

CREDITOR'S REMEDIES AND DEBTOR'S PROTECTION

Mr. Appel

Syllabus — Fall 2012

I. Introduction

- A. Overview of the course.
- B. The vocabulary of lending and borrowing.
- C. Debtors and Creditors - an historical perspective
 - 1. What do we mean by “Creditors’ Remedies” and “Debtor Protections”?
 - 2. The origins of debt
 - 3. Evolution of western societal attitudes towards lending and borrowing
 - a. Tribal
 - b. Biblical
 - c. Middle Ages
 - (1) See C. Dickens, Little Dorrit, Chapter 6,
http://www.online-literature.com/dickens/little_dorrit/7/ for a vivid description of debtor's prison
 - d. 19th and 20th century
 - e. Modern age
- D. What is the Relationship between the Economic and Legal Systems?
 - 1. The rise of property rights.
 - 2. The importance of credit.
 - a. Development of international credit.
 - b. The rise of corporations and credit.
 - c. Consumer credit.
 - 3. The protection of property rights by the legal system.

Assignment: A short paper describing areas of the law that have to do with protection of property rights and identify types of laws or areas of legal practice that do NOT have to do with property and protection of property rights.

- a. Civil law protection of property rights.
- b. Criminal law protection of property rights.
- 4. The relationship between property rights and laws relating to Debtors and Creditors.

II. Constitutional Considerations.

A. Are the rights of secured creditors entitled to constitutional protection?

B. Is Procedural Due Process a Debtor Protection?

1. The history of due process protections.
2. Analysis of the constitutional provisions.
 - a. 5th amendment.
 - b. 14th amendment.
3. Prejudgment Remedies.
 - a. C.R.C.P. 102-attachment- parts a-d
 - b. C.R.C.P. 104 (replevin)
4. The State Action Requirement

Flagg Bros. v. Brooks, 436 U.S. 149 (1978)

Lugar v. Edmonson Oil Co, 457 U.S. 922 (1982)

5. What Does Due Process Require?

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

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

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974)

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)

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

6. Colorado Law - a sampling of due process under State law.

Bankers Trust Company v. El Paso Pre-Cast, 560 P.2d 457 (1977)

Antonoff v. Denver, 577 P.2d 281 (Colo 1978)

Chaffin v. Wallain, 689 P.2d 684 (Colo. App. 1984)

Denver Welfare Rights Org v. PUC, 547 P.2d 239 (Colo. 1976)

Whiteside v. Smith, 67 P.3d 1240 (Colo. 2003)

7. Post-judgment remedies.

Endicott-Johnson Corp. v. Encyclopedia Press, 266 U.S. 285 (1924).

C. Are creditors and debtors entitled to litigate their claims and defenses?

1. Federal Arbitration Act. 9 U.S.C. §1, et seq.
2. Colorado arbitration law. C.R.S. §13-22-201, et seq.
3. *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932); *Firelock, Inc. v.*

District Court of 20th Judicial Dist., 776 P.2d 1090 (Colo. 1989); *State Farm Mut. Auto. Ins. Co. v. Broadnax*, 827 P.2d 531 (Colo. 1992).

III. Laws Protecting Debtors.

- A. Usury laws.
- B. Protection from Debt Collectors - Fair Debt Collections Practices Act, 41 U.S.C. §1692, et seq.

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

- C. Consumer Debt Protections.
 - 1. Credit Cards
Fair Credit Reporting Act, 15 U.S.C.S. § 1681 (1994) et seq
 - 2. UCCC. CRS §5-1-101 et seq.; 5-2-201 et seq (maximum finance charges).
- D. Exemptions (mentioned here; studied in detail later in the semester).
- E. Assignment for the Benefit of Creditors. C.R.S. §6-10-101, et seq. See also *Carlson's for Music, Inc. v. Gould*, 176 Colo. 172, 489 P.2d 1038 (1971).
- F. Bankruptcy. Bankruptcy is taught in the spring semester and you are encouraged to take the course. I'll post an outline under Course Materials on Twen so you have a very superficial overview of the bankruptcy laws.

IV. Laws facilitating collection of debts by private creditors.

- A. Non-judicial collection methods.

- 1. Confession Judgments.

D. H. Overmyer v. Frick, 405 U.S. 174 (1972)
Hecker v. Vail, 431 P.2d 11 (Colo. 1967)

- 2. Setoff.

Allied Sheet Metal v. Peoples National Bank, 518 P.2d 734 (Colo. 1974)

- 3. Miscellaneous State Statutory Liens.

- a. CRS §§ 38-20-101 to 38-20-116; 38-20-201 - 210 (agistor, landlord and artisans' liens).

- B. Collection of Debts Through the Courts.

- 1. Common law claims.

2. Statutory remedies.
 - a. Relating to collection of the debt.
 - b. Relating to liquidation of the collateral.
- C. Pre-Judgment Remedies.
 - CRCP 102 (attachment)
 - CRCP 103, Section 5 (prejudgment garnishment)
 - Federal Court Prejudgment Procedures FRCP 64 and 4(e) (seizures and service)
- D. Procedure: Obtaining Judgments and Default Judgments.

Assignment: Prepare a simple complaint. Fact pattern to be posted on TWEN.

1. C.R.C.P. 54, 55, 58, 59, 60, 79 (judgments).
 2. C.R.C.P. 3, 4 and 5 (commencement and service).
 3. C.R.C.P. 62, C.A.R. 8 (stay).
 4. C.R.S. §13-63-101 (default judgments in civil actions).
- E. Collection Remedies After Judgment.
1. Discovery.
 - a. F.R.C.P. 69 (execution).
 - b. C.R.C.P. 69 (execution).
 2. Garnishment.
 - a. C.R.C.P. 103.
 - b. *Webb v. Erickson*, 134 Ariz. 182, 655 P.2d6 (1982)
 - c. *Commonwealth Edison v. Denson*, 144 Ill. App. 3d 383, 494 N.E.2d 293, 98 Ill. Dec.859 (Ill.App.1986)
 - d. *Network Solutions, Inc. v. Umbro International, Inc.*, 529 S.E.2d 80 (Va.2000)
 - e. C.R.S. §§13-54.5-101 to 13-54.5-111, 13-55-101 (claim of exemption).
 - f. 42 U.S.C. §§ 659 to 661(garnishment of the United States for wages of employee).
 - g. CRS §§ 13-61-101 to 13-61-105 (garnishment of State of Colorado for wages of employee).
 3. Execution.
 4. Turnover Orders.
 5. Other Writs.
 6. Judgment Liens.

7. Family Debts.

V. Debt Collection by the Government.

A. Federal Priority.

31 U.S.C. § 3713 (federal priority).

B. Federal Tax Lien.

1. 26 U.S.C. (Int. Rev. Code) §§ 6321 to 6323 (federal tax lien).

United States v. Vermont, 377 U.S. 351

United States v. McDermott, 507 U.S. 447.

C. State Tax Liens.

1. Employment Security Tax Lien, CRS §8-79-103
2. Real Property taxes, CRS §39-1-105 and 39-1-107.
3. Income Tax Lien, CRS §39-21-114.
4. Income Withholding Tax Lien, CRS §39-22-604.
5. Inheritance and Succession Tax Lien, CRS §39-23-132.
6. Gift Tax Lien, CRS §39-25-110.
7. Sales Tax Lien, CRS §§39-26-117 and 39-26-118.
8. Use Tax Lien and Priority, CRS §39-26-205.

VI. Collection in Other Jurisdictions.

- A. U.S. Constitution, Article IV, Section 1 (Full Faith and Credit Clause)
- B. 28 U.S.C. §§ 1738, 1738A, and 1739 (implementing statutes for full faith and credit).
- C. 28 U.S.C. § 1963 (registration of federal judgments)
- D. CRS §§ 13-53-101 to 13-53-108, (Uniform Enforcement of Foreign Judgments Act, 1964).
- E. Cases
 - Gerdes v. Kennamer*, 155 S.W.3d 541 (Tex.App.-Corpus Christi 2004)
 - Keeton v. Hustler Magazine, Inc.*, 815 F.2d 857 (2nd Cir. 1987)

VII. The Struggle Among Creditors-Priorities.

- A. Background.
- B. Competing Unsecured Creditors.

In re Estate of Robbins, 74 Misc. 2d 739, 346 N.Y.S. 2d 86 (N.Y. Sur. 1973)

Weaver v. Weaver, 605 A.2d 410 (Pa. 1992)

- C. The Aging Judgment.
CRS §13-52-102(2)(A)
- D. Priorities on Execution.

Credit Bureau of Broken Bow v. Moninger, 204 Neb. 679,
284 N.W.2d 855 (1979)

VIII. Remedies Relating to Liens - Foreclosure and Redemption

- A. Overview of the foreclosure process.
- B. Voluntary Liens.
- C. Statutory liens and trust funds.
See §38-22-127
- D. Mechanics Liens.
 - 1. CRS §§ 38-22-101 to 38-22-133.
 - 2. Outline of mechanic's liens (Course materials on Twen)
 - 3. Palcanis article on the Colorado Mechanics' Lien Law (Course materials on Twen).
- E. Personal Property UCC Foreclosures.
 - 1. C.R.S. §§4-9-601 – 617
- F. Real Estate Foreclosure.
 - 1. Statutory provisions.
 - a. CRS §§ 38-35-117 (lien theory of mortgages).
 - b. CRS §§ 38-38-104 (statutory right to cure, and notice).
 - c. CRS §§ 38-38-101 to 38-38-112 (foreclosure of deeds of trust).
 - d. CRS § 38-39-101 (private deeds of trust and mortgages must be enforced through court action).
 - e. CRS § 38-38-701 (application of foreclosure provisions to other liens and enforcement proceedings against land, including sales on execution).
 - f. CRS §§ 38-38-401 to 38-39-209 (other provisions on foreclosure).
 - g. CRCP 120 (order for sale under power).
 - 2. Redemption.

- a. Statutory provisions.
 - (1) CRS §§ 38-38-301 to 38-38-306 (redemption from trust deed sales).
 - (2) CRS § 38-38-701 (redemption provisions made applicable to enforcement of other liens and enforcement provisions against land, including sales on execution).

G. Receivers and Receiverships.

- 1. CRCP 66.

IX. Property Exempt from Seizure.

CRS §§ 13-54-101 to 13-54-107 (general exemptions).
 CRS §§ 13-55-101 to 13-55-110 (claim of exemptions).
 CRS §§ 38-41-201 to 38-41-212 (homestead exemption).

- A. Introduction.
- B. The state and federal exemption schemes.
- C. Classification of Property.

In re: Johnson, 14 B.R. 14 (Bankr. W.D. Ky. 1981)
In re: Pizzi, 153 B.R. 357 (Bankr. S.D. Fla. 1993)

D. Valuation of Exempt Property.

In re Walsh, 5 B.R. 239 (Bankr.D.D.C. 1980)
In re Mitchell, 103 B.R. 819 (Bankr. W.D. Tex.1989)

E. Proceeds and Tracing.

In re Palidora, 310 B.R.164 (Bankr. D. Ariz. 2004)
 CRS §38-41-207 (sale of homestead)

- F. Partially exempt property.
- G. Security Interests in Exempt Property.
- H. Avoiding Judicial Liens on Exempt Property.
- I. Homestead Exemptions.

In re Reed, 700 F.2d 986 (5th Cir. 1983)

X. Advanced Creditor's Remedies

- A. Fraudulent Transfers.

1. Origins.
 - a. Twyne's Case
 - b. CRS §§ 38-8-101 to 38-8-112 Colorado Uniform Fraudulent Transfers Act.
 - c. CRS §§ 38-10-101 and 38-10-102 (Colorado version of Statute of 27 Elizabeth).
 - d. CRS §§ 38-10-114 and 38-10-115 (fraudulent retention of possession of personal property following sale).
 - e. *CB Richard Ellis, Inc. v. CLGP, LLC*, 2010 Colo. App. LEXIS 1050.

2. Uniform Fraudulent Transfer Act.

ACLI Government Securities, Inc. v. Rhoades, 653 F. Supp.1388
(S.D.N.Y. 1987)

3. Leveraged Buyouts.

In re Bay Plastics, 187 B.R. 315 (Bankr. C.D. Cal. 1995)

B. Piercing the Corporate Veil.

1. Introduction.
2. *Phillips v. Englewood Post No. 322 Veterans of Foreign Wars*, 139 P.3d 639 (Colo. 2006).

C. Marshalling of Assets or Liens.

D. Guarantees

1. Introduction.
2. Rights of creditors.
3. Defenses of guarantors.

E. Asset Protection Trusts.