



# **DEFENDING CONSUMERS IN DEBT COLLECTION**

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# 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.





# OVERVIEW OF THE DEBT COLLECTION INDUSTRY

Know who you are dealing with

# OVERVIEW OF DEBT-BUYING INDUSTRY



# SELLING OF DEBTS

- Organized into portfolios
- Often Categorized by age
  - Fresh: up to 6 months; no attempt to collect after charge-off
  - Primary: 12 months old; one 3-rd party usually attempted to collect
  - Secondary and Tertiary: 18-30 months; 2 or more collectors had attempted to collect



# WHAT INFORMATION DO THE DEBT BUYERS HAVE?

Type of Information	Percentage of Accounts for Which Debt Buyers Obtained the Specified Information at Time of Purchase (5,087,032 Accounts) <sup>2</sup>
<b>Account Information</b>	
Original Account Number	100%
Original Creditor Name	46%
Account Open Date	97%
Type of Debt	62%
Credit Limit	10%
Interest Rate	30%
<b>Debtor Information</b>	
Name	100%
Social Security Number	98%
Street Address	99%
Home Telephone Number	70%
Work Telephone Number	47%
Mobile Telephone Number	15%
Birth Date	65%
Credit Score	< 1%
<b>Balance</b>	
Current Balance	100%
<b>Balance Breakdown</b>	
Balance at Charge-Off	72%
Principal Amount <sup>4</sup>	11%
Principal Amount or Charge-Off Balance	82%
Finance Charges and Fees <sup>5</sup>	37%



# WHAT DOCUMENTS DO DEBT BUYERS

TABLE

Type of Document	Percentage of Accounts for Which Debt Buyers Received the Specified Document at Time of Purchase (3,862,018 Accounts)	Percentage of Portfolios for Which Debt Buyers Received the Specified Document for Any Account at the Time of Purchase (333 Portfolios) <sup>2</sup>
Any Document	12%	13%
Account Statements	6%	9%
Terms and Conditions	6%	3%
Account Applications	< 1%	3%



# WHAT DO THE PORTFOLIOS LOOK LIKE?

**Table 2: Basic Characteristics of Submitted Portfolios**

Account status at time of purchase	Portfolios		Accounts		Face Values (a)			Acquisition Expenditures (b)		
	#	%	#	%	\$	%	Avg. FV of accounts	\$	%	per \$ of Face Value
Charge-off	3,087	61%	77,675,862	87%	\$104,733,044,243	73%	\$1,348	\$5,014,641,267	78%	\$0.04788
Bankruptcy	1,966	39%	11,357,757	13%	\$38,194,615,739	27%	\$3,363	\$1,426,349,243	22%	\$0.03734
Total	5,053	100%	89,033,619	100%	\$142,927,659,982	100%	\$1,605	\$6,440,990,510	100%	\$0.04506

**Table Notes:**

- (a) Aggregate face values were computed by multiplying the average face value of accounts in each portfolio (as requested at specification II.A.3.g) by the number of accounts in each portfolio (as requested at specification II.A.3.c), and then summing across all relevant portfolios. Average face value figures were calculated by dividing the relevant aggregate face value by the relevant aggregate number of accounts.
- (b) Specification II.A.3.e requested the amount paid for each portfolio. Acquisition expenditures per dollar of face value figures were calculated by summing the amount paid for each portfolio across all relevant portfolios and then dividing by the relevant total face value as described in (a), above.





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# JUDICIAL ENFORCEMENT OF DEBTS

Looking Backwards

# DOES THE DEBT COLLECTOR HAVE THE PROPER LICENSE?

- **Licensing of Debt collectors**

Indiana Code § 25-11-1 *et.seq* :

- Unlawful act to conduct a collection agency without a license (Ind. Code §25-11-1-7)
- Violation is a class B misdemeanor (Ind. Code § 25-11-1-12):



## YES...NO...WELL, MAYBE

- Mere filing, **no** (Fausset v Mortgage First, LLC, 2010 Dist. LEXIS 24315 (N.D.Ind. March 12, 2010)).
- Maybe, if misrepresent that you are licensed Fick v. American Acceptance Co., 2012 U.S. Dist. LEXIS 43761 (N.D. Ind. March 28, 2012)





# SETTING ASIDE DEFAULTS

# IND. TRIAL RULE 60

## Within 1 Year

- (1) Mistake, surprise or reasonable neglect
- (2) any ground for motion to correct error
- (3) fraud
- (4) default and only served by publication

## Reasonable time

- (5) incompetency
- (6) judgment is void
- (7) judgment satisfied, released or discharged
- (8) any reason (but 1-4)



# A MERITORIOUS DEFENSE

- Needed for

- (1) Mistake, surprise or reasonable neglect
- (2) any ground for motion to correct error
- (3) fraud
- (4) default and only served by publication
- (8) Other reasons

- NOT needed for

- (6) Judgement is void



# SUMMONS

## INDIANA TRIAL RULE 4.1

- (1) Registered or certified
  - (2) Personal service
  - (3) Leaving summons and complaint at house or usual place of abode
  - (4) Serving his agent
- 
- (3) and (4) must be followed by first class mailing of summons and complaint



# VOID JUDGMENT (IND. T.R. 60(B)(6))

Can be attacked at any time:

De Novo Review on Appeal

No Discretion by court

Court Lacks Jurisdiction

personal

subject matter

Court Lacks Authority







# **SERVICEMEMBERS CIVIL RELIEF ACT**

**50 USC app. § 521**

## SMALL CLAIMS RULE 10(C)

- Void: same discussion as above
- <1 year: good cause
- >1 year: independent action under T.R. 60





# THE LITIGATION

Complaint filed



**VENUE: 15 U.S.C. §1692i(A)(2)(B)**

**“Only in the judicial district or similar legal entity**

**(A) “Signed the contract”**

**(B) “Consumer resides”**

# VENUE ISSUES

## Medical Debts

- If a contract for payment was signed, either
  - Residence
  - Where contract signed
- If no contract for payment signed
  - Residence only

## Credit Card

- Considered oral contracts:
  - Only residence of the consumer



## OTHER VENUE ISSUES

- Joint Debtors: must sue in proper jurisdiction for each, if they do not live in same jurisdiction
- Evidence of forum shopping between Superior/Circuit/Small Claims Court





# AFFIDAVIT OF DEBT

Indiana Trial Rule 9.2

# AFFIDAVIT OF DEBT

- \*Originating lender
- \*Type of account
- \*Date account opened
- \*Last payment received
  
- Indiana Trial Rule 9.2
- Indiana Small Claims Rule 2(B)(4)(B)





## TOTAL ACCOUNT BALANCE

- \*Last four digits of the account number
- \*Late fees
- \*Interest rate
- \*Any other charges included in the amount due
- \*Whether or not Attorneys fee are requested





# STATUTE OF LIMITATION

# STATUTE OF LIMITATIONS

## *INDIANA CODE § 34-32-11-2*

### ○ *6 years:*

- *Accounts*
- *Unwritten contracts*
- *Contracts for payment of money*

### ○ *10 years:*

- *foreign judgments*
- *Mortgages*
- *Contracts other than for the payment of money*



# NEGOTIABLE INSTRUMENTS

- Last state to rule on this issue
- U.C.C. 26-1-3.1-118:
  - Six years when due or six years from acceleration
- *Tennant v. Hulet*, 65 Ind. App. 24 (Ind. App. 1917)





# LITIGATION

Preliminary matters

# THE LITIGATION STRATEGY AND THE DEFENSE

- Send admission to unrepresented party
- They will forget to answer
- File Summary Judgment
  
- The key question: “Plaintiff is the real party in interest and the correct party to collect the debt”
  
- This is a legal assertion; not a factual statement



# CREDIT CARD: WHAT MUST THE CREDITOR SHOW

- 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
  - *SETH V. MIDLAND FUNDING*, 997 n.e.2D 1139, 1140(Ind. Ct. App. 2013).



## MEDICAL DEBT

Charges reflect the  
services

\*Amounts

-usually

-customarily

-reasonably billed





## ACCOUNT STATED

### WHAT MUST THEY SHOW

- Statement delivered
- Debtor does not dispute
- Court may imply agreement to pay
- Burden shifts to debtor to dispute





# SUMMARY JUDGMENT

# AFFIDAVITS

- Based on personal knowledge (T.R. 56 (E))
- Hearsay contained in affidavit should be disregarded
- Business records exception only applied to authenticated business records



# EXHIBITS

- Must be authenticated (Evidence Rule 803(6))
- Must be sworn statements
- Business exception (Evidence Rule 803(6)):
  - Made at or near time by someone with knowledge
  - Kept in the ordinary course of business
  - Making the record was a regular practice of the business
  - All these shown by testimony of custodian of the records
  - Neither the source of information nor the method or circumstances or preparation indicate a lack of trustworthiness





# LITIGATION

Going to Trial

## SAME ISSUES AT TRIAL

- One business cannot lay the foundation for admission of the business records of another business
- Assignments must clearly show that the account in question was in the group of accounts transferred





# POST-JUDGMENT

Collection Proceedings

## PROCEEDINGS SUPPLEMENTAL T.R. 64

- Verified Motion: ordering the plaintiff to appear
- Be careful not to agree to a payment plan that is incorporated into a judgment
- “use of contempt to enforce an obligation to pay money even where, as here, the debt does not involve child support or fraud” violates the Indiana Constitution (*Carter v. Grace Whitney Properties*, 939 N.E.2d 630, 637-38 (Ind. Ct. App. 2010))

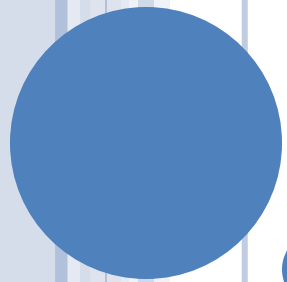




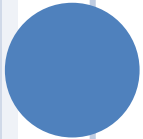
# EXEMPTIONS

- \$19,300 real property
- \$10,250 other property
- \$400 bank account
- Tenancy by the entireties
- Retirement accounts
  - And more in outline





# WAGE GARNISHMENTS



# INCOME SUBJECT TO GARNISHMENT

## Judgment debts:

- Greater than:
- 25% disposable earnings for week
- OR
- Excess of 30 times the minimum wage



## EXAMPLE:

- Client earns: 545.50 gross
- Deduction: 253.51 taxes
- 35.11 401K
- 110.00 medical insurance
- Net: \$146.88
  
- Disposable income:  $545.50 - 253.51 = 291.99$



# WHAT IS GARNISHABLE?

## 25% of disposable income

- Disposable income:  
291.99
- $25\% = 72.99$

## Excess of 30 x minimum wage

- $7.25 \times 30 = 217.50$
- Disposable income:  
291.99
- $291.99 - 217.50 = 74.49$



*BRANHAM V. VARBLE, No.62501-1103-131  
2011 LEXIS 742 (IND. AUGUST 31, 2011)*

- Wage garnishment cannot be in excess of exemption statute
- Disallowed requirement that debtor apply for five jobs per week
- Garnishments self-executing for unrepresented parties in small claims court

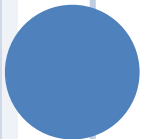


## ORDER OF GARNISHMENTS

- \*Child support garnishment and a judgment garnishment
- \*Take out child support first
- \*Only satisfy the judgment garnishment to the extent the total of both does not exceed 25%

*Miller v. Ownes*, No 52A05-1012-CP-742, 2011 Ind. App. LEXIS 1283 (July 13, 2011)





## **CHILD SUPPORT**

**Garnishment rules different**

**Can take more!**



# WHAT IS GARNISHABLE?

## 25% of disposable income

- Disposable income: 291.99
- $25\% = 72.99$
- Child support: 25.00
- $72.99 - 25.00 = 47.99$

## Excess of 30 x minimum wage

- $7.25 \times 30 = 217.50$
- Disposable income: 291.99
- $291.99 - 217.50 = 74.49$



# BANK ACCOUNT GARNISHMENTS

## General rule

- \$400 is exempt
- Special categories if you can trace the funds

## Federal Benefits

- “protected amount” is exempt



## FEDERAL BENEFITS:

- Social Security retirement
- Social Security disability
- Supplemental Security Income
- Railroad retirement
- Railroad unemployment
- Veteran's benefits
- Federal employee retirement
  
- **31 C.F.R. §§212.2-212.9**



# PROCEDURE IF ANY FEDERAL BENEFITS DIRECT DEPOSITED INTO ACCOUNT

- Garnishment order arrives at the bank
- Account is NOT frozen
- Account review held within 2 days
- Look-back onto account 2 months
- Self-executing



## PROCEDURE:

- Garnishment order arrives
- NO freezing of account
- Within 2 days, account review
- 2 months look-back
- \* Self-executing



## EXAMPLE ONE

- Garnishment order arrives October 10
- Account balance on October 10 is \$1500
- Account review done on October 12
- Look-back is from
  - **August 12 –October 12**



# LOOK-BACK:

## EXAMINE WHAT WAS DEPOSITED DURING THE LOOKBACK

- September 1: \$400 state pension
- **September 5: \$2000 deposited for Social Security**
- September 7: \$200 wages
- September 21: \$200 wages
- October 1: \$400 state pension
- October 4: \$200 wages
- **October 5: \$2000 deposited for Social Security**



# HOW MUCH CAN BE GARNISHED?

○ Amount in Account :	\$1500
○ MINUS	
○ Protected Amount:	(\$4000)
○ \$2000 Sept 5	
○ \$2000 Oct 5	
	<hr/>
	-2500.00

Nothing can be garnished from the bank account





## SUPPOSE SAME CLIENT :

- But amount in account on October 10 is \$6,000
- Amount in account: \$6000
- Minus
- Protected amount: (\$4000)
- Amount that can be garnished: \$2000
- BUT, Judgment debtor can still assert any state exemptions, they are just not self-executing



# PREMIER CREDIT

- Indiana tax collection
- Extremely aggressive
- Some of the rules do not apply
- State working on humanizing the process
- Don't forget the Indiana constitution



# BENCH WARRANTS

- New Rules Jan. 1, 2019 (Ind. Court Order 0010)
- Amends T.R. 64
- Requires personal service of rule to show cause
  
- Person fails to appear
- Writ of attachment, bench warrant or body attachment must have sufficient information to properly identify the judgment debtor
- Then, a writ of attachment, bench warrant or body attachment may attach

