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WHEN BANKRUPTCY IS NOT THE BEST OPTION

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The U.S. economy is teetering on a mountain of consumer debt. By the end of 2011, Americans were carrying $2.5 trillion in all manner of consumer debt. Although credit card use has fallen in recent years, revolving debt in the United States rose to approximately $800 billion as of December 2011.[1] Of that, 98 percent is credit card debt.[2] While credit card delinquency and default rates have also fallen in the last year, the lingering economic downturn continues to affect numerous consumers.[3] Filed in 2009 were 1.4 million bankruptcies, most of them by individuals under Chapter 7 and Chapter 13. Business bankruptcies made up only 6 percent of all filings.[4]

Not surprisingly, many low-income people have difficulty paying their bills and experience life on the receiving end of debt collection efforts. Newly unemployed and elderly consumers may find themselves unable to pay their bills for the first time in their lives after years of working hard and never missing a payment. This sudden inability to meet their expenses causes some to feel terribly ashamed. Some people fear that their nonpayment will result in the seizure of their already-too-small incomes, and some even believe, wrongly, that they may be imprisoned for nonpayment of debt. Many people wish to file bankruptcy to get rid of their debts and stop the phone calls from creditors, but bankruptcy may not be appropriate or necessary in their cases.[5] Here I explore alternative approaches to assist clients when bankruptcy is not the best option.

What We Can Do

Our clients are in debt for various reasons. Job layoff and illness are common. Some have become prematurely unable to work, and their disability or retirement income is much less than their prior income from work. Meanwhile, the cost of living rises, and additional costs for medicine and utilities eat up more of the clients' monthly

[1] Federal Reserve, Statistical Release: Consumer Credit December 2011 (Feb. 7, 2012), http://1.usa.gov/K45lO3.

[2] Ben Woolsey & Matt Shulz, *Credit Card Statistics, Industry Facts, Debt Statistics*, CreditCards.com (Feb. 28, 2012), http://bit.ly/KLiaxO.

[3] Although default and delinquency rates have declined over the past year, some of the largest credit issuers continue to report high levels of defaults. E.g., Bank of America's credit card default rate was 5.63 percent in January 2012, down from a peak of 11.55 percent in March 2010 (Associated Press, *Bank of America January Credit Card Defaults Drop*, Yahoo! Finance, Feb. 15, 2012, http://yhoo.it/J9HvTJ). Citibank similarly reported a credit card default rate of 5.27 percent in January 2012, down from a peak rate of 9.2 percent at the end of 2010 (Associated Press, *Citibank Credit Card Defaults Increase in January*, Bloomberg Businessweek, Feb. 15, 2012, http://buswk.co/L3AJdr). "Delinquency" refers to active accounts that are thirty or sixty days past due, while "default" generally refers to accounts of consumers who have not made a payment in more than six months and the financial institution has "charged off" or written off the debt as uncollectable. Many of those accounts, which are typically sold to "debt buyers," are still winding their way through the collection system.

[4] Woolsey & Shulz, *supra* note 2.

[5] Other reasons why clients seek bankruptcy are utility shutoff, loss of housing, garnishment, inability to pay student loans, or the aftermath of a social security overpayment. In such cases bankruptcy may be the best solution. As legal aid attorneys, we consider representing clients in bankruptcy proceedings in appropriate situations, primarily to save a home or to preserve or restore utility service. However, here I focus on those clients for whom bankruptcy is premature or inappropriate.

income. There is "too much month at the end of the money." Clients often make up the difference with credit cards and, occasionally, "payday" or car title loans, which bear enormous rates of interest. Moreover, the minimum payment on a credit card is often so low that it could take twenty years to pay off, even if the card was never used again. Fall behind, and the late fees, overlimit fees, and accrued interest quickly mount. After a short time, the balance due becomes inflated beyond all recognition. By and large, the people we talk to are not living high on the hog; rather, they are running up their credit cards with prescriptions, groceries, emergency car repairs, and occasional gifts for their children or grandchildren. Sometimes our clients, particularly seniors, have been victims of financial abuse by family members who impose on them to buy things or cosign for unaffordable cars or other goods.

By the time our clients call us, often after years of paying only the minimum payment, they may well have paid more than the cash price of whatever they bought. The clients may be just on the verge of realizing that they can no longer afford even the minimum payment, sometimes trying to show their "good faith" by paying $10 or $20 a month. Or they may have stopped paying some time ago and now face collection agencies and lawsuits. We need to reassure especially clients who feel bad about their debt situation that they are not bad people simply because they cannot afford to pay their bills; acknowledging that we know that they would pay this in a minute if they could afford to do so can be helpful. Explaining that debtor's prisons were abolished long ago and that they cannot be put in jail for not paying debts can go a long way to help set clients' minds at ease.

We can advise clients on how to prioritize their payments. They usually have more important things—food, medicine, electricity, heat, and the rent or mortgage—to worry about than some old credit card bill. If there is anything left after paying daily necessities, then they can consider what they might be able to pay on old debts. Usually the answer is that there is nothing left after the necessities are paid; indeed, we see clients who forgo purchasing food or medicine or cannot pay utilities because they have been hounded by a debt collector to pay something else instead. Occasionally clients can benefit from good credit counseling—but be sure to advise them to avoid debt-management or debt-settlement scams.

Legal aid agencies can inform and counsel these clients and thus give them confidence and peace of mind. We can make the phone stop ringing for those being harassed by telephone collectors. We can assist those being wrongfully hounded for debts they do not owe in disputing old, inaccurate, fraudulent, or paid accounts and defend them from judgments. We can prevent wrongful garnishments and obtain the release of exempt funds in bank accounts frozen in error. We can preserve what little home equity is left in this world by representing defendants in credit card cases and preventing judgment liens on our clients' homes.

Alternative Strategies

Here are some alternative strategies to assist debtor clients without filing for bankruptcy protection.

Be Too Poor to Pay. Often legal aid clients do not need a bankruptcy because they have no garnishable income or assets. Many such clients have income that is completely exempt from garnishment or is too low to be garnished. For those clients, the first and most important piece of advice is that social security, most pensions, and other government benefits are generally "exempt funds."[6] They are not garnishable for any debts except social security overpayments, child support, student loans, and taxes or other federal debts. Exempt income is protected even after it is deposited in the bank.[7] Sometimes debt collectors take advantage of a debtor who does not

[6]See, e.g., 42 U.S.C. § 407(a) (2006). Other common exempt funds under various state laws are unemployment compensation, disability payments, and welfare.

[7]*Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973).

know this and threaten to garnish such income. Learning that their little income cannot be garnished gives our clients immediate relief from one of their most pressing concerns.

If the client is employed, wages near or below full-time minimum wage generally cannot be garnished, and some states do not allow any wage garnishments.[8] You should be familiar with the wage garnishment exemptions in your state to ensure that clients are not garnished more than is allowed. Also important is considering whether the debtor expects to earn more or to acquire substantial assets in the future because the debtor may be subject to garnishment at that time.

With uncollectable assets or otherwise, if the client receives a personal citation to discover assets or to participate in a similar supplementary process, the client must go to court and disclose earnings, bank accounts, and other assets. This is the only kind of collection summons that could result in the client being arrested, via a "body attachment" by the sheriff; the arrest is for contempt of court for failure to respond to the summons, not for owing the money. The purpose of the citation hearing is for the debtor to show all assets and income that could be used to satisfy the judgment. Clients should go to court, "turn their pockets inside out," and bring documents showing that they have only exempt assets and income if that is the case.

Years ago banks receiving third-party citations to discover assets or similar restraints created problems by freezing bank accounts holding exempt funds. However, new rules of the U.S. Department of the Treasury now require banks responding to citations, restraints, and third-party garnishments to examine the debtor's bank accounts for electronic direct deposits of social security and other federal benefits.[9] The new regulation protects an amount equal to two months of exempt federal benefits electronically deposited into the account. Amounts above the last two months' worth of benefits are frozen, although the debtor retains the right to assert a personal exemption to the extent available under state law.

Assert Personal Exemptions. Most states also have a personal exemption, sometimes called the "wildcard exemption," for which the debtor can choose any otherwise nonexempt property or money. For example, in Illinois up to $4,000 of personal assets (personal property or money in the bank) may be exempted from garnishment.[10]

However, a client with substantial savings other than social security or pension deposits, above the personal exemption amount, should be advised to keep that money in a separate account because if exempt money is commingled with other money, it could become garnishable if it becomes impossible to tell the difference between the exempt and nonexempt funds. For example, clients who make frequent withdrawals from commingled funds cannot discern if the money was withdrawn from exempt or nonexempt funds. Clients may need to spend down their nonexempt funds while allowing their social security benefits to accumulate in an exempt-funds-only account for future use.

Preserve Attachable Assets. To clients with very low income but a large amount of equity in a home or other assets, we often need to explain that bankruptcy is simply not a viable option because their monthly income is insufficient to pay their ongoing monthly living expenses plus a Chapter 13 bankruptcy plan payment each month. If the client owns a home with a large amount of equity and

[8]Federal and several states' laws protect an amount up to thirty times the federal minimum wage (15 U.S.C. §§ 1671–1677 (2006); Kan. Stat. Ann. § 60-2310(b) (2012) (thirty times federal minimum wage, after deduction from such earnings of any amounts required by law to be withheld); Utah Code Ann. § 70C-7-103(2)(b) (West 2012) (thirty times federal minimum wage)). Illinois is somewhat more generous, exempting an amount equal to forty-five times the state minimum wage, which is higher than the federal minimum wage (735 Ill. Comp. Stat. 5/12-801–819 (2012)). A few states do not allow wage garnishments at all except for certain debts such as student loans and child support (e.g., 42 Pa. Cons. Stat. § 8127 (2012); Tex. Prop. Code Ann. § 42.001(b)(1) (West 2012)).

[9]31 C.F.R. §§ 212.1–.12 (2012).

[10]735 Ill. Comp. Stat. 5/12-1001(b) (2012).

tries to file a Chapter 7, the bankruptcy trustee would require the client to sell the property to pay off the creditors.[11] A client with substantial savings similarly must pay debts with nonexempt savings even when those funds may be all the client has to last a lifetime.

The fear of a lien on their homes is a major concern for our debtor clients, often because they do not understand that the typical creditor cannot put a lien on a home without filing suit. The creditor must first serve a summons and give the debtor an opportunity to appear in court either to challenge the debt or to work out a payment plan if possible.[12]

An attorney therefore must determine whether the client owns a home and, if so, whether any equity is in the house. When counseling homeowner debtors, an attorney must have a reliable estimate of the home's value as well as knowledge of available homestead exemptions. An attorney would incorrectly advise that a debtor has no garnishable assets if the debtor has home equity above the homestead exemption.

If the client has a large mortgage, say, 75–80 percent or more of the current fair market value of the property, the threat of a lien is typically minimal because the cost of foreclosing on a judgment lien, which includes paying off the large mortgage and any other prior liens plus the homestead exemption, is just not worth what the judgment creditor could get out of a lien sale. In this situation, if a judgment cannot be avoided, a lien will be recorded but could just sit there for years, until the client decides to sell the house or refinance the existing mortgage, in which case the client will have to pay off the lien with the sale or loan proceeds. In the current depressed real estate market, we do not often see foreclosures or sheriff's levies of judgment liens, but when real estate values were high, we did see an increase in such foreclosures.

If a client owns a home free and clear or nearly so, the risk of a judgment lien foreclosure is much greater. But the debtor should receive ample notice of any attempted lien sale, which again would give the debtor time to make arrangements to pay off the debt. Again, there can be no lien without the creditor getting a judgment in court first. Clients with substantial home equity are in the most urgent need of representation to fight a collection lawsuit and attempt to reduce or eliminate the alleged debt whenever possible.

Defend Debtors in Collection Court. When clients have too little income to support a Chapter 13 bankruptcy plan and too much home equity to discharge their debts in a Chapter 7, their property is at risk of a judgment lien. Similarly, when a client has potentially garnishable income or other assets, an attorney should consider defending the client if the client is sued in collection court. We can protect debtors' garnishable income and home equity by defeating the claims of debt buyers and avoiding judgment liens. Explore all possible defenses, such as fraud in the inducement of the contract, forgery, identity theft, or unauthorized use of credit cards. Find out if the client is only an authorized user of the credit card rather than the actual obligor on the account.[13] Challenge the asserted balances and ask the court to require the

[11]States have different homestead exemptions protecting all or a portion of home equity. The amount of the homestead exemption can be as low as zero (e.g., New Jersey and Pennsylvania) or $5,000 (e.g., Ala. Code § 6-10-2 (2012); Ky. Rev. Stat. Ann. § 427.060 (West 2012); Va. Code Ann. § 34-4.1 (2012)). Other states have homestead exemptions of $10,000 to $20,000 (e.g., Ga. Code Ann. § 44-13-100 (2012); Haw. Rev. Stat. § 651-92 (2012); 735 Ill. Comp. Stat. 5/12-901 (2012); Ind. Code § 34-55-10-2 (2012)). Others are as high as $60,000 to $75,000 (e.g., Cal. Civ. Proc. Code § 704.730 (West 2012); Colo. Rev. Stat. § 38-41-201 (2012); Conn. Gen. Stat. § 52-352b (2012)). In some states, the homestead exemption can be as much as 100 percent of the home value (e.g., Ariz. Rev. Stat. Ann. § 33-1101 (2012); D.C. Code § 15-501 (2001); Fla. Stat. § 222.01 (2012); Iowa Code § 561.16 (2012); Kan. Stat. Ann. § 60-2301 (2012); Tex. Prop. Code Ann. § 41.002 (West 2012)). In states with a 100 percent homestead exemption, ownership of substantial home equity does not preclude a Chapter 7 discharge.

[12]The client could have nonjudgment liens created by mortgages, home improvement contracts, and unpaid income taxes—the few examples where the creditor would not have to get a judgment first.

[13]Not infrequently, credit card issuers and debt buyers sue individuals who have been added to the account only as authorized users with no legal responsibility to pay.

plaintiff creditor to demonstrate how the total balance was calculated and make sure all payments made have been properly credited to the account.[14] If the client has paid or settled the account in full or has discharged the debt in bankruptcy, the case is certainly defensible.

Clients are often unfamiliar with the name of the plaintiff who is suing them in a collection case because more than half of credit card collection cases are brought by assignees of the original creditors. These assignees, also known as debt buyers or debt scavengers, purchase hundreds or thousands of defaulted accounts for a minimal price, between two and six cents on the dollar, somewhat more if the debtor owns real estate. An account may be assigned two or three times before a holder files suit, and the client may have never heard from the debt buyer plaintiff before receiving the summons. In most debt-buyer transactions, the assignee has little or no documentation that would constitute admissible evidence to prove the debtor opened the account, used the credit card, or agreed to the terms and interest rates imposed and added to the purported balances due. Typically only electronic information on the alleged account is given to the debt buyer.

Often no contract is attached to the complaint.[15] Instead an affidavit of a purported employee of the debt buyer is attached and states that the defendant owes the amount claimed based on the records of the debt-buyer plaintiff. Such affidavits are not based on any admissible business records; they are often signed by employees of document mills that prepare affidavits for many different debt-buyer entities.

If any contract is attached to the collection complaint in a credit card case, it is frequently only the generic boilerplate "Terms and Conditions" or "Cardholder Agreement" that has no name or signature of the alleged debtor. The debt-buyer plaintiff's name does not appear on such a document either. The attached documents may even appear to be composites of several different versions of boilerplate, bearing different issue dates, or may have the name of yet another financial institution if the original issuing bank has merged and changed its name during the life of the account.

Because all of the debt buyers' information comes from another, unrelated entity, the account records are inadmissible hearsay. Despite the familiar recitations of the debt buyers' affiants, they have no personal knowledge of the creation and maintenance of the account records, and therefore the business-records exception to hearsay does not apply. The debt buyers are subject to a motion to strike the evidence, leading to dismissal of the case.

Debt-buyer complaints often lack any evidence that the particular account has been assigned to the plaintiff. They often attach a "bill of sale" or similar document indicating that the plaintiff (or an affiliate of the plaintiff) has purchased a group of accounts from the original creditor, but these documents do not state that the particular individual account was part of that sale. The plaintiff fails to establish that it has standing to file suit.

Get a Reverse Mortgage. If the collection case cannot be defended or judgment cannot be avoided, the client may face a potential levy on the judgment lien. If the homeowner is over 62 and has substantial home equity, the homeowner may be able to obtain a reverse mortgage to pay off the lien. A reverse mortgage is just like a regular mortgage, except that no payments are due as long as the borrower resides in the home. Interest and fees are added to the loan balance, which becomes due when the borrower dies or vacates the home (for example, if the homeowner goes into a nursing home for more than one year). The homeowner would not have to pay all outstanding debts to get the reverse mortgage because the borrower's credit score is irrelevant. Only outstanding debts that have been

[14]Recent reports suggest that even the largest credit issuers, such as Chase Bank, have problems establishing the correct balance due (see Jeff Horwitz, *OCC Probing JPMorgan Chase Credit Card Collections*, American Banker, March 12, 2012, http://bit.ly/JjoPel).

[15]Contracts are usually not attached to the complaint in credit card cases. If the debt arises from a single written contract, such as a car note, personal loan, or payday loan, the obligation is set forth in a single written contract, attached to the complaint.

reduced to judgment liens would have to be paid out of the reverse mortgage loan proceeds.

Reverse mortgages can be very costly in terms of closing costs and monthly fees plus accrued interest. However, they can be a last resort to keep seniors in their homes by avoiding foreclosure or levy of judgment liens. When the borrowers die, their estate and heirs have no liability for the mortgage beyond the value of the home. Heirs who wish to keep the property may purchase it by paying off 95 percent of the fair market value of the property. The reverse lender is insured for the difference between the property value and the outstanding balance on the loan.

Work out a Payment Plan. Where the client has garnishable income, the client can attempt to work out a payment plan in the neighborhood of the amount that could be garnished. Because court-ordered garnishments usually add court costs and attorney fees, more of the payment will go toward reducing the balance due if the client enters into a voluntary payment plan. If the client is nearing retirement age, a payment plan can forestall a judgment until the client goes on social security (and thus becomes ungarnishable) or becomes old enough to get a reverse mortgage to pay off the debt. If the debt results from an uninsured automobile collision, the client may be required under state financial responsibility laws to enter into a payment plan to retain the client's driver's license. However, consumers who want to try to make payments on their debts must be on the lookout for scam debt-management companies.

Avoid Debt-Management and Debt-Consolidation Scams. A whole new industry of companies offering purported services in negotiating settlements of large debts on behalf of consumer debtors has arisen in recent years. These services, frequently advertised on billboards and late-night television, are often fraudulent and inappropriate for our clients' situations. These programs are very expensive and are usually a waste of money for someone who is judgment-proof anyway. Many creditors refuse to deal with these companies because of the high rate of fraud and overreaching. Although a tiny handful of legitimate credit-counseling agencies do negotiate settlement or payment arrangements on delinquent accounts, the worst of these scams take thousands of dollars from consumers without ever making a payment to their creditors. The scammers often misrepresent the value of their services, the likely success of their programs, or the percentage of likely savings from settlement. These programs are set up supposedly to accumulate a large balance in the debt-settlement company's accounts until the creditor is willing to settle, but, more often than not, the client is sued instead. Some debt-management agencies misrepresent that they are attorneys or have attorneys to represent debtors in court. They sometimes advise clients to file false disputes or have clients change their addresses to that of the debt-settlement company to divert billing statements so that clients do not receive collection notices or service of process.

New Federal Trade Commission rules prevent such companies from charging up-front fees until they successfully settle accounts. Debt-settlement companies may not misrepresent the likelihood of success and must keep client funds separate from their operating accounts, allowing clients to withdraw funds at any time.[16] This new regulation applies only to interstate telemarketing and does not apply if the company has at least one face-to-face meeting with the client. It does not apply to genuine nonprofit entities. It contains no exception for attorneys generally.

Where clients have signed up with one of these outfits and the clients' funds are not being turned over to the creditors monthly or the client is collection-proof and needs those funds for other things, attorneys should file a complaint with the attorney general and the Federal Trade Commission and demand an immediate and full refund of all amounts paid to the settlement company.

[16] Telemarketing Sales Rule, 16 C.F.R. §§ 310.1–.9 (2012).

Pursue Violations of the Fair Debt Collection Practices Act. Attorneys should advise their debtor clients about their rights under the Fair Debt Collection Practices Act.[17] This federal law says that everyone has the right to be treated with dignity and respect even if one owes money.

The Fair Debt Collection Practices Act does not apply to a creditor that is collecting its own debts, such as when a bank employee calls or a creditor sends bills and demand letters. The Act applies only when the creditor sends the account to a third-party collection agency or law firm or assigns the delinquent account to a debt buyer.[18] When a debtor is making small payments to a creditor, the creditor keeps calling and hounding the debtor for more money. Stopping the creditor from making such calls, which can be as harassing as calls from any outside debt collector, is almost impossible under the law. Particularly when a client is completely judgment-proof, the client may be better off to stop making payments to the creditor and just let the debt go to collection.

If a client is completely collection-proof, acknowledge that no one really wants to be sent to collection and that the client can avoid third-party collections for a long time by making small payments to the creditor, but explain that the client may want to stop making payments and allow the debt to go to collection because we cannot stop the creditor from calling, but we *can* make the phone stop ringing if it goes to an outside collection agency or debt buyer. Legal aid agencies should consider establishing a brief-services program to send "cease communications" letters on behalf of elderly or other vulnerable clients. Such a service requires very little staff time to interview clients and prepare the letters, although it does mean someone at the agency must answer calls from collectors to reiterate that the client cannot make payments.

The Fair Debt Collection Practices Act requires debt collectors, including law firms, to give the debtor certain information and not to abuse or deceive the debtor. Here are the Act's main provisions that our clients need to know:

- Debt collectors must state that they are in the business of debt collection and that any information they get may be used to collect the debt.[19] Clients should be instructed *never* to give a debt collector (or any unknown person on the phone) personal information such as social security number, date of birth, bank account numbers, or credit card information.
- Within five days from the first communication, the collector must tell the debtor that the debtor has thirty days to dispute the validity of the debt. If the debt is disputed *in writing*, the collector must supply "validation," or proof of the debt, before the collector can continue trying to collect.[20] Such proof can be fairly minimal, but often collectors give up and just turn the account back over to the original creditor if it is disputed.
- If the debtor has a lawyer, the collector may not contact the debtor *at all*.[21] We represent many people for the sole purpose of stopping the collection calls. Tell the client to say the four magic words: "Talk to my lawyer!" Remind the client to give the collector the attorney's name and phone number, too. Also, advise people that they can use caller identification, an answering machine, or the privacy manager functions of their phone systems to avoid collection calls. Each person is different—some people do not care if the phone rings as long as they do not have to talk to anyone, while others

[17] Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (2006).

[18] *Id.* § 1692a(6).

[19] *Id.* § 1692e(11).

[20] *Id.* § 1692g.

[21] *Id.* § 1692c(a)(2).

are disturbed by the frequent ringing of the phone even if they do not have to answer. Explain to people in this situation that collection agencies use automated dialing machines, which keeps dialing many times a day if no one answers the phone; if the ringing bothers them, they should answer the phone and (assuming we agree to be their attorney for this purpose) give them our information. Clients should also give us the collector's information if possible; if they have any collection letters, they should send them to us. We send the collector a "cease contact" letter and send a copy to the client. If the collector "has reason to know" that the debtor has a lawyer, even from the debtor orally informing the collector that the debtor is represented by counsel, the collector is not allowed to communicate with the debtor.

- A collector may not call the debtor at any time, including late at night or very early in the morning (or any time even during normal business hours if, for example, the debtor or someone in the debtor's household works a night shift and sleeps during the day), or place known to be inconvenient to the debtor or at work if the debtor is not allowed to receive phone calls at work.[22] This restriction applies even if the collector is orally informed of the inconvenience; the debtor does not have to tell the collector in writing.
- Debtors can ask collectors to cease all further communication by writing their own "cease-contact" or "cease-communications" letters (sometimes erroneously called a "cease and desist" letter). After the collector receives the cease-contact letter, the collector may contact the debtor only once more, to tell the debtor what the collector may do or is likely to do next, such as filing suit against the debtor.[23] One risk of the debtor sending a cease-contact letter is that the creditor may proceed more quickly to file suit.
- To the debtor, a debt collector is not allowed to make false statements such as "We will garnish your social security," or "We're going to send the sheriff to arrest you," or even to threaten a lawsuit if the collector does not intend to sue.[24] Sometimes collectors say, "Everyone has to pay something," when this is not true for someone who is completely judgment-proof.
- A debt collector is not allowed abusive language, swearing, racial epithets, or behavior considered harassment.[25] However, simply calling every day to ask for payment, without more abusive tactics, is not technically harassment and is not a violation of the Fair Debt Collection Practices Act unless the client has an attorney or there has been a written dispute within thirty days or a cease-contact letter.

If a debt collector violates the Fair Debt Collection Practices Act, the debtor has the right to sue the collector for statutory damages of $1,000, plus attorney fees, even if there are no actual damages and the client did not suffer any real emotional distress as a result of the violation.[26] If the debtor suffers actual emotional distress as a result of collection abuse, the debtor can get even more as actual damages, typically anything between $1,000 and $10,000, depending on the egregiousness of the abuse and the severity of the client's emotional distress reaction—these are not usually million-dollar cases. The Fair Debt Collection Practices Act claim has nothing to do with whether the money is owed, and clients can sue and collect damages under the Act even if they still owe the debt and even if they are judgment-proof. The typical client recovery in a Fair Debt Collection Practices Act case is less than the personal exemption in most states; the creditor or collector cannot force

[22] *Id.* § 1692c(a)(1).

[23] *Id.* § 1692c(c).

[24] *Id.* § 1692e.

[25] *Id.* § 1692d.

[26] *Id.* § 1692k.

the consumer to pay the debt from the recovery under the Act, although sometimes a Fair Debt Collection Practices Act case can result in a settlement of the outstanding debt.

Clarify Effect of Credit History on Employment. Some clients seek bankruptcy to "clear" their credit reports to find employment. However, bankruptcy does not erase the consumer's bad credit history, although it does reduce all the balances to zero, and a bankruptcy will appear on the client's credit report for ten years. The Illinois Employee Credit Privacy Act prohibits most employers from basing employment decisions on an applicant's or employee's credit information.[27] The Illinois Employee Credit Privacy Act lists exceptions for workers in the financial services industry and management or financial positions in other fields. Oregon, Washington, and Hawaii have similar laws.[28]

Explore Utility Assistance and Other Alternative Means to Pay. One of the few reasons an otherwise judgment-proof client may need to file bankruptcy is to restore utility service or prevent utility shutoff. Subsidized tenancies can be terminated for failure to maintain utility service.[29] Many clients have little other debt, and the utility debt may be relatively small (though completely beyond their means to pay), but bankruptcy may be the only relief available.

However, many communities have utility-assistance programs such as the Low-Income Home Energy Assistance Program, Percentage of Income Payment Plan, and other special hardship programs. Private foundations may make emergency grants to restore utilities or preserve housing. When such resources are available, clients should avoid bankruptcy and save the bankruptcy option for when there is no other relief available.

Debtor relief outside bankruptcy court may be available similarly for medical bills. Many tax-exempt nonprofit hospitals must offer a certain amount of charity care to their communities. Failure to do so can lead to the loss of their tax-exempt status.[30] Many hospitals offer medical debt relief or charity care, available upon filing a financial aid application with the hospital.

Delay Filing Bankruptcy. Many clients seek bankruptcy at the wrong time—when their economic situation is at its worst and they have no money. Rather than simply rejecting cases as inappropriate or outside the legal aid program's priorities, view this as an opportunity to advise clients why bankruptcy is wrong at this time. Where a client has substantial unsecured debt but little home equity because of a large mortgage, filing a Chapter 7 bankruptcy and getting the debts discharged before property values rise may be advisable.

■ ■ ■

Bankruptcy is a powerful tool, but it is often not the appropriate or only way to protect debtor clients. Attorneys must consider all available debt-relief alternatives before filing a bankruptcy.

[27]Employee Credit Privacy Act, 820 Ill. Comp. Stat. 70/1–30 (2012).

[28]Haw. Rev. Stat. § 378-2.7 (2012); Wash. Rev. Code § 19.182.020 (2012); Or. Admin. R. 839-005-0060 (2012).

[29]Preserving subsidized housing is also a primary reason for low-income debtors to file bankruptcy, to prevent eviction and allow time to pay off rent arrears.

[30]See *Provena Covenant Medical Center v. Department of Revenue*, 925 N.E.2d 1131 (2010) (hospital lost its property tax exemption under state law where hospital provided charity care amounting to less than 0.723 percent of its revenues to only 0.27 percent of its patients; most of its income came from services for fee; and it failed to promote availability of charity care and referred unpaid bills to debt collectors); see also Valerie McWilliams & Alan A. Alop, *The Dearth of Charity Care: Do Nonprofit Hospitals Deserve Their Tax Exemptions?*, 44 Clearinghouse Review 110 (July–August 2010).

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