COLLECTION CASES: WHERE'S THE MONEY?
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It is a common concern for some consumers to have loaned money out to another individual or entity, only to see that party renege on the deal when it is time to pay the loan back. The debtor will invariably place the lender on notice that they are not going to pay the money back via one or more of three time-honored different means:

(1) Indifference or lack of communication from the debtor in response to inquiries for repayment by the lender,

(2) Representations by the debtor that they don't have the money, and/or

(3) Representations by the debtor that they don't owe the money given their version of the transaction (ie., it was a gift, there were services rendered in consideration for the loan, it was for an investment that went bad through no fault of the debtor, etc.). When that happens, it is important to bear in mind what the legal system can and can't do for you if you are such a consumer who has loaned money to a less than responsible party.

A. What You Shouldn't Do To Collect The Money –

1. The Threatening of Criminal Action: Some lenders, especially when the representations used by the debtor in the original transaction lend themselves to a characterization of fraud, will want to threaten the debtor with going to the police or the district attorney unless they are paid back. The problem with this approach is that the threatening of criminal prosecution to obtain money, even if the money is rightfully owed and there was criminal activity engaged in by the debtor, constitutes extortion which is a crime in and of itself.

While a lender shouldn't hesitate to go to the authorities if in fact they have been the victim of fraud or embezzlement, if civil action against the debtor is contemplated then the reporting of the matter to the authorities should not be disclosed to the debtor. If a criminal action is filed, the debtor will find out about it soon enough. As a practical matter, the district attorney's office will rarely get involved in prosecuting such cases if the matter can be characterized at all as a private financial transaction between two consenting parties. If criminal action is initiated, it is not a bar to also pursuing the debtor in a civil action, should the lender choose to do so.

2. Referral To A Collection Agency: Some lenders, and usually in an attempt to avoid legal fees, will assign the collection claim to a commercial collection agency. Most collection agencies will take these claims on pursuant to an assignment, whereby the lender is paid a percentage of whatever monies are actually collected by the agency. The problem with doing this is that most such assignments are irrevocable, which means that the lender has lost any further control over the claim because he doesn't own it anymore, as only the agency does.

Most collection agencies will not initiate legal action against the debtor where the amount involved is relatively small. If the amount is large enough to justify legal action, most agencies will make the filing of a lawsuit the measure of last resort, in an attempt to collect the debt without filing suit and thereby avoiding legal fees. Many collection agencies will do no more than report a negative credit history on the debtor with a credit reporting company, and/or send form letters to the debtor demanding payment "or else". Other collection agencies may take more aggressive steps, but if they cross the line and the steps can be

characterized as harassment or otherwise run afoul of the Rosenthal Fair Debt Collection Practices Act (Civil Code sec. 1788.1, et seq.), then they risk being sued by the debtor, and by extension the lender may end up getting sued as well on the theory that he was the real party in interest or the hirer of the agency in regard to the illegal debt collection practice.

When collection agencies do file suit, the attorney that they choose may have the interests of the agency take precedence over the interests of the lender, and the lender will have no control over how the litigation proceeds or what the case might settle for short of trial.

3. Do Nothing: Some lenders, either believing in the debtor's representations of trying to do something down the line or in the belief that the debtor will "do the right thing" eventually, will wait inordinately long before initiating legal action. The problem with doing nothing is that it gives the debtor time to transfer or conceal their assets, or even to disappear, while the clock is running out on the statute of limitations.

The statute of limitations is an absolute defense in any given legal action, and some of the more common statutes that apply to collection cases include the following:

Breach of Written Contract - A lender has four years to sue for breach of a written contract (C.C.P. sec. 337), with the four years starting to run from the date that the obligation became due and payable.

Breach of Oral Contract - A lender has two years in which to sue for breach of an oral agreement (C.C.P. sec. 339). The problem with oral contracts is that the debtor may have a different version of when or if the obligation was actually due, such that the statute may start running from some other date than that which the lender believes is controlling given his version of the transaction.

Open Book Accounts/Accounts Stated - Most prevalent in the commercial credit context, this iswhere a debtor is sent a regular bill on an acknowledged indebtedness, usually arising out of a series of different or continuing transactions. If a true open book account or account stated exists, then there is a four year statute of limitations (C.C.P. secs. 337, 337a), calculated from the date that a payment was last made or when the debtor last acknowledged the indebtedness.

Fraud - If the loan was procured through fraudulent misrepresentations or deceit on the part of the debtor, then there is a three year statute of limitations [C.C.P. sec. 338(d)], calculated from the date of discovery of the fraud.

Conversion - Sometimes a debt situation arises when a debtor acquires the personal property of the lender and either disposes of, transfers, or destroys it. In such a situation, there is a three year statute of limitations [C.C.P. sec. 338(c)], calculated from the date the lender discovered the loss. The bottom-line on all statutes of limitation is that the law protects the vigilant, and that the longer the lender waits to avail himself of legal action, the more difficult it may be to successfully collect on the case.

B. What You Should Do To Collect The Money -

1. Make A Demand: Once the obligation is due and the debtor has failed to satisfactorily explain when payment will be had, a written demand for payment should be made, giving the debtor a specific time frame in which to either pay or work out a deal if legal action is to be avoided. Written demands made by a lender's attorney are apt to be more persuasive than a written demand coming only from the lender.

2. Make A Deal: If the debtor responds with an offer of installment payments or payment sometime in the future, then some sort of security or leverage should be demanded in order to give an incentive for making

good on the deal. If the original transaction was an oral agreement, then this would be the time to put it in writing, including an attorney's fees clause should legal action be initiated thereafter. A provision for the payment of interest can also be considered. Promissory note forms can be obtained from a stationery store, but it is advisable to at least have an attorney look the form over before it is signed, or even have an attorney prepare a more formal legal document that would better fit the circumstances of your situation.

Better yet is to have the note secured by a deed of trust of real property. Another avenue is to utilize the Confession To Judgment Procedure (C.C.P. secs. 1132, et seq.), whereby if the installment plan isn't satisfied then the lender can automatically obtain a judgment by submitting a written Confession To Judgment signed by the debtor and his attorney directly with the court. The Confession procedure will ordinarily require the services of legal counsel for both the lender and the debtor, however, to make sure the specific requirements of the code are satisfied.

3. File A Lawsuit: If the filing of legal action is necessary, the lender must make a choice as to which court he is going to file in. Lawsuits must be filed in the county where the transaction occurred, or where the debtor resides or otherwise does business in.

Small Claims Court - Suit for up $7500.00 can be brought in small claims. If the actual amount owed is greater than that, then the lender can opt to waive the difference and sue for just $7500.00, in order to avoid the expense of retaining an attorney and to obtain the advantage of securing an early trial date, which is usually within 30 days from filing the action. In small claims the parties cannot be represented by an attorney, although they can consult with an attorney about how to present their case. If the lender loses the case, then that is the final end of the case. If the debtor loses the case, he can appeal it, which will result in another trial in front of another judge. At that stage, either party may retain legal counsel to represent them if they choose to.

Limited Jurisdiction Court - Formerly called municipal court, Limited Jurisdiction Court can award damages up to a maximum amount of $25,000.00, not including costs of suit. The rules of evidence are less formal than Unlimited Jurisdiction Court, such that the testimony of witnesses may be presented by written declaration, so long as the witness is within 150 miles from the courthouse and written notice of the declaration is provided to the other party at least 30 days prior to trial. Trial will ordinarily be set 9 to 12 months away from the date of filing the action, depending upon which court and county the case is filed in.

Unlimited Jurisdiction Court - Unlimited Jurisdiction Court can award damages in excess of $25,000.00. The rules of evidence are more formal than Limited Jurisdiction Court, such that the legal costs associated with prosecuting an Unlimited case are generally more expensive than those incurred in a Limited case. Trial is ordinarily set a year from the date of the filing of the action, at least in Orange County, or longer in other counties such as Los Angeles.

C. What Can You Sue For?

1. Principal:- Of course, the chief component of damages is the amount of the principal due on the loan or indebtedness.

2. Pre-judgment Interest: An award of pre-judgment interest is mandatory if the sum being sued on is capable of being made certain of by calculation (Civil Code sec. 3287), at the rate of .10% (Civil Code sec. 3289), or as fixed by the terms of a written contract, not to exceed .12% (Civil Code sec. 1916.12-2). Post-judgment interest automatically accrues at .10% per annum.

3. Costs of Suit: The prevailing party in any litigation is ordinarily awarded their costs of suit, as defined by statute (C.C.P. sec. 1033.5), and includes filing fees, service of process charges, court reporter fees, and other statutorily designated expenses.

4. Attorney's Fees: Attorney's fees can be awarded a prevailing party only if the right to same is designated in a written contract between the parties if litigation arises there from, or as fixed by statute. The more common statute for awarding attorney's fees in collection actions is in the account stated/open book account transaction (Civil Code sec. 1717.5), although some courts have attorney's fees schedules that regulate what the amount of the fee award is to be in proportion to the amount in dispute. Attorney's fees are decided by the court after a trial, usually pursuant to a motion by the prevailing party.

5. Treble Damages: If the indebtedness arises from a stop payment on or a bad check, the lender may demand treble damages, not to exceed $1500.00, so long as he has first put the debtor on written notice of same per the specific wording of the pertinent statute (Civil Code sec. 1719).

If the indebtedness arises out of the conversion of the lender's personal property by the debtor, under a fact situation where the debtor has stolen or acquired the property knowing it to be stolen, then treble damages and attorney's fees can be awarded pursuant to Penal Code sec. 496(c).

6. Emotional Distress: While it is a rare lender who isn't "put out" by the refusal or inability of the debtor to make good on a loan, emotional distress damages are not recoverable in a breach of contract situation, unless the lender can make out some sort of intentional wrongdoing by the debtor amounting to fraud or deceit.

7. Punitive Damages: Punitive or exemplary damages are only awarded where there is clear and convincing evidence that a defendant has engaged in malice, oppression or fraud, as defined in the code (Civil Code sec. 3294). These type of damages are ordinarily not allowable in a breach of contract situation.

D. I Have A Judgment, So Where's The Money?

A court judgment is not the equivalent of a court order that the judgment debtor must pay the judgment creditor the amount of the judgment. The age of debtor prison has long since passed (don't hesitate to write your congressman demanding a return to the good old days). It is up to the judgment creditor to avail him or herself of various forms of legal execution on the judgment, should payment by the debtor not be voluntarily forthcoming. Among the more common means of judgment collection are the following:

1. Bank Levy: If it is known where the debtor has an account, the lender can obtain a writ of execution from the court which rendered the judgment, and then submit it to the Sheriff's Offices for service upon the debtor's repository. This will cause the account to be frozen by the repository, until such time as it remits the amount due to the Sheriff who in turn remits it to the lender or their attorney. If no bank account is known to the lender, there are private investigative agencies who for a reasonable fee can conduct searches to identify accounts in the name of the debtor, although this usually requires having a current address on the debtor and knowing their SSN.

Because it is a relatively fast procedure and may collect the entire amount of the judgment without advance notice to the debtor, the bank account levy is a preferred method of judgment collection.

2. Wage Garnishment: If it is known where the debtor is employed, their wages can be garnished, for approximately 25% of their net pay. This procedure doesn't work if the debtor is self-employed. The debtor can claim hardship and file a request for exemption with the court, which may be granted in whole or in part, depending upon the debtor's financial situation and the situation with their dependents.

Because the amount of garnishment per paycheck is relatively small, and because prolonged wage garnishment can give the debtor an incentive to file for bankruptcy or to change employment, wage garnishment is generally not that effective in satisfying a large judgment within a reasonable period of time.

The debtor's spouse, if they are married, and even though the judgment is not against the spouse, may have their wages garnished also because their earnings are community property. This requires the bringing of a motion to obtain a court order (C.C.P. sec. 706.109).

3. Judgment Debtor Examination (JDE): The debtor may be served with a court order to appear in court for a JDE, in order to be cross-examined by the lender or their attorney as to their financial situation. If they are also served with a subpoena, then the debtor's financial records can be compelled to be produced as well. This procedure can only be utilized once every 120 days (C.C.P. sec. 708.110), but it can also be utilized against third parties who may have control or possession of property belonging to the debtor (C.C.P. sec. 708.120).

As a cheap alternative to a JDE, written interrogatories and a demand for production of documents may be served upon the debtor (C.C.P. secs. 708.020, 708.030), but if the debtor elects to ignore such creditor discovery then there isn't much that can be done to press the issue on a practical level.

4. Abstract of Judgment: This is a certified record of the judgment, issued by the court that rendered the judgment, that can be recorded with the county recorder. Every judgment should have an abstract issued and recorded in the county where the debtor is believed to reside. It will have the effect of clouding title on any real estate that the debtor may own or thereafter acquire, such that the debtor will not be able to sell the property or refinance it without satisfying the judgment. No title company will issue a title policy on real estate that has an abstract recorded on it against the owner thereof.

To be productive, the abstract must contain either or both the SSN and the driver's license number of the judgment debtor.

If the judgment creditor is not sure where the judgment debtor resides, there is nothing counter-productive in recording the abstract in multiple counties. Given the financial situation of the debtor, the abstract may not bear fruit for some years after the date of entry of the judgment.

If the debtor's equity in their property exceeds the homestead exemption limits (C.C.P. sec. 704.730 exempts a debtor's equity in their residence from $50,000.00 to $150,000.00 depending upon their age, marital status, dependents, and other factors), then the judgment creditor can bring an order to show cause to force a judicial sale of the property to satisfy the judgment.

5. Seizure of Motor Vehicle: Pursuant to a writ of execution and instructions to the Sheriff's Offices, a judgment creditor may seek to have the debtor's motor vehicle seized and sold at a judicial auction. This requires being able to identify the motor vehicle, and having it accessible in a known location. The debtor is entitled to an exemption of $2300.00 (C.C.P. sec. 704.010) from the sales proceeds, but given the

required up-front fee to tow away a motor vehicle (at least $800.00 or more, depending upon the county) and the difficulty in getting a fix on the motor vehicle, this is not a preferred means of collection.

E. The Long Wait: Sometimes it can literally take years to collect a judgment, depending upon on how pro-active the judgment creditor is willing to be, and given the financial responsibility (or lack of same) on the part of the judgment debtor.

The judgment will continue to bear simple interest at .10% per annum, and is good for ten years from the date of entry. The judgment can be renewed in additional ten year increments, so long as the renewal process is completed before the end of any given ten year period. When the judgment is renewed, the amount of accrued interest to date can be based both upon both the principal and the interest accumulated up to that point in time, such that the renewal process can end up adding interest on top of interest and thereby increase the total amount of the judgment exponentially.

Conclusion: Collection of debts and judgments requires patience and expertise, and a lender's chances of successful resolution are enhanced by retaining an experienced and aggressive attorney.