

**SMBA HOUR BY HOUR
DEBT COLLECTION BINGO
SEPTEMBER 25, 2020**

I. What You Should Do Before Litigation

A. Have a fee agreement

1. Determine whether or not fee will be hourly or contingent.
2. If hourly, get fees in advance.
3. Have a written fee agreement. Contingent fee contract must be in writing.
Rule 4-1.5 (c)**
4. If hourly, bill the client as the work is done – preferably monthly.

B. Investigate facts

1. Do you have enough information to file a petition?
 - a. Determine whether or not a judgment will be collectible.

Does debtor have job, bank, car or real estate (the “big four”) ?

Is debtor still in business?

b. Determining **what type of claim it is**

- (1) **Commercial Claims.** Claims incurred primarily for a business, occupation, trade, or profession.
- (2) **Retail Claims.** Claims incurred for personal, family or household use. Comply with the Fair Debt Collection Practices Act. See 15 U.S.C. §1692 et seq.
- (3) **Is the claim dischargeable in bankruptcy?** Determine whether or not you can have a claim that may not be dischargeable in bankruptcy – e.g., fraud, breach of fiduciary duty, etc.

c. Determine who is liable.

(1) Individual

- (A) **Tenancy by the Entirety.** A judgment against one spouse does not entitle the judgment creditor to levy or garnish assets that are owned jointly in a tenancy by the entirety. Judgments that are collectible if you can find a theory of liability on both spouses sometimes become completely uncollectible when you only have a judgment against one of the spouses (e.g., self-employed debtor who owns all of his

assets in a tenancy by the entirety). You may need to attempt to hold the spouse of the debtor liable in order to obtain a collectible judgment.

(2) Company

Can be sole proprietor, corporation, limited liability company, limited partnership, fictitious name, partnership, Professional Corporation, etc.

2. Determine where the debtor is located, and the proper person to serve and where to serve the summons. If you cannot find debtor, you cannot obtain service of process.
3. Determine whether a judgment is collectible before suit is filed. There is no reason to sue unless the judgment will be collectible.
 - a. There may be insurance.
 - b. Ask: If you had a judgment right now (before suit), how would you collect?

II. Replevin Rule 99 and RSMo. Chapter 533

- A. **What is replevin?** Replevin is an action to enforce a claim to possession of personal property. Rule 99.01.
- B. To obtain replevin, you must establish a right to possess the personal property. You must determine whether or not your client has the right to possess the personal property by showing, e.g., that you have a security interest in the personal property such as when a bank has a lien on a motor vehicle and then repossesses it, or repossesses equipment, or other collateral.

The document you rely on to obtain possession of the personal property must have some language in it that actually conveys or grants a security interest in the collateral. See RSMo. §400.9-203. *Bradley v. K&E Investments, Inc.*, 847 S.W.2d 915 (Mo.App.S.D. 1993).

If creditor sells widgets on open account there is no security interest in the widgets so creditor is not entitled to a replevin.

C. **How to proceed on enforcing the security interest**

1. **You must locate the collateral.** If you can't find it, you can't replevin it. RSMo. §508.020 provide replevins "... shall be brought in the county in which such property may be found."
2. **Self-Help Repossession.** You can repossess the collateral if there will be no "breach of the peace." See *Sperry v. ITT Commercial Finance Corp.* 799 S.W.2d 871, 879 (Mo.App. 1990) for how to determine whether or not the creditor has breached the peace.

D. **Judicial Enforcement of Right to Possession After Default**

1. **Pre-Judgment Replevin.** Pre-judgment replevin in Rule 99 allows for a party to file an affidavit and a bond (as provided in Rule 99.03 - 99.06) and obtain a pre-judgment order allowing the party to obtain possession of the personal property. You must establish that creditor is in danger of losing the property unless immediate possession is obtained. Rule 99.03(e). The court enters an order of delivery, and creditor must coordinate the logistics of sheriff picking up the collateral and shipping it to a location for storage and other disposition according to the Uniform Commercial Code.
2. **Post-Judgment Replevin.** Instead of obtaining an ex parte order prior to judgment on a replevin, you pray for a post-judgment replevin, which does not require a bond, affidavit, etc. A petition is filed, you can ask that the court award possession of the personal property to creditor. The case proceeds as any other case, and after judgment is entered, under Rule 99.15, creditor can obtain an execution for delivery for the item to be recovered from .

III. **Post-Judgment Remedies**

A. **Voluntary payment.**

1. Ask for the money by letter or phone.
2. The best use of a suit is to get the debtor's attention and get the debtor to "come to the table" with money to settle the case.

B. **Garnishment Procedures**

A garnishment is served by a garnishor, who is the judgment creditor, on a garnishee, who is the person summoned as garnishee, to pay money owed by the garnishee to the garnishor instead of to the judgment debtor. See Rule 90.01.

C. **Bank Garnishment.** See Rule 90.

1. Ask that the garnishment be returnable in 30 days. (No continuous garnishment allowed on bank garnishments)
2. How do you locate debtor's bank account?
 - a. Ask client whether or not debtor has ever paid by check.
 - b. Is bank information listed on the credit application?
 - c. Search UCC (Uniform Commercial Code) records at Secretary of State's office UCC or BMV (Bureau of Motor Vehicles).
 - d. If the debtor is a retail establishment, send them a check or have someone go into the business and buy something and then see where the check is deposited.

- e. Ask debtor where he banks.

D. **Employer garnishments**

1. Ask that employer garnishment be returnable in 180 days in order to capture as many wages as possible during the garnishment period. May want to consider asking for a continuous garnishment. See below.
2. **Amount which can be garnished.** If the wage earner claims the head of household exemption, only 10% of the net income can be garnished, otherwise 25% of the net income is subject to wage garnishment. RSMo. §513.430, RSMo. §525.030.
3. **Service of Garnishment.** Make sure that your garnishment names a garnishee that is a legal entity, not just a fictitious name, because if the garnishee does not perform as required under the Rules by answering interrogatories or withholding on the garnishment, the ultimate remedy creditor has is to ask for judgment against the garnishee for the amount due on the garnishment, and if the garnishment does not name the correct garnishee, creditor will be getting judgment against a non-entity. See Rule 90.10.
4. **Rule 90 changes in 2016**

a. Continuous Garnishment

1. Mentioned in RSMo §525.040 (a) (1) “or in the case of a continuous garnishment, until the judgment is paid in full.” No other information in that statute on the procedure to follow.

2. Defined

Mo Rule 90.01 (e) “Continuous wage garnishment” is the garnishment of earnings as defined in §525.030, RSMo, that does not have a return date and instead remains in effect until the judgment is paid in full or until the employment relationship is terminated, whichever occurs first”.

3. Answers to Interrogatories to Garnishee

Rule 90.07 (b) answers to interrogatories are due “.. within 20 days from the date on which the garnishee is served with the writ.”

After the initial answers to Interrogatories 90.07 (a) (5) requires notification of garnishor upon termination of debtor’s employment and supplementation of interrogatory “responses” as a continuing duty of the garnishee..

Rule 90.07 (e) Interrogatories are not filed with the court, only the

certificate of service is filed.

4. When garnishee payment due

Rule 90.10 (a) requires garnishee to pay within 10 days after the end of each pay period garnished.

5. Exceptions To Answers To Interrogatories

Rule 90.07 (c) must file exceptions within 20 days after service of the answer or 20 days after return date but if it is a continuous garnishment within 20 days after service of the answers to interrogatories

b. Priority of Garnishments

Garnishments have priority according to service date. Rule 90.04

Continuous garnishments have priority until paid or employment is terminated over any other garnishments served thereafter. Rule 90.04

Child support “garnishments” still have priority over any other legal process, including garnishments, against said wages. RSMo §454.505(7).

Garnishee must identify the existence of all senior garnishments and inform the garnishor upon the release, satisfaction or termination of a senior garnishment. Rule 90.07 (a) (4) . Interrogatory must be added to ask for this information.

c. Reports on judgment balance due every 6 months

Applies to continuous garnishments and where garnishor elects to have money sent to attorney for garnishor not the clerk. Rule 90.19(b)

Must file a statement of balance due with all payments, etc. within 20 days of the close of each 6 month period. The six month period starts when the garnishment is issued. Rule 90.19(b)

If the statement is not filed on time as required, the garnishment can be terminated. Rule 90.19(c) It can be terminated by the court on its own motion or upon motion of any party or junior garnishor.

Statement of judgment balance can act to revive judgment as a payment on the record. Rule 90.19(a).

Rule 90.19 (e) If judgment is unenforceable due to it being satisfied, settled, etc. garnishee must notify garnishor not later than 20 days after the event.

Rule 90.19 (e) requires any over payment to be refunded within ten days to garnishee (not judgment debtor).

d. Service of Garnishment on Judgment Debtor

Mo Rule 90.03(c) Within five days of service of the summons garnishee must hand deliver or mail a copy of the summons and writ to judgment debtor.

e. Time Limit For filing Motion To Stay, Quash or Vacate the garnishment

Mo Rule 90.18 requires motions to stay, quash or vacate not later than 90 days after any specific payment shall have been made by garnishee.

C. **Levy on Personal Property**

1. Judgment creditor can levy and execute on tangible personal property pursuant to Rule 76.
2. A levy on personal property is problematic
 - a. Most debtors have liens on their motor vehicles. See Rule 76.07.
 - b. Costs of levying on vehicles and other personal property are high. Sheriff of Greene County requires a \$400 deposit per vehicle and the vehicle must be towed and stored at the judgment creditor's expense.
 - c. Some items are exempt from sale – e.g., under RSMo. §513.430, household furnishings and goods in a value not to exceed \$3,000, any motor vehicle not to exceed \$3,000, any other property of any kind not to exceed the value of \$600 (the “wild card” exemption).
 - d. Personal property levies on most items of personal property produce meager returns. There are high costs involved in transporting and storing the personal property and the price paid at the Sheriffs sale can be far below fair market value.

D. **Levy on Real Estate**

1. Levies on real estate are difficult and expensive. See Rule 76.06(a), 76.07, 76.11, etc.
 - a. Always get a **reliable** title report before you levy on real estate, and if you have an old title report that you got before you filed suit, update the title report.
 - b. Homestead exemption is \$15,000. RSMo. §513.475.

2. **Judgment Liens**

- a. Judgments entered in the Circuit Court are automatically liens on any real estate the debtor owns in the county where the judgment is entered.. RSMo. §511.350. See Rule 74.13 on procedure for obtaining liens in a county other than the county in which the judgment was entered.
- b. Judgments entered in Circuit Court, Associate Division, are not liens unless the judgment is transcribed to circuit court to become a lien on real estate. See RSMo. §517.141 and §517.151.

When reviving judgment, associate court judgment again to be safe. There is no case Missouri state appellate case on point **Ameriquet Mortgage Company v. Anthony Robert Elwood, 290 B.R. 706 (U.S. Bankruptcy Court, WD MO. 2003)** is a case that states the judgment does not have to be transcribed again.

3. **Procedure for Levying on Real Estate**

The levy is made by filing a notice of the levy with the Recorder of Deeds. See Rule 76.07. A notice of sale must be provided to the debtor, and it must be published pursuant to Supreme Court Rules 76.16 and 76.17.

Real estate is sold by the Sheriff. Rule 76.18.

E. Satisfaction Of Judgment

Rule 74.11 requires a satisfaction of judgment to be filed when a judgment is paid or settled voluntarily or by execution on the judgment. RSMo §511.570 only requires satisfaction of judgment to be filed if the judgment is satisfied "...otherwise than by execution".

F. Notice Of Request For Execution

Rule 103.08 (b) and Rule 103.09 (b) (effective July 1, 2020)

No notice is given electronically upon application or request for execution or garnishment.

IV. Procedures to Locate Debtor's Assets

- A. **Rule 76.28.** Rule 76.28 provides discovery in aid of execution. "In aid of the judgment or execution, the judgment creditor, or a successor in interest, when that interest appears of record, may obtain discovery as provided by Rules 57.01, 57.03, 57.04, 57.05, 57.06, 57.07, 57.09, 57.10 and 58.01, and may enforce discovery as authorized by Rule 61.01 or by any order treating as a contempt of court the failure to comply with the discovery request."

- B. **Debtor's Examination.** When the debtor takes the Fifth Amendment on the Rule 76.28 examination, judgment creditors can always proceed pursuant to RSMo. §513.380. This statute allows the judgment creditor to take the Judgment debtor's examination of the debtor in court after service by the judgment creditor. Debtor is usually sworn and the examination occurs outside the court room. There is a big problem with debtors asserting the Fifth Amendment. See *State ex rel Nothum v. Walsh*, 380 S.W.3d 557 (Mo Banc 2012) which explains the problems with granting immunity at debtors' examinations.

V. **How Bankruptcy Affects Collections**

- A. **Bankruptcy filing stays the action to collect.** See 11 U.S.C. §362. Prevents creditor from recovering on creditor's claim that arose before commencement of bankruptcy case.

B. **Creditor's remedies in bankruptcy**

1. **Proofs of Claim**

- a. **Chapter 7 (liquidation).** Usually no dividend is paid, and no proof of claim is required unless creditor receives notice to do so.
- b. **Chapter 13 (wage-earner's plan).** Creditors **must** file proofs of claim in order to participate in a dividend.

2. **Discharge.** Debtors file bankruptcy to obtain a discharge of their debts.

- a. Some debts are not dischargeable under 11 U.S.C. §523 – e.g., taxes, money obtained by false pretenses, fraud, domestic support obligations, etc. If the creditor wants to object to the discharge of any particular debt, creditor, for some debts, must file a complaint to discharge which has **very** short time deadlines. See time limits in Bankruptcy Rule 4007.
- b. Creditors can also object to debtor's discharge for all of his debts under 11 U.S.C. §727. Grounds for objection to discharge include where the debtor has partially conveyed his assets, concealed, destroyed, mutilated, or falsified document, made a false oath, etc. There are also short deadlines on objecting to debtor's discharge.

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