NOTE: The following questions and sample answers are based upon a question used in past examinations. In this portion of the sample, both the questions and the answers have been updated to reflect the present state of the law. The questions give an idea of the likely scope and subject matter of the questions you will see. Although an excellent paper would discuss in some detail all of the issues raised in the sample answer, a paper may receive a passing grade even though the analysis is less thorough. The sample answers are often far more detailed than a test-taker’s answer will be, in order to reflect all the issues that one might discuss. Historically, more than 90 percent of the papers have received a passing score.

Creditors’ Rights Subspecialty Essay

Question A

Todd Garrett’s uncle died, and bequeathed to Garrett $100,000. After much research and many discussions with experienced investors, Todd instructed his stockbroker, Brokers, Inc., to buy 1000 shares of ICC, Inc. stock with the money and to place it in his account at Brokers, Inc. Brokers bought the shares and kept them in the account that it held at Clearing Corp. Brokers marked its records to indicate that Todd was really the owner of 1000 shares of the stock.

Garrett will marry his college sweetheart next month, and he wants to surprise her with an extraordinary honeymoon on an around the world cruise on a luxury liner. He asked Wilshire Bank for a loan, using the 1000 shares of ICC, Inc. stock as collateral. You are the counsel for Wilshire Bank. The bank wants to make the loan to Garrett, but you want to make sure that the bank’s security interest is in the least vulnerable position possible.

1. Describe the possible methods that the bank can use to perfect its security interest.

2. Recommend a method or methods of perfection to your client and why you made that recommendation.

3. Discuss and explain any remaining risks to the bank despite perfection, if any exist.

Answer

The collateral is investment property (9-102(49)) and, because the shares were purchased through the stockbroker (the securities intermediary 8-102(a)(14)) who marked the account it maintained for Garrett as the owner of the collateral, Garrett is an entitlement holder 8-102(a)(7) of a security entitlement 8-102(a)(17).

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1. To perfect a security interest in a security entitlement, the bank may file a financing statement (9-312(a)) or the bank may perfect by control (9-314(a)) in the manner as described in 8-106(d): (1) bank may become the entitlement holder; or (2) Brokers, Inc. may agree to comply with entitlement orders originated by bank without further consent by Garrett, or (3) if another person has control of the security entitlement on behalf or bank or, having previously acquired control of the security entitlement, the other person acknowledges that it has control on behalf of bank.

2. The recommended method of perfection is through control (the three means of control are equal in preference). Control is the preferred method because of 9-328(1) which gives priority to a secured creditor who has control over one who has does not have control.

3. There is another risk to the bank, and that risk is that if Brokers, Inc. takes a security interest in the security entitlement (or securities account) it is automatically perfected (9-309(10)) by control (8-106(e)) and, under 9-328(3), Brokers, Inc. would have priority over all other security interests, including that of the bank, even if bank perfects through control before Brokers, Inc. is given the security interest.
Creditors’ Rights Subspecialty Essay

Question B

FastBank sends an unsolicited credit card application to Penny Smith, who works as a waitress for wages and tips which average $2,400 per month. She is unmarried and lives alone with her daughter in a small rented apartment. She needs everything she earns to cover the necessities of life. The credit card solicitation states that there would be 0% interest for 6 months, and 9% interest per year thereafter, and that minimum payments would not exceed 1/24 of the total unpaid balance. Seeing this as a chance to have better things for her daughter and herself, Penny applies for and receives a FastBank Credit Card with a $10,000 credit limit. With the credit card, she receives but does not read a “Statement of Terms and Conditions” which include the following:

1. “The terms of payment and interest rate are subject to change at any time upon notice from FastBank to the cardholder.”
2. “The interest rate on any balance on which the monthly payment is delinquent shall be 24%.”
3. “The monthly payment is delinquent if it is not received by FastBank by the due date shown on the monthly statement.”

Over the next three months, Penny incurs credit card charges of over $4,000 and makes the minimum required payments on time. In the third month Penny receives a notice from FastBank that because of the changed economic circumstances it has had to impose a 10% interest charge on all its former 0% accounts starting with the following month. Penny continues to charge the card and makes minimum monthly payments for the next four months, but by then, with accruing interest, the balance has increased to $9,000. At this point, Penny’s employer goes out of business and Penny is left jobless. Still unemployed, Penny misses the next payment. She then is notified by FastBank that because of her missed payments her card has been cancelled and the interest on the unpaid balance has been increased to 24% per year, and the minimum monthly payment amount had been increased to 1/10 of the outstanding balance. Still unable to pay, Penny receives telephone demands from FastBank’s debt collector, Fast Collect, often two or three times a day, in which Fast Collect threatens to sue her and “ruin her credit” even though she tells them that she will try to resume making the minimum monthly payment as soon as she gets a job. She then does get a new waitress job, at a similar wage and when Fast Collect next calls she tells them about the new job and promises to resume payments after her first payday. The next day, Fast Collect calls her at work and adds a threat that if she doesn’t pay the full $1,000 delinquency together with a minimum 10% payment on the remaining balance now, they will sue her and attach her wages. Penny tells Fast Collect that her employer doesn’t want her to take personal calls at work, but Fast Collect keeps calling her there anyway.

Afraid of losing her job because of the repeated personal calls or for being sued and having her wages garnished by Fast Collect, on behalf of FastBank, Penny comes to you, her lawyer for help. Please discuss your advice on the following:

Creditors’ Rights Subspecialty Essay Sample Exam 2018
1) Is Penny liable for the entire balance and accrued interest under the credit card agreement?

2) Has Fast Collect done anything wrong in seeking to collect the debt?

3) Does Penny have any statutory or common law remedies?

4) Would bankruptcy help Penny?

**ANSWER**

1. Absent a showing of fraud in the inducement, or usury law provisions limiting the interest rate that can be changed, Penny has no contractual defense to any suit the Bank might file to recover the balance with all accrued interest. The terms of the credit card agreement do provide for the Bank’s right to change terms and unless the increase is shown to be unconscionable (again, absent any applicable usury limitations). By continuing to use the card Penny accepted the change to the interest terms. Therefore, the Bank can increase the rate or change the terms to whatever it wishes.

2. Fast Collect’s phoning Penny repeatedly at her place of employment, after being told not to call her there clearly violates the provisions of the Federal Fair Debt Collection Practices Act and may violate provisions of applicable state law consumer protection statutes.

3. If a violation of the FDCPA is proven, the court can order Fast Collect to pay Penny’s damages and attorney fees. In addition, Penny may have common law causes of action for damages or remedies under the forum’s consumer protection statutes for actual and emotional damages sustained from the collector’s abusive tactics.

4. Bankruptcy would stop the dunning calls, because of the operation of the automatic stay of 11 U.S.C. § 362. In addition, the stay prevents any creditor from taking action to garnish her wages during bankruptcy. However, one of the consequences of filing bankruptcy is that any statutory or common law rights to pursue FastBank or Fast Collect will become property of the bankruptcy estate pursuant to 11 U.S.C. §541(a) and the proceeds from these causes of action will be used by the bankruptcy trustee to pay her creditors.
Creditors’ Rights Subspecialty Essay

Question C

After obtaining a judgment in the amount of $8,000 against Martha, Attorney Sullivan records the judgment, sends the judgment debtor interrogatories in aid of judgment, and learns the following: (1) the debtor is a 70-year-old widow whose only income is Social Security (and whose only income has been Social Security for the past 10 years); (2) the debtor’s assets consist of a home (valued at $200,000 with no mortgage), (3) banking accounts (with an approximate total balance of $40,000); (4) a motor vehicle (valued at $20,000, owned free and clear of all encumbrances), (5) miscellaneous personal property (valued at approximately $10,000) and (6) a race horse (valued at approximately $10,000) located in an adjacent State.

Your jurisdiction recognizes all applicable federal, non-bankruptcy exemptions and the following State exemptions:

<table>
<thead>
<tr>
<th>Exemption</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Homestead</td>
<td>unlimited</td>
</tr>
<tr>
<td>One motor vehicle</td>
<td>$5,000</td>
</tr>
<tr>
<td>Tools of the trade</td>
<td>$2,000</td>
</tr>
<tr>
<td>Banking accounts</td>
<td>$20,000</td>
</tr>
<tr>
<td>Misc. personal property</td>
<td>$5,000</td>
</tr>
</tbody>
</table>

How should Attorney Sullivan proceed to collect on her client’s $8,000 judgment against Martha?

ANSWER

The simplest way to proceed would be to file a non-wage garnishment petition with the court and take the resulting order to the bank where Martha’s accounts are and garnish the bank accounts. However, if Martha’s only source of income for the past 10 years has been Social Security, it is very likely that the source of all of the funds in her banking accounts is attributable to Social Security, which federal law exempts from creditor collection efforts. If the judgment creditor could satisfy the court that it was not seeking to satisfy its judgment from Social Security funds, the matter would be very straightforward and completed rather quickly.

If the creditor cannot trace the funds or establish that the debtor has co-mingled exempt funds with non-exempt funds, the judgment creditor will have to look to another source to satisfy the judgment. Any other method of collection would require the creditor to request the court to request the court (or just the sheriff in some jurisdictions) to levy Martha’s executable property. The only items that could be reached by a creditor at this time are Martha’s vehicle and some of her personal property. Due process requires only notice to Martha, an opportunity to be heard, and safeguards be in place to guard against a mistaken taking. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1973).

Regarding the horse, Sullivan will have to register the judgment in the adjacent State (assuming it has adopted the Uniform Enforcement of Foreign Judgments Act) or bring an action on the judgment (if it has not adopted the UEFJA), register the judgment and execute the judgment against the horse.

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