



## Assisting Clients Who Have Been Sued by Creditors

August 2008 Tip of the Month

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This Tip provides guidance on where to start when providing legal services for clients sued by creditors. To provide the most lasting benefit to your client, first assess your client's situation:

1. Is your client judgment proof? If your client has only income or assets that are *exempt* from collection,<sup>1</sup> your client is considered "judgment proof." However, if that judgment proof status is temporary (e.g., based on temporary receipt of public assistance), your client may benefit more if you proceed as though he or she were *not* judgment proof.
2. Is the matter pre- or post-judgment? You might check the [court information website](#) to see if the case has been filed with the court.<sup>2</sup> Remember that a Minnesota court action is commenced upon *service* of the action upon the defendant, not upon filing it with the court.<sup>3</sup> If a defendant fails to answer, a plaintiff can garnish before the lawsuit is filed with the court.<sup>5</sup>
3. Does your client have any meritorious defenses to the lawsuit? Common defenses include full or partial payment, discharge of debt (e.g., in bankruptcy), invalid assignment, and expiration of the statute of limitations.<sup>4</sup> If the plaintiff is a successor in interest to the original creditor, see our [March 2008 Tip of the Month](#) for more details on possible defenses.
4. Would your client benefit from filing bankruptcy? Depending on your client's overall financial situation and debt load, he or she may benefit more from filing bankruptcy than the options below. Bankruptcy may eliminate the need to fight multiple court battles or maintain permanent vigilance for garnishment notices.

Given your assessment, your options include the following:

### If your client is NOT judgment proof and the case is PRE-judgment and . . .

- **Your client HAS a full or partial defense:** Draft an Answer to the Complaint accordingly and serve it on the other party. If your client's household income is at or below 125% of the [Federal Poverty Guidelines](#), ask the court for an [In Forma Pauperis \(IFP\) Order](#) to waive the filing fee; then file the Answer with the court. To pursue the claim, the plaintiff will have to pay \$252 to file the Summons and Complaint.
- **Your client DOES NOT HAVE a full or partial defense:** Draft and serve an Answer to prevent the plaintiff from garnishing your client's income or bank accounts 40 days after service.<sup>5</sup> Try to settle the case with a lump sum. (Contact VLN for a resource suggesting factors to consider.)

### If your client is NOT judgment proof and the case is POST judgment and . . .

- **Your client HAS a full or partial defense:** If your client did not answer the original Summons and Complaint and the case went to administrative default (which is fairly common), consider filing and serving a Notice of Motion and Motion to Vacate Default Judgment.<sup>6</sup> Usually, there is a sufficient reason why the defendant did not answer the original petition.<sup>7</sup> It is not a high threshold if the client has a substantive defense on the merits. If service was never accomplished pursuant to [Minn. Rules of Civil Procedure](#) 4.03, the judgment is void and you don't have to allege a good defense to obtain an order nullifying the judgment.

If your client did answer the complaint and recently lost for other reasons, you might explore requesting the court to reconsider, although reconsiderations are rarely granted.

- **Your client DOES NOT HAVE a full or partial defense:** Assess the extent to which your client has exempt income and/or assets and advise him or her about [garnishment](#).

**If your client is permanently judgment proof:** Regardless of whether the case is pre- or post-judgment and whether your client has any defenses, you may write a [letter to your client's creditors](#) (including this plaintiff). In this letter, explain that your client is judgment proof and request that they cease contacting/harassing your client. Enclose proof of exempt income/assets after redacting any confidential information. Under the Fair Debt Collection Practices Act, all debt collectors must comply with this written request; while original creditors may not be required to comply, they usually do. Creditors still may sue your client and get a judgment.

Unfortunately, your client will have an ongoing burden to verify the exempt status of assets and income. To reduce future problems, advise your client to: (a) cooperate with collectors' requests for confirmation of exempt income/assets; (b) not mix any non-exempt with exempt money in bank accounts; and (c) be ever vigilant for garnishment notices and ready to complete and submit the exemption claim form within the time specified (10 or 20 days).<sup>8</sup> Failure to do so may result in the judgment (or even pre-judgment<sup>5</sup>) creditor seizing income or freezing and seizing accounts.<sup>9</sup>

**Aside:** If a judgment is from a car accident in which your client did not have insurance, a judgment creditor may ask the court to suspend the defendant's driver's license until and unless the defendant is complying with an agreed-upon payment plan.<sup>10</sup> Your client may get the most benefit from your assisting with negotiating a lump sum settlement, even if he or she is judgment proof. (Contact VLN for a resource suggesting factors to consider in negotiating a payment plan.)

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<sup>1</sup> For exempt assets and income, see: Minn. Stat. §§ 550.37 (various exempt assets and income); 510.02 (real property); 510.07 (proceeds from homestead); 571.922 (earnings); 571.925 (bank account funds); 268.17 (unemployment compensation); 550.38 (veterans benefits); 550.39 (payments from accident or disability insurance); and 42 U.S.C. § 407 (social security benefits).

<sup>2</sup> Typically, Hennepin County trial court records are posted online within a week of the action; default judgments are posted within a month.

<sup>3</sup> [Minn. Rules of Civil Procedure](#) 3.01 Commencement of the Action

<sup>4</sup> In contracts for the sale of goods, Minnesota's statute of limitations is four years under the UCC. Minn. Stat. § 336.2-725. If the date of last payment was *after* August 1, 2004, the statute of limitations from the state in the choice-of-law provision applies, which is typically three to four years. The statute of limitations starts to run the date of the last payment or last charge.

<sup>5</sup> [Minn. Stat. § 571.71\(2\)](#).

<sup>6</sup> See [Minn. Rules of Civil Procedure](#) 60.02. To obtain relief from judgment, a party must show that: 1) It has a reasonable defense on the merits; 2) It has a reasonable excuse for failure or neglect to answer; 3) It has acted with due diligence after notice of the entry of judgment; and 4) No substantial prejudice will result to the other party. ([Finden v. Klass](#), 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964)). Your assessment of the client's credibility and the client's likelihood of winning on these grounds will determine whether and how you draft the client's paperwork. An extremely helpful resource on motions to vacate default judgments is Chapter 16 DISMISSALS AND JUDGMENTS, Part G. Default Judgment, [Minnesota Civil Practice](#), McFarland, Keppel, Copyright 2007, Matthew Bender & Company, Inc., a member of the LexisNexis Group. VLN also has sample forms and tips on Motions to Vacate Default Judgments.

<sup>7</sup> Courts may properly consider the intelligence or inexperience in business or legal affairs of a party in determining whether an excuse for failure to answer is reasonable. See [Roe v. Widme](#), 191 Minn. 251, 254 (1934); [Wood v. Schoenauer](#), 85 Minn. 138, 88 N.W. 411 (1901); [Pilney v. Funk](#), 212 Minn. 398, 3 N.W.2d 792 (1942).

<sup>8</sup> Minn. Stat. Chapter 571, especially § 571.72. Note that while notice of intent to garnish earnings is given prior to the earnings being taken, notice of intent to garnish an account is given *after* the account has been frozen.

<sup>9</sup> Even if the creditor/collector has been told that your client is judgment proof, it can still freeze a bank account without warning, often resulting in NSF charges and bank fees (more so if the client loses any time in sending back the exemption claim to get the account unfrozen). If the client delays, and the funds are actually seized, the client may eventually get the exempt money back via letter or court hearing, but it requires much effort and follow through.

<sup>10</sup> Minn. Stat. § 171.182.