

Collections: Collecting Your Money Through the Courts

By:

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Question: I am owed a significant sum of money by someone who agreed to pay me but who will not do so. How do I get my money through the Courts?

Answer: After making sure the debt is still collectible and not barred by any statute of limitations, you will need to file suit in the appropriate court, serve the debtor, obtain a judgment, and collect on that judgment. For reasons set forth below, an experienced collection attorney would probably be your best starting point, even if you choose to bring your own suit.

Statute of Limitations – A statute of limitations is a bar against old or stale claims. It is in a sense a “statutory right not to be sued.” Many states have a three-year statute of limitations for contract matters, some have a four-year period, some have six, and some special contracts have a ten-year statute of limitations. Payments on the debt and reaffirming the debt can cause the period of the statute of limitations to start over. Statutes are tolled by the filing of Chapter 13 bankruptcy and sometimes by inability to sue and serve a defendant. This is a very complex legal issue; consult an experienced collection attorney before abandoning a claim. Do not sit on your rights.

Oral Agreements – Although written agreements to pay money are preferable, oral agreements to pay money are enforceable in most cases. Do not assume that you cannot collect monies owed you because your borrower “never signed anything.” Assemble a time line, get canceled checks, proof of payments made, list witnesses, recall the reasons the money was loaned, and so forth. The borrower may have deposited the funds in his or her bank account, used the funds to buy a car, or otherwise created written records that can be used to prove the loan was made.

Which Court? – Most states have various levels of courts depending on the amount involved. In North Carolina, Small Claims Court can award up to \$5,000 to a creditor, District Court is generally for suits under \$10,000 (but is actually unlimited in authority), and Superior Court is for claims over \$10,000. There are advantages and disadvantages to each court. Small Claims Court is desirable for do-it-yourself litigants, and it is generally a quick way to get resolution in terms of obtaining the judgment. If you are incorporated or have a limited liability company (LLC), you can appear in Small Claims Court in North Carolina, but in such a case you must have an attorney if you wish to appear in District Court or Superior Court.

Collecting the Judgment – After a court awards you a judgment, you will need to

collect on the judgment. Do not assume the debtor will pay just because the court has ordered the debtor to pay. Although many, perhaps most court orders are enforceable by contempt and a willful violation today can result in arrest and jail, that is not so for an ordinary money judgment that orders a debtor to pay money. The United States does not have debtor prisons.

A judgment against a debtor is generally an automatic lien on that judgment-debtor's real estate in the county where the debtor resides. Marital real estate is protected in most states if your judgment is only against one spouse.

Execution laws in North Carolina in many states require you as a judgment-creditor to provide a Notice of Rights to individual debtors (but not to corporate debtors). The individual debtor can generally exempt a substantial amount of property. In North Carolina, for example, a debtor can exempt \$18,500 in equity in a home (\$37,500 per married couple), \$5,000 in personal property, \$2,500 in equity in a vehicle and more.

Bank Accounts, Vehicles, and Sheriff Sales – Often your best chance of collecting a money judgment is to have the Sheriff levy on bank accounts and vehicles owned by your judgment-debtor. In some states (not North Carolina), you can garnish wages. After attempting to seize money and other personal assets, you can then go after real estate. You will be required to put up fees of \$300 to \$1,000 (in North Carolina) to have the Sheriff seize and sell a vehicle of the judgment-debtor, and the fees to get real estate sold, with advertising expenses, can be \$750 to \$1,500 in North Carolina. You can recover these fees from a Sheriff's Sale, or you can bid in the property, often at bargain prices. In most instances, commencement of execution results in the debtor paying or setting up payment plans rather than watch his or her assets be sold by the Sheriff for a fraction of their true worth.

Ten (10) Years; Income or Assets– If your debtor has no meaningful assets and no real ability to pay, there is little the law can do to force the debtor to pay. If your debtor exempts all of his or her property, there is little the law can do. However, many judgment-debtors can and will set up payment plans. In North Carolina a judgment is good for ten years and can be renewed for ten more. Interest on a judgment generally accrues at 8% per annum. Thus the judgment is on the debtor's property for a long time, significant interest can accrue, and the judgment-debtor runs the risk of having his property seized, bank accounts seized, vehicles seized, and so forth. Having a judgment on one's credit record can wreak havoc on Beacon scores.

Bankruptcy – If your judgment-debtor successfully files for Chapter 7 Bankruptcy Protection, your debt and your judgment will be gone. A discharge in Bankruptcy discharges the debt to you. If the judgment-debtor files Chapter 13 Bankruptcy, you can expect to recover about 20% of the judgment amount over three to five years without interest. Chapter 13 bankruptcies often convert to Chapter 7, in which case you will receive no further payments. Chapter 13 cases often get dismissed, in which case the judgment is back on track.

Collection Attorneys—Per hour or Contingency-Fee? – Many persons owed money initially demand that the attorney collect all the money and “make the borrower pay all attorney fees and court costs since the borrower broke the agreement to repay.” Although that is certainly understandable, **by the time most collections cases come to an attorney the lender has made numerous efforts to collect, and there is a substantial likelihood no amount is ever going to be collected.** Indeed, many businesses have written off the debt for tax purposes well before turning the matter over to an attorney for collection. In short, any recovery at this stage should often be viewed as a positive, and demanding full payment of principal plus interest plus filing fees plus all attorney fees is simply not realistic. It is also unfair to ask an experienced collection attorney to work hard on your collection case but at the same time insist that you not pay the attorney for the considerable work and effort required to force your breaching debtor to pay.

Be aware that a collection case is quite different from a disputed claim for breach of contract where it is necessary to prove breach by one party and deal with such defenses as warranty claims and counterclaims. A collection case generally involves a debt that is owed but the debtor is just not paying and will not pay until the legal process is invoked.

If you have a very good collection case—a substantial amount owed, good documentation, no meritorious defenses, and a solvent defendant who will pay when ordered by a court to do so, you should hire an experienced attorney on a per-hour or flat-fee basis. However, to avoid throwing good money after bad, for most collections you should hire an experienced collection attorney on a contingency-fee basis or possibly a flat-fee basis. Contingency fees generally range from 22% to 33 $\frac{1}{3}$ % and may go higher, depending on the total amount, complexity, solvency of the defendant, and more. Law firms may also be willing to do a combination of per-hour, flat-fee, and contingency-fee. The goal of the agreement should be fairness to both client and attorney.



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