



The Debtor Client— Approach and Strategies

CARPLS Legal Aid Volunteer Training



Welcome to CARPLS



CARPLS has many debtor clients



- Debt related and consumer legal issues are 30% of our work
- The recent down economy makes these issues even more prevalent





Most Debt Clients Are Not in Real Legal Jeopardy

- They are **collection proof**
- They have no garnishable wages
- they have no substantial money in the bank (under \$4000)
- They own no real estate subject to collection



There is no debtors' prison in America



- Clients often need some basic education on how debt collection works
- Clients often need some practical advice about how to order and prioritize their debt
- Clients often need some empathy for their situation, and consolation over losing a job or a costly divorce



Keep the Client Focused on the Current Debt Problem



- Stay on what has prompted the call today
- Don't get too involved in hypotheticals or events that might never happen
- Make sure the client knows he can call back when and if something else occurs



Don't worry today about what might not even happen tomorrow



It could be a very long time (if ever) before a creditor actually sues the client on a credit card debt (time from first missed payment to litigation can be a year or much more)



The Legality versus the Morality of Paying Your Debts



- Some clients want to pay their debts because they feel a moral obligation to do so
- Most clients do not have a legally compelling reason to pay their debts if they are collection proof
- The destitute client should not be worrying about paying unsecured debt



What to do when you don't have enough money to pay your bills



- Prioritize your bills, life critical bills first (rent or mortgage, utilities, food, medicine)
- Pay secured debt before unsecured debt (cars, furniture bought on time, items that can be repossessed or trigger a wage assignment)
- Only then pay the unsecured debt (like credit cards, family members)



Downsides to putting off the day of reckoning/payment of a debt



- Nonpayment triggers a higher interest rate, and that is accruing (often over 25%)
- The client's credit rating/score is negatively affected by nonpayment/charge offs
- Bad credit can affect the client's ability to get a job, or get other credit, including a mortgage



Working with Creditors



- Before you miss a payment—contact your creditors first, and let them know what is going on
- Don't avoid your creditors—being silent is the worst thing you can do
- Creditors are very willing to work with customers during this down economy



Collection Calls and Letters



- ANSWER the phone!
- Actually OPEN your mail!
- Explain what is happening with your finances (i.e. job loss, illness)
- Try to work out paying a small set amount, or that the interest is abated, or pay only interest for a time period
- Confirm any agreement in writing



When Debt Collectors Go Too Far



- When do collection agency contacts amount to actionable harassment under the federal Fair Debt Collection Practices Act (FDCPA)? If they:
- Call before 8 am or after 9 pm
- Make contact with third parties other than to get contact information on the debtor
- Call the debtor at work after being told you can't take such calls at work
- Make threats that are "extralegal" in nature
- CARPLS has a private attorney panel to which we refer these affirmative claims



"I am Collection Proof"



- If the client is collection proof, tell the creditor in writing (CARPLS' software has form letters we can customize to the client's facts)
- Informing the creditor of collection proof status should stop the calls (they may still sue the client, however)



Debt Litigation



- Why do creditors even sue collection proof debtors?
- Because only if they get a court judgment, and take all the steps to prove it is uncollectable through court process, can they properly write the debt off as a "bad debt" under IRS regulations
- And, they *might* get some money someday



Statutes of Limitation



- On credit cards, oral contracts and accounts stated, the limitations period is **5 years** from the last **payment** made or last **acknowledgment** of the debt See 535 ILCS 5/13-205
- 10 years on written contracts (for personal or family loans); a credit card debt cannot be based on a contract theory <http://www.illinoiscourts.gov/opinions/appellatecourt/2009/1stdistrict/may/1073004.pdf>
- **Don't pay on or "reaffirm" your old debts!**



Common Defects in Debt Collection Complaints



- Suing after the statute of limitations has run out
- Not attaching the written contract under 735 ILCS 5/2-606
- Not attaching evidence of the assignment of the debt, or pleading facts of the assignment in the body of the complaint under 735 ILCS 5/2-606



Common Procedural Defects



- Improper venue—suing client where client used to live when the credit account was opened
- Improper service of process—serving client where client used to live when the credit account was open
- Just "bad" service—perjured, false affidavits of service of process in this high volume, cut the corners debt collection business



I received a summons—now what?

- The court date on the summons is the "return date"
- That is the date and time by which the client must have filed a written appearance; the case is not actually before a judge that day
- Apply for a Illinois Supreme Court Rule 298 fee waiver if you can't afford the filing fees FIRST
- File your appearance BEFORE the return date
- Another court date will then be set for about five weeks later where the client WILL stand before a judge



What happens when the client "goes to court"?

- Some clients just "show up" at the courtroom on the return date
- Creditor's attorney will try and talk them into a payment plan in the hallway
- Don't agree to anything client cannot actually do
- Beware that what the client thinks is only a "payment plan" is often entered as an agreed JUDGMENT against the client



"Should I Appear, or Default?"

- It's a strategic decision of whether to appear and defend, or let the matter go to a default judgment
- Appear and defend if you have a defense, if you need a longer time horizon to settle, or you don't care about the creditor incurring more attorneys' fees and costs (if you are collection proof anyway)
- Let it go to a default if you have no defense, you simply "can't go to court," you are not in a financial position to settle, or you want to cut off the high interest and attorneys' fees and costs



If the Client Actually Has a Defense



- File an Appearance (and an answer if the *qd damnum* is over \$10,000; in smaller value cases, the appearance serves as a general denial of all claims)
- Ask for discovery, including all evidence of the debt, all payments made, documentation of any assignments of the debt
- Be "ready for trial" at each court date
- The creditor will often not have the evidence to prove up the debt, and end up voluntarily dismissing the case



Strategies that Buy More Time



- Anything that "gums up" the machinery of the high volume debt collection legal process often will get concessions from a creditor's attorney, tactics like:
 - Motion to dismiss the complaint
 - Motion to quash service
 - Discovery requests
 - Demanding trial



Settlement Strategies



- Many people actually do want to pay their debts (or a portion thereof)
- Don't offer what you don't have
- Make sure anything you offer you can live up to
- Offer more than they could get in a formal collection proceeding (such as a garnishment)
- A lump sum offer now of half that is owed is often attractive to creditors (some money now is better than possibly no money later)
- Avoid having it entered as a judgment
- GET ANY AGREEMENT IN WRITING and get a full release and dismissal



The judgment has been entered, now what?



Post Judgment Collection Proceedings

- In Daley Center Courtroom 1401
- This is NOT the courtroom in which to argue the merits of the underlying judgment
- CARPLS' Collection Pro Se Advice Desk is in 1401



"I didn't know anything about it"

- Clients often don't know they have even been sued
- They learn of judgments from pulling their credit reports
- Post-judgment collection proceedings are also often their first knowledge that there is a judgment
- Judgments are good for 7 years, and renewable up to 20 years, so they may have forgotten about the debt/lawsuit



Post Judgment Proceedings



- **Citation to Discover Assets 735 ILCS 5/2-1402**
 - The client MUST APPEAR as it is a court order to appear, or risk a body attachment
 - serves as a court supervised deposition about the client's finances/ability to pay the judgment
 - will inquire about employment, bank accounts and other liquid assets, & real estate owned
- Once all questions are answered, the creditor has its answers, the citation is "dismissed"



Post Judgment Proceedings



- **Bank Freezes or "Non Wage Garnishments" 735 ILCS 5/12-701 et seq.**
 - Many clients can get all their money unfrozen, due to exemptions, such as:
 - Exempt income source or exempt account (retirement, Social Security, VA, public aid)
 - The funds actually belong to another person
 - if all else fails, exercise the \$4000 wild card exemption



Post Judgment Proceedings



- **Wage Garnishments 735 ILCS 5/12-801 et seq.**
 - must make at least \$371.25 net a week to even be garnishable
 - Only one creditor's garnishment at a time until judgment is paid off
 - garnishment amount is limited to the LESSER of: 15% of gross wages OR the amount by which take home (net) pay exceeds the exempt amount (\$371.25)



Post Judgment Proceedings



• Illinois Supreme Court Rule 288 Agreements

- This rule allows the debtor to ask the court for a payment plan on a judgment (a good way to avoid garnishment or bank freeze)
- Only for judgments less than \$10,000



-must be able to pay it off within 3 years

-can ask for this any time after a judgment is entered



Post Judgment Proceedings



• Liens on Real Estate

- judgment is registered against real property owned in the county in which it is situated
- generally the lien just "sits there" until the debtor/owner tries to convey (or refinance) and at that time the judgment lien would have to be paid to proceed with their plans
- not likely valuable real estate would be forced to a sale to satisfy a much smaller judgment



Bankruptcy



- Bankruptcy is the last resort
- Most of our clients do not have a legal need to file bankruptcy (as they are collection proof)
- You file bankruptcy when you need the "protection of the federal bankruptcy court"
- You file bankruptcy when you have a multiplicity of court actions against you
- You file bankruptcy when you are in actual legal jeopardy



What benefit is there to filing bankruptcy?



- Triggers an **automatic stay** of all collection proceedings against the debtor
- All creditors must come into the bankruptcy court and deal with the debtor there under that court's supervision
- Interest stops accruing
- The automatic stay does not stop eviction possession, license suspension, paternity, child support, custody, divorce, or domestic violence proceedings



When to File Bankruptcy



- At the last possible moment
- When something of legal or practical consequence is about to happen (foreclosure, wage garnishment, bank freeze where you stand to lose something of value)
- If there are ongoing debts, don't file yet, as those debts will not be included in the discharge (such as having ongoing medical problems and no health insurance)



Chapter 7 Bankruptcy



- What most people are thinking of when they call about bankruptcy—a "do over" on their debts
- Wipes away dischargeable debts and you start over again
- Requires an "Assets versus Debts" analysis
- Requires a liquidation of assets to pay creditors if possible, but the rest is discharged



Exemptions for Certain Assets in Chapter 7 Bankruptcy



- \$15,000 of equity is exempt in real estate (\$30,000 for married couple filing jointly)
- \$2400 exempt in a motor vehicle
- \$4000 "wild card" exemption for personal property (usually used to keep the cash on hand)



Not All Debts are Dischargeable



- Debts incurred by fraud
- Alimony/maintenance
- Child support
- Most student loans
- Certain types of taxes
- Parking tickets and quasi criminal fines



ARE NOT dischargeable

Who can file Chapter 7?



- After the 2005 bankruptcy code revisions, a means test is applied (11 U.S.C. sec. 707(b)(2))
- Must have income lower than the median for the state of residence to use Chapter 7 (below \$49,682 for 1 person in Illinois as of 2015)
- The calculation *excludes* Social Security, unemployment compensation, public aid under TANF



Other Chapter 7 Requirements



- Must do consumer credit counseling before you can file
- Can file Chapter 7 only once every 8 years



Chapter 13 Bankruptcy



- Is essentially a court supervised repayment plan, managed by the Bankruptcy Trustee
- Must have sufficient income to "support the repayment plan"
- Usually lasts for 60 months
- Creditors agree to accept far less than what is owed
- Debtor at the end "emerges" from bankruptcy
- You can use Chapter 13 to deal with just one debt
- A good option if there is a house that debtor wants to "save"



When to File Chapter 13



- When a major creditor will no longer work with debtor and is threatening suit/foreclosure
- Can't file a Chapter 13 within 4 years of a Chapter 7
- Chapter 13 often comes first, the debtor "defaults" on the payment plan, the Chapter 13 is dismissed, and then a Chapter 7 is filed



Other Points on Bankruptcy



- No Legal Aid clinic will do a bankruptcy for a collection proof client for the sole purpose of discharging debts--there has to be a legally compelling reason to get their help
- If someone insists they have to file bankruptcy, refer them to the private bar
- Bankruptcy shows on your credit report for 10 years (and follows you "forever" because most credit applications ask if you have "ever" filed bankruptcy)



Bankruptcy is Not the End of the World



- So many people have filed bankruptcy that it is not the "scarlet letter" it used to be
- Credit will be initially impossible to get, but after six months to a year, a credit card is possible
- Even a mortgage is possible (with higher interest rates)
- Recently bankrupt customers have no debt so they are considered relatively "good" credit risks



Some other Consumer Debt Issues



• Wage Assignment

- Not to be confused with wage garnishment
- Contractual, not judicial, permission to intercept wages
- Probably gave it when buying furniture, car or getting a "pay day" loan
- Under Illinois law, a wage assignment is revocable at time for any reason
- CARPLS has revocation letters we can draft for the client



Some other Consumer Debt Issues



- **Repossession of Cars**
- Creditor has a right to repossess without a breach of the peace
- Debtor entitled to notice within three days of his right to redeem the car within 15 days IF he has paid more than 30% of amount financed as of the time of the repossession (815 ILCS 375/20)
- Car is sold, usually at auction, and that amount is credited against what the client owes
- Client is often then sued for the "deficiency" balance, even though the car was repossessed



Some other Consumer Debt Issues



- **Debts of Another**
- "co-signing" on loans, for cars, for apartments
- Are they a primary obligated party or a "guarantor" (if a guarantor, the creditor has to go against other first and find the debt uncollectable before going after the guarantor)
- 815 ILCS 375/18 provides a defense as a "co signer" for a parent, spouse or other person who did not actually receive the goods



Final Practical Tips For Working with the Debtor Client



- If the client is not really ready to talk, suggest client get all their debt papers organized and call back if necessary
- Look up **all litigation** in the Cook County Clerk of Court's website www.cookcountyclerkofcourt.org
- Look for other suits against client as well and tell them about them so they can investigate further


