

LEGAL LUNCHES
DEBT COLLECTION
May 20, 2008

A. Bad Debt is Bad Business

1. We are all in business to make money

a. Whether we are selling a product or selling a service, if we don't get paid for the work we do or the product we sell, we will not be able to stay in business.

2. "Collectability" of Receivables

a. The more time that elapses between the time of rendering the service or providing the product and the time of collecting the receivables greatly reduces the likelihood of collection.

b. Important to Stay on Top of Receivables

3. Client Relationships

a. New Clients are expensive and difficult to acquire

b. Fee Disputes are one of the quickest ways to lose clients

c. Objective should be to avoid fee disputes or overdue A/R

4. Avoiding Bad Debt

a. Be Clear at the Outset

1.) What is the Job you are hired to perform/product to be sold

2.) What is the cost of the job

3.) How is the cost to be paid

4.) Are there any variables that will affect Price/Service/Product

a.) If so, put it in the contract

b. Get Retainer Up Front

B. Contractual Terms

1. Use Written Contracts

a. Oral Contracts can be enforceable --- just more difficult!

2. Who are the Parties –Know who you are dealing with

a. Corporation or Individual?

b. Correct Names

3. What is the Product to be sold/Work to be Performed/Service to be Provided

a. Be Clear

4. When is the Contract to be Performed

a. Firm Date or "Ball Park" Estimate

b. Give yourself time to complete the contract considering any contingencies

5. What are the Payment Terms

a. Money Required Up Front?

b. Payment due upon Delivery?

c. Payment due Net 30 days?

6. Include Payment Default Language

a. Sample Language:

1.) "Any sums not paid when due shall accrue interest at the rate of 1.5% per month. Should this matter be turned over to an attorney for

collection, the Buyer shall be responsible for all costs of collection, including a reasonable attorneys' fees equal to 25% of the amount due".

- 2.) Interest – Seller is not entitled to charge interest unless it is included in the signed contract.
- 3.) Attorneys fees and Costs – Seller is not entitled to recover its attorneys fees and costs unless this provision is included in the signed contract.

C. Fair Debt Collection Practices Act

1. Fair Debt Collection Practices Act: governs collection activities by third-parties (i.e. not the creditor itself)

2. Federal Version: 15 U.S.C. §§ 1692 et seq.

a. Regulates “debt collectors”, which is anyone who:

- 1.) Uses interstate commerce
- 2.) In any business whose principle purpose is collection of consumer debt; or
- 3.) Who regularly collects or attempts to collect such debts

3. Maryland Consumer Debt Collection Act: Md. Code Ann. Commercial Law II §§ 14-201 et seq. *Not limited to only those who ‘regularly’ engage in such activities*

a. Prohibitions

1.) Harassment

- (a) Threat of force, criminal prosecution
- (b) Use of “obscene or grossly abusive language”
- (c) Use of communication which “simulates legal or judicial process or gives the appearance of being authorized by a governmental agency, or a lawyer, when it is not.”

2.) Communications at unusual time or place

- (a) *Federal version specifically prohibits calls before 8 a.m. or after 9 p.m.*

3.) Communications at time known to be inconvenient

4.) Communications at place of employment

- (a) if reason to know employer prohibits such communications

5.) Strict limitations on communications with third parties

6.) No direct communication once debtor retains counsel

b. Damages for Violation

- 1.) Include for emotional distress and mental anguish, with or without accompanying physical injury.

c. Requirements

1.) Within 5 days of initial contact with debtor, collector must send debtor written notice with

- (a) Amount of debt
- (b) Name of creditor
- (c) Statement that within 30 days of such notice, the debtor may in writing

i. Request verification of the debt

- ii. Dispute some or all of the debt
 - iii. Request the name of the original debtor, if not known.
 - 2.) Upon receipt of such request from debtor, all collection efforts must cease until request fulfilled.
 - (a) i.e.- no filing of court actions
- d. Misc. Provisions
 - 1.) Debtor may be sued only
 - (a) Where they live
 - (b) Where the debt instrument, if any, was executed
 - (c) *Change from general law in Maryland allowing debtor to also be sued where he/she works.*
 - (d) *An action against real estate is still brought only in the County where located.*

D. Court Action

1. Objective: Obtain a Collectable Judgment

a. Judgment – Order by the Court stating that a certain sum of money is owed by one party to another party.

1.) Distinction – A Judgment is not an “Order to Pay”

(a) No Debtor’s prison

2.) Can act as a “Lien” on any real property owned by Debtor

b. “Collectability”

1.) “Judgment Proof Debtor” – Debtor who has no current or future ability to pay.

(a) Corporations with no assets

(b) Bankrupt Defendant

2. Background: Maryland Court Structure & Jurisdictional Limits

a. District Court

1.) Lowest Level Court of Original Jurisdiction

2.) Exclusive Jurisdiction for Matters where the amount in controversy is \$5,000 or less.

(a) Trial by Jury is not available if amount in controversy is less than \$10,000.

3.) Concurrent Jurisdiction with Circuit Court for Matters where the amount in controversy is greater than \$5,000 but is \$30,000 or less

(a) Trial by Jury is available if amount in controversy is over \$10,000.

(b) If Jury Trial “prayed”, matter is transferred to Circuit Court

b. Circuit Court

1.) Highest Level Court of Original Jurisdiction

2.) Concurrent Jurisdiction with District Court for Matters where the amount in controversy is greater than \$5,000 but is \$30,000

or less.

(a) Trial by Jury is available is amount in controversy is over \$10,000.

3.) Exclusive Jurisdiction for Matters where the amount in controversy is greater than \$30,000.

(a) Trial by Jury is available

3. Small Claims – Available Only in District Court

a. Defined as any civil where the amount in controversy is \$5,000 or less

b. Significance

1.) Rules of Evidence are Relaxed

(a) Court will decide what “weight” to give evidence

2.) Appeals to Circuit Court are heard “*De Novo*” – meaning that if an appeal is taken to Circuit Court, have a brand new trial.

(a) This is different than other appeals from District Court which are heard “on the record”.

(b) In Appeals “on the record”, a transcript of the District Court proceeding is made and transmitted to Circuit Court. No new evidence is taken at the Circuit Court. Just have oral argument based upon the facts presented at the District Court level. Makes it important for the Record to be complete at District Court trial.

3.) Corporations – May be represented by an Officer or Owner.

(a) Distinction: In non-small claims action, Corporations, Limited Liability Companies must be represented by an attorney.

4. District Court Complaint Form – Explanation of Complaint

a. Plaintiff – Legal Name and address

b. Defendant – Legal Name and Address

1.) Corporations

(a) Serve Resident Agent

(b) Search SDAT Website www.dat.state.md.us

c. Jurisdictional Limits

d. Contract/Tort/Replevin/Detinue/Bad Faith Insurance Claims

e. Particulars – Brief Statement of Claim

1.) Example:

Plaintiff entered into a written contract dated January 1, 2008, whereby Plaintiff would sell and Defendant would purchase 1000 widgets from Plaintiff. That Plaintiff delivered the widgets as provided in the Contract but, despite demand, Defendant has failed to pay. That the total contract amount was \$1,000, of which \$500.00 remains due and outstanding. That the contract provides that overdue balances accrue interest at the rate of 1.5% per month and provides that Defendant pay for all costs associated with collection and attorneys fees of 25% of the amount due.

f. Claims Section

1.) Amount Claimed

- 2.) Interest
- 3.) Attorneys Fees
- 4.) Signature
- g. Application and Affidavit in Support of Judgment
 - 1.) Allows for the Court to enter a judgment against a defendant who does not respond to the Complaint
 - 2.) Must provide written documentation satisfactory to the Court which proves that Plaintiff is entitled to Judgment.
- h. Notice of Intent to Defend – Defendant has 10 days after service of the Complaint to file a notice of intent to defend the claims. If no notice is filed then no trial – Affidavit Judgment obtained, then you have to collect, execute your judgment.

<http://www.courts.state.md.us/courtforms/index.html>

E. Execution on a Judgment: How to Collect on a Judgment once you have one.

1. Waiting periods:

- a. Must wait 10 days (automatic stay period) before attempting to collect on a money judgment.
- b. Should wait 30 days after entry of judgment to avoid appeal period.

2. Discovery Methods in Aid of Enforcement: How you find out what assets a person (debtor) may have. MD Rules 2-633 and 3-633

- a. Debtor’s Interrogatories: Must wait 30 days before serving the debtor. Judgment creditor sends out written questions to the Judgment Debtor. Questions involve, bank accounts, finances, real estate, employment, etc. Debtor must answer questions under oath within 15 days of service. If no answer, file Motion to Compel Answers. If still no answer, file “Show Cause” order.
- b. Oral Examination: Must wait 30 days before requesting by filing form document. Bring Judgment Debtor into Court to answer questions about assets, finances, property, bring documents, etc. under oath. If debtor does not show, file a “Show Cause” Order—brings debtor into court to “show cause” why they should not be held in contempt. If debtor does not show up to Show Cause, body attachment is ordered by the Judge.

3. Collecting Money: Methods:

- a. Garnishing Wages: Portion of debtor’s wages will be diverted to Judgment Creditor each month until judgment is paid off.

- 1.) File simple form "Request for Garnishment of Wages"
- 2.) Need name, address, etc. of employer (known as "Garnishee")
- 3.) Clerk will order a Writ of Garnishment to be served upon employer.
- 4.) Instructs the employer to withhold a portion of debtor's wages to satisfy judgment.
- 5.) Employer Garnishee has 30 days to file an Answer to the Writ of Garnishment, identifying other attachments, garnishments, etc. against debtor's wages.
- 6.) Federal law allows garnishment only up to 25% of debtor's disposable income (amounts left after required deductions, federal taxes, state taxes, social security, etc.).
- 7.) Garnishments are satisfied in order in which they are served on the Employer garnishee.

b. Garnishing Bank Accounts: Attachment of money in Debtor's bank accounts to satisfy Judgment.

Note: Cannot garnish retirement or escrow accounts.

- 1.) File simple form "Request for Garnishment of Property other than Wages".
- 2.) Need name and address of financial institution(s).
- 3.) Need to know amount of Judgment and any additional awards by Court (i.e. attorneys fees, post judgment interest, etc.).
- 4.) Clerk will issue a "Writ of Garnishment" to be served upon the financial institution ("Garnishee").
- 5.) Garnishee has 30 days to answer the Writ after service and Answer with a "Confession of Assets".
- 6.) Once 30 days has passed since the Original Request for Garnishment has been served and Garnishee has Answered, Creditor may file a Request for Judgment-Garnishment form.
- 7.) Must mail a copy of the form to the Garnishee and Debtor.
- 8.) Judge will order Garnishee to turn over money withheld in debtor's bank account to Creditor.

c. Seizing Personal Property or Real Estate: Most complicated and time consuming method.

- 1.) Costs involved in the process that will be deducted from the sale of the assets.
- 2.) Cannot attach property that is held jointly unless Judgment is against both owners.
- 3.) File Request for Writ of Execution form.

Real Estate: Must make sure your judgment is recorded in the Circuit Court for the County in which the property is located.

(Notice of Lien form and Request for Transmittal of Judgment form)

- 4.) Can attach cars, boats, tvs, other personal property.
- 5.) Request that the Court seize Debtor's property to satisfy the judgment.
- 6.) Choices of what you request the Sheriff to do: Check Box:
 - (a) "Leave property where found": Sheriff provides notice that property has been levied.
 - (b) "Exclude others from access to it or use of it": Sheriff will leave the property but render it inaccessible. May be required to post bond.
 - (c) "Remove it from premises": Sheriff will remove property. Bond usually required for expenses.
- 7.) 30 days (waiting period) after seizure of Property, Sheriff can sell the Property to pay Creditor.
- 8.) Will not happen automatically, must coordinate sale with Sheriff's office.

F. Renewing Judgments and Satisfaction of Judgments:

1. Judgment valid for 12 years.
2. May renew Judgment for additional 12 years by filing form while judgment is still valid.
3. Once judgment is satisfied (paid in full), Creditor must file "Satisfaction of Judgment" form or pleading in the Court.
4. Remember, Judgment goes on record of Debtor.
5. Failure to file may result in Creditor having to pay Debtor's costs, attorney's fees, etc. for having to file same.