th Cir.1982). A judgment rendered in violation of due process is ***void***. *Id.; PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 273 (Tex.2012). Due process requires that a party receive "reasonable notice" of trial. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84, 108 S.Ct. 896, 899, 99 L.Ed.2d 75 (1988).

In *Peralta*, the United States Supreme Court held that "a judgment entered without notice or service is constitutionally infirm," and some form of attack must be available when defects in personal jurisdiction violate due process. 485 U.S. at 84, 108 S.Ct. 896. The Court stated, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action. . . ." *Id.* (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). Thus, the "[f]ailure to give notice violates 'the most rudimentary demands of due process of law.'" *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)).

4. Post-answer default

The issue of entering a default judgment without notice arises most often in a post-answer default case. In that instance, well-settled law forbids entering a default judgment against a defendant that has received no notice of the hearing on a motion for default judgment. *See, e.g., LBL Oil Co. v. Int'l Power Servs., Inc.*, 777 S.W.2d 390, 390-91 (Tex. 1989) (citing *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84-85 (1988), and *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988)). A court's ability to impose a "death penalty" sanction is further limited by due process. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917-9188 (Tex. 1991) (orig. proceeding). A court has no power to violate a party's due process rights by investigating possible sanctionable conduct – by hearing or by nonhearing – without notice. *Tarrant County Hosp. Dist. v. Henry*, 52 S.W.3d 434, 454 (Tex.App.-Fort Worth 2001, no pet. & orig. proceeding).

The failure to appear is considered neither an abandonment of the defendant's answer nor an implied confession of any issues. *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979). In the context of a post-answer default, a judgment

cannot be rendered on the pleadings. *Id.* The plaintiff still must offer evidence and prove its case. *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 183 (Tex. 2012); *In re E.M.W.*, No. 14-10-00964-CV, 2011 WL 5314525, at *4 (Tex.App.—Houston [14th Dist.] Nov. 3, 2011, no pet.) (mem. op.) (holding that plaintiff still must offer evidence and prove plaintiff's case as in a judgment following a contested trial).

5. Default as a sanction

In *Wal-Mart Stores, Inc. v. Butler,* 41 S.W.3d 816 (Tex. App. – Dallas 2001, no pet.), the trial court ordered that the parties attend mediation, and that a failure to attend mediation could result in sanctions, including a dismissal or a default judgment. *Id.* at 817. Wal-Mart did not attend mediation in violation of the court's order, and after a hearing on a sanctions motion, the court struck Wal-Mart's answer and entered judgment in favor of the plaintiff. *Id.* Wal-Mart appealed the judgment, based on an abuse of discretion, and the Dallas Court of Appeals reversed and remanded the case. *Id.* at 818. The Dallas Court of Appeals' analysis follows:

> In its sole issue, Wal-Mart asserts the trial court abused its discretion in striking its answer. A trial court possesses all inherent powers necessary for the enforcement of its lawful orders. *Luxenberg v.Marshall*, 835 S.W.2d 136, 141 (Tex.App.-Dallas 1992, no writ). A trial court may impose appropriate sanctions for violations of pretrial orders. *See Koslow's v. Mackie*, 796 S.W.2d 700, 703-04 & n. 1 (Tex. 1990); *Luxenberg*, 835 S.W.2d at 141. Sanctions must, however, be just. *Luxenberg*, 835 S.W.2d at 141.

In *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding), the Texas Supreme Court outlined the limitations on a trial court's power to sanction for discovery abuse. First, there must be a direct relationship between the offensive conduct and the sanction. *Id*. Second, the sanction must not be excessive. That is, a sanction should be no more severe than necessary to satisfy its legitimate purposes. *Id*. The court stated:

> A court's ability to impose a "death penalty" sanction is further limited by due process. *See id*. at 917-18. Sanctions that are so severe as to preclude presentation of the merits of the case should not be assessed absent a party's flagrant bad faith or counsel's callous disregard for the rules. Even then, lesser sanctions must first be tested to determine whether they are adequate to secure compliance, deterrence, and punishment of the offender. *See Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992).
>
> Although *TransAmerican* was a discovery sanction case, this Court has applied the same standards in determining whether death penalty sanctions were appropriate following violations of a pretrial order. *See Luxenberg*, 835 S.W.2d at 141. Therefore, we review this case in light of *TransAmerican. See id*. By striking Wal-Mart's answer, the trial court precluded it from presenting its case on the merits. Therefore, the trial court was first required to test lesser sanctions. *See Chrysler Corp*., 841 S.W.2d at 849. Because the trial court did not do so, we conclude it abused its discretion in striking Wal-Mart's answer. We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

Wal-Mart v. Butler, 817-818.

C. The standard of review

A turnover order and an appointment of a receiver are reviewed under an abuse-of-discretion standard of review. *See Beaumont Bank, N.A. v. Buller,* 806 S.W.2d 223, 226 (Tex. 1991) (stating that abuse of discretion is standard of review for turnover order); *Matz v. Bennion,* 961 S.W.2d 445, 452 (Tex. App.-Houston [1st Dist.] 1997, pet. denied) (stating that abuse of discretion is standard of review for appointment of receiver). A trial will be reversed for abusing its discretion only if it is found that the court acted in an unreasonable or arbitrary manner. *Buller,* 806 S.W.2d at 226. That is, an abuse of discretion occurs when a trial court acts "without reference to any guiding rules and principles." *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241-42 (Tex. 1985). A corollary principle is that an appellate court may not reverse for abuse of discretion merely because it disagrees with a decision of the trial court, if that decision was within the trial court's discretionary authority. *Id.* at 242. A trial court's issuance of a turnover order, even if predicated on an erroneous conclusion of law, will not be reversed for abuse of discretion if the judgment is sustainable for any reason. *Buller,* 806 S.W.2d at 226.

D. Challenges to the turnover order

1. Is this the court that entered the judgment?

This would require that the new court have jurisdiction over the parties and subject matter jurisdiction. This would limit post-judgment discovery, as discovery must be initiated and maintained in the same trial court where the judgment was rendered. *See* Tex. R. Civ. P. 621a. While this sounds so basic, there have been instances where a turnover order is entered by a court who did not render the judgment.

2. If this court did not enter the judgment, is it a court of "appropriate jurisdiction"?

Consider these facts: suit is brought in a Harris County justice court to recover against a defendant who lives in Burleson County, Texas. The process server erroneously claims that the defendant lives in, and was served in, Harris County. A default judgment is taken against him. More than six years later a turnover proceeding is initiated in another and different Harris County justice court; the application is filed *ex parte,* and notices are mailed to an address where he does not live. The turnover order contains post judgment discovery, in violation of Tex. R. Civ. P. 621a. Is there a lack of jurisdiction? I think so…

3. Does the evidence support the order?

This is the most fertile area for finding grounds to have the trial court vacate the turnover order.

a. Is there a reporter's record?

Often the applicant seeking the turnover order will fail to have the court reporter make a record of the hearing. The non-existence of a record of the hearing is conclusive proof that the creditor did not make the factual showing that is required for the Court to have granted turnover relief, and appointed a receiver. Most likely only the application will be presented to the court, along with some sort of argument. Motions and arguments of counsel are not evidence. *Elkins v. Stotts-Brown,* 103 S.W.3d 664, 669 (Tex. App. - Dallas 2003, no pet.). Under these circumstances, the creditor will never have

presented any evidence regarding the nonexempt assets owned by defendant as required by section 31.002 of the Texas Civil Practice and Remedies Code. *Schultz v. Fifth Judicial Dist. Court of Appeals at Dallas,* 810 S.W.2d 738, 740 (Tex. 1991). It is an abuse of discretion for a trial court to enter a turnover order without any evidence to support the order. *Clayton v. Wisener,* 169 S.W.3d 682, 684 (Tex. App. - Tyler 2005, no pet.).

An exception could exist, if there was evidence introduced at trial that would meet the required showing. *See Sivley v. Sivley,* 972 S.W.2d 850, (Tex. App. - Tyler 1998, no pet.).

b. Is there evidence of a judgment?

It would seem that the creditor's attorney would introduce a copy of the judgment, or at least ask the court to take judicial notice of the judgment. Even if this request is made, was there testimony as to an unpaid balance due? Was it sworn testimony, or just argument? If there was testimony, did the creditor have someone testify, or was the lawyer acting as witness? Is there a basis for finding some fault with the testimony? Was there a document introduced? Is there a basis for finding some fault with the admissibility of the document?

c. Is the creditor on the judgment the same as the creditor seeking turnover relief?

If not, is there a proper assignment of the judgment? Many creditor's attorneys argue that the language in the Property Code is permissive, because it says that a transfer may be filed with the papers of the suit if the transfer is acknowledged or sworn to in the form and manner required by law for acknowledgement or swearing of deeds. *See* Tex. Prop. Code § 12.014. While "may" is certainly a permissive word, absence of a proper assignment means a lack of standing. To recover on an assigned cause of action, the party claiming the assigned right must show that the cause of action being assigned existed and was assigned to the party alleging assignment occurred. *Allodial Ltd. P'ship v. N. Tex. Tollway Auth.*, 176 S.W.3d 680, 683 (Tex. App. — Dallas 2005, pet. denied); *Tex. Farmers Ins. Co. v. Gerdes*, 880 S.W.2d 215, 217 (Tex. App. — Fort Worth 1994, writ denied) (to recover on assigned cause of action, party claiming assigned rights must prove cause of action existed that was capable of assignment and cause was assigned to party seeking recovery).

d. Is there evidence of nonexempt property?

In my experience, this is the most frequent omission. Often the application and any supporting affidavit(s) will claim that the defendant has bank accounts, and "on information and belief" or "to the best of my knowledge" those accounts contain nonexempt funds. The most glaring defect is that qualification of knowledge. Should the court consider "information and belief" or "to the best of my knowledge" as meeting the required showing, the affidavit will be legally insufficient. "An affidavit which does not positively and unqualifiedly represent the facts as disclosed in the affidavit to be true and within the affiant's personal knowledge is legally insufficient." *Humphreys v. Caldwell,* 888 S.W.2d 469, 470 (Tex. 1994) (*citing Brownlee v. Brownlee,* 665 S.W.2d 111, 112 (Tex. 1984)); *see also N. P. Davis & Co. v. Campbell & Clough,* 35 Tex. 779, 781 (1872) (affidavits must be made to actual knowledge of the facts, "not to the best of the knowledge and belief" of the affiant); *Caperton v. Wanslow,* 18 Tex. 125, 133 (1856) (finding affidavit based on "information and belief of the party" manifestly insufficient).

IX. GETTING PAID FOR BEATING THE TURNOVER

In anticipation of your hearing to vacate the turnover order, you feel confident that you and your client will emerge victorious. So you decide that getting out of the trap isn't enough; you want more cheese. How can you get it?

A. Liability of the receiver

Generally a receiver has derived judicial immunity:

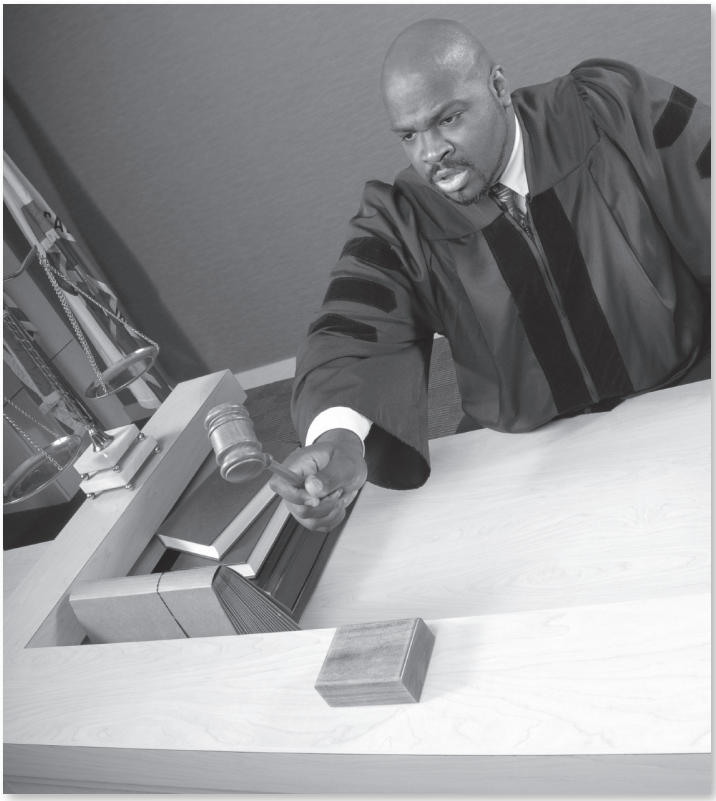
> Generally, once an individual is cloaked with derived judicial immunity because of a particular function being performed for a court, every action taken with regard to that function—whether good or bad, honest or dishonest, well-intentioned or not—is immune from suit. *Halsey,* 87 S.W.3d at 554. Once applied to the function, the cloak of immunity covers all acts, both good and bad.
> *B.K. v. Cox*, 116 S.W.3d at 357.

However, derived judicial immunity is lost when the court officer acts in the clear absence of all jurisdiction and outside the scope of his authority. *See Clements v. Barnes,* 834 S.W.2d 45, 46 (Tex. 1992) (per curiam). Even when a receiver is appointed by the trial court and acts pursuant to a court order, these facts alone do not conclusively establish the receiver's entitlement to derived judicial immunity for all of his functions as receiver. *Alpert v. Gerstner,* 232 S.W.3d 117, 131 (Tex. App. - Houston [1st Dist.] 2006, pet. denied). In *Dallas County v. Halsey,* 87 S.W.3d 552 (Tex. 2002), the Texas Supreme Court stated:

> When entitled to the protection of derived judicial immunity, an officer of the court receives the same immunity as a judge acting in his or her official judicial capacity — absolute immunity from liability for judicial acts performed within the scope of jurisdiction. *Stump v. Sparkman,* 435 U.S. 349, 356-57, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (stating that "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" (quoting *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 351, 20 L.Ed. 646 (1871))); *Turner v. Pruitt,* 161 Tex. 532, 342 S.W.2d 422, 423 (1961) (noting that in judicial proceedings in which the court has jurisdiction, a judge is immune for his or her actions).
> *Dallas County v. Halsey,* 87 S.W.3d 554.

1. When does a receiver act outside the scope of his authority or in the absence of jurisdiction?

As a general statement, most receivers act within the confines of the receivership order. However, many do not. A receiver is an "officer of the court, the medium through which the court acts." *Sec. Trust Co. v. Lipscomb Cnty.,* 142 Tex. 572, 180 S.W.2d 151, 158 (1944). A receiver must act only on the authority of the court appointing him. *Knox v. Damascus Corp.,* 200 S.W.2d 656, 659 (Tex. App. - Galveston 1947, no writ). The receiver derives his authority from the trial court and has only those powers that the appointing court may confer upon him. *Id.* The trial court cannot confer the exercise of non-delegable judicial discretion and power to the receiver. *Seagraves v. Green,* 116



Tex. 220, 288 S.W. 417, 424 (1926). As the trial court's agent, the receiver is subject to the trial court's authority, decrees, and orders at all times and in all things pertaining to the administration of the receivership. *Knox,* 200 S.W.2d at 659. A receiver has no constitutional authority to adjudicate parties' rights. *Seagraves,* 288 S.W.at. 239. A turnover order containing receivership powers is reviewed for abuse of discretion. *Bahar v. Lyon Fin. Servs.,* 330 S.W.3d 379, 391 (Tex. App. - Austin 2010, pet. denied; *Moyer v. Moyer,* 183 S.W.3d 48, 51 (Tex. App. - Austin 2005, no pet.).What constitutes a departure from propriety is probably a matter of degree. Here are some things that I have seen in turnover orders:

- Turnover of all assets, present and future, to the Receiver, at his office. Duty to supplement. The Respondent is ordered to turnover all of the listed items, and all similar items. All portions of this order continue until the judgment is paid. For example, the duties to disclose, supplement, turnover, etc., continue. If the items are not presently in existence, or the control of [debtor], [debtor] with knowledge of such assets [is] ordered to turnover the items to the Receiver, immediately upon taking control[.] If [debtor] does not have control of an asset, but receives knowledge of its existence, [debtor] is ordered to notify the Receiver, in writing, immediately, by fax, personal delivery or certified mail.
- Third party liability. The Receiver, and all persons acting under the direction of the Receiver, are immune from liability for all actions taken by them, to the extent that such actions are permitted by this order.
- Access to assets. The Receiver is authorized to take all action necessary to gain access to real property, leased premises, storage facilities, mail and safety deposit boxes, in which real or personal property of [debtor] may be situated, whether owned by [debtor] or not.
- Receiver's fees. Receiver may pay himself fees not less than 25 percent of all proceeds coming into his possession (before deducting out of pocket costs), which the Court finds to be a fair, reasonable, and necessary fee, and distribute all remaining proceeds to [creditor's] attorney in trust for the benefit of [creditor] (not to exceed the total payoff of the judgment), without any further order.

B. Liability of the creditor's lawyer

In the collection of consumer debt, this is a viable area for liability. There are three principal areas here: the Fair Debt Collection Practices Act; the Texas Finance Code (also referred to as the Texas Debt Collection Act); and penalties under Chapter 12 of the Civil Practice & Remedies Code. Relief also may be available through the Deceptive Trade Practices Act.

1. The Fair Debt Collection Practices Act [FDCPA]

This Act applies to an attorney who regularly engages in the collection of consumer debt, when a client is a consumer with regard to the debt being collected. If the judgment creditor is a debt buyer, it also applies to it.

a. Typical claims

This is a proceeding to be filed in federal court, with allegations for false, deceptive and misleading representations in a judicial proceeding. *See* 15 U.S.C § 1692.

b. Damages

Recovery in an FDCPA case consists of four components: statutory damages (up to a maximum of $1,000); actual damages; court costs; and attorney fees. Declaratory relief may also be awarded. *See* 15 U.S.C. § 1692k.

2. The Texas Finance Code

This applies to an attorney who regularly engages in the collection of consumer debt, when a client is a consumer with regard to the debt being collected. If the judgment creditor is a debt buyer or a first party creditor, it also applies to it.

a. Typical claims

This is a proceeding that can be added to the Complaint filed in federal court as an additional count, or filed in state court should you not want to file in federal court. The allegations are the state version of the FDCPA claims for false, deceptive and misleading representations in a judicial proceeding. *See* Tex. Fin. Code § 392.

b. Damages

Recovery in a TDCA case consists of four components: statutory damages (depending on the particular violation, which have a floor of $100 and no ceiling); actual damages; court costs; and attorney fees. Declaratory and injunctive relief may also be awarded. *See* Tex. Fin. Code **§ 392.403**.

c. The Texas Deceptive Trade Practices Act [DTPA]

A violation of chapter 392 of the Finance Code is

a deceptive trade practice under Subchapter E, Chapter 17, Business & Commerce Code, and is actionable under that subchapter. *See* Tex. Fin. Code **§ 392.404(a).**

3. Tex. Civ. Prac. & Rem. Code § 12.001 et seq

This applies to anyone who signed a false affidavit in support of the application for turnover.

a. Typical claims

This claim is for the filing of a fraudulent "court record" as that term is defined by Tex. Penal Code § 37.01 and further interpreted by *State v. Vasilas,* 187 S.W.3d 486 (Tex. Crim. App. 2006). Be aware that liability is predicated on the affiant having knowledge that the affidavit is fraudulent of that it is a fraudulent lien or claim against real or personal property. *See* Tex. Civ. Prac. & Rem. Code § 12.002(a).

b. Damages

Recovery in a successful claim consists of a statutory award of the greater of $10,000 or the actual damages caused by the violation; court costs; attorney's fees; and exemplary damages as determined by the court. *See* Tex. Civ. Prac. & Rem. Code § 12.002(b).

C. Liability of the judgment creditor

1. The FDCPA

This applies to the judgment creditor that is a debt buyer, when your client is a consumer with regard to the debt being collected. The attorney and his client can both be defendants in the same case filed in federal court.

a. Typical claims

This is a proceeding to be filed in federal court, with allegations for false, deceptive and misleading representations in a judicial proceeding. *See* 15 U.S.C § 1692.

b. Damages

Recovery in an FDCPA case consists of four components: statutory damages (up to a maximum of $1,000); actual damages; court costs; and attorney fees. Declaratory relief may also be awarded. *See* 15 U.S.C. § 1692k. If the damages flow from the same document (as there are no independent acts or omissions between the two defendants), then there can only be a single recovery of damages.

2. The Texas Finance Code

This applies to the judgment creditor that is a debt buyer or a first party creditor, when your client is a consumer with regard to the debt being collected.

a. Typical claims

This is a proceeding that can be added to the Complaint filed in federal court as an additional count, or filed in state court should you not want to file in federal court. The allegations are the state version of the FDCPA claims for false, deceptive and misleading representations in a judicial proceeding. *See* Tex. Fin. Code § 392.

b. Damages

Recovery in a TDCA case consists of four components: statutory damages (depending on the particular violation, which have a floor of $100 and no ceiling); actual damages; court costs; and attorney fees. Declaratory and injunctive relief may also be awarded. *See* Tex. Fin. Code **§ 392.403.** If the damages flow from the same document (as there are no independent acts or omissions between the two defendants), then there can only be a single recovery of damages.

c. The DTPA

A violation of chapter 392 of the Finance Code is a deceptive trade practice under Subchapter E, Chapter 17, Business & Commerce Code, and is actionable under that subchapter. *See* Tex. Fin. Code **§ 392.404(a).**

3. Tex. Civ. Prac. & Rem. Code § 12.001

This applies to anyone who signed a false affidavit in support of the application for turnover.

a. Typical claims

This claim is for the filing of a fraudulent "court record" as that term is defined by Tex. Penal Code § 37.01 and further interpreted by *State v. Vasilas,* 187 S.W.3d 486 (Tex. Crim. App. 2006). Be aware that liability is predicated on the affiant having knowledge that the affidavit is fraudulent of that it is a fraudulent lien or claim against real or personal property. *See* Tex. Civ. Prac. & Rem. Code § 12.002(a).

b. Damages

Recovery in a successful claim consists of a statutory award of the greater of $10,000 or the actual damages caused by the violation; court costs, attorney's fees; and exemplary damages as determined by the court. *See* Tex. Civ. Prac. & Rem. Code § 12.002(b).

** Jerry J. Jarzombek, The Law Office of Jerry Jarzombek, PLLC, 301 Commerce Street, Suite 2900, Fort Worth, Texas 76102. Telephone 817-348-8325, email jerryjj@airmail.net*