ATTACK OF THE ZOMBIE DEBT COLLECTORS

Peter A. Holland
Julie Nepveu
May 15, 2013
SPEAKERS

- Julie Nepveu – Senior Attorney, AARP Foundation Litigation, Washington, D.C.

- Peter A. Holland – Visiting Law School Assistant Professor, University of Maryland Francis King Carey School of Law
Zombie Debt is aptly named because it is hard to defend against and seemingly never dies. Learn to defend debt collection lawsuits and protect exempt federal benefits from garnishment.
“Debt collector” (original creditor such as a Citi, Chase, BOA, HSBC, hospital, retail store)

“Debt buyer” – a business whose sole activity is purchasing charged off debt from the original creditor, and then suing in its own name (Unifund, Midland, Arrow Financial, etc.)
A.R.M. DEFINITION OF DEBT BUYER:

“A debt buyer is a firm that purchases debt from another company, usually a creditor or bank, at a deeply discounted rate. The debt purchaser then attempts to collect the debt through its own operations or through the use of a third-party debt collection agency. Some debt buyers may sell all or part of the debt to another party at a profit.”
FOLLOW THE MONEY...

The 10-K filing for Encore Capital Group, Inc., parent of various Midland entities:
"From our inception through December 31, 2008, we have invested approximately $1.2 billion to acquire 25.5 million consumer accounts with a face value of approximately $39.3 billion," or 3.05% of face value.
They then try to enforce them against the consumer at 100 cents on the dollar.

Cost: $0.03

Benefit: Up to $1.00 PLUS Attorneys Fees.

Consider Common Ownership: Debt Buyer Hires Its Owners as Its Law Firm and Charges Attys Fees to Collect Its Own Debt
DEFINITION OF “MEDIA”

- FROM A.R.M. WEBSITE:
- “Media in the ARM industry refers to the files procured from the original creditor that validate the debt as belonging to a consumer.”
COMMON FATAL FLAWS

- Creditor can’t prove the debt
- Statute of limitations
- Debt buyer can’t prove the debt
- Debt buyer can’t prove the assignment
- Fraudulent affidavit
- Sewer service
- Inadmissible evidence
- Illegal attorneys fees
WHAT THE COURTS ARE SAYING:

“The commencement of litigation to collect consumer debt is neither ‘brain surgery’ nor ‘rocket science.’ But it does require some attention to the rules of civil procedure, which based on this court's experience, apparently is not part of the equation for a significant number of members of the debt collection fraternity.”

JUNK DEBT IS:

- Assigned debts purchased for pennies on the dollar with little or no documentation of the contract, the payments or the chain of assignment.
- Many times, the people don’t owe the money, or owe less than claimed.
- More frequently, sued twice on same debt.
A TRUE STORY:

A quote from an actual conversation Peter had with a junk debt buyer attorney about one year ago:

“I sued you and you didn’t file and answer, and you didn’t come to court. What more do I need to prove?”
Q: "What’s your job there?
A: I execute affidavits"

......

Q: How many are you expected to execute?
A: At least 2,000
Q: 2,000 over what period of time?
A: Per day

P. 8 L. 2 – L. 13
Q: Okay. Do you actually prepare the affidavit?

A: No.

Q: Who prepares the affidavits?

A: I don’t know”
WHAT CAN THE DEFENSE DO?

- Demand proof that a contract exists
- Demand proof of all assignments
- Demand proof consumer’s account is included in any assignment
- Demand proof that the claim is not barred by the statute of limitations
- Demand proof that the plaintiff is licensed and has standing to sue
- Demand proof that a qualified records custodian appear to offer competent evidence
DEBT BUYERS: IT’S ALL ABOUT HEARSAY

“I am the Assignee of Your Account, and My Records State That You Owe Me Money.”

Question: Aren’t “Your Records” Comprised Entirely of Records From Several Other Businesses?
HEARSAY WITHIN HEARSAY

- My Company’s Records Indicate That I Own Your Account. (Hearsay).
- My Company’s Records Include Records That I Purchased From My Assignor. (Hearsay Within Hearsay).
- The Records From My Assignor Included Records From Chase Bank (Hearsay Within Hearsay Within Hearsay).
- The Chase Bank Records Say That You Owed Chase $2,301.45. (Hearsay Within Hearsay Within Hearsay Within Hearsay).
Some thoughts about hearsay:

+ Every debt buyer case contains a minimum of 3rd level hearsay. (DB’s own records are 1st level; bank’s records are 2nd level; statements offered for TOMA are 3rd level)

+ Every debt buyer affidavit is based on a minimum of 3rd level hearsay.

+ Second Generation Buyer (i.e. Bank to DB Broker to DB #1) = 4th level

+ Third Generation Buyer = 5th level hearsay

+ Fourth Generation = 6th level hearsay
Rule 5-902 – Documents Can Be “Self Authenticating” only if Documents Are:

+ “of regularly conducted business activity,”
+ “within the scope of 5-803(b)(6) AND
+ “Certified pursuant to (b)(2) of this rule”
+ Notification >10 Days Prior to Trial
+ Copies made available to adverse party AND
+ Def., w/in 5 days, did not file “written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.”
OBJECTION!

Plaintiff: “They waived their right to object, because when she was pro se, their client didn’t file an objection within 5 days of when we sent it to her. Therefore, the documents automatically come into evidence.”

Defense Counsel: “I am not objecting on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness. Rather, I am objecting on the ground that they are not even business records within the scope of 5-803(b)(6) to begin with.”
HEARSAY BUSINESS RECORDS – EASY!

“The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of regularly conducted business activity.”
5 ELEMENTS OF 5-803(B)(6)
ELEMENT #1:

“A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses”

Is it a recording “of acts, events, conditions, opinions or diagnoses”?

- is the balance on a credit card statement an act, event, condition or opinion? (probably yes).
ELEMENT #2:

“if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis,”

Question: How Could a Fourth Generation Purchaser Possibly Know When the Documents From Third Party Entities Were MADE? The dates on the bank statements are themselves hearsay.
5 ELEMENTS OF 5-803(B)(6)

ELEMENT #3:

“(B) it was made by a person with knowledge or from information transmitted by a person with knowledge,”

Question: How Could a Fourth Generation Purchaser Know Who Made or Transmitted the Records of Third Party Entities?
5-803(B)(6)
ELEMENT #4:
“(C) it was made and kept in the course of a regularly conducted business activity, and”
How Could a Fourth Generation Purchaser Know Whether it was Made and Kept “In the Course of a Regularly Conducted Business Activity”?
- “in the course of”?
- “regularly conducted”?
- “business activity”? 
ELEMENT #5:

“(D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation.”

On What Basis is a Fourth Generation Purchaser Competent to Testify About the “Regular Practice” of Each Prior Third Party Entity?
OVERARCHING QUESTIONS:

- If it is the Debt Buyers’ Regular Practice to “Make and Keep” Business Records of Prior Assignors, Then Why are They Always Missing so Many Documents?
- Why do They Not Already Have “the Media”?
- Why do They Have to Pay for Bank Statements, if Their Prior Assignors Made and Kept Them?
TOP 5 EMERGING TRENDS

- Secretly Securitized Accounts
- More and More People Getting Sued Twice on Same Debt
- Robo Signing Paradigm Shift from “deadbeat consumer” to “assault on the integrity of the court.”
- Emerging jurisprudence on junk debt buyers’ lack of evidence
- High Profile Enforcement Actions by Regulators
CLOSING ARGUMENT

1. They have no proof.
2. Until recent years, courts have been justified in relying on debt buyer affidavits, but no more. Things are not like they used to be.
3. Similar to robo-signing in foreclosures, many of these cases constitute a full-scale assault on the integrity of the courts.
4. Always, always, always “Trust, But Verify.”
5. You can no longer count on Opposing Counsel to do #4 for you or the court.
LIST OF CONSUMER LAWYERS:

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES: WWW.NACA.NET

CIVIL JUSTICE NETWORK, INC. WWW.CIVILJUSTICENETWORK.ORG

UNIVERSITY OF MARYLAND LAW SCHOOL CLINIC: PHOLLAND@LAW.UMARYLAND.EDU
RESOURCES

NCLC MANUALS:
FAIR DEBT COLLECTION PRACTICES ACT
COLLECTIONS
UNFAIR AND DECEPTIVE ACTS AND PRACTICES
REPOSSESSIONS
FTC STUDIES


Once a judgment is entered, can you protect your client’s money from judgment creditors?
The Social Security Act provides that Social Security and SSI benefits are not transferable or assignable and forbids “execution, levy, attachment, garnishment or other legal process” to reach benefits paid or payable to recipients.

These benefits are exempt both before and after payment to the beneficiary.
TREASURY’S RULE ON GARNISHMENT

- Interim Final Rule effective May 1, 2011.
- Exempt funds are covered by this rule if ACH Batch Header Record contains a specified unique garnishment exemption identifier (“XX” encoded in positions 54 and 55 of the “Company Entry Description”).
NEW PROCESS FOR ALL GARNISHMENTS

- If creditor is **US government** or **child support agency**, follow normal state law – exempt funds not protected.

- Other creditors: Bank must look to see if any Federal benefits have been *electronically* deposited within the last 2 months.
  - If not e-deposited within the last 2 months, proceed normally under state law.
  - If yes, then bank must protect (not freeze) sum of 2 months of benefit deposits or the current balance of the account, whichever is lower.
IF ACCOUNT BALANCE EXCEEDS 2 MONTHS

- Excess funds can be frozen and bank garnishment fees can be charged.
- If frozen funds are from exempt source, they can still be claimed as exempt: use state law process to claim the exemptions.

Includes:
- SS back payments,
- funds deposited by check or transferred
- funds of joint account holders
ALIMONY, TAXES TREATED SAME WAY

- All garnishments for alimony, state taxes and state government debts against exempt federal benefits are treated the same as all other garnishments – exempt funds protected.

- Alimony judgments may be collected by offset procedure directly from payor agency.
FEES AND NOTICE

- Banks prohibited from charging garnishment fees from protected amount (2 months e-deposit exempt funds).
- Permitted to take fees from frozen amount (garnished funds) or funds in the account over both protected amount and frozen amount.
- If there are any protected funds in the account, the bank must send a notice to the account holder explaining what has happened, and explaining how, under state law, the account holder can challenge the seizure of any frozen funds.
INCONSISTENT STATE LAW PREEMPTION

- Inconsistent state laws preempted.
- State laws Not Preempted if:
  - Higher exemption amounts apply, and
  - More types of funds protected.
- Garnishment order may not last more than one day: New York and Georgia law preempted.
- If the same garnishment order is served again, the bank is required to reject it. If a new garnishment order is served, the same process will begin again.
OVERDRAFT AND SET-OFF OF BANK FEES

- Treasury rule is silent on banks’ right of set off (to collect money owed to the bank) against exempt funds and ability to charge overdraft fees from exempt funds.
- The majority rule is that if funds are exempt from garnishment, they are also exempt from set-off.
- Significant minority of courts, through a variety of rationales, allows set-off against exempt funds.
SET OFF

- Depository Bank – holding Consumer’s account
- Uses statutory, common law and/or contractual right of set off to pay—
  - amounts owed to that bank for another debt (e.g. a car loan or a mortgage)
  - an overdraft
  - bank fee
  - any other reason
SET OFF - MONEY IN JOINT ACCOUNTS

- Issue of state law – is money held in a joint account held “by the entireties” or simply “jointly.”
  + Entireties: only debts owed by both spouses may be basis for taking of entireties property.
  + Jointly: all money accessible for debts of either owner – regardless of ownership of funds.
Most jurisdictions rule that a creditor may seize funds only to the extent of the debtor-depositor’s equitable interest in the funds.

Courts focus: (1) the agreement between the bank and the depositors; (2) the co-depositors’ respective net contributions to the account, and/or (3) statutes defining the rights in jointly held bank accounts.
SET OFF: MONEY IN JOINT ACCOUNTS

- The Multi-Party Accounts Act (MPAA), which is applicable in some states, requires the creditor to demonstrate that the spouse who deposits the funds and who is not the debtor intended that the funds belong to the debtor.
SET-OFF OF CREDIT CARD DEBT LIMITED

- Truth in Lending Act card issuer can NOT take funds out of a deposit account to satisfy credit card debt except under an automatic payment plan previously authorized by the cardholder in writing.

- The self-help remedy available only to financial institutions by reason of their relationships with their depositors is restricted.

- Card issuer can still garnish or levy upon funds under procedures available to other creditors.
SET OFF: OTHER REQUIREMENTS

- Debts must be *Mutual* -- both the bank and the customer have the dual status of being debtor and creditor.
- Debt Must Have Matured:
  + the date specified in the agreement between the parties
  + any time if the agreement is a “demand” note
  + when the consumer is in default
EXCEPTION TO MATURITY REQUIREMENT

“Universal rule” is:

“when a creditor serves a bank with notice of garnishment of a debtor’s bank account, ... the bank may set off the account against the debtor’s unmatured debts owed to the bank.”
SET OFF: OTHER ISSUES

- Accounts must be in debtor’s name
- No set-off against special purpose accounts
- Debtors who are “secondarily” liable may have funds set-off – depends on state law
- Joint Accounts – depends on state law whether debts of one party can be set-off against funds in joint accounts – same rules as for garnishment – see above
SET OFF AGAINST FEES

- Unfortunately it is legal under 9th Circuit case of Lopez v. Washington Mutual for banks to engage in practice of making deliberate loans called “overdraft protection” and then offset fees against exempt funds – based on theory of waiver of §407 rights.

- But you should always ask for a waiver of fees when only source of funds is exempt benefits.
FEDERAL DEBT COLLECTION

- SSA and Treasury authorized to seize Social Security Title II benefits in accordance with the exceptions to section 207 of the Act

STATUTORY EXEMPTIONS FROM OFFSET

  - Federally insured student loans under Title IV of the Higher Education Act of 1965, see 31 U.S.C. § 3716(c)(1)(C)
  - Veterans Affairs pension and parents’ dependency and indemnity compensation programs, see 38 U.S.C. § 5301(a), 5314 (except overpayments)
  - Tier 2 Railroad Retirement benefits, see 31 U.S.C. 3716(c)(3)(a)
OTHER EXEMPTIONS FROM OFFSET

- Upon the request of the head of an agency, the Secretary is required to exempt payments made under means-tested programs, and may exempt other classes of payments under standards prescribed by the Secretary. 31 U.S.C 3716 (c)(3)(B).
- The standards must give due consideration to whether administrative offset would tend to interfere substantially with or defeat the purposes of the payment certifying agency’s program.
ADMINISTRATIVE COLLECTIONS PROGRAMS

- SSA uses Court Ordered Garnishment System (COGS) for child support/alimony.
- Treasury’s Financial Management Service (FMS) uses Benefit Payment Offset (BPO) to collect non-tax debts owed to federal agency or state governments.
- Treasury’s Internal Revenue Service (IRS) collects tax debt using Federal Payment Levy Program (FPLP).
Title II benefits are generally subject to legal process brought by an individual in a State court to enforce a legal obligation to pay child support and/or alimony. 42 U.S.C. § 659.

SSI payments are not subject to levies or garnishment. 63 F.R. 44,986 (Aug. 21 1998).

Designated representative of any Social Security field office or processing center may be served.

Use for Alimony collection.
CCPA LIMITS GARNISHMENT TO:

- The lesser of the state protected amount or:
- 50 %, if the beneficiary is supporting a spouse and/or child other than the spouse and/or child whose support has been ordered;
- 60 %, if the beneficiary is not supporting another spouse and/or child; or
- 55 % or 65 % respectively, if the garnishment order or other evidence submitted indicates the original support ordered is 12 or more weeks in arrears.

- Amounts being deducted for overpayment not counted as received by debtor. 31 U.S.C. 3716(C)(3)(a)(ii).
BenEFIT PAYMENT OFFSET: NON-TAX DEBT

- Limited to 15 % of “monthly covered benefit payment” 31 C.F.R. 285.4(e)(1)(ii).
- Payable on a recurring basis at monthly intervals ... and not expressly limited to less than 12 months.
- BPO will not reduce benefit payments below $750 per month ($9000 per year).
- Challenges/defenses must be raised directly with agency owed, not FMS or Treasury.
FEDERAL PAYMENT LEVY PROGRAM: TAX DEBT

- The *Taxpayer Relief Act of 1997* (P.L. 105-34) authorizes the IRS to collect overdue Federal and state tax debts from Federal payments, including Social Security.

- IRS authorized to levy up to 15% of each payment until the tax debt is paid. 31 U.S.C. § 3720A.

- There is no minimum amount below which benefits can be reduced to collect tax debt, as there is for non-tax debt.
AGENCY ADVANCE NOTICE REQUIRED

- Agencies must give debtors advance notice that litigation may be initiated or the Treasury Department is going to offset the debt against a payment owed to the debtor based on rules from each agency.

- Single notice by agency to last known address at time debt is referred for offset sufficient. See Omegbu v. U. S. Dep’t of Treasury, 118 Fed. Appx. 989 (7th Cir. 2004) (student loan offset of SSDI).

- 31 C.F.R. §§ 285.5(d)(6), 901.3(b)(4).
TREASURY ADVANCE NOTICE REQUIRED

- Treasury must provide a second notice stating time offset will begin once a claim has been submitted but before offset occurs. 31 C.F.R. 285 (4)(f)(1).
- Offset program Call Center: 800-304-3107.
DUE PROCESS NOTICE REQUIREMENTS

- Basis for the indebtedness;
- Right to see file and seek review within agency;
- Opportunity to enter into repayment agreement;
- Standards for imposing interest, penalties, or administrative costs (agency specific);
- Date by which payment should be made to avoid interest, fees and offset (usually 30 days);
- Name, address, and phone number of a contact person or office within the agency.
PROPERLY SENT NOTICE NEED NOT BE RECEIVED BY DEBTOR

- *Setlech v. United States*, 816 F. Supp. 161 (E.D.N.Y. 1993) (for tax refund intercept, notice mailed to last address known to Internal Revenue Service was sufficient even though it was not received by the debtor), *aff’d*, 17 F.3d 390 (2d Cir. 1993) (table).
INFORMING CREDIT REPORTING AGENCY

- OK except tax debt, S.S. (ex. certain overpayments) and tariffs.
- Notice required of right to seek review 60 days prior to release of information to the CRA. 31 U.S.C. 3711 (e)(1)(C).
- Must verify prior to reporting, reinvestigate disputes, and Agency subject to FCRA claims.
- Agency may not report to CRA if a repayment plan has been agreed to or an administrative review has been requested.
INTEREST, CHARGES, AND PENALTIES

- Interest and admin costs must be charged based on statutory or contract rate (interest cannot be charged on benefit overpayments or non-contractual claims).
- Administrative costs and penalties up to 6 % must be imposed on claims >60 days late if not paid within 30 days of notice.
- Interest accrues from date of notice, penalty accrues from date of delinquency. 31 C.F.R. 901.9 (b)(1) and 901.9 (d), respectively.
- Suspension pending review regs required, regs re: waiver of penalties and interest optional.
TAX REFUND INTERCESSION

- The federal government may intercept federal income tax refunds to offset a federal agency’s claim against a taxpayer, including EITC. See Sorenson v. US 475 U.S. 851 (1986).
- Protect EITC and other funds by ensuring tax withholding will not amount to a large refund that can be intercepted. Employee must fill out IRS form W-5 to receive EITC in each check, not in lump sum.
LIMITATIONS ON TAX INTERCEPT

- Intercept is only allowed for debts that are referred to Treasury for offset within ten years after the agency’s right of action accrues, except for judgment debts or as otherwise allowed by law (e.g. student loans).

- Intercept is not allowed as a means of collecting Social Security and SSI overpayments from people who are still receiving Social Security benefits.
WHAT WE LEARNED

- New Treasury Rule on Garnishment
  - What is protected
  - What is not
  - Strategies to protect unprotected amounts
- Set-off issues – what is the law?
- Federal Debt Collection
CONCLUSION

- Even if a judgment is entered, you can protect exempt benefits from third party garnishment.
RESOURCES


- National Consumer Law Center, *Collection Actions* (1st Ed. 2008), and 2010 Supplement Chapter 12.