

State Bar of Georgia

Creditor's Rights Section Newsletter

WINTER 2003

CREDITOR'S RIGHTS SECTION OFFICERS 2002-2003 BAR YEAR

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LETTER FROM THE SENIOR CO-CHAIR OF THE CREDITORS RIGHTS SECTION HARRIET C. ISENBERG

Miscellaneous thoughts from the Chair:

The economy does and always has played an important roll in the business volume of attorneys practicing in the area of creditors rights (debt collection). Unfortunately, debtors are getting foxier which means we have to really be on top of our game.

Georgia law is among the most favorable in the country as far as creditors rights go. But first you have to know the law and second you have to use it and thirdly you have to use it correctly. When in doubt, call a colleague in the section. Most of us are happy to share what has worked for us, and more importantly what has not.

Once you have evaluated your case, filed the suit properly and had it correctly served, you are on your way. Then we all pray for a default. In most cases, you are entitled to interest and attorney's fees if you have properly framed your complaint. Be familiar with what has to be in your complaint to get the highest and best remedy available under Georgia Law.

If you are not luck enough to get a default, you review the answer and decide on your strategy. How much discovery, which kinds, mediate, arbitrate, summary judgment, bench or jury trial, etc. Find the buttons to push to bring the opponent to their senses. Find technical defaults, compel full discovery responses, or in very

simple cases and low dollar cases, the strategy may be to push it to trial and do very little or nothing. I don't recommend doing nothing because you will not know if they have a meritorious defense or not until you get to trial and then you are not prepared. Your client may not tell you everything and may not know what actually occurred on a particular job.

When you argue a motion or are in a charge conference, don't depend on the Judge knowing the law. They have different backgrounds and levels of experience. For the most part, they appreciate not having to do the research or make a guess. It is your duty to educate them on your position and of course do it better than your opponent.

If possible, when you have an adverse ruling and it is actually or probably incorrect, take the time to file an appeal. This gets us new and better law and law we can cite when others have the same circumstances. If you need help on an appeal, contact a member of the appeals committee who are Emory Potter and Ryan Isenberg.

Although 2003 continues to have its challenges, we have to be the squeaky wheel to get the oil for our clients. Most creditor's rights attorneys report that they are having a phenomenal year thanks to the poor economy. (Sad but true!)

Don't forget to enjoy life and stop and smell the roses.

CREDITOR'S RIGHTS SECTION FOUNDER, EMORY POTTER, TEACHES HIGH SCHOOL STUDENTS ABOUT CREDIT

On October 21 and 23, 2002, Emory Potter of the firm of Hays & Potter, was

asked to speak to the Economics students at Columbia High School on credit issues. He received accolades for his presentation. Dr. Anne Jones said he was the BEST speaker they ever had. She said that he maintained the students attention and adjusted his presentation perfectly to their level. He stressed the need to ignore all of the credit card applications available on college campuses and the need to maintain good credit and told them how to do it and what happens if you don't.

He made our section and our profession proud.

THANKS EMORY!!

CREDITOR'S RIGHTS SECTION MAKES PRESENTATION TO STATE COURT JUDGES

The Council of State Court Judges held their sem-annual conference in Jekyll Island on October 9-11, 2002 and our section was quite fortunate to be asked to make a presentation on two issues and present two papers. The Section was represented by its Co-chairperson, Harriet Isenberg of Isenberg & Hewitt. The presentation subjects chosen by the State Court Judge's Council were Attorney's Fees in Debt Cases and Personal Property Foreclosures. The papers are available to section members upon request. The Personal Property material was prepared by members David Dolinsky and Michael Kaplan from the firm of Macey, Wilensky, Cohen, Wittner & Kessler.

The presentation went well and seemed to be appreciated by the judges.

The Section had previously contacted the council and asked if there was some way we could get involved and initially were told that the agenda was full for Fall

and Spring. Surprisingly, the executive director of the Council said that when those issues were brought before the education committee that the judges were intent on having those subjects presented.

It was a great plug for the Section and the participants. Hopefully, we will be asked again.

A TALE OF TWO THEORIES— A DISCUSSION OF ATTORNEY'S FEES IN DEFAULT CASES ON COMMERCIAL ACCOUNTS

By Harriet C. Isenberg

While many of us do not attempt to recover attorney's fees when a case is in default, I routinely do. My reason for this is that when our clients sell goods or services on an account basis, they do not anticipate, in their profit and overhead margins, the cost to collect the money rightfully due them. Clients always assume that they will recover the fees they pay for legal services and believe that they are entitled to them. They are often disappointed.

In order to recover attorney's fees in a commercial account situation, in which there is no agreement by the debtor to pay for attorney's fees and costs of litigation.

O.C.G.A. 13-6-11 provides that "The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them." This might lead

you to believe that if you cannot prove bad faith that you cannot recover attorney's fees. However, the case law supporting an award of fees states otherwise. The issue is that the debtor has caused unnecessary trouble and expense by failing to pay an undisputed debt. That is where there is no bona fide controversy.

See *Typo-Repro Svcs. v. Bishop*, 188 Ga. App. 576, 580 (2) (373 S.E.2d 758) (1988).

{*804} *Wheat Enterprises v. Redi-Floors*, 231 Ga. App. 853, 856-857 (1) (c) (501 S.E.2d 30) (1998). Also note that the judge may also award fees as the trier of fact. *Derrickson V. Kristal*, 148 Ga. App. 320, 251 S.E.2d 170 (Ct. App. 1978)

When you file a motion for a default judgment, you should include a Motion For Attorney's fees citing these cases. Most of the court's in the Atlanta area award attorney's fees upon proper motion and proof. Since attorney's fees are considered unliquidated, they must be proven. This is where it may get tricky.

O.C.G.A. 9-11-55(a) requires that if there are any unliquidated damages, the court must conduct an evidentiary hearing and produce evidence of the damages before the court without a jury. See also *Oden v Legacy Ford-Mercury, Inc.*, 222 Ga. App. 666, 476 S.E.2d 43 (1996). At least one judge in the Atlanta area has taken the position that ruling in the case of *T.A.I. Computers, Inc. v CLN Enterprises, Inc.* 237 Ga. App. 646, 516 S.E.2d 340 (1999) supercedes 9-11-55(a). In the *T.A.I.* case, there were damages that the Court of Appeals found to be unliquidated and therefore remanded the case to the trial court for a hearing on damages. They also looked at the award of attorney's fees. The opinion stated: "we want to make clear that

on default judgment an award of attorney fees which is based solely on an affidavit is not necessarily erroneous, so long as the affidavit meets the requisite level of proof" citing *Oden, Supra*. They did not feel that the requisite level of proof was contained in the affidavit and recommended that the affidavit might have been sufficient if billing records had been attached and/or the tasks performed were described with more particularity.

Which theory will carry the day? It depends on the judge until the matter is taken up again.

What do we do about the judges who refuse to award attorney's fees on a default? Be courageous enough to have the hearing, have it taken down and take it up if necessary.

As a service to our profession, I did this very thing and it should be helpful to all. I had a hearing on a Motion For Default Judgment as required under O.C.G.A. 9-11-55 (notwithstanding T.A.I. v CLN) for the unliquidated portion of the claim which was the attorney's fees only. The Gwinnett County judge determined that there was no bad faith or unnecessary trouble and expense and was nice enough to actually prepare an order denying the fees with those findings. I argued that Forrest Cambridge (Defendant) had failed to file an answer and therefore admitted the allegations in the Complaint. The Complaint clearly alleged that the Defendant had caused the Plaintiff unnecessary trouble and expense and had acted in bad faith and that there was no dispute. The Court of Appeals said that if all that was admitted, the Court could not find as a matter of law that there was no bad faith or unnecessary trouble and expense. The case is now on remand for

the trial Court to determine what fees are customary and reasonable. To show how some attorney's are poor losers, the opposing counsel filed a Motion For Reconsideration with the Court of Appeals which was denied, applied for certiorari which was denied and then had the NERVE to ask the Supreme Court to reconsider their denial of certiorari. Of course they did not so the Appeals Court's decision is good law. (As good as it gets)

See *Fresh Floors, Inc. v Forrest Cambridge Apartments, L.L.C*, 257 Ga. App. 270, 570 S.E. 2d 590.

Since this section is about helping our members through education, legislation and changing unfavorable law. We now have an Appeals Committee to help with appeals which are relevant to our practice. Banning together also will help our plight with judges who do not understand certain areas of our practice. It is our job as lawyers to educate the court.

Harriet Isenberg is a practitioner with many years of experience in the creditor's rights area. She represents commercial creditors and has helped define the attorney's fees issue in many ways. She was successful in defeating the appellant (defendant) in the important case of *Wheat Enterprises v Redi-Floors, Inc.* and more recently in *Fresh Floors v Forrest Cambridge LLC*. The firm name is Isenberg & Hewitt, P.C. Their web site is WWW. Isenberg-Hewitt.com . You may send e-mail to hisenberg@isenberg-hewitt.com.