



Tip of the Month—March 2008

Defending Debt Collection Lawsuits

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Introduction

At this moment, default rates are soaring in every financial sector. That means lenders are writing off debts and assigning debts to debt collectors and selling debts to debt buyers in astonishing volumes.

In 2007, debt collectors filed more than 36,000 defaults in Minnesota.² Due to Minnesota's permissive "pocket filing" rule³ and the pre-judgment (often pre-filing due to an ambiguity) garnishment provisions⁴ of the Minnesota statutes, the actual number of lawsuits brought by debt collectors is probably several—or many— times that number.

Since most debtor-defendants do not understand the pocket filing rule and wrongly believe that they will have an opportunity to answer the claim at a hearing, most do not serve a written answer and wind up in default and then garnishment.

When debtors call an attorney for help, either because they have been sued by a debt collector or because they are receiving harassing phone calls from a debt collector, an appalling number of attorneys simply advise them to "just pay it."

Although the advice "just pay it" may be appropriate in some cases, it should only follow a careful analysis of the facts. VLN now offers a *pro se* clinic for debtors who have been sued by debt buyers which provides debtors with this analysis and assistance defending themselves.

The debt buying industry

After a debtor defaults on a debt—a credit card, for example—the original creditor will usually attempt to collect the debt, either by itself or by hiring a debt collector, for a short period. At some point, the creditor charges off the debt, bundles it with other

¹ Sam may be found online at <http://sjglover.com>. For a steady flow of consumer law and information, visit the Caveat Emptor blog at <http://caveatemptorblog.com>.

² Flores, Elizabeth, *Defaults on loans surge in Minnesota*, Star Trib., February 23, 2008, available at <http://www.startribune.com/local/15907357.html>.

³ "A civil action is commenced . . . when the summons is served . . .," meaning a plaintiff may bring a lawsuit without incurring a filing fee. Minn. R. Civ. P. 3.01.

⁴ Minn. Stat. § 571.912 provides that if the garnishee (the bank or employer) does not receive an exemption claim in time, a garnishee "will be free to turn the [garnished funds] over to the sheriff or the creditor." In the frequent case where the debtor does not return the exemption claim in time, this ambiguity allows debt collectors to avoid obtaining the writ of execution that Minn. Stat. §§ 571.72, Subd. 2(5), and 571.74 appear to require.

charged-off debt, and sells it to a debt buyer. Debt buyers pay pennies on the dollar for debt from credit card companies and other credit providers.⁵

Most debts will pass through multiple debt buyers over a period of years, as each re-bundles the debt and sells it in different chunks. Debt buyers trade lists of names that include some identifying information, the amount of the debt, and a few other details about the debt. They rarely, if ever, pass along any information that could actually be used to prove the debt in court.

Eventually, a debt buyer purchases the debt that intends to collect on it.

Debt buyers are also debt collectors for some purposes, and often do collect their own debts. In Minnesota, many debt buyers will simply hire a debt collection law firm to serve a summons and complaint, since Minnesota's pocket filing rule seems to make suing cheaper for debt collectors than collecting in other ways.

But, due to the way debts are bought and sold, most debt buyers cannot prove that they own any particular debt. As a foreclosure victim recently said, "If you're going to take my house away from me, you better own the note."⁶

The same is true in debt buyer lawsuits. *In many cases, the debt buyer will have no proof that it owns a particular debt, no proof that it is entitled to recover from the debtor, and no proof that the debtor actually owes the debt.* There are often other defenses to debt buyers' claims, including the statute of limitations and that some amounts claimed are invalid.

Finding help

Although few debt buyers can prove their claims, they still bring tens of thousands of lawsuits a year. Why? Because they know few consumers will bother to fight their claim. They make the legal system just another branch of their collection office, serving complaints, then serving garnishment papers.

That is why VLN started a Debt Collection Defense Clinic last Fall.

The clinic is designed around a set of forms that are easy to use. Clinic clients are assisted in drafting an answer and discovery requests on their first visit. On subsequent visits, they can receive help responding to discovery requests, objecting to inadequate discovery responses, and preparing for trial. Clients who qualify can receive full representation to bring a motion for summary judgment.

Some clients also report they are the victims of illegal debt collection harassment. Such clients are referred to the lawyer referral database at the National Association of Consumer Advocates,⁷ where they can find an attorney who can help stop the harassing conduct.

⁵ Mayer, Caroline, *New breed of collectors has debtors seeing red*, Wash. Post, July 27, 2005, available at <http://www.msnbc.msn.com/id/8733453/>.

⁶ Ivry, Bob, *Mortgage Note Issues Help Debtors Avoid Foreclosure*, Bloomberg News, February 23, 2008, available at <http://www2.tbo.com/content/2008/feb/23/bz-mortgage-note-issues-help-debtors-avoid-foreclo/>.

⁷ NACA may be found online at <http://naca.net>.

The Debt Collection Defense Clinic is held at 2 p.m. every Friday afternoon. Currently, the clinic is hosted at the VLN offices in the Hennepin County Bar Association.