

DEFENDING CONSUMERS IN DEBT COLLECTION  
JUDITH FOX, CLINICAL PROFESSOR  
NOTRE DAME LAW SCHOOL  
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- I. Indiana Constitution: Section 22. The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale, for the payment of any debt or liability hereafter contracted: and there shall be no imprisonment for debt, except in case of fraud.
  
- II. Overview of the Debt Buying Industry<sup>1</sup>
  - a. Price: 2015 paid an average of 4 cents on the dollar; number slightly higher here in Indiana because collection perceived to be easier
  - b. Structure: Debts bought and sold in portfolios
    - i. Specialty pools: sometime created for certain kinds of debt (i.e. mortgage, medical, bankruptcy)
    - ii. Age:
      - 1. Fresh: up to 6 months; no attempt to collect after charge-off
      - 2. Primary: 12 months old; one 3-rd party usually attempted to collect
      - 3. Secondary and Tertiary: 18-30 months; 2 or more collectors had attempted to collect
    - iii. Information debt Buyers have about account holder
      - 1. Original account number (though will tell you it is secret)
      - 2. Fewer than half have the original creditor name
      - 3. Most have date account opened
      - 4. Fewer than a third have the applicable interest rate
    - iv. Documents Debt Buyers have at purchase
      - 1. Any document: 12%
      - 2. Account Statements: 6%
      - 3. Terms and Conditions: 6%
      - 4. Applications: <1%
    - v. Characteristics of the Pool
      - 1. 61% charge offs
      - 2. 39% bankruptcies
  
- III. Judicial Enforcement of Debts: Looking Backwards

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<sup>1</sup> All the data in Part I is derived from the FTC study. THE FED. TRADE COMMISSION, *The Structure And Practices Of The Debt Buying Industry* Jan. 2013, <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf>.

- a. License requirement: Ind. Code §25-11-1-7.
- b. Setting Aside Default Judgments (T.R. 60)(B)
  - i. Within a year
    - 1. (1) Mistake, surprise or reasonable neglect
    - 2. (2) any ground for motion to correct error
    - 3. (3) fraud
    - 4. (4) default and only served by publication
  - ii. Reasonable Time
    - 1. (5) incompetency
    - 2. (6) judgment is void
    - 3. (7) judgment satisfied, released or discharged
    - 4. (8) any reason (but 1-4)
  - iii. Meritorious Defense needed for 1,2,3,4,& 8: NOT 60(b)6)
- c. T.R. 60(b)(6): Void Judgments
  - i. De novo review (*Link America Corp. v. Albert*, 857 N.E.2d 961, 965 (Ind. 2006))
  - ii. Can be attacked at any time (*Anderson v. Wayne Post 64 et.al.*, 4 N.E.3d 1200, 1205 (Ind. Ct. App. 2015))
  - iii. No discretion for court
  - iv. Lack of personal jurisdiction
    - 1. Indiana T.R. 4.1
      - I. Registered or certified mail
      - II. Personal service
      - III. Leaving complaint at house or place of abode, followed by first class mailing
      - IV. Servicing an agent, followed by first class mailing
    - 2. Serviced at wrong address
      - I. *Poteet v. Bethke*, 507 N.E.2d 652, 654 (Ind. Ct. App. 1987) (moved 10 months ago)
      - II. *Mills v. Coil*, 647 N.E.2d 679, 680-81 (Ind. Ct. App. 1005) (moved from Mother's home with no intention of returning)
    - 3. Served wrong person
      - I. TR 4.16(B): only applies to person with authority to accept service (*LaPalme v. Romero*, 621 N.E.2d 1102 (Ind. 1993))
      - II. Serving parents insufficient (*Norris v. Personal Finance*, 957 N.E.2d 1002 (Ind. Ct. App. 2011))
  - v. Lack of subject matter jurisdiction
    - 1. Lack of Standing:
      - I. Grandparent visitation order void because grandparent lacked standing (*In re Guardianship of A.J.A.*, 991 N.E. 2d 110,115 (Ind. 2013))

- vi. Servicemembers' Civil Relief Act: 50 USC app. §521: right to set aside default if you were on active duty
  - vii. Lack of Authority:
    - a. Court in divorce could not rule on custody while CHINS still open (*Alexander v. Cole*, 697 N.E.2d 80, 8203)(Ind. Ct App. 1998)
  - viii. Practice Tip: Check the service: who was served? What address? Did the mail service come back. In my study of debt collection cases, I discovered that many default judgments were entered before the mail was returned undeliverable.<sup>2</sup>
- d. Small Claims Rule 10(C):
- i. less than one year: vacate for good cause shown
  - ii. Void: same issue as above
  - iii. More than a year, need to file independent action under TR 60(B).
    - 1.
- IV. Judicial Enforcement: The Complaint Filed
- a. Venue:
- i. 15 U.S.C. 1692I(A)(2)(B):
    - 1. Consumer lives
    - 2. Signed the contract
  - ii. Ind. T.R. 75: in any court in any county
  - iii. Medical Debts:
    - 1. Practice Note: watch medical debts; sometimes client was out of town and ended up in an emergency room, but they often have them sign an agreement to pay which pulls the case into that district
    - 2. If no contract, residence rules
  - iv. Credit Card: residence; cannot use forum clause to pull them into foreign jurisdiction
  - v. Joint Debtors: must sue each in proper location
  - vi. Some Issues:
    - 1. Filed in wrong venue: the FDCPA violation statute of limitations begins to run when the case is filed in the improper venue *Jack v. Midland Credit Management*, 2011 U.S. Dist. LEXIS 106345 (S.D. Ind. Sept. 19 2011)
- b. Affidavit Of Debt : TR 9.2 and SC Rule 2(B)(4)(B).
- i. Originating lender
  - ii. Type of account

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<sup>2</sup> Judith Fox, Do We have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana. 24 LOY. CONSUMER L. REV. 355 (2011-12); Judith Fox, *Rush to Judgment: How the Fair Debt Collection Practices Act Fails to Protect Consumers in Judicial Debt Collection* 13 FSU BUS. L. REV 37 (2014).

- iii. Date account opened
- iv. Last payment received
- v. Last four digits of the account number
- vi. Late fees
- vii. Interest rate
- viii. Any other charges included in the amount due
- ix. Whether or not Attorneys fee are requested

c. Statute of Limitations

- i. Credit cards: Ind. Code 34-11-2-7
  - 1. 6 years from last payment or last use
  - 2. *Smither v. Asset Acceptance*, 919 N.E.2d 1153 (Ind. Ct. App. 2010).
- ii. Mortgage:
  - 1. Last state to rule on whether loan is automatically “unaccelerated” if bank fails to foreclosure (majority position is no)
  - 2. UCC 26-1-3.1-118: six years from acceleration of loan
  - 3. *Tennant v. Hulet*, 65 Ind. App. 24 (Ind. App. 1917): A mortgage being a mere incident to the debt which it secures, when the debt becomes barred by limitations, the mortgage lien also ceases to be effective

V. Litigation: Preliminary Matters:

a. Strategy of Plaintiff: Admissions:

- i. many will send the debtor admissions, knowing they will fail to answer
- ii. “Plaintiff is the real party in interest and the correct party to collect the debt”: legal conclusion not factual and not proper for admissions

b. Prima Facie Case

- i. Credit cards (*Seth V. Midland Funding*, 997 N.E.2D 1139, 1140(Ind. Ct. App. 2013)).
  - 1. that your client opened the account
  - 2. that the plaintiff was the assignee of that debt
  - 3. that the plaintiff owed the money claimed
- ii. Medical Bills (*Galloway v. Methodist Hosp., Inc.*, 658 N.E. 2d 611, 613-14 (Ind. Ct. App. 1995)):
  - 1. Charges correctly reflect the services
  - 2. Are they the amounts usually, customarily and reasonably charged
- iii. Account stated (*Jackson v Trancik*, (Ind. Ct. App. July 20, 2011))
  - 1. Statement delivered
  - 2. Debtor does not object
  - 3. Court can imply agreement to pay
  - 4. Burden shifts to debtor to dispute

VI. Summary judgment

- a. Affidavits:
    - i. T.R. 56: Based on personal Knowledge (And one company lacks personal knowledge of another companies records, see *Speybroeck v. State*, 875 N.E.2d 813, 821 (Ind. Ct. App. 2007); *Holmes v. National Collegiate Student Loan Trust*, 94 N.E.3d 722, 724 (Ind. Ct. App. 2018).
    - ii. Inadmissible Hearsay in affidavit should be ignored (*City of Gary v. McCrady*, 851 N.E.2d. 359, 363 (Ind. Ct. App. 2006); *Breining v. Harkness*, 872 N.E. 2d 155, 158 (Ind. Ct. App. 2007)
    - iii. Business record exception only applied to authenticated business records (*Seth*)
    - iv. One company cannot authenticate the records of another (*Holmes v. national Collegiate Student Loan Trust*, 94 N.E. 3d. 722, 724 (Ind. Ct. App. 2018)
  - b. Exhibits:
    - i. Must be authenticated
    - ii. Can be authenticated by affidavit (Evidence Rule 803(6))
    - iii. But, and one company cannot authenticate the documents of another (*Holmes v. national Collegiate Student Loan Trust*, 94 N.E. 3d. 722, 724 (Ind. Ct. App. 2018))
    - iv. Must be in form of sworn statements (*Seth v. Midland Funding, LLC*, 997 N.E. 2d. 1139, 1140(Ind. Ct. App. 2013).
    - v. Must clearly connect defendant to the account: (*Seth*, N.E.2d at 997)
- VII. Litigation: The Trial
- a. Witnesses
    - i. Witness from one business cannot lay the foundation for the admission of the business records of another business (*Williams v. Unifund CCR, LLC*, 70 N.E.3d 375, 379 (Ind. Ct. App. 2017)).:
  - b. Exhibits:
    - i. Business exception to hearsay (Evidence Rule 803(6))
      - 1. Made at or near time by someone with knowledge
      - 2. Kept in the ordinary course of business
      - 3. Making the record was a regular practice of the business
      - 4. All these shown by testimony of custodian of the records
      - 5. Neither the source of information nor the method or circumstances or preparation indicate a lack of trustworthiness
- VIII. Post-Judgment Collection
- a. Proceeding Supplemental: T.R.64
    - i. Process, what must be alleged:
      - 1. Plaintiff owns the judgment
      - 2. No cause to believe that levy of execution will satisfy the judgment?
      - 3. Order to appear to answer to nonexempt property

4. Garnishee defendant usually only answers interrogatories, but can be ordered to appear
- ii. Non exempt property:
  1. Wages (see below discussion of wage garnishment)
  2. Other exempt property (Ind. Code 34-55-10-2;750 IAC 1-1-1 ):
    - I. \$19,300 real property
    - II. Other real estate or tangible property: \$10,250
    - III. Any tenancy in the entireties
    - IV. Deposits : \$400
    - V. Prescribed health aides
    - VI. Certain Retirement funds
    - VII. Medical savings accounts
    - VIII. 529 education plans (with some limits)
    - IX. 530 education plans (with some limits)
    - X. Earned income tax credits
    - XI. Certain disability awards to veterans
    - XII. Supplemental state fair relief fund
- b. Garnishment
  - i. Income Subject to Garnishment: Greater than:25% disposable earnings for week OR Excess of 30 times the minimum wage (Ind. Code §24-4.5-5-105; Consumer Credit Protection Act, 15 U.S.C. § 1671)
  - ii. Cannot be in excess of exemption statute
  - iii. NOTE: child support garnishment different (15 §USC 1673)
    1. 50% if supporting other child or spouse
    2. 60% if not
  - iv. Self-executing for unrepresented parties in small claims court (but not happening in real life)
  - v. Order: child support first, others only to extent of rules above
  - vi. Special rules for federal benefits:
    1. Federal benefits deposited into account
    2. 2 month look-back
    3. Self-executing
  - vii. Student loan proceeds: protected to extent they can be traced
  - viii. Retirement funds
- c. Premier Credit Issues
  - i. Very aggressive in collecting: will garnish wages and take what is left in bank as well
  - ii. Exempt from state exemptions (not federal)
  - iii. Don't forget the Indiana Constitution
- d. Bench warrants, etc
  - i. New rules Jan 1, 2019
  - ii. Personal service of show case before issue bench warrant, body attachment or writ of attachment

- iii. Documents must have sufficient information to identify the correct person