

# Advising Clients Who Have Been Sued by Creditors

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Below is a brief summary of how to evaluate a client's options in a consumer debt collection lawsuit. This updates the August 2008 Tip of the Month.

## **1. ASSESS THE SITUATION**

Does the client have any defenses? Do they dispute (or lack sufficient knowledge to admit or deny) any of the facts alleged in the Complaint? Besides a number of *debt-specific* affirmative defenses (i.e., relating to the car loan, credit card, medical bill, etc.), there are also commonly-raised general affirmative defenses:

- The Plaintiff sued the wrong person or the account was opened by an identity thief.
- The client disputes the amount of the debt (e.g., the alleged amount includes unauthorized purchases or fees and interest rates that were not in the contract).
- The claim is barred by the statute of limitations. (Minnesota's six-year statute doesn't always apply.<sup>i</sup> Some credit card contracts invoke the law of other states whose statutes may be as short as three or four years.<sup>ii</sup> Vehicle loans have a four-year statute.<sup>iii</sup>)
- The Plaintiff does not have standing to sue on an assigned account.<sup>iv</sup>

To what extent are the client's income and property exempt? This includes:

- All funds from "government assistance based on need" (e.g., SSI, MSA, MFIP and EITC).<sup>v</sup>
- Some other sources that aren't "need based": Social Security Retirement, Disability and Survivor benefits, child support, UC, disability benefits, student loans, life insurance proceeds, veteran's benefits.<sup>vi</sup>
- All earnings<sup>vii</sup> when the client: a) receives any type of need based assistance (e.g. Food Support, Medical Assistance, Minnesota Care, Energy Assistance, SSI, MSA, MFIP and EITC; OR b) earns less than \$290 per week.
- Note: if the client earns more than \$290 per week, up to 25% of after-tax earnings are *not* exempt.
- Exemptions for other types of property can be found at Minn. Stat. 550.37.<sup>viii</sup>

Determine the status of the case. Don't rely on the client's understanding: check the MNCIS webpage,<sup>ix</sup> call the court clerk, and maybe even call opposing counsel. Note that Plaintiffs can start garnishing without filing in court if the Defendant hasn't answered 45 days after service.<sup>x</sup> Also, an action is commenced in Minnesota upon *service* of the action upon the defendant, not upon filing it with the court.<sup>xi</sup> Determine:

- Has the case been filed in court? (If yes, is there a judgment or any pending motions?)
- Does the Plaintiff believe that the Defendant has been served or is in default?
- Has the Plaintiff served any discovery request (especially Requests for Admissions)?

## **2. DETERMINE THE BEST RESPONSE**

First Option: Dispute the Debt. (The ability to do this may depend on the status of the lawsuit.)

- If the Summons and Complaint has been served within the past 20 days, the client can serve an Answer to dispute any or all facts alleged in the Complaint and to raise other affirmative defenses.
- If more than 20 days has passed, it is still good to serve an Answer. If the Plaintiff objects, it may be necessary to move for leave to answer.<sup>xii</sup>
- If a default judgment has been entered, the client first needs to vacate the judgment based on:
  - Lack of service (in which case, the default judgment is void and must be vacated).<sup>xiii</sup>
  - Meeting four<sup>xiv</sup> factors within one year of entry of the judgment: 1) a reasonable defense on the merits; 2) a reasonable excuse for failure or neglect to answer; 3) due diligence after notice of the entry of judgment; and 4) no substantial prejudice to the other party.<sup>xv</sup>

Second Option: Claim Exemptions for Protected Funds. If the client is being or has been garnished, follow the statutory instructions<sup>xvi</sup> for sending an exemption claim for the protected part of the money. It helps to send proof of an exemption *before* the garnishment starts (e.g. with the Answer) because the Plaintiff might decide to not file or litigate the matter or agree to delay garnishing.

Third Option: Settle the Debt. Settlement may be advisable in situations where the client: is not completely exempt; does not have strong defenses against the entire debt; **or** does have a compelling reason to avoid having a judgment entered. See also Caveat, below.

- The agreement should include: (A) a stipulation that the payments will be a full and final satisfaction of all claims; (B) the total amount to be paid; (C) the date and amount of each payment; and (D) that the client has not waived their defenses in the event that the settlement agreement isn't completed.
- A client should not agree to pay exempt money to a debt collector without a good reason for waiving their exemptions and certainty that they can afford to buy what they need.
- Collection attorneys may settle for less if the client has strong defenses or only exempt income.
- Long-term payment plans should be avoided. One lump sum payment is usually best because clients can't fully anticipate future income or unexpected expenses/emergencies.

Fourth Option: File for Bankruptcy. Bankruptcy might be a good option if: (A) there are no strong defenses; (B) the debt is large (and/or there are other judgments or court actions) and (C) the money is not protected by exemptions. Bankruptcy may also be advisable if client will be pro se and is unable to argue their defenses in court or to claim their own exemptions. See also Caveat, below

Fifth Option: Do Not Defend. Not defending is advisable **only** when the client does not have any defenses against the debt, any merits to vacate a default judgment, any exemptions, or any option to settle.

- "Collection-proof" status is not reason to ignore a lawsuit. Even exempt funds can be frozen until the debtor proves their exemptions and many consumer debtors have difficulty in claiming their own exemptions. In the meantime, significant overdraft and other fees may be incurred.
- In any event, clients always need to respond to post-judgment discovery requests or risk being arrested for contempt for not complying with an order to compel discovery.

Caveat: If the judgment is from a car accident where the client/defendant was uninsured, the court might suspend the client's driver's license unless the client complies with an agreed-upon payment plan.<sup>xvii</sup> Here, the client's best option may be bankruptcy or to use exempt funds to settle or satisfy the judgment.

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<sup>i</sup> MINN. STAT. § 541.31, Subd. 2 was enacted in 2004 to provide that when an action is based on another state's laws, that state's statute of limitations will also be applied (in most situations.)

<sup>ii</sup> See e.g., Del. Code Ann. 10, § 8106 (3 years); N. H. Rev. Stat. § 508.4 (3 years); and Nev. Rev. Stat. § 11.190 (4 years).

<sup>iii</sup> MINN. STAT. § 336.2-725(1).

<sup>iv</sup> Minn. R. Civ. P. 17.01.

<sup>v</sup> Find a list of examples at MINN. STAT. §§ 550.37, Subd. 14; 571.912; and 571.925.

<sup>vi</sup> Id and 20 USC § 1095a(d) (student loans are exempt).

<sup>vii</sup> MINN. STAT. §§ 550.37, Subd. 13; 571.912; and 571.925.

<sup>viii</sup> The value limits of these property exemptions are usually increased every two years by the Minnesota Department of Commerce.

<sup>ix</sup> <http://pa.courts.state.mn.us>.

<sup>x</sup> MINN. STAT. §571(2).

<sup>xi</sup> Minn. R. Civ. P. 3.01.

<sup>xii</sup> Minn. R. Civ. P. 6.02.

<sup>xiii</sup> Minn. R. Civ. 60.02(d) and Hengel v. Hyatt, 252 N.W.2d 105, 106 (Minn. 1977).

<sup>xiv</sup> Proof of all four factors requires that a judgment to be vacated but a failure to prove all four factors doesn't mean that the motion must be denied. See, Northland Temporaries, Inc. v. Turpin, 744 N.W.2d 398, 406 (Minn. Ct. App. 2008).

<sup>xv</sup> Minn. R. Civ. P. 60.02(a) and Finden v. Klass, 128 N.W.2d 748, 750 (Minn.1964).

<sup>xvi</sup> MINN. STAT. §§571.912 and 571.925.

<sup>xvii</sup> MINN. STAT. §171.182.