

## JOINT MEMORANDUM

To: Supreme Court Advisory Committee (SCAC)  
From: Ad Hoc Debtor Group (Debtor Group)  
Texas Creditors Bar Association (TXCBA)  
Texas Association of Turnover Receivers (TATR)  
Re: Range of agreement and discussion over exemption notice and procedures  
Date: October 6, 2021

### A. Introduction

Following the passage of H.B. 3774 with its mandate for an expedited procedure for raising personal property exemptions in post-judgment proceedings, the Debtor Group and TXCBA appeared at the September 3, 2021 meeting of the SCAC to advocate for specific rule proposals. On September 14<sup>th</sup>, Jim Perdue, Jr. e-mailed these stakeholder groups to advise them to work out an agreed rule proposal before the next SCAC meeting on October 8<sup>th</sup>. Following that e-mail, the Debtor Group, TXCBA and TATR have met no fewer than six times on September 22<sup>nd</sup>, 24<sup>th</sup>, 27<sup>th</sup>, 30<sup>th</sup> and October 4<sup>th</sup> and 5<sup>th</sup>. Bronson Tucker of the Texas Justice Court Training Center (TJCTC) has participated in all but the earliest meetings.

The stakeholder groups have not been able to work out an agreement on the form of a proposed rule or rules to implement the mandate of H.B. 3774, but they have been able to narrow their differences, and have modified their proposals to address concerns raised by each side. The positions of these groups have moved closer on a number of issues, including the timing of the notice and the length of the suspension period. In addition, the parties have agreed to withdraw proposals that were not directly mandated by H.B. 3774, including notice about third party rights to joint accounts, notice about the right of judgment debtors to challenge the validity of the underlying judgment, and a provision for waiver of exemption rights if not timely raised.

What follows is a description of the major unresolved issues, grouped into subjects where compromise may be possible, and subjects where compromise could not be reached despite extensive discussion. Each party has provided a short description of their proposal and a critique of the alternative proposal. Bronson Tucker's comments and a separate proposal by the TJCTC related to notices included in the judgment or notice of judgment have also been included.

The parties' revised, full proposals relating to the rules, their notice and claim forms, and language for turnover orders are separately submitted.

## **B. Issues that remain unresolved but possibly subject to compromise**

### **1. Timing of notice to be sent to judgment debtors**

**Issue summary:** There is disagreement on how long the creditor or receiver has to send the exemption notice and claim form, and what should trigger the running of that period.

**Debtors' proposal:** The Debtor Group proposes that exemption notices and forms should be sent to judgment debtors within 3 business days of the day the relevant party (judgment creditors with garnishment and execution and turnover receivers with turnover) receives actual notice that the funds or tangible personal property at issue have been seized or frozen. To speed that process, the Debtor Group further proposes that constables should be required to inform judgment creditors or their counsel of the service of the writ of garnishment or a writ of execution by telephone or e-mail on the day service occurs. Similarly, recognizing that the apparent standard allowed long delays in giving notice, the Texas Judicial Council passed resolution no. 7 on September 24, 2020 to recommend that Rule 663a be amended to require that notice be sent in 3 business days.

This proposal is consistent with the approach taken by Georgia in its recently-reworked post-judgment rules which requires notice of exemptions to be sent within 3 business days after service of the writ of garnishment. Similarly, New York provides that such notice issue within 4 days after service of a restraint order. *McCahey v. L.P. Investors*, 593 F.Supp. 319, 322, 328 (E.D.N.Y. 1984)(N.Y. provides notice of restraint within 4 days after service), *aff'd*, 774 F.2d 543 (2<sup>nd</sup> Cir. 1985). Moreover, it is consistent with caselaw holding that due process requires notice of exemptions be given shortly after the effective freezing or seizure of assets. *New v. Gemini Capital Group*, 859 F.Supp.2d 990, 996-997 (S.D. Iowa 2012)(declaring Iowa's post-judgment garnishment procedures unconstitutional in part because notice of garnishment did not need to be sent until the judgment creditor moves to seize garnished funds). Finally, the 3 business day proposal is consistent with the language in H.B. 3774, which requires an "expedited procedure."

**Creditors' critique:** The Debtor Group proposal ignores Texas' unique garnishment and turnover processes, and attempts to impose the minimal possible period for a reasonable creditor to process and send notifications. The creditors prefer consistency, and would like the timing of the notice of exemption to run with the timing for the garnishment notice under Rule 663a. There is no case holding that "as soon as practicable" is unconstitutional or improper. The TXCBA's largest concern is for small practitioners, where some error occurs in the notification that service was rendered, or the attorney is out of office for a few days. The judgment plaintiff should not be subject to an argument

that missing an arbitrary deadline would result in an unjust windfall to the defendant and the return of even non-exempt funds.

The issue of requiring constables or sheriffs to notify creditors of service was not discussed in prior meetings, and the TXCBA does not believe that the key stakeholders for such a rule have been consulted.

**Creditors' proposal:** The notice should not be sent until actual seizure occurs, to prevent defendants from withdrawing funds from slow-processing banks, and to prevent confusion and unnecessary hearings when an account with no balance is hit. Creditors believe the "as soon as practicable" language used elsewhere in the Rules is appropriate; creating a hard deadline does not allow flexibility based on the unique circumstances of each case.

**Debtors' critique:** Contrary to the mandate of H.B. 3774, the TXCBA proposal does not assure an expedited exemption procedure. By providing that notice need only be sent "as soon as practicable," TXCBA has proposed an unworkably vague standard. Currently, Rule 663a provides that notice of garnishment be given to judgment debtors "as soon as practicable," and that has been construed to mean no more than 14 days by most courts. *Arriaga v. Jess Enterprises*, 2014 WL 1875917, \*2 (N.D. Tex. 2014)(applying Texas law); *Lease Finance Group, LLC v. Childers*, 310 S.W.3d 120, 124-128 (Tex. App. – Fort Worth 2010, no pet.); *Requena v. Salomon Smith Barney, Inc.*, 2002 WL 356696, \*3-4 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2002, no pet.). As a reflection of how amorphous this standard is, though, one appellate court more recently found that an 18-day delay in providing this notice was acceptable. *Carlson v. Schellhammer*, 2016 WL 6648754, \*5-6 (Tex. App. – Fort Worth 2016, no pet.). Concurrent with TXCBA's proposal to impose no time limit on ruling upon exemption claims, the current process in the garnishment process would be lengthened, not expedited. This means judgment debtors with valid exemption claims will have to wait even longer to obtain relief.

## 2. Timing of hearing

**Issue summary:** There is disagreement on whether the rules should mandate that the hearing be held within a certain time period.

**Debtors' proposal:** The Debtor Group proposes that any hearing and ruling on an exemption claim should occur within 10 days after the claim is filed upon reasonable notice, which can be 3 days or less. This is the current standard for motions to dissolve writs of garnishment and sequestration which was imposed in response to successful constitutional challenges to those procedures in the 1970s. Tex.R.Civ.P. 664a and 712a.

**Creditors' critique:** A mandate of ten days to have a hearing will cause a significant amount of docket chaos for many courts. The courts should be required to promptly set a hearing, but left to fit the hearing within their schedules.

However, TXCBA's strongest concern is the proposed mandate that the court must make a finding at the first hearing, and may not continue the hearing if the case needs to be developed. The creditor or receiver will have almost no time to develop the case before the hearing – especially if the hearing is on fewer than three days' notice – and will be at an extreme disadvantage if the defendant does not bring sufficient evidence. The court needs the flexibility to continue the hearing to allow more evidence to be developed.

**Creditors' proposal:** The rule should instruct the court to promptly set a hearing, but not set a firm deadline, as court scheduling and the facts of each case vary. The rules should not mandate that a decision must be made at the first hearing, as the hearing may have been expedited, and the facts may need to be further developed. The critique of the Debtor Group that the lack of a strict deadline would likely deny due process is incorrect, as their cited case predates the automatic protections and federal preemption of state law under 31 CFR Part 212.

**Debtors' critique:** TXCBA's proposal on this issue also has the effect of delaying the ultimate hearing and ruling on exemptions, contrary to the statutory mandate to impose an *expedited* procedure. In fact, current Rules 614a, 664a and 712a (relating to distress warrants, garnishment and sequestration) impose a far more expedited ruling requirement, as they require a hearing to be held and a ruling made within 10 days, allowing continuances only when all parties agree. Rather than impose the standard which has been in effect since the 1970s, TXCBA merely seeks to require that hearings be held "promptly" and would allow judgment creditors to seek continuances of indefinite length. This is a step away from an expedited exemption procedure, as it would allow further delays in the process. By permitting such delays, suddenly destitute judgment debtors with valid exemption claims would have to wait even longer to obtain the return of funds desperately needed to pay basic bills like rent and utilities and cover the cost of necessities such as food. Moreover, under these circumstances, imposing no deadline for a ruling and allowing continuances would likely deny due process to exemption litigants. *Finberg v. Sullivan*, 634 F.2d 50, 59-61 (3d Cir. 1980)(permitting a hearing to occur in 15 days with no limit on continuances is unconstitutional).

TXCBA's proposal would also have the bizarre effect of allowing exemption claim proceedings, presumably filed most by unsophisticated, pro se judgment debtors, to take more time than hearings on motions to dissolve writs of garnishment which must be ruled upon 10 days. Since only judgment debtors who can afford counsel are likely to utilize the current procedure in Rule 664a, that means debtors with more resources receive speedier justice than those who have less. That cannot have been the intent of the Legislature when it passed H.B. 3774.

The reference to 31 C.F.R. Part 212 does not save TXBCA's proposal from due process attack, because it only covers a few federal exemptions and even that protection

for federal benefits is limited by amount (not to exceed two months) and account (only protects funds in account that receive wire from U.S. Treasury and not savings accounts).

### 3. Length of suspension period

**Issue summary:** There is disagreement on how long the post-judgment process must be suspended to give the judgment debtor time to receive, fill out and file a claim of exemption.

**Debtors' proposal:** The Debtor Group proposes that, for turnover receivers and with writs of execution, seized funds should not be distributed and seized tangible personal property should not be sold for a period of 30 days. A specified time period is not necessary for writs of garnishment, because funds and property that are frozen in garnishment proceedings cannot be distributed or sold until there is a final ruling by the court.

This 30-day proposed time period is half of our original proposal. We made the concession to try to accommodate concerns raised by TXCBA. Thirty days are needed simply to assure enough time for judgment debtors to receive notice, file an exemption claim and go to a hearing. Although funds could be retrieved after they are distributed, the process to do so is cumbersome and often time-consuming. The funds would need to be retrieved both from the turnover receiver and the judgment creditor, creating substantial hardship for the judgment debtor who assert funds or property are exempt.

**Creditors' critique:** This suspension period would mandate that seized personal property would sit in storage at extremely high rates while a writ of execution (good for only 30, 60 or 90 days) expires. When added to the time required for the court to set a hearing, the process for seizure and sale of personal property quickly becomes so costly, even for obviously non-exempt property, that all effective judgment enforcement against personal property will be useless. Worse, the defendant's property will still be sold, but any equity will be consumed by the costs of sale, so Defendants will lose much of the credit they would have obtained towards the judgment even when they have no intention of claiming an exemption.

No rationale is given as to why the exemption period should be 30 days when the response period for the lawsuit itself is only 14 days in justice court, or 20-27 days in county or district court. The suspension period does not need to contemplate that the hearing be held within the suspension period. If the claim of exemption is received, the rule can provide for further suspension until the claim is considered. This allows for a much more reasonable period for the vast majority of cases where no exemption is claimed.

**Creditors' proposal:** The proposed 14-day hold period should be aligned with the majority of states surveyed that have a 10–15-day response period. It also aligns with the answer period for justice courts, where the majority of enforcement of consumer debts

occur. If service of the notice and form occurs by mail, the mailbox rule would increase the response period to 17 days. The hold period must consider that for personal property seizures, the judgment creditor or receiver may be paying for costly storage of the personal property in anticipation of sale.

**Debtors' critique:** TXCBA's survey of state policies appears to be related to writs of garnishment and execution and not turnover receivers. The use of turnover receivers to collect consumer debts is unique to Texas. Comparing turnover receivers and their expansive powers to writs of garnishment and execution is not an apples-to-apples comparison.

Furthermore, a substantial number of states in TXCBA's own survey imposed a suspension period in excess of 14 days. In footnote 2 of its proposal, the TXCBA acknowledged in its informal survey of exemption periods of less than 30 states that at least 6 states (Florida, Georgia, Missouri, New York, North Carolina and Wisconsin) imposed a 20-day suspension period. The Debtor Group asserts that 30 days is ordinarily needed to give unsophisticated judgment debtors time to receive notice and to complete and file an exemption form. If the SCAC considers a period of less than 30 days, the Debtor Group would ask that it be no less than 21 days.

#### **4. Time limit for raising exemptions before distribution or sale**

**Issue summary:** While both sides have agreed to allow exemptions to be asserted after the suspension period, there is disagreement as to whether exemptions can be asserted right up until distribution or sale.

**Debtors' proposal:** The Debtor Group proposes that exemptions should be allowed to be raised at any time before distribution or sale, and even afterwards as agreed by both TXCBA and TATR. This is consistent with the current garnishment procedure which permits the filing of motions to dissolve writs of garnishment at any time before funds (frozen by a writ) are ordered to be distributed to the judgment creditor in the judgment of garnishment.

**Creditors' critique:** The Debtor Group proposal would allow for 11<sup>th</sup>-hour gamesmanship to prevent sales and distributions. Judgment defendants are getting a significant window and guarantee of their ability to assert their exemption rights; in return, third parties who purchase property at auction, and judgment creditors who have had to pursue the judgment defendant all the way to enforcement in order to obtain redress for their valid judgment, should have some certainty that the sale or distribution is conclusive.

**Creditors' proposal:** For an orderly sale of property to occur, and having already allowed weeks to pass for the exemption to be received, there needs to be a period of

time wherein the creditor and purchasers at auction may be assured that no last-minute exemption claim has been filed to stop the process or void the transfer. Otherwise, gamesmanship or the failure of unsophisticated defendants to copy the creditor, receiver or deputy could create unwelcome scenarios.

**Debtors' critique:** TXCBA's proposal only imposes vague standards on when exemption notices are sent and when rulings on exemption claims can be expected, and then follows that up with a requirement that funds or property be held in suspense only for 14 days. As the coup de grace, TXCBA provides that judgment debtors must provide judgment debtors and receivers of their exemption claims within 7 days of fund disbursement or property sale to make the process more convenient for parties seeking to collect judgment. (Their proposal would also be confusing to *pro se* litigants, because it does not state how to determine this deadline from TXCBA's proposed form notice.) Under their proposal, there is no assurance that a judgment debtor will receive the notice promptly and have sufficient time to file an exemption claim before funds are distributed and property sold. The exemption process would not be truly expedited --- instead, it would be a trap for the unwary, unsophisticated judgment debtor.

## 5. Language for turnover orders

**Issue summary:** While both sides agree that turnover orders should reference the new rules and instruct receivers to follow them, there is disagreement as to the scope of the instructions.

**Debtors' proposal:** The Debtor Group proposes that the following language be used in any order appointing a turnover receiver:

In the first contact with the judgment debtor following the freezing or seizure of personal property, [receiver] must first inform the judgment debtor orally that this property may be exempt from seizure and that notice of exemption rights will be sent to the judgment debtor. [Receiver] shall not disburse funds or sell any tangible personal property has been served with the notice and form in compliance with Rule XXX, and at least X days have passed since the date of service, in compliance with Rule XXX. [Receiver] must likewise evaluate evidence of applicable exemptions before disbursement of funds, sale of tangible personal property or entry into a payment plan.

**Creditors' critique:** The instructions exceed the Legislative mandate, and create difficult-to-interpret standards for turnover receivers. What if the defendant does not contact the receiver by phone – must the receiver employ a call center to attempt to call the defendant in addition to sending the written notice? If funds are turned over with no explanation, is the receiver required to evaluate evidence of applicable exemptions even if the defendant

never claims an exemption? What if a defendant wants to enter into a payment plan and use exempt funds to do so – is the receiver required to reject the agreement? What if the receiver discovers the asset but does not locate the defendant? The instructions are designed to require receivers to assert exemptions on behalf of the defendants, even when they don't want to, which is inappropriate given their role.

**Creditors' proposal:** A one-sentence instruction that a turnover receiver must comply with proposed Rule 621b should suffice. Anything else is outside the Legislative mandate.

**Debtors' critique:** During our meetings, receivers stated that they usually discovered that funds had been frozen or seized (following a levy letter from the receiver to a bank) when they received telephone calls from judgment debtors. They further stated that it was during that first telephone conversation that the receiver would offer a payment plan in exchange for the release of funds in the frozen account. Many judgment debtors agree to those payment plans to obtain access to their bank accounts and consequently waive their exemption rights. The Debtor Group merely seeks to address the imbalance in knowledge between receivers and most judgment debtors by requiring some oral notice that judgment debtors may have exemption rights and will shortly receive some detailed information on the subject. In addition, the Debtor Group seeks to impose an obligation on turnover receivers to at least consider applicable exemptions with individual judgment debtors before entering into payment plans and distributing funds or proceeding with sales. Otherwise, the entire procedure will be rendered meaningless if turnover receivers induce less knowledgeable judgment debtors to agree to payment plans that waive exemption rights. Given that judgment debtors feel coerced into such plans to avoid destitution, they will often agree to make payments to judgment creditors from wholly exempt funds, such as Social Security, unemployment compensation and child support. If turnover receivers are to act as neutral officers of trial courts, though, they should not merely collect funds for judgment creditors but also act to protect the exemption rights of *pro se* judgment debtors by giving some notice of exemption rights and consideration of exemption rights before forcing a waiver of such rights.

## **C. Issues on which compromise is not possible**

### **1. Whether more funds are exempt from turnover than the other forms of post-judgment collection**

**Issue summary:** There is strong disagreement as to whether exemption law is different for turnover orders than for other forms of post-judgment enforcement.



**Debtors' proposal:** The Debtor Group proposes that the exemption notice and claim form recognize that some funds are exempt from turnover, even though they are not exempt from garnishment. Specifically, its proposed exemption notice and claim form for turnover receivers specifically states that wages and spendthrift trust proceeds are exempt from turnover. This reference to exemptions from turnover are based on subsection (f) of the turnover statute, CPRC § 31.002, which prohibits the turnover “of the proceeds of, or disbursement of, property exempt under any statute, including Section 42.0021, Property Code.”

Through this provision, the Legislature “. . . intended to specifically exempt [from turnover] paychecks, retirement checks, individual retirement accounts and other such property exempt under the bankruptcy code. 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.” *Caulley v. Caulley*, 806 S.W.2d 795, 798 (Tex. 1991)(overruling trial court order compelling judgment debtor to turnover his wages to a court-appointed receiver). The reasoning behind this decision has been followed by other courts. *Marrs v. Marrs*, 401 S.W.3d 122, 124-127 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2011, no pet.)(wages paid to bankruptcy trustee and then paid to judgment debtor when bankruptcy was dismissed are exempt from turnover as proceeds or disbursements of exempt property); *Leibman v. Grand*, 981 S.W.2d 426, 435 (Tex. App. – El Paso 1998, no pet.)(paychecks received by debtor are exempt from turnover under subsection (f)); *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317, 323 (Tex. App. – Dallas 1997, writ denied)(“This amendment was intended, in part, to prevent turnovers of paychecks . . . after a judgment debtor received them.”).<sup>1</sup> Similarly, payments from a spendthrift trust received by a judgment debtor are exempt from turnover. *Id.* In other words, once wages or payments from a spendthrift trust are received by a judgment debtor, they become the proceeds or disbursements of exempt property and thereby not subject to turnover.<sup>2</sup>

**Creditors' critique:** The Debtor Group spends a great deal of time arguing this point because it is an attempt to create new law through the rule-making process, where they have failed to convince any courts or the Legislature to adopt their position. The legislative intent behind CPRC § 31.002(f) was to reverse *Cain v. Cain*, 746 S.W.2d 861, and prevent orders compelling the turnover of *checks* – specifically, checks representing

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<sup>1</sup> At least two courts of appeal have assumed that taking the proceeds of a paycheck from a judgment debtor's bank account by way of a *turnover order* might violate section 31.002(f), but the more limited exemption for current wages did not preclude *garnishment* of those proceeds. *Guiberson v. Bohnefeld*, 1993 WL 175242, \*1-2 (Tex. App. – Dallas 1993, no writ); *American Express Travel Related Services v. Harris*, 831 S.W.2d 531, 532-533 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1992, no writ).

<sup>2</sup> One recent appellate court relied upon subsection (f) to find that a royalty payment constituted the proceeds from a homestead and was thereby exempt from turnover. *Fitzgerald v. Cadle Company*, 2017 WL 4675513, \*1-3 (Tex. App. – Tyler 2017, no pet.).

retirement income – and was not addressing money held in a bank account.<sup>3</sup> Each case cited by the Debtor Group addresses exactly that situation, where a turnover order had been used to compel the turnover of an actual paycheck once received and before deposited, or to require turnover of a paycheck on a recurring basis.<sup>4</sup> The Debtor Group tries very hard to claim that money in a bank account is not subject to turnover if it is traceable to wages when there is no case law in support of that argument, and substantial case law speaking to the transformative nature of the wage deposit into a bank account, such that it becomes a debt owed by the bank to the depositor (and no longer current). *Sutherland v. Young*, 292 S.W. 581 (Tex.Civ.App. – Waco 1927, no writ); *Bandy v. First State Bank, Overton, Tex.*, 835 S.W.2d 609, 620 (Tex. 1992).

**Creditors’ proposal:** This issue is outside the Legislative mandate, and the Debtor Group’s insistence on it has been the primary reason behind the inability to agree on a simple approach and notice. The TXCBA proposed notice simply includes this exemption along with all other listed exemptions. If a defendant or defendant’s attorney wants to argue this issue, they may do so along with any of the other listed exemptions. The TXCBA would prefer better clarification in the notice – clarification that wages deposited in the bank account are not exempt – because otherwise there will be a lot of unnecessary hearings over this subject.

**Debtors’ critique:** The creditors’ proposal renders subsection (f) of the turnover statute superfluous. There was an attempt in the 87<sup>th</sup> Legislative Session to change CPRC § 31.002(f) to limit its protections to “sales proceeds” of exempt property.<sup>5</sup> This effort was not successful. See above for a fuller explication of the Debtor Group’s position. That said, if all exemptions are required to be listed in exemption notices under H.B. 3774, exemptions from turnover provided by subsection (f) of the turnover statute must be recognized. Otherwise, the statutory mandate to list all exemptions will be ignored.

## 2. One rule or multiple rule changes.

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<sup>3</sup> The TXCBA will submit the bill analysis explaining the background of Tex. Civ. Prac. & Rem. Code § 31.002 with its separate proposal.

<sup>4</sup> The Texas Supreme Court in *Caulley* specifically references “paychecks”, not money in the bank, and the 14<sup>th</sup> Court of Appeals in *Marrs* actually specifically states that it was undisputed that the debtor “did not receive the subject wages and did not deposit them into her bank account.” *Marrs*, 401 S.W.3d at 125-126. The *Harris* case expressly holds that when wages are paid, they cease to be exempt, and simply states that the turnover statute didn’t apply because it wasn’t directed to the judgment debtor. The other cases cited by the Debtor Group all reference paychecks or situations where the wages have not yet been deposited. Every single case cited by the Debtors’ Group does not reference money in a bank account or support the broad position they advocate.

<sup>5</sup> See H.B. 2918, regular session, 87<sup>th</sup> Legislature.

**Issue summary:** There is strong disagreement whether the mandated process can be accomplished with one rule change, or requires multiple rule changes.

**Debtors' proposal:** The Debtor Group proposes that the garnishment and execution rules be amended and that new rules be adopted for garnishment, turnover and execution. There are several advantages to this approach.

First, it reflects the fact that there already is an established rule regime for challenging writs of garnishment which only needs some tinkering to provide a simple, expedited procedure for judgment debtors to raise exemptions by claim form rather than by motion. By contrast, there are no rules governing procedures in turnover proceedings, and thus no rules providing notice and opportunity to be heard on exemptions. Similarly, while rules governing execution procedures exist, there are no such rules that provide any procedure for challenging seizures based on exemptions.

Second, the exemption rules can be found in the sections set aside for garnishment and execution, and that will make them easier for practitioners and courts to find. Likewise, the separate turnover rules will be placed in the same section of rules as garnishment with the title of section 4 being changed to "Garnishment and Turnover," thereby placing the two primary mechanisms for judgment collection in the same area of the rules.

Third, section 15 of H.B. 3774 which required rulemaking on exemption procedures is the result of Texas Judicial Council resolutions issued on September 24, 2020. Resolutions 7-9 provide the underlying basis for section 15, and resolutions 7 and 8 specifically call for amendments to two garnishment rules and resolution 9 calls for the issuance of rules for turnover. This is evidence that the Judicial Council contemplated that there would be multiple rules implementing the new exemption procedure.

**Creditors' critique:** The Debtor Group overreaches in its re-write of garnishment rules and implementation of entirely new rules for executions and receiverships. First, this proposal would apply the process of personal property exemptions universally, even when judgments are being enforced against non-individual defendants. This will result in constant delays and increased hearings even when personal property exemptions are not involved. Second, the Judicial Council resolutions were issued without any input from other stakeholders, and its recommendations were either specifically rejected in the legislative process, or were not referred to us by the committee.

**Creditors' proposal:** Rule 621 provides for execution on judgments, and Rule 621a provides for postjudgment discovery. Proposed Rule 621b could provide for an exemption process that works with all other post-judgment processes.

**Debtors' critique:** TXCBA's proposed single rule has a number of serious defects. First, it fails to recognize that the three mechanisms for post-judgment collection --- garnishment, turnover, and execution --- operate differently and require different notices.

For example, certain exemptions are available in turnover that are unavailable in garnishment, and, unlike turnover and garnishment, execution typically raises exemption issues relating to tangible personal property and not to fungible money. Likewise, the procedures for garnishment and execution already are well-established and only require amendment, whereas turnover currently has no procedural requirements.

Second, by imposing a process for raising exemptions that is slower than that for motions to dissolve writs of garnishment, an existing mechanism for raising exemptions, the TXCBA proposal has the effect of giving well-funded judgment debtors an advantage over judgment debtors who cannot afford counsel who will be utilizing an exemption procedure that is slower and full of traps.

Third, TXCBA's proposal refers to warrants, presumably a reference to distress warrants, in its single rule, but distress warrants are only a pre-judgment remedy. Tex.R.Civ.P. 610 (can seek a distress warrant "[e]ither at the commencement of a suit or at any time during its progress ..."). As such, it refers to a remedy that is not encompassed by the post-judgment mandate of H.B. 3774.

### **3. One set or multiple sets of exemption forms**

**Issue summary:** Although progress was made on adapting each sides' form to be more thorough or use more plain-English language, we were unable to reach agreement on whether one form or multiple forms were needed.

**Debtors' proposal:** The Debtor Group proposes that there be three exemption notice and claim forms --- one for garnishment, one for turnover, and one for execution. This approach has several advantages over a single exemption notice and claim form being suggested by TCBA.

First, the information needed to assert exemptions in garnishment, turnover and execution varies considerably. For example, wages and spendthrift trust funds are exempt from turnover but not from garnishment, see above, so the information provided must address this difference in protections. Moreover, execution procedures where exemption issues might arise typically involve the seizure of tangible personal property, so information about funds exemptions is not relevant and could be confusing.

Second, it is easier to write an exemption claim form that is both relatively short and yet written in plain language when there are different forms for different forms of judgment collection. Given that H.B. 3774 mandates that the notice of exemption must be simple and written in plain language, there is no effective way to meet that obligation without multiple forms.

Third, parties, process, and terminology associated with each proceeding are different. In order to ensure a clear and easy to navigate process for a pro se judgment debtor, it is essential to have three separate forms. Otherwise, each different proceeding

would need to be described in the instructions in order for the judgment debtor to understand the proceeding at issue and who the different parties are.

**Creditors' critique:** The Debtor Group's scheme to create new law on turnover receiverships is the primary driver of their complicated proposal, and it is evident in their creation of three separate forms. If the Committee does not adopt their view of the law, then the need for multiple forms disappears.

This proposal does not address common situations where a receiver or writ of execution levies against mixed assets at the same time – like funds in a bank account plus jewelry in a safe deposit box, or a sole proprietor with cash in the till but also inventory. There are also situations where a creditor is using two concurrent judgment enforcement processes. These scenarios would require two or more separate notices and forms to be sent at the same time, further confusing the situation.

**Creditors' proposal:** The notice and exemption form should be short, simple, informative, and generally applicable, because situations often arise where both funds and personal property are seized at the same time. The creditors' proposal has a 2-page notice and 2-page claim form that are simple and designed to accomplish the Legislative mandate in all situations.

**Debtors' critique:** TXCBA's proposed single notice of exemptions has several defects. First, it is not simple nor is stated in plain language. By acknowledging that separate notices should be sent depending on the remedy being utilized, as proposed by the Debtor Group, the notices can be both simpler and in plain language. In sum, the TXCBA notice is far less accessible than the three different notices being proposed by the Debtor Group. Second, it fails to recognize that at least two types of funds, wages and spendthrift trust payments received by a judgment debtor, are exempt from turnover, but not garnishment. By so doing, it effectively denies notice to judgment debtors of their exemption rights under CPRC § 31.002(f). In fact, it treats subsection (f) as if it did not exist.

#### **D. TJCTC Proposal**

**The Texas Justice Court Training Center proposed the adoption of rules that would advise an individual defendant at judgment of the availability of exemptions. This proposal was offered based on comments during the meetings about how the other proposals don't impact collection pre-seizure. The proposal is set forth below, with commentary from each group.**

Rule 306a (3):

When the final judgment or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first-class mail advising that the judgment or order was signed. If a judgment is rendered against an individual defendant, the court must provide to the defendant written notice of the judgment. The notice must contain the following language: “You may have a right to claim exemptions to protect your property against seizure for satisfaction of this judgment. If you would like to talk with a lawyer, you can find free and low-cost legal information at <https://www.txcourts.gov/programs-services/legal-aid>.” The notice may be delivered by any method authorized by Rule 21a. Failure to comply with the provisions of this rule shall not affect the periods mentioned in paragraph (1) of this rule, except as provided in paragraph (4).

To add for Justice Courts:

#### DEFAULT JUDGMENT

RULE 503.1(d) Notice. The plaintiff requesting a default judgment must provide to the clerk in writing the last known mailing address of the defendant at or before the time the judgment is signed. When a default judgment is signed, the clerk must immediately mail written notice of the judgment to the defendant at the address provided by the plaintiff, and note the fact of such mailing on the docket.

The notice must state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date the judgment was signed, and contain the following language: “You may have a right to claim exemptions to protect your property against seizure for satisfaction of this judgment. If you would like to talk with a lawyer, you can find free and low-cost legal information at <https://www.txcourts.gov/programs-services/legal-aid>.” Failure to comply with the provisions of this rule does not affect the finality of the judgment.

#### SUMMARY DISPOSITION

RULE 503.2(d) Order. The judge may enter judgment as to the entire case or may specify the facts that are established and direct such further proceedings in the case as are just. Any judgment entered must comply with the requirements of Rule 505.1.

#### JUDGMENT

RULE 505.1(c) Form. A judgment must:

- (1) clearly state the determination of the rights of the parties in the case;
- (2) state who must pay the costs;
- (3) be signed by the judge; and

(4) be dated the date of the judge's signature; and

(5) contain the following language: "You may have a right to claim exemptions to protect your property against seizure for satisfaction of this judgment. If you would like to talk with a lawyer, you can find free and low-cost legal information at <https://www.txcourts.gov/programs-services/legal-aid>."

## ENFORCEMENT OF JUDGMENTS

### RULE 505.2.

Justice court judgments are enforceable in the same method as in county and district court, including the requirements imposed by Rule XXX, except as provided by law. When the judgment is for personal property, the court may award a special writ for the seizure and delivery of such property to the plaintiff, and may, in addition to the other relief granted in such cases, enforce its judgment by attachment or fine.

## DEBT CLAIM CASES

RULE 508.3(a) Generally. If the defendant does not file an answer to a claim by the answer date or otherwise appear in the case, the judge must promptly render a default judgment upon the plaintiff's proof of the amount of damages. Notice of any default judgment, as required by Rule 503.1(d), must be sent to the defendant.

## REPAIR AND REMEDY

RULE 509.6. (5) If the judge awards monetary damages, the judgment must contain the following language: "You may have a right to claim exemptions to protect your property against seizure for satisfaction of this judgment. If you would like to talk with a lawyer, you can find free and low-cost legal information at <https://www.txcourts.gov/programs-services/legal-aid>."

## EVICTION

RULE 510.6(b) Default Judgment. If the defendant fails to appear at trial and fails to file an answer before the case is called for trial, and proof of service has been filed in accordance with Rule 510.4, the allegations of the complaint must be taken as admitted and judgment by default rendered accordingly. If a defendant who has answered fails to appear for trial, the court may proceed to hear evidence and render judgment accordingly. Notice of any default judgment, as required by Rule 503.1(d), must be sent to the defendant.

RULE 510.8(b) Judgment for Plaintiff. If the judgment is in favor of the plaintiff, the judge must render judgment for plaintiff for possession of the premises, costs, delinquent rent as of the date of entry of judgment, if any, and attorney fees if recoverable by law. If the judge awards monetary damages, the judgment must contain the following language:

“You may have a right to claim exemptions to protect your property against seizure for satisfaction of this judgment. If you would like to talk with a lawyer, you can find free and low-cost legal information at <https://www.txcourts.gov/programs-services/legal-aid>.”

**Debtors’ position:** The Debtor Group support the TJCTC proposal, because it would provide additional information to unsophisticated judgment debtors about their exemption rights.

**Creditors’ position:** Although the creditors are not completely opposed to the concept, these proposed rules are not within the legislative mandate, and would require input from other significant stakeholders such as courts and clerks. Additionally, the proposed language would result in the inclusion of property exemption language in all judgments, even in judgments against corporate defendants where no exemptions are available. Finally, if the Committee is interested in modifying judgments to reference exemption rights, then additional consideration should be given to the concept of allowing creditors to provide the notice and form at the time of judgment in satisfaction of the legislative mandate, rather than during the judgment enforcement process.

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