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Collection Law in Kentucky

Office of Continuing Legal Education at the University of Kentucky College of Law

UK CLE

COLLECTION LAW IN KENTUCKY

September 2001

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September 2001

Presented by the
OFFICE OF CONTINUING LEGAL EDUCATION
UNIVERSITY OF KENTUCKY COLLEGE OF LAW

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OUTLINE OF THE FAIR DEBT COLLECTION PRACTICES ACT

(15 U.S.C. 1692)

FAIR DEBT COLLECTION PRACTICES ACT (15 U.S.C.A. § 1692)

1. HISTORY OF THE ACT (15 U.S.C. § 1692).

Prior to the enactment of the Fair Debt Collection Practices Act [1] (the "Act"), debtors seeking recourse against debt collectors had to resort to common law tort claims, such as invasion of privacy, intentional infliction of emotional distress, false imprisonment, libel and slander, malicious prosecution and abuse of process or assault and battery. Most often these claims were difficult to prove. Also, even victorious plaintiffs rarely came out ahead because of the added effect of the "American Rule" that requires each side pay its own attorneys' fees. An example of the types of activities engaged in by debt collectors and the relative lack of success attained by debtors through common law claims is highlighted in Public Finance Corp. v. Davis.[2]

In Public Finance Corp., a debt collector phoned and visited the debtor's home repeatedly. The debt collector also called the debtor at the hospital when she was visiting her sick daughter, induced the debtor to write a check for the debt by promising not to cash it until later and then phoned a friend of the debtor and informed her that the debtor was writing bad checks. During one visit to the debtor's household, the debt collector asked if he could use the phone to call a colleague and, once inside, used the telephone to give the colleague an inventory of the debtor's household goods, presumably for later repossession. The debtor eventually filed suit alleging intentional infliction of emotional distress. The court denied the claim holding that these acts were not "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency."[3]

After a number of congressional hearings conducted before the Consumer Affairs Subcommittee of the Senate Committee on Banking, Housing and Urban Affairs in the mid - 1970's, Congress acknowledged that debt collection abuse by third party collectors was a serious national

problem. The Subcommittee found that the main reason for such widespread abusive practices was the lack of any regulation of the industry at the state level. At that time, there were thirteen (13) states, Kentucky among them, that had no debt collection laws. Another eleven (11) states had some type of law in effect but were, in the opinion of the Senate Subcommittee, ineffective to control debt collection abuse.

Since third-party collectors usually operated on a commission basis, the Subcommittee found that many did not care what effect their tactics had on consumers. Moreover, the use of WATS lines[4] and other discounted long-distance calling arrangements was found to have increased interstate collections, thus making it difficult for states to crack down on illegal debt collection practices conducted across state lines.

In response to these continuously compounding difficulties, Congress established the Act as a new title to the Consumer Credit Protection Act in 1977.[5] The passage of the Act was supported by most of the groups it would affect including consumer groups, labor unions, state and Federal law enforcement officials, and even the debt collection industry itself. Since all debt collectors are regulated under the Act, none are competitively disadvantaged.

2. PARTIES AFFECTED (15 U.S.C. § 1692a).

2.1 The Act Applies To Independent Debt Collectors.

The act regulates only the collection of consumer debts which are primarily for personal, family or household purposes.[6] It has no application to the collection of commercial accounts. Further, the Act regulates the activities of persons who regularly collect consumer debts for others, i.e., independent debt collectors.[7] It does not apply when a creditor is acting to collect a debt which is owed to it.

While the Act only applies to the actions of "debt collectors," "debt collectors" can also be found vicariously liable for the acts of their agents. In Ditty v. CheckRite, for example, the court held that CheckRite, who was a debt collector, could be held vicariously liable for the actions of its attorney.[8] As such, violations of the Act by counsel for a debt collector can expose the debt collector to liability as well. Contrarily, non-debt collectors will not be found liable for the actions of a debt collector as the Act only imposes liability upon debt collectors.[9]

More specifically, the Act applies to:

(a) Persons who use interstate commerce or the mails in any business, the primary purpose of which is the collection of debts.[10] A typical collection agency uses the telephone and the mail, thus subjecting itself to regulation under the Act.

(b) Persons who regularly collect debts owed to another.[11] This includes the typical collection agency but also includes persons who regularly collect debts, but are not necessarily in a business with the primary purpose of collecting debts. This could include attorneys, credit reporting agencies or creditors who have a reciprocal agreement to collect the other's debts.

(c) Creditors who use a name other than their own to collect debts, so that it appears as if a third party is collecting for it.[12]

(d) Professional repossessors or repossession companies who use interstate commerce (phone, mails, fax, etc.) and who take or threaten action to repossess collateral where there is no present right to possession, or no present intention to take possession, or the collateral is exempt.[13]

(e) Persons who design forms to sell to creditors, which forms are designed to convey to a consumer, when mailed to the consumer by the creditor, that a third party is involved

in collecting the debt, when such is not the case.[14] This practice is commonly referred to as "flat-rating."

All of the persons engaged in activities as described above are "debt collectors" under the Act and must therefore comply with its provisions.

2.2 Excluded Parties.

Conversely, the term "debt collector" does not include the following persons:

(a) "in-house" collectors for creditors as long as they use the creditor's name in collection efforts[15] (note: as creditors continue expanding their in-house collections, more and more debts are collected outside the reaches of the Act);

(b) affiliated companies collecting for each other as long as they only collect for other related entities and are not in the principal business of debt collection;[16]

(c) federal or state employees/officials if collecting debts in the performance of their official duties;[17]

(d) process servers while serving or attempting to serve legal process;[18]

(e) non-profit consumer credit counseling services/agencies;[19]

(f) fiduciaries, such as trust departments, escrow companies or others acting in a legitimate fiduciary capacity;[20]

(g) mortgages, mortgage servicing companies and others who service outstanding debts for others, as long as the debts were not in default when taken for servicing;[21]

(h) collection of debts owed to a creditor when the collector is holding account receivables as collateral for commercial credit extended to the creditor;[22] and

(i) attorneys engaged in activities which qualify them to be called "debt collectors." [23]

An attorney will be subject to the requirements of the FDCPA if he or she "regularly collects" consumer debt for his or her clients.[24] Whether an attorney "regularly collects" consumer debt is determined on case by case basis, but courts have found the following factors relevant: (1) the percentage of revenue generated by debt collection activities, (2) the sheer volume of debt collection activities; and (3) whether the attorney has an on-going relationship with a collection agency."[25]

An attorney does not need substantial activity to be a debt collector.[26] "The word 'regular' is not synonymous with the word 'substantial.'"[27] Occasionally, a court will hold that an attorney who only rarely collects debts is not covered by the Act.[28] The most prudent course remains that an attorney handling a consumer debt collection matter should assume that he or she is covered by the Act.

2.3 Definition of Consumer Debt.

The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.[29]

Moreover, the question as to what constitutes "consumer debt" has recently been interpreted more broadly by some courts and has been found to does/does not include:

(a) does: collecting dishonored checks even though they were not issued in a credit transaction; [30]

(b) does: eviction actions;[31] or

(c) does: condominium homeowners' association dues and assessments;[32]

(d) does not: collecting taxes;[33]

(e) does not: torts and criminal acts;[34]

(f) does not: business debt;[35] and

(g) does not: child support.[36]

3. ACTIONS PERMITTED (15 U.S.C. § 1692b, § 1692c).

The drafters recognized that the Act should not completely tie the hands of third party debt collectors, and that certain practices were necessary to further the purposes of the industry. Therefore, the Act allows some collection efforts albeit in a quelled manner.

3.1 Location.

Debt collectors may contact third parties to obtain "location information" about the debtor (e.g., residence address, phone number and place of employment).[37] The debt collector must identify himself, state that he is confirming or correcting location information concerning the debtor, and, only if expressly requested, identify his employer.[38] However, in doing so the debt collector may not:

(a) state to the debtor that the consumer owes a debt;[39]

(b) contact the same debtor more than once unless requested to do so if necessary to obtain more complete information;[40]

(c) communicate by postcard;[41]or

(d) use any language or symbol on any envelope or in the contents of any communication through the mails or by telegram that indicates that the debt collector is in the debt collection business or that the communication relates to collection of a debt.[42]

3.2 Allowed Communication.

Debt collectors may communicate with debtors, but the contact is limited. Written contact must make the debt collector's intentions clear.[43]

Without the prior consent of the consumer or express permission of a court of competent jurisdiction, a debt collector's communications with the consumer in connection with collection of a debt are restricted as follows:[44]

(a) Phone calls or other communications may not occur at an unusual time or place known or which should be known by the debt collector to be inconvenient to the debtor. [45] It is presumed under the Act that contacts made after 8:00 a.m., and before 9:00 p.m. are reasonable and permissible.

(b) If the debtor is represented by an attorney with respect to the debt, the debt collector must make reasonable effort to contact the attorney first, and may only contact the debtor if the attorney fails to respond within a reasonable time or if the attorney permits communication directly with the debtor.[46]

(c) Efforts to contact the debtor at his or her place of employment are prohibited if the debt collector knows or has reason to know that the employer prohibits the debtor from receiving communications at work or if the debt collector is asked to refrain from such tactics.[47]

3.3 Cessation of Communication.

The debt collector must cease communication with the consumer if the consumer notifies the debt collector in writing that the debt is disputed, that the consumer refuses to pay the debt, or that the consumer desires the debt collector to cease further communication.[48] The debt collector may, however:

(a) advise the consumer that the debt collector's efforts to collect are terminated;[49]

(b) notify the consumer that the debt collector or the creditor may utilize specific remedies only if such remedies are intended or ordinarily used by such debt collector or creditor;[50] or

(c) where applicable, notify the consumer that the debt collector or creditor intends to invoke a specified remedy.[51]

The Sixth Circuit has recently held, however, that noncoercive settlement offers can be made after receipt of written notice by the debtor to cease further communications.[52] The court reasoned that prohibiting such offers would be plainly at variance with the policy of the legislation as a whole. "Allowing debt collectors to send such a letter is not only consistent with the Act but also may result in resolution to litigation, saving all parties involved the needless cost and delay of litigation."[53]

3.4 Conservative Approach Is Recommended.

In Section 1692c of the Act, the use of terminology like "should be known," "has reason to know," "readily ascertain," and "reasonable period" create ambiguities that may complicate a debt collector's efforts to comply with the Act.[54] Thus, a conservative approach in deciphering these issues is the most prudent course to follow.

4. ACTIONS RESTRICTED (15 U.S.C. § 1692d).

The Act prohibits debt collectors from engaging in any type of behavior, the natural consequence of which is harassment or abuse.[55] Without limiting the broad coverage of this statement, the following acts are considered violations of the Act:

4.1 Use or Threat of Violence. The use or threat of violence or other criminal means to harm the physical person, reputation or property of any person is prohibited;[56]

4.2 Obscene or Profane Language. The use of obscene or profane language or language the normal consequence of which is to abuse the hearer or reader;[57]

4.3 Publication of Consumers. The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to certain persons to whom a consumer reporting agency may divulge information about the consumer;[58]

4.4 Advertisement. The advertisement for sale of any debt to coerce payment of the debt;[59]

4.5 Telephone Conversations. Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse or harass any person at the called number;[60] or

4.6 Caller's Identity. Except as provided in 15 U.S.C.A. § 1692b regarding communications to collect a debt, the placement of telephone calls without meaningful disclosure of the caller's identity.[61]

This is a nonexclusive list of unlawful collection tactics and it has been left to the courts to determine what additional behaviors constitute harassment or abuse on a case by case basis. Moreover, although a creditor collecting its own debts is generally not subject to the Act, many state

consumer protection acts also broadly prohibit abusive behavior similar to the Act.[62] As such, creditors collecting their own debts should also take note of their states' laws and comply accordingly.

5. PROPER PROCEDURES TO COLLECT UNDER THE ACT (15 U.S.C. § 1692g).

5.1 Written Notice.

The Act requires that the debt collector send a written notice to the consumer containing the following information within five days after the initial communication with the consumer:

(a) a so-called "Mini-Miranda" statement that provides, "The debt collector is attempting to collect a debt and any information obtained will be used for that purpose";[63]

(b) the amount of the debt and the name of the creditor to whom the debt is owed;[64]

(c) a specified "Validation of Debt Notice" that clearly indicates that, unless the consumer, within thirty (30) days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;[65]

(d) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector;[66] and

(e) a statement that upon the consumer's written request[67] within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.[68]

This information need not be provided if contained in the initial communication with the consumer, or if the debt has been paid.[69]

5.2 Mini-Miranda Warning.

Although prior law required the Mini-Miranda warning on all communications with the debtor, including communication during litigation,[70] that requirement has been altered by an amendment to 15 U.S.C. § 1692e(11). The Mini-Miranda warning must now be given on or during all initial written or oral communications to the consumer except formal pleadings made in connection with a legal proceeding.[71] On all subsequent written or oral communications (except formal pleadings made in connection with a legal action), the Mini-Miranda warning need not be included but the communication must still disclose that the communication is from a debt collector.

5.3 Validation of Debt Notice.

A debt collector should pay particular attention to preventing the Validation of Debt Notice from being overshadowed by other language in the communication so as to negate the required effects of the notice. In considering this issue, the court may apply a "least sophisticated consumer" test to determine whether the consumer could be confused by the inclusion of additional information to the communication.

In these circumstances, additional information can be easily viewed as contradicting or complicating the Validation of Debt Notice and thus negate its effect and cause a violation of the Act. [72] The Seventh Circuit has held that, as a matter of law, demands for "immediate" or "urgent" payment overshadow and contradict the Validation of Debt Notice, unless there is a full explanation of the relationship between the demand and the debtor's validation rights. [73]

Although the "least sophisticated consumer" test is applied in the majority of circuits,[74] in Gammon v. GC Services, [75] the Seventh Circuit objected to a standard based on the "single most unsophisticated consumer who exists." The court preferred a standard that reflected simply an "unsophisticated consumer," stating that an "unsophisticated consumer" standard protects the consumer who is uninformed, naive or trusting, yet it admits an objective element of reasonableness. Moreover, the Fifth Circuit has simply declined to recognize any difference between the two standards and has refused to select between them. [76]

While the Validation of Debt Notice provides for a thirty (30) day period for the debtor to dispute the validity of the debt, the debt collector remains free to file suit within the thirty day (30) period. In Sprouse v. City Credits Company[77] the debt collector filed its complaint to collect the debt prior to the expiration of the thirty (30) day validation period provided for under the Act. The debtor argued the debt collector's actions violated the Act by attempting to require debtor's response (in filing its answer to the complaint) to the validity of the debt before the expiration of the validation period.

The Sprouse court held that the language in the summons accompanying the debt collector's complaint requiring the debtor to file its answer within thirty (30) days did not 'overshadow' the debt collector's validation notice. The court reasoned it was entirely possible for the debtor to file their answer within the thirty (30) day period and still file their objection to the validity of the debt as provided for under the Act. In other words, a debt collector does not have to stop its collection efforts to comply with the Act, instead, it must ensure that its efforts do not threaten a debtor's right to dispute the validity of the debt.[78]

5.4 Debt Collector Must Provide Requested Information.

If the consumer notifies the collector in writing within the thirty-day period that any portion of the debt is disputed, the debt collector must cease collection of the debt until the debt collector obtains the required information and mails it to the consumer.[79]

5.5 No Admission of Liability.

The failure of a consumer to dispute a debt does not constitute an admission of liability in a court of law.[80]

6. RESPONSIBILITY OF COLLECTORS (15 U.S.C. § 1692e, § 1692f, § 1692i).

Debt collectors may not engage in any conduct which constitutes harassment or abuse.[81] Communications with consumers must conform with the guidelines set out in the Act regarding when and where the communications may take place, with whom the collector may communicate, and the content of the communication.[82]

6.1 No Unfair or Unconscionable Methods.

The debt collector has a responsibility to avoid using unfair or unconscionable methods to collect debts.[83] Without limiting the scope of this broad statement, the following conduct is prohibited under the Act:

(a) the collection of any amount of money unless permitted by law or authorized by the contract creating the debt;[84]

(b) acceptance by the debt collector from any person of a check or other instrument for payment postdated by more than five days, unless the person is notified in writing of the debt collector's intent to deposit the instrument not more than ten nor less than three days prior to such deposit;[85]

(c) the solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution;[86]

(d) depositing or threatening to deposit any postdated check or other instrument prior to the date on the instrument;[87]

(e) causing charges to be made to any person for communications (such as collect telephone calls) by concealment of the true purpose of the communication;[88]

(f) taking or threatening to take any non-judicial action to effect dispossession or disablement of property if:

(1) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(2) there is no present intention to take possession of the property; or

(3) the property is exempt by law from such dispossession or disablement;[89]

(g) communicating with a consumer regarding a debt by postcard;[90] and

(h) using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.[91]

A typical violation of the last prohibition occurs when a collection agency whose name clearly implies its business, includes its name as well as its address on the envelope to the debtor. As the courts rule on cases concerning different types of conduct alleged to be violations of the Act, the list will undoubtedly expand. For example, a debt collector's filing of a suit on a debt

for which the statute of limitations had run, without first making reasonable inquiry as to whether the statute was tolled, is an unfair practice under the Act.

The prohibition against collecting any amount that is not permitted by law or authorized by the agreement creating the debt can be equally problematic. For example, in Charles,[92] a plaintiff wrote a bad check for $17.93 to pay for a restaurant meal. When the bad check bounced, the restaurant sent it to a third party debt collector. The debt collector demanded $42.93, then referred the matter to the defendant attorneys. The attorneys claimed the plaintiff owed $317.93 and offered to settle for $127.93. The Ninth Circuit ultimately held the plaintiff could file a claim under the Act stating that unless one of the foregoing exceptions applies the Act prohibits the collection of anything greater than the amount of the debt, $17.93.[93]

6.2 False Representation Prohibited.

A debt collector may not use any false, deceptive, or misleading representations or means in connection with the collection of any debt.[94] Without limiting the general application of the foregoing, the following conduct is a violation:

(a) the false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any state, including the use of any badge, uniform, or facsimile thereof;[95]

(b) the false representation of:

(1) the character amount, or legal status of any debt; and

(2) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt;[96]

(c) the false representation or implication that any individual is an attorney or that any communication is from an attorney;[97]

(d) the representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action;[98]

(e) the threat to take any action that cannot legally be taken or that is not intended to be taken;[99]

(f) the false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to:

(1) lose any claim or defense to payment of the debt; and

(2) become subject to any practice prohibited by this subchapter;[100]

(g) the false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer;[101]

(h) communicating or threatening to communicate to any person credit information that is known or that should be known to be false, including the failure to communicate that a disputed debt is disputed;[102]

(i) the use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued or approved by any court, official or agency of the United States or any state, or which creates a false impression as to its source, authorization or approval;[103]

(j) the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer;[104]

(k) except as otherwise provided for communications to acquire location information under section 1692b of this title, the failure to disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose;[105]

(l) the false representation or implication that accounts have been turned over to innocent purchasers for value;[106]

(m) the false representation or implication that documents are legal process;[107]

(n) the use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization;[108]

(o) the false representation or implication that documents are not legal process forms or do not require action by the consumer;[109] and

(p) the false representation or implication that a debt collector operates or is employed by a consumer reporting agency.[110]

With regard to the prohibition relating to a "threat to take any legal action that cannot be legally taken or that is not intended to be taken," the threats can be implicit as well as explicit. Statements that a debt will be subject to "legal review" or "will be transferred to an attorney" have been held to be implicit threats of suit.[111] A statement by an attorney that "all necessary actions" will be taken is a threat of suit, "because to most consumers, the relevant distinction between a collection agency and an attorney is the ability to sue."[112]

In C. Lewis v. ACB Business Services, Inc., the Sixth Circuit held the use of a pseudonym on a letter to a debtor does not violate the Act's prohibition against "the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."[113] Ruling on policy grounds, the Court reasoned that aliases and office names have long been utilized by collection agencies for the protection of their employees. As such, the burden to an ethical debt collector that would result from prohibiting the use of assigned aliases by designated employees clearly outweighs any abstract benefit to a debtor that such a prohibition might yield.[114]

6.3 Forum/Jurisdiction.

The Act controls the forum in which suits may be filed against consumers by debt collectors. An action to enforce an interest in real estate securing the debtor's obligation, usually a foreclosure action, must be filed in the county where the real estate is located.[115] This coincides with the venue statute in Kentucky for this kind of action, KRS 452.400. However, under the Act, any other action filed by a debt collector on a debt against a consumer must be filed in either the county where the debtor signed the contract sued upon, or the county in which the debtor resides when the action is filed.[116]

This is somewhat more restrictive than KRS 452.480, which permits an action to be filed in the county of the debtor's residence or in a county where the debtor may be served, thus permitting suit to be filed against a person in the county where employed or where it is known the debtor may be found if different from the debtor's residence. In situations where there is a conflict between the Act and a state statute, the Act is controlling.

7. CIVIL LIABILITY (15 U.S.C. § 1692k).

7.1 Civil Liability.

Under this section of the Act, a debt collector who violates the provisions of the Act with respect to any person shall be liable to the aggrieved person for the sum of:

(a) any actual damage sustained by the person;[117]

(b) statutory damages not to exceed $1,000.00;[118]

(c) a reasonable attorney's fee as determined by the court;[119]

(d) in the case of a class action:

(1) statutory damages not to exceed $ 1,000. 00 for each person named as plaintiff; and/or

(2) an amount allowed by the court for all other class members not to exceed the lesser of $500,000.00 or one percent (1 %) of the net worth of the defendant debt collector;[120] and

(e) if the court finds that an action under this section was brought in bad faith and for the purpose of harassment, it may award attorney fees to the defendant in an amount reasonable in relation to the work expended and its costs of the action.[121]

An award of attorney fees to a successful debtor is generally considered by courts to be mandatory.[122] The fact that legal services were provided to the debtor for no charge does not bar recovery of attorney fees, although it may be a factor used by the court to determine the "reasonableness" of the fee. However, a plaintiff who is an attorney and proceeds pro se may not recover attorney fees on his own behalf.

Moreover, Attorney's fees arising from the prosecution of a case under the Act will not be awarded for work performed by a plaintiff's attorney after the debtor makes an offer to confess judgment for all amounts properly due at the time of the offer.[123] In Lee v. Thomas & Thomas, the Sixth Circuit held that by proposing to confess judgment under the provisions of Rule 68 of the Federal Rules of Civil Procedure, the debtor *capped* its liability for attorney's fees under the Act at the amount of attorney's fees incurred by plaintiff's counsel at the time the confession of judgment offer was made.

In Murphy v. Equifax Check Services, Inc.[124], the United States District Court for Connecticut went one step further ruling an offer by a debtor to pay the statutory $1,000 plus "all reasonable fees and costs determined by the court" resulted in the case being dismissed as there was no longer a constitutional "case or controversy" for the litigation to continue. The district court did retain jurisdiction, however, to determine the appropriate amount of attorney's fees to be awarded.

7.2 Amount of Liability.

In determining the amount of liability in any action, courts consider:

(a) in an action filed by an individual debtor, the frequency and persistence of noncompliance by the debt collector, the nature of the violation and whether or not it was intentional;[125] and

(b) in a class action, the factors set out in, Section 7.2(a) and also the financial resources of the debt collector, the number of persons adversely affected and the extent to which noncompliance was intentional.[126]

With respect to class actions, most debt collectors deal with a large volume of work to which they apply standardized procedures. Therefore, an error in the procedures causing a violation of the Act will affect numerous debtors. This might present the requisites for a class action.

While the Act provides for damages in class actions, it does not otherwise provide specific procedures for bringing class actions under the Act. Federal and state rules regarding class actions will, however, apply. Courts interpreting class actions under the Act typically address the following: (1) is legal counsel competent?; (2) were violations of the Act common to all class members?; (3) does the number of class members make it impractical to join them as parties?; and (4) is the plaintiff representative of the class?[127]

7.3 Intent.

The courts generally will award the entire $1,000.00, or a large portion thereof, to a successful consumer when the conduct of the debt collector is persistent, frequent and intentional. The degree of culpability is relevant only as to the amount of the damages. A debt collector who proves by a preponderance of the evidence that the violation was: (1) unintentional; (2) a bona fide error; and (3) occurred despite the fact that the debt collector maintained procedures that were likely to prevent such errors may not be found in violation under the Act.[128]

The Sixth Circuit, however, treats the Act as a strict liability statute. As such, the Sixth Circuit has held that the "bona fide" error defense only applies to clerical errors.[129] If the matter relates to an error in legal judgment, the "bona fide" error defense will not apply.[130]

7.4 Limitations.

Actions to enforce liability under the Act must be brought within one year from the date the violation occurred, and shall be brought in any U. S. District Court or any state court of

competent jurisdiction.[131] When the year begins to run depends on the nature of the violation and the jurisdiction in which the violation occurs.[132]

8. MISCELLANEOUS.

8.1 Administrative Enforcement (15 U.S.C. § 1692l).

Compliance with the Act is enforced by the Federal Trade Commission, with certain exceptions. [133]Additionally, neither the Commission nor any other administrative agency may promulgate any regulations with respect to collection of debts by debt collectors.

8.2 Relation to State Laws (15 U.S.C. § 1692n).

In states that have enacted their own laws to regulate debt collection practices, debt collectors must also comply with state statutes except where they are inconsistent with any provision of the Act.

8.3 Multiple Debts (15 U.S.C. § 1692h).

In the case of multiple debts owed by one consumer, and in which the consumer sends one payment to the debt collector with respect to the debts, the debt collector must apply the payment in accordance with the debtor's directions. If none are given, the debt collector may apply the payment as it wishes but may not apply any part of the payment to a known disputed debt.

1. 15 U.S.C. § 1692.

2. 360 N.E.2d 765 (Ill. 1976).

3. Id. at 767-69.

4. WATS stands for Wide Area Telecommunication Service. WATS offers unlimited outgoing calls for a pre-established price - the opposite of the 800 and 888 services.

5. Effective March 20, 1978, the Act was enacted as Title VM of the Consumer Credit Protection Act, 15 U.S.C. § 1692 et seq.

6. 15 U.S.C. § 1692a(5).

7. 15 U.S.C. § 1692a(6).

8. 973 F.Supp. 1320 (D. Utah 1997); See also, Havens-Tobias v. Eagle, 127 F. Supp.2d 889 (S.D. Ohio 2001); Martinez v. Albuquerque Collection Servs., 867 F.Supp. 1495 (D.N.M. 1994).

9. Havens-Tobias v. Eagle, 127 F. Supp.2d 889 (S.D. Ohio 2001).

10. 15 U.S.C. § 1692a(6).

11. Id.

12. Id.

13. 15 U.S.C. § 1692f(6); see also Jordon v. Kent Recovery Systems, Inc., 731 F.Supp. 652 (D. Del. 1990); Robert M. Lloyd, Wrongful Repossession in Tennessee, 65 Tenn. L. Rev. 761, 795 (Spring 1998).

14. 15 U.S.C. § 1692j(a)&(b)

15. 15 U.S.C. § 1692a(6)(A).

16. 15 U.S.C. § 1692a(6)(B).

17. 15 U.S.C. § 1692a(6)(C).

18. 15 U.S.C. § 1692a(6)(D).

19. 15 U.S.C. § 1692a(6)(E).

20. 15 U.S.C. § 1692a(6)(F).

21. 15 U.S.C. § 1692a(6); Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985), citing S. Rep. No. 95-382, 95th Cong., 1st Sess. 3, reprinted in 1977 USCCAN 1695, 1698.

22. 15 U.S.C. § 1692a(6)(F)(iv)

23. Pub.L. 99361, July 9, 1986, 100 Stat. 768; see also Heintz v. Jenkins, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995) (attorneys who regularly collect debts are subject to the Act).

24. Heintz v. Jenkins, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995) (attorneys who regularly collect debts are subject to the Act).

25. Id. See also, Havens-Tobias v. Eagle, 127 F. Supp.2d 889 (S.D. Ohio 2001).

26. Crossley v. Lieberman, 868 F.2d 566, 569 (3rd Cir. 1989) (collection activity more than a "handful" of times a year); Stojanovski v. Strobl and Manoogian, 783 F.Supp. 319, 322 (E.D. Mich. 1992) (collection activities amounted to less than 4% of firm's business); Cacace v. Lucas, 775 F.Supp. 502 (D. Conn. 1990) (144 small claims lawsuits in two years, more than sixty percent of attorney's work).

27. Havens-Tobias v. Eagle, 127 F. Supp.2d 889 (S.D. Ohio 2001); Schroyer v. Krankel, 197 F.3d 1170, 1174 (6th Cir. 1999) (quoting Stojanovski v. Strobl and Manoogian, 783 F. Supp. 319, 322 (E.D. Mich. 1992)

28. See, e.g., Schroyer v. Frankel, 197 F.3d 1170 (6th Cir. 1999) (firm: 50 to 75 debt collection cases annually, less than 2% of the firm's overall practice; attorney: 29 debt collection cases annually, 7.4% of his practice); Argentieri v. Fisher Landscapes, Inc., 27 F.Supp.2d 84 (D. Mass 1998) (0.4% of firm's overall practice); Mertes v. Devitt, 734 F.Supp. 872 (W.D. Wis. 1990) (17 collection matters in 10 years, less than 1% of attorney's practice); Nance v. Petty, Livingston, Dawson & Devening, 881 F.Supp. 223 (W.D. Va. 1994) (holding that collections activities comprising less than one percent of attorney and firm activities did not constitute "regular" collection of debts).

29. 15 U.S.C.A. § 1692a(5).

30. See Snow v. Jesse L. Riddle, P.C., 143 F.3d 1350 (10th Cir. 1998); Duffy v. Landberg, 133 F.3d 1120 (8th Cir. 1998); Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322 (7th Cir. 1997); Charles v. Lundgren & Assoc., 119 F.3d 739 (9th Cir. 1997).

31. See Romea v. Heiberger & Assoc., 980 F.Supp. 715 (S.D.N.Y. 1998), aff'd, 163 F.3d 111 (2d Cir. 1998) (compliance with state eviction laws is an effort to collect debt subject to the Act).

32. See Newman v. Bolhm, Pearlstein & Bright, Ltd., 119 F.3d 477 (7th Cir. 1997); Ryan v. Wexler & Wexler, 113 F.3d 91 (7th Cir. 1997).

33. Staub v. Harris, 626 F.2d 275 (3rd Cir. 1980) (a per capita tax levied by a state taxing district was not a "debt" under the Act); Pollice v. Nat'l Tax Funding, L.P., 59 F.Supp.2d 474, 485 (W.D. Pa. 1999) (citing Staub).

34. Coretti v. Lefkowitz, 965 F.Supp. 3 (D. Conn. 1997) (theft of services did not create a "transaction" so it was not "debt" subject to the Act); Shorts v. Palmer, 155 F.R.D. 172, 175-176 (S.D. Ohio 1994) (shoplifting obligation was not based on contract so it was not debt); Zimmerman v. HBO Affiliate Group, 834 F.2d 1163 (3d Cir. 1987) (stolen television signal was not a transaction - it was non-consensual).

35. First Gibraltar Bank v. Smith, 62 F.3d 133 (5th Cir. 1995) (commercial transaction is not a "debt" under the Act); Holman v. West Valley Collection Services, Inc., 60 F.Supp.2d 935 (D. Minn. 1999) (contact at business person's home does not change business debt to personal debt); Bloom v. I.C. Sys., Inc., 753 F.Supp. 314 (D. Or. 1990), aff'd, 972 F.2d 1067 (9th Cir. 1992) (personal loan to friend for investment was for commercial purposes).

36. Mabe v. G.C. Services, Ltd. Partnership, 32 F.3d 80, 84 (4th Cir. 1994) (obligation to pay child support not incurred in exchange for consumer goods or services); Brown v. Child Support Advocates, 878 F.Supp. 1451 (D. Utah 1994) (collection of child support by state not "debt").

37. 15 U.S.C. § 1692b(1).

38. Id. The notice must not be overshadowed by other aspects of the communication. Swanson v. Southern Oregon Credit Services, 869 F.2d 1222 (9th Cir. 1988).

39. 15 U.S.C. § 1692b(2).

40. 15 U.S.C. § 1692b(3).

41. 15 U.S.C. § 1692b(4).

42. 15 U.S.C. § 1692b(5).

43. Riveria v. MAB Collections, Inc., 682 F.Supp. 174 (W.D.N.Y. 1988) (placing the validation notice on the back of a collection letter while neglecting to refer to it on the front constitutes a violation of the Act).

44. For purposes only of 15 U.S.C. § 1692c, "Communication in connection with debt collection," the guidelines apply not only to communications with the debtor, but also

communications with the debtor's spouse, parent (if the consumer is a minor), guardian, executor or administrator.

45. 15 U.S.C. § 1692c(a)(1).

46. 15 U.S.C. § 1692c(a)(2).

47. 15 U.S.C. § 1692c(a)(3). See also Austin v. Great Lakes Collection Bureau, Inc., 834 F.Supp. 557 (D. Conn. 1993) (contact of debtor at employer after request not to is violation of the Act); Sluys v. Hand, 831 F.Supp. 321, 326 (S.D.N.Y. 1993) (violation of the Act where the attorney sent a debt collection letter to the debtor's employer).

48. 15 U.S.C. § 1692c(c).

49. 15 U.S.C. § 1692c(c)(1).

50. 15 U.S.C. § 1692c(c)(2).

51. 15 U.S.C. § 1692c(c)(3).

52. C. Lewis v. ACB Business Services, Inc., 135 F.3d 389 (6th Cir. 1998).

53. Id. at 398.

54. See supra notes 40 - 45.

55. 15 U.S.C. § 1692d.

56. 15 U.S.C. § 1692d(1).

57. 15 U.S.C. § 1692d(2).

58. 15 U.S.C. § 1692d(3).

59. 15 U.S.C. § 1692d(4).

60. 15 U.S.C. § 1692d(5).

61. 15 U.S.C. § 1692d(6).

62. The Kentucky Consumer Protection Act at KRS 367.170(1) prohibits, "Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

63. 15 U.S.C. § 1692g(e)(11).

64. 15 U.S.C. § 1692g(a)(1)(2).

65. 15 U.S.C. § 1692g(a)(3).

66. 15 U.S.C. § 1692g(a)(4).

67. Brady v. Credit Recovery Co., 160 F.3d 64 (1st Cir. 1998) (a writing is not necessarily required to be a valid dispute of debt).

68. 15 U.S.C. § 1692g(a)(5).

69. 15 U.S.C. § 1692g(a).

70. See Tolentino v. Friedman, 46 F.3d 645 (7th Cir. 1995).

71. See 15 U.S.C. § 1692e(11).

72. See Russell v. Equifax ARS, 74 F.3d 30 (2d Cir. 1996).

73. See Chauncey v. JDR Recovery Corp. 118 F.3d 516 (7th Cir. 1997).

74. Vasquez v. Gertler & Gertler, Ltd., 987 F.Supp. 652 (N.D. Ill. 1997); see Smith v. Computer Credit, Inc.; see also Johnson v. Revenue Management Corp., 169 F.3d 1057, 1060 (7th Cir. 1999) (The factual question is did the letter confuse its recipients. "If the letter effectively advises the consumer about the statutory entitlements, then the Act has been satisfied."); Ross v. Commercial Financial Services, Inc., 31 F.Supp.2d 1077 (N.D. Ill. 1999) (letterhead calling company a "different kind of debt collection company" adequately identified company as debt collector).

75. 27 F.3d 1254 (7th Cir. 1994).

76. See McKenzie v. E.A. Uffman & Assoc., Inc., 119 F.3d 358 (5th Cir. 1997).

77. Sprouse v. City Credits Company, 126 F. Supp.2d 1083 (S.D. Ohio 2000).

78. Smith v. Computer Credit, Inc., 167 F.3d 1052 (6th Cir. 1999).

79. 15 U.S.C. § 1692g(b).

80. 15 U.S.C. § 1692g(c).

81. 15 U.S.C. § 1692d.

82. Transamerica Financial Serv., Inc. v. Sykes, 171 F.3d 553, 555 (7th Cir. 1999) ("Section 1692f addresses the conduct of the debt collector, not the validity of the underlying debt").

83. 15 U.S.C. § 1692f.

84. 15 U.S.C. 1692f(1).

85. 15 U.S.C. 1692f(2).

86. 15 U.S.C. 1692f(3).

87. 15 U.S.C. 1692f(4).

88. 15 U.S.C. 1692f(5).

89. 15 U.S.C. 1692f(6).

90. 15 U.S.C. 1692f(7).

91. 15 U.S.C. 1692f(8).

92. Charles v. Lundgran, 119 F.3d 739; (9th Cir. 1997).

93. Id.

94. 15 U.S.C. § 1692(e).

95. 15 U.S.C. 1692e(1).

96. 15 U.S.C. 1692e(2).

97. 15 U.S.C. 1692e(3).

98. 15 U.S.C. 1692e(4).

99. 15 U.S.C. 1692e(5).

100. 15 U.S.C. 1692e(6).

101. 15 U.S.C. 1692e(7).

102. 15 U.S.C. 1692e(8).

103. 15 U.S.C. 1692e(9).

104. 15 U.S.C. 1692e(10).

105. 15 U.S.C. 1692e(11).

106. 15 U.S.C. 1692e(12).

107. 15 U.S.C. 1692e(13).

108. 15 U.S.C. 1692e(14).

109. 15 U.S.C. 1692e(15).

110. 15 U.S.C. 1692e(16).

111. See United States v. National Financial Services, 98 F.3d 131 (4th Cir. 1996); Strombach v. Knepper & Moga, 1998 U.S. Dist. Lexis 15533 (N.D. Ill. 1998).

112. Vaughn v. CSC Credit Services, 1995 WL51402 (N.D. Ill. 1995).

113. 135 F.3d 389 (6th Cir. 1998).

114. Id.

115. 15 U.S.C. § 1692i.

116. 15 U.S.C. § 1692i(i); Weddington v. Credit Acceptance Corp., 76 F.3d 103 (6th Cir. 1996).

117. 15 U.S.C. § 1692k(a)(1). Damages for emotional distress are allowed. See Teng v. Metropolitan Retail Recovery, Inc., 851 F.Supp 61 (E.D.N.Y. 1994); Smith v. Law Offices of Mitchell N. Kay, 124 B.R. 182 (D. Del. 1991); Donahue v. NFS, Inc., 781 F.Supp 188 (W.D.N.Y. 1991).

118. 15 U.S.C. § 1692k(a)(2)(A).

119. 15 U.S.C. § 1692k(a)(3).

120. 15 U.S.C. § 1692k(a)(2)(B).

121. 15 U.S.C. § 1692k(a)(3).

122. See, e.g., Sanders v. Jackson, No. 99-1673, 2000 WL 424251, at n. 12 (7th Cir. 1999); Zagorski v. Midwest Billing Servs., Inc., 128 F.3d 1164, 1166 (7th Cir. 1997); Tolentino v. Friedman 46 F.3d 645, 651 (7th Cir. 1995).

123. Lee v. Thomas & Thomas, 109 F.3d 302 (6th Cir. 1996).

124. 35 F. Supp.2d 200 (D. Conn. 1999).

125. 15 U.S.C. § 1692k(b)(1).

126. 15 U.S.C. § 1692k(a)(2).

127. Sanders v. Jackson, 209 F.3d 998 (7th Cir. 2000).

128. 15 U.S.C. § 1692k(c).

129. Edwards v. McCormick, 136 F. Supp.2d 795 (S.D. Ohio 2001); See also, Frey v. GangwishII, 970 F.2d 1516 (6th Cir. 1992).

130. Edwards v. McCormick, 136 F. Supp.2d at 800.

131. 15 U.S.C. § 1692k(d) (the one year limitation period may not be extended).

132. See e.g., Malay v. Phillips, 64 F.3d 607 (11th Cir. 1995) (holding statute of limitation began when debt collector mailed the letter when violation occurred in collection letter); Bates v. C&S Adjusters, Inc., 980 F.2d 865 (2d Cir. 1992) (holding statute of limitations begins when debtor receives the letter).

133. 15 U.S.C. § 1692l(b).

PREJUDGMENT COLLECTION AND RECOVERY REMEDIES

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SECTION B

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Prejudgment collection and recovery remedies in Kentucky are known as provisional remedies and found in Chapter 425 of Kentucky's Revised Statutes. The Kentucky Legislature enacted the two remedies, writ of possession and attachment, in 1976 as a legislative response to decisions of the United States Supreme Court mandating due process rights for defendants in prejudgment seizure actions. The attachment remedy retained its name, however, Kentucky's former order of delivery became a writ of possession. Substantive amendments were enacted in 1984 to enhance due process protections for defendants and to make the writ of possession remedy more utilitarian for use in commercial cases.

I. WRIT OF POSSESSION

The writ of possession remedy primarily used by secured creditors when self-help repossession cannot be obtained. *Owens v. First Commonwealth Bank of Prestonsburg, Kentucky,* 706 S.W.2d 414 (Ky. App. 1985).

A. When Filed. A motion for a writ of possession is proper only after the complaint is filed and prior to final judgment. KRS 425.011(1). The post-judgment counterpart of the writ of possession is a judgment granting specific possession of personal property. See, KRS 426.295 and 426.300 for post-judgment possessory remedies.

B. Compared With the Attachment. Both the writ of possession and the attachment suit seek possession of specific personal property. However, the writ of possession is directed toward property in which the plaintiff holds an ownership or security interest, or which constitutes the proceeds of property in which the plaintiff held a security interest. (See, KRS 355.9-315 (Rev. 9) as to traceable proceeds.) Attachment is a remedy for collection of an ordinary debt, proceeding by seizure of the debtor's assets under legal process. *Placer Coal, Inc. v. Rochdale Coal Services*, 684 S.W.2d 25 (Ky. App. 1985).

C. **As Election of Remedy.** A plaintiff's decision to seek possession of property through a writ, in most cases where the plaintiff holds a security interest, does not constitute an election of remedies under former KRS 355.9-501(1), and the case law thereunder, or under Revised KRS 355.9-601. The plaintiff is entitled to pursue the simultaneous remedies of possession of the collateral and the monetary balance due on the obligation for which the property serves as collateral. *Ingersoll-Rand Financial Corporation v. Electro Coal, Inc.,* 496 F.Supp. 1289 (E.D.Ky. 1980); *Glamorgan Coal Corp. v. Bowen,* 742 F.Supp. 308 (W.D. Va. 1990); *Bank One Akron, NA v. Nobil,* 610 N.E.2d 538 (Ohio App. 1992); *Contra, Coones v. Federal Deposit Ins. Corp.,* 848 P.2d 783 (Wyo. 1993). A pending writ of possession action does not prevent private action through self help repossession pursuant to KRS 355.9-609. *Headspath v. Mercedes-Benz Credit Corp.*, 709 A2d. 717 (D.C. App. 1998), citing former 9-503).

D. **Procedure to Obtain Writ of Possession.**

1. **Motion and Affidavit or Verified Motion.** The plaintiff seeking a writ of possession may do so through a motion and affidavit, or may proceed through a verified motion. The affidavit or verified motion must meet the very specific requirements of KRS 425.011(2). The following factual evidence must be presented to the court under oath.

   a. The plaintiff must show the basis of the claim which entitles the plaintiff to possession of the property sought through the writ. If the claim is made on the basis of a written instrument, such as a security agreement, a copy of the instrument should be attached to the motion or affidavit and incorporated by reference.

   b. Factual evidence must show that the property sought is wrongfully detained by the defendant, how the defendant obtained possession of the property and, according to the plaintiff's best knowledge, information and belief, why the defendant is detaining the property. If the plaintiff obtained its security interest after the debtor acquired the property, the only alternative may be to state that the defendant owned the property at the time the security interest was

granted, and has held the property at all times since, subject to the plaintiff's security interest. Often the reason for detention is merely that the defendant continues to have the beneficial use and enjoyment of the property.

c. A particular description of the property to be seized and a statement of its value must be given to the court. The value of the property as stated by the plaintiff is the basis upon which the amount of the required bond will be determined. The value should be sufficiently high that it cannot be challenged in court but sufficiently low that it does not result in an excessive bond premium. A debtor's defense to a deficiency judgment may be based on the plaintiff's statement of value as opposed to the amount the property brought at repossession sale. As originally enacted, the requirement for a "particular description" was open to interpretation. The 1984 amendments to Chapter 425, however, adopted the description requirements of the Uniform Commercial Code (KRS 355.9-108 (Rev. 9)) as the legal standard for the description under Chapter 425. Where multiple items of property are sought through a writ of possession, the statement of value may relate to the whole of the property and is not required for each individual item.

d. Because it may be necessary for a sheriff to enter private property in order to levy the writ of possession, the plaintiff must state the location of the property. The plaintiff must provide sufficient facts to show there is probable cause to believe the property is located there.

e. The affidavit or verified motion must also contain the statutorily required statement that "[T]he property has not been taken for a tax assessment, or fine, pursuant to a statute; or seized under an execution against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure." KRS 425.011(2)(e).

E. **Due Process - Notice and Demand.** Prior to various decisions of the United States Supreme Court (discussed later in this section), it was possible for a plaintiff to obtain a replevin in what was known as a "claim and delivery" or "order of delivery" action without prior notice to the defendant. Following the decision in *Fuentes v. Shevin,* 407 U.S. 67 (1972), and a decision specific as to the Kentucky statute, *Thompson v. Kessee,* 375 F.Supp. 195 (E.D. Ky. 1974), the Kentucky Legislature enacted our current statutes on prejudgment remedies. The primary thrust of these statutes is to provide a defendant with meaningful notice and an opportunity to be heard before property is taken through the power and force of the government. KRS 425.012.

1. **Notice and Service.** Notice must be timely. A writ may not be issued less than seven (7) days nor more than sixty (60) days after notice has been served on the defendant, or mailed to the defendant. Notice and other required papers may be served in the manner set out in CR 4, or personally served by any person entitled to serve a subpoena, or may be sent to the defendant's last known place of residence. CR 69.01.

   The concept behind the less restrictive service requirements for prejudgment remedies is to ensure that the defendant has notice of the proceeding. Technical service requirements might inhibit quick receipt of notice of a proceeding where time is of the essence. There is no case law on whether final judgment can be obtained through service under CR 69.01; however, Phillips, Kentucky Practice (5th ed. 1995), asserts that service under 69.01 can be the basis for a personal judgment.

   a. **Service by Mail.** Service by mail, certified or registered, should not require personal service on the defendant (restricted delivery) but only a return receipt. This is different from the requirement under CR 4. Although the writ notice and demand requirements are statutory, and the Civil Rules for mail service do not apply, a cautious practitioner will follow CR 6.05 and allow three (3) additional days before obtaining the writ when service is by mail instead of personal service.

   b. **Documents Served.** The defendant must be served with a summons, notice and demand, complaint,

motion and affidavit or verified motion, and a copy of any instrument upon which the plaintiff bases its claim for possession. KRS 425.012(1).

2. **Required Contents of Notice.**

a. **Time for Response.** The notice should open with a statement that the debtor has seven (7) days from the date of the demand to petition the court for a hearing on the plaintiff's motion for a writ of possession. Or, in cases where the writ is on the basis of a security interest held by the plaintiff, seven (7) days to pay the amount claimed in the plaintiff's complaint. The defendant should additionally be informed that if a hearing is not requested, or the amount claimed not paid, the writ of possession will automatically be issued.

b. **Other Required Contents.** The notice must identify the court in which the lawsuit is pending, the grounds on which the plaintiff bases its motion for a writ, the date of the notice and demand, the amount of money claimed due the plaintiff, and the name and address of the plaintiff and its counsel.

c. **Local Rules.** The plaintiff's attorney should check local rules of court for any additional specific requirements of notice in prejudgment proceedings. Jefferson Circuit Court Rule 509, for example, sets out specific requirements for the notice and demand in addition to the requirements of the statute. The local rule in Jefferson County makes the notice more meaningful by explaining how the defendant may obtain a hearing.

F. **Issuance of the Writ of Possession.** If the defendant has not requested a hearing, and the plaintiff or plaintiff's counsel has tendered an affidavit evidencing compliance with the notice requirements of KRS 425.012, the statute provides that the clerk shall issue the writ of possession. The Kentucky Attorney General has affirmed the clerk's power to issue a writ of possession. See, 1980-1981 Ky. Op. Atty. Gen. 2-174 The writ must meet the following requirements.

1. **Direction of Writ to Sheriff.** The writ must be directed to the sheriff. KRS 425.046(1)(2). Assuming proper jurisdiction and venue in the county where the action was filed, the writ may be directed to any sheriff of the Commonwealth. The sheriff should be directed to levy the writ pursuant to KRS 425.091 and, if the property is found, to retain the property in the custody of the sheriff until released or sold pursuant to KRS 425.101. A writ of possession may also be levied by special bailiff. KRS 454.145. See, 1989 Ky. Op. Atty. Gen. 2-417.

2. **Description of Property.** The property to be seized by the sheriff must be sufficiently identified that the sheriff may levy the writ without risk of taking property which is not subject to the proceeding. KRS 425.046(1)(b).

3. **Private Property to be Entered.** If the sheriff is to enter private property to levy the writ, that property must be specifically identified. KRS 425.046(1)(c).

4. **Notice of Defendant's Options.** The writ must contain a notice to the defendants that they have a right to post a bond in order to obtain redelivery of the property pursuant to KRS 425.116, that they have a right to except to the sureties on the plaintiff's bond, and that they have a right to seek an order under KRS 425.081 to quash the writ and release the property. KRS 425.046(2),(4).

G. **Levy by Sheriff and Execution of Writ.** Levy by the sheriff is governed by KRS 425.091, KRS 425.096, and KRS 425.101. One reason the writ of possession remedy is sometimes more useful than its post-judgment equivalent is that a sheriff has the right to force entry into private property to levy a writ of possession. The right to force entry is not generally available to a sheriff executing a post-judgment remedy. The precise procedure to be followed by the sheriff prior to forcing entry is set out at KRS 425.091(3). The sheriff may call upon other law enforcement officers for assistance in the levy of the writ but is under a duty to retreat if a risk of death or serious bodily harm may result from levy of the writ. Entry by Sheriff to levy a writ of possession is not within the prohibition of the Fourth or Fifth Amendments of the Constitution. *GM Leasing Corp. v. United States,* 429 U.S. 338 (1977).

1. **Dwellings.** If the property to be seized is a dwelling (most often manufactured homes, but possibly boats, recreational vehicles, or any other personal property in which a debtor resides), the sheriff must appoint a keeper of the property for two days before taking further action. (Make sure a manufactured home has not been converted to real property under KRS 186A.297, a statute passed in the 2000 Legislature.) Once the defendant resident has been provided with two days to vacate the premises, the sheriff may remove personal property not covered by the writ of possession and then take possession of the property to be levied upon. KRS 425.091(2).

2. **10-Day Waiting Period.** In order to provide a defendant with an opportunity to post a redelivery bond, except to the plaintiff's surety, or demand a hearing on a motion to quash, the sheriff must hold the property seized under a writ of possession for ten (10) days. If no bond has been posted or a hearing demanded, the sheriff may deliver the property to the plaintiff. KRS 425.101(1)(a).

3. **Storage of Property.** KRS 425.091 directs the sheriff, upon levy, to remove the property to a place of safe keeping (except in the case of property used as a dwelling). This provision worked out very well when a sheriff was directed to levy upon an automobile but was quite impractical, for example, when the writ was directed to the entire inventory, equipment, fixtures, and other personal property of an automobile dealership. Additional problems arose in instances where sheriffs were directed to levy upon delicate, expensive, and sophisticated computer or scientific equipment, large jet aircraft, etc. These problems were remedied through the 1984 amendments that offered sheriffs additional alternatives in the levy of a writ of possession.

    a. **Immovable Property.** If the sheriff determines that it is impractical or impossible to move property levied upon to a place of safe keeping or to store the property, the sheriff may secure the property where the levy has been made or surrender the property to the plaintiff immediately upon seizure. KRS 425.101(3).

b. **Perishable Property.** If the property levied upon is perishable, or subject to immediate and substantial deterioration or depreciation, or if the interest of the parties are best served, a judicial officer (See, KRS 425.006(1)) may order that the property be sold and the proceeds held by the court. KRS 425.101(2). The author has previously used this remedy when levying a writ of possession on the meat, dairy products, vegetables and the other perishables in the inventory of a grocery store.

4. **Securing the Property**. In order for a sheriff to secure property in the place where it is found, the property must consist of all, or substantially all, of the property within a structure or area which is not used as a dwelling. Additionally, the sheriff must have the consent of any third party owner or occupant of the structure or area and must provide the defendant with a reasonable right of access to any property not covered by the writ of possession. After levying upon the property, the sheriff may secure the property by locks or other means. KRS 425.101(3)(b). See, *School Supply Co., Inc. v. First National Bank of Louisville,* 685 S.W.2d 200 (Ky. App. 1985).

5. **Immediate Surrender to the Plaintiff.** If the property levied upon is surrendered to the plaintiff, the plaintiff is required to hold the property within the Commonwealth of Kentucky and under all the same restrictions and requirements as are placed upon the sheriff. KRS 425.101(3)(a).

6. **Return of Writ.** The sheriff must make a return on the writ of possession no more than thirty (30) days after levy, and in no event, even if levy has not been made, no more than sixty (60) days following the date the writ is issued. KRS 425.106(1).

7. **Delivery of Copy of Writ.** At the time the writ of possession is levied, the sheriff should deliver to the person in possession of the property, whether or not the defendant, a copy of the writ of possession and a copy of the plaintiff's bond. If there is no obvious party in possession or control of the property at the time of the levy, and the defendant cannot be found, the

sheriff is directed to leave a copy of the writ and bond at the "usual place of abode of the person in possession of the property." KRS 425.096(1)(2).

8. **Levy in Another County.** Although a writ may be directed to any sheriff of the Commonwealth, the sheriff who initially has been charged with levy of the writ may pursue property which is subject to the writ into another county if the property has been removed from the original county within twenty-four (24) hours of the time the writ was placed in the sheriff's hands. If time permits, the prudent practitioner should make an *ex parte* motion pursuant to KRS 425.051 to have the writ of possession endorsed for service in another county. This avoids the question of the precise time the property was moved in relation to the time the writ was placed in the sheriff's hands.

H. Plaintiff's Bond. A plaintiff must post a bond in order to obtain a writ of possession. Counsel representing plaintiff should make locating a surety for the bond one of their first priorities. Many surety companies are reluctant to write this type of bond and will require extensive information concerning the client which frequently must be reviewed by regional or home office personnel. When practicing in an area where time is frequently important, the surety requirement can often cause the greatest delay. KRS 425.111 and KRS 425.116.

1. **Amount.** The plaintiff's bond must be a minimum of twice the value of the property to be seized. If a hearing is held on the plaintiff's motion for a writ of possession, one of the determinations which must be made by the judicial officer is the value of the property for bonding purposes. If sureties are unavailable a cash bond may be posted with the court. KRS 425.111.

2. **Required Statement.** The plaintiff's bond must provide that "[I]f the plaintiff fails to recover a judgment in the action, the plaintiff shall return the property to the defendant, if return thereof be ordered, and shall pay all costs that may be awarded to the defendant and all damages referred to in subsection (2), not exceeding the amount of the bond." KRS 425.111(1).

3. **Damages.** Damages for which a plaintiff's bond may provide reimbursement include "all damages sustained by the defendant which are proximately caused by the operation of the temporary restraining order and preliminary injunction, if any, the levy of the writ of possession, and the loss of possession of the property pursuant to levy of the writ of possession or in compliance with an order issued under KRS 425.036."

4. **Sureties; Exception to Requirement.** Sureties are not required on the bond of any "domestic bank, savings and loan institution, or institution which is a member of the Farm Credit System, as defined by 12 U.S.C. §2002." KRS 425.001.

I. **Defendant's Bond.** Any person who claims an interest in property levied upon, or about to be levied upon, may either prevent the taking, or regain possession pending final adjudication on the merits, by filing a defendant's bond. See, *Wahba v. Don Corlett Motors,* 573 S.W.2d 357 (Ky. App. 1978). This bond, which also requires sureties, may be in an amount equal to the plaintiff's bond or, if there has been no judicial determination of the value of the property, the value stated in the plaintiff's motion for a writ of possession. A defendant's bond is determinative of the question of adequate protection in the event of the defendant's bankruptcy. *In Re Milo Ridge Resort,* 26 BR 277 (Bankr. W.D. Ky. 1982).

1. **Amount.** The statute setting out the requirements for a defendant's bond, KRS 425.116, does not make sense when read in conjunction with the statute for the plaintiff's bond, KRS 425.111. A plaintiff's bond must be in an amount not less than twice the value of the property, while the defendant's bond may either equal the plaintiff's bond or be only in an amount equal to the value of the property. There is no logical reason for a defendant to elect to equal the amount of the plaintiff's bond.

2. **Required Statement; Damages.** The defendant's bond must provide that, "[I]f the plaintiff recovers judgment on the action, the defendant shall pay all costs awarded to the plaintiff and all damages that the plaintiff may sustain by reason of the loss of possession of the property, not exceeding the amount of the bonds." KRS 425.116(1).

3. **Notice of Bond.** A defendant who posts a bond must mail a copy to the levying officer and the plaintiff. At the time the original bond is filed with the court it must be accompanied by a certificate that the appropriate copies have been mailed. The defendant's bond must also state the address to which a copy of a notice of exception to sureties may be sent. KRS 425.116(2)(3).

J. Exceptions to Sureties. Both the plaintiff and defendant have the right to object to each other's sureties. KRS 425.121. The defendant's objection must be filed no later than ten (10) days after levy of the writ. The plaintiff's exceptions must be taken no later than ten (10) days after the defendant's bond is filed with the court. Any party taking exceptions to the other's sureties must file the original exception with the court and mail a copy to the levying officer and the opposing party. The failure to timely take exception to the surety on a bond constitutes a waiver of any further objection. KRS 425.121(3).

1. **Appearance by Surety.** When exception is taken to a surety, the surety must appear before a judicial officer at the time specified by the party taking exception and justify their ability to act as surety. If the judicial officer determines that a surety is not qualified, the statute directs that they vacate any writs or orders entered under KRS Chapter 425 and the levying officer must deliver all seized property to the prevailing party at the hearing. KRS 425.121(5)(6).

2. **Retention of Property by Sheriff.** Counsel filing a notice of exception to sureties should seek a court order directing the sheriff to retain possession of the property levied upon until such time as a hearing has been held on the notice of exception.

K. Special Procedures Available Under the Writ of Possession Statute.

1. ***Ex Parte Writs.*** A writ of possession may be obtained *ex parte* under certain limited circumstances. KRS 425.076. The plaintiff must tender an affidavit which shows sufficient facts to indicate that the plaintiff will be subject to great or

irreparable injury if issuance of the writ is delayed in order for the notice requirements of KRS 425.012 to be met.

a. **Requirements.** Specific statutory circumstances which meet the required standard are:

(i) that there is a danger that the property sought will be concealed, placed beyond the process of the court, or substantially impaired in value;

(ii) that the defendant obtained the property by wrongfully taking it from the plaintiff (except property taken by a defendant who was entrusted with the property or originally obtained by a defendant by false pretense or embezzlement; the restrictions are such that they almost require outright theft before this subsection applies);

(iii) that the property is a credit card; or

(iv) there are other circumstances which in the judgment of a judicial officer would result in great or irreparable injury if the writ is delayed for the notice period.

b. **Other Requirements Not Waived.** With the exception of the required notice and demand, all other aspects of the writ of possession statute must be met by the plaintiff who seeks a writ *ex parte.* In addition to service of the writ and bond as required by KRS 425.096, any defendant against whom a writ has been entered *ex parte* must additionally be served with a copy of the summons, complaint, motion, and any affidavit tendered in support of the writ of possession and *ex parte* procedure.

c. **Limitations on *Ex Parte* Relief.** Counsel should only use the *ex parte* procedure in limited circumstances which unquestionably justify this most extraordinary of extraordinary remedies. Although the United States Supreme Court, in a footnote to *Fuentes v. Shevin,* 407 U.S. 67 (1972) (described

further at Sec. IV, Infra), referred to circumstances where notice might not be appropriate, no decision specifically approves the use of an *ex parte* prejudgment remedy. See, *Farmers Deposit Bank v. Ripato,* 760 S.W.2d 396 (Ky. 1988), Leibson, concurring opinion. The basic allegation that the property sought through the writ might be removed from the Commonwealth is insufficient to justify obtaining a writ *ex parte* unless an affidavit has been provided to the court alleging specific facts concerning the plaintiff's knowledge of imminent removal. A defendant's threat to destroy property if a writ action is filed would probably constitute circumstances where the *ex parte* procedure would properly be used.

(i) The majority opinion of the Kentucky Supreme Court, *Farmers Deposit Bank v. Ripato*, 760 S.W.3d 396 (Ky. 1988), specifically withheld a ruling on KRS 425.076, the statute allowing an *ex parte* writ of possession. However, Justice Leibson, in a concurring opinion, argued that Kentucky's statute meets the due process requirements of federal law.

(ii) To obtain an *ex parte* writ of possession plaintiff must present an affidavit or verified motion alleging actual knowledge of specific facts that meet the test of KRS 425.076. E.g., the defendant's threat to destroy the property or an imminent and specific threat of removal of the property from the jurisdiction if a writ of action is filed. A general allegation that the property may be moved is insufficient.

d. **Issued by Judicial Officer.** An *ex parte* writ of possession should only be issued by a judicial officer (as defined at KRS 425.006). KRS 425.076(1). When no notice or opportunity to be heard is provided to the defendant before a writ, it is necessary that the plaintiff's pleadings be inspected for their legal

sufficiency by a neutral magistrate. *Mitchell v. Grant,* 416 U.S. 600 (1974).

2. **Indorsing a Writ of Possession.** After the writ of possession is issued, if the plaintiff determines that the property sought to be seized is at a private place that is not specified in the writ, through motion, and affidavit showing probable cause, the writ can be indorsed for levy at a place not specified in the writ. A copy of the indorsement should be served with the writ of possession.

3. **Order Transferring Possession.** At the time a writ of possession is entered, the plaintiff may also obtain an order from the judicial officer which directs the defendant to transfer possession of the property to the plaintiff. This order is most useful in situations where the property sought cannot be located but the defendant is available for service of the order. KRS 425.041.

4. **Procedure When the Property Sought Cannot be Located.** If the levying officer's return indicates that the defendant has disposed of the property, or has concealed the property so that it cannot be found, the plaintiff may obtain an order of the court compelling attendance of the defendant for examination under oath concerning the property. The contempt powers of the court may specifically be invoked against uncooperative defendants. KRS 425.106(2).

L. Defending Writ of Possession Actions.

1. **Strict compliance with Statutes.** The seizure of property prior to entry of a final judgment constitutes an extraordinary procedure. This requires strict compliance with all of the statutory requirements to obtain the writ of possession. *Duo-Therm v. Sheergrain,* 504 S.W.2d 689 (Ky. 1974); *Weisenberger v. Corcoran*, 275 Ky. 322, 121 S.W.2d 712 (1938). The strict compliance standard does not apply to the third remedy, garnishment, authorized by Chapter 425. *PNC Securities Corp. v. Finanz-UND GMBH*-Liedgens, 1996 WL 665574 (6th Cir. 1996).

2. **Request for Hearing.** If the plaintiff's pleadings are in order but defendant's counsel believes questions of fact or law

exist, a request for a hearing should immediately be filed with the court and certified to plaintiff's counsel. The hearing procedure is set out in KRS 425.031. Each party may present witnesses, cross-examine adverse witnesses, and compel the attendance of witnesses by subpoena.

3. **Standard of Proof.** The plaintiff's standard of proof is found at KRS 425.036. Under that section, a plaintiff must establish the "probable validity of his claim to possession." The judicial officer must also determine the value of the property, the sufficiency of the plaintiff's bond, and whether probable cause exists for allowing a sheriff to enter private property.

4. **Effect of Failure to Prevent Writ.** A defendant who unsuccessfully opposes entry of a writ of possession has not been prejudiced in his/her case on the merits. KRS 425.061 provides that the determinations of the judicial officer at a hearing on a motion for writ of possession may not be given in evidence at trial on the merits and have no effect on any issues other than the proceedings under Chapter 425.

5. **Lack of Notice; Motions to Quash.** In cases where a defendant has not received notice of the plaintiff's motion for a writ, and was unaware of the proceedings until the property was taken, a motion to quash is the remedy. KRS 425.081. A motion to quash gives the defendant a second chance for a hearing. When a motion to quash has been made, a hearing is held pursuant to KRS 425.031, the same statute governing hearings prior to the writ having been issued. However, a mere motion to quash is insufficient to prevent delivery of property to the plaintiff. Defense counsel must make a motion and obtain an order staying delivery. KRS 425.081(2).

6. **Bond.** The defendant may take exception to sureties on the plaintiff's bond. KRS 425.121.

7. **Venue.** Any action which seeks possession of specific personal property, when coupled with a demand for damages, is a transitory action and must be filed where personal service may be obtained. *Gover v. Wheeler,* 206 Ky. 734, 178 S.W.2d 404 (Ky. 1944). If the action is filed only against the property, for the purpose of gaining possession, it may be

brought *in rem*. If the action is filed in a county where personal service may be obtained, the writ may be directed to any county in Kentucky where the property is located. KRS 425.056(3).

II. TEMPORARY RESTRAINING ORDERS UNDER CHAPTER 425

A Temporary restraining order (TRO) often fills the gap which exists between a noticed motion for a writ of possession and proceeding *ex parte*. At the time a motion for writ of possession is filed, the plaintiff may also apply for a TRO. When a TRO is sought in conjunction with a writ of possession it is pursuant to a statutory process, rather than the Civil Rules. For this reason, there is a disagreement between judges, commentators, and practitioners as to whether or not the notice requirements of CR 65.03 are applicable. KRS 425.066 and KRS 425.086.

A. **Use.** This remedy is frequently used in situations where a third party has temporary possession or control of the collateral which may become unavailable for levy if transferred back to the defendant. An example is an automobile temporarily in possession of a dealer for repairs and which is the subject of a writ of possession proceeding brought by an unpaid secured party.

B. **Farm Products and Inventory.** If the property sought by the writ of possession action is either a farm product (KRS 355.9-102(34)(Rev. 9)), or inventory (KRS 355.9-102(48)(Rev. 9)), the TRO may not prohibit transfer of the property in the ordinary course of the defendant's business, however, the TRO may impose restrictions on disposition of the proceeds of farm products and inventory. KRS 425.071(a).

C. **Restrictions on Ordinary Property.** Other prohibitions that may be obtained by a temporary restraining order include prohibiting the defendant from: transferring any interest in the property by sale, pledge, or grant of security interest, or otherwise disposing of or encumbering the property; concealing or otherwise removing the property in such a manner as to make it less available to seizure by levying officer; and impairing the value of the property either by acts of destruction or by failure to care for the property in a reasonable manner. KRS 425.071(a), (b), and (c).

D. **Required Statement.** In order to obtain a TRO, pending issuance of the writ of possession, the plaintiff must show by affidavit "[T]hat

there is an immediate danger that the property claimed may become unavailable by reason of being transferred, concealed, or removed or may become substantially impaired in value." KRS 425.066(2).

E. **Scope of Order.** TROs may prohibit the transfer of an interest in property by sale, pledge, or grant of security interest, encumbrance of property, concealment or removal of property which makes it less available to a levying officer, or impairment of the value of property by either act of destruction or failure to care for the property. KRS 425.071./

F. **TRO Following Request for *Ex Parte* Writ.** The plaintiff who unsuccessfully seeks an *ex parte* writ of possession may move the court for a TRO under KRS 425.086 in lieu of the *ex parte* procedure.

G. **Hearings.** If a hearing is requested on the plaintiff's motion for a writ of possession, the judicial officer must either dissolve the temporary restraining order or enter a preliminary injunction based on the court's decision on the merits of the plaintiff's motion. If a preliminary injunction is entered it is to cover the period between entry of the writ of possession and levy by the sheriff.

III. ATTACHMENTS

A. **Generally.** Attachments are governed by KRS 425.301 *et seq.* An attachment is a remedy available at the commencement of an action for the recovery of money. It is similar in nature to the writ of possession but is the proper remedy for seizure of property in which the plaintiff does not hold a security or ownership interest. An attachment is a remedy for collection of an ordinary debt, when the creditor proceeds by seizure of debtor's personal property assets under legal process. *Placer Coal, Inc. v. Rhondale Coal Services Co., Inc.,* 684 S.W.2d 25 (Ky. App. 1984). The purpose of the attachment is to serve as security for satisfaction of a final judgment. Attachment is also available prior to the time a debt or liability may be due when an equitable action for indemnity is brought against a debtor, a principal by a surety, or one joint debtor against another. KRS 425.306.

1. **Variety of Attachment Remedies.** The various remedies available under the umbrella term "attachment" include garnishments of bank accounts and wages, liens against real estate, and the seizure of personal property. AOC Form 106

(Rev. 11/99), available from court clerks and the print shop of the Administrative Office of the clerk, is a general attachment against all of a defendant's property including property in the hands of a debtor or in the possession of a third party. The latter type of attachment is similar to a garnishment but is prejudgment in nature.

2. **Proper Defendants.** Attachment is not available to every plaintiff. If the motion for attachment is brought pursuant to KRS 425.301 in an action for recovery of money, a motion for attachment is proper against:

(a) foreign corporations and nonresidents of Kentucky;

(b) residents who have been absent from Kentucky for four months, or

Persons who:

(c) have departed from Kentucky with the intent to defraud their creditors;

(d) have left the county of their residence to avoid service of a summons;

(e) have concealed themselves so that a summons cannot be served on them;

(f) are about to remove, or have removed their property, or a material part thereof, out of Kentucky, not leaving enough within the state to satisfy the plaintiff's claims, or the claims of the defendant's other creditors;

(g) have sold, conveyed or otherwise disposed of their property or permitted it to be sold, with the fraudulent intent to cheat, hinder or delay their creditors; or

(h) are about to sell, convey or otherwise dispose of their property with the fraudulent intent to cheat, hinder or delay their creditors.

3. **Attachment to Secure Liquidated Debt.** If the sum of money is due upon a contract, judgment or award, proper defendants additionally include those who do not have property in this state subject to execution, or not enough property to satisfy the plaintiff's demand, and the collection or demand will be endangered by a delay in obtaining judgment.

4. **Unmatured Obligations.** If the attachment is sought pursuant to KRS 425.306, on the basis of a debt or liability upon a contract which is not yet due or mature, it is proper if:

   (a) the defendant(s) is or are about to depart from Kentucky, and, with intent to defraud their creditors, have concealed or removed from Kentucky their property, or so much of their property that after judgment there would be an insufficient amount available for execution; or

   (b) the defendant falls within any of the groups set forth in 2., supra.

5. **Specificity of Pleadings**. When seeking an attachment do not take a shotgun approach in listing the statutory criteria which entitled you to an attachment. You should list specific grounds and be prepared to show facts to back up those grounds. *Universal C.I.T. Credit Corp. v. Collett,* 256 S.W.2d 35 (Ky. 1953).

B. Due Process Requirements—Notice and Demand. The notice requirements of KRS 425.301(3) associated with a motion for a prejudgment attachment are nearly identical to those in KRS 425.012, the writ of possession statute. The contents of the required notice differ, but the procedural requirements are identical.

1. **Notice.** The notice given the defendant against whom an attachment is sought must be timely. The attachment may not be issued less than seven (7) days nor more than sixty (60) days after the notice has been served on the defendant, or mailed to the defendant. Service of the notice and other required papers may be accomplished in the manner set out in CR 4, or personally served by any person entitled to serve a subpoena, or may be sent to the defendant by registered or

certified mail, return receipt requested, to the defendant's last known place of residence. See, CR 69.01. As noted in the notice and demand section of the discussion on writs of possession, the primary thrust of the statutory and Civil Rules requirements for service in attachment actions is to insure that the defendant has notice of the proceeding. The time in which the defendant must respond in order to keep the attachment from being issued is very short. Hence, the drafters of the statute deemed making the notice available to the defendant more important than insuring that it is delivered personally to the defendant.

a. **Service by Mail.** If service is made by certified or registered mail, it should not be sent restricted delivery. This varies from the mail requirements of CR 4 and must often be explained to court personnel. Although the statute requires only a minimum of seven (7) days notice, a cautious practitioner who serves by mail will follow CR 6.05 and not seek the attachment until ten (10) days have run. The notice must be served simultaneously with a copy of the complaint, the motion for attachment, a summons, and any affidavit in support of the motion.

b. **Local Rules.** The Jefferson Circuit Court has enacted local rule 509 concerning all motions for prejudgment remedies under KRS Chapter 425. Additional notice requirements, designed to make the notice more meaningful to the average person, are required. Specific directions on how to obtain a hearing from the court must be provided in notices and demands used in Jefferson County. Practitioners in other circuits should check their local rules for any similar requirements.

2. **Required contents of the Notice and Demand.**

a. **Required Statement.** The notice and demand must contain an initial statement to the effect that the defendant has seven (7) days in which to request a hearing from the court, or in which to pay the plaintiff's claim in full, and that if a hearing is not requested or the claim paid, the plaintiff will seek an

order which will subject the defendant's property to payment of the claim. If the notice and demand are being sent by mail the plaintiff must consider the effect of CR 6.05.

b. **Other Requirements.** The notice and demand must identify the court in which the suit has been filed, the grounds on which the plaintiff bases the motion for attachment, the date the demand is served or mailed, the amount of the plaintiff's claim, and the name and address of the plaintiff and counsel.

C. **Motion for Attachment.** Under KRS 425.307, the following must be contained in the motion for attachment, which shall be executed under oath:

(a) the nature of the plaintiff's claim;

(b) that it is just;

(c) the sum which the plaintiff believes it ought to recover; and

(d) the existence of any of the enumerated grounds for attachment set out in KRS 425.301 or 425.306.

D. **Issuance of the Attachment.** KRS 427.307(3) states that the order of attachment "shall" be issued by the clerk upon compliance with KRS 425.301(3). This statute sets out the notice and service requirements and also requires an affidavit of the plaintiff, or plaintiff's attorney, evidencing compliance with the notice, service, and pleading requirements. The Kentucky Attorney General discussed the clerk's authority to issue an order of attachment at 1980-1981 Ky. Op. Atty. Gen. 2-174.

E. **Attachment Bonds.** A plaintiff is required to post a bond under KRS 425.309 in a minimum amount of double the plaintiff's claim before an attachment will be issued.

1. **Compared to Bond Requirements in Writ Actions.** The bond requirement for attachment suits is different from that in writ of possession actions. For attachment suits, the amount of the bond is based on the plaintiff's claim, as opposed to the

value of the property to be attached. This works well in situations where the property is worth more than the debt to be collected but poses problems for the plaintiff with a large claim and only limited assets of the defendant to attach. An argument can be made that the bond amount should be twice the plaintiff's claim which is in the nature of attachment (the value of the property to be attached) as opposed to the total amount of the lawsuit brought against the defendant.

2. **Defendant's Bonds.** Prior to the 1984 statutory amendments, there were no provisions for a defendant's bond. Now, upon posting of a bond equal to the plaintiff's claim, including court costs and attorney's fees, an attachment entered against a defendant's property may be dissolved by the posting of a bond. KRS 425.309(2).

3. **No "Magic Words".** The attachment bond statute does not have a requirement for specific language as is found in the writ statute. However, the language of the writ of possession statute can serve as a model.

4. **Sureties and Exceptions.** Exceptions to the sureties on both plaintiff's and defendant's attachment bonds are made in accordance with the writ of possession surety exception statute. KRS 425.121. Just as in the writ of possession statute, no surety is required on the bond of a plaintiff that is a domestic bank, savings and loan institution, or institution which is a member of the Farm Credit System (as defined by KRS 12 USC § 2002). KRS 425.001.

F. ***Ex Parte* Relief.** An order of attachment is available to a plaintiff *ex parte* under KRS 425.308. If the plaintiff meets the requirements of KRS 425.307, and additionally demonstrates that great or irreparable injury will result if issuance of the attachment is delayed for the notice period, the order for attachment may be issued without notice to the defendant. As with the *ex parte* provisions of the writ of possession statute, practitioners are urged to use extreme caution and carefully examine the facts upon which a client bases a request for *ex parte* relief. KRS 425.306(2) implies that when an attachment is sought as part of an equitable action for indemnity it may be had without notice if certain specific grounds appear in the petition. This section has not been tested before our state's appellate courts. A conservative practitioner would follow the requirements of KRS

425.308 before seeking the *ex parte* order. (*See,* discussion of *exparte* writs of possession, *supra.*)

G. **Venue.** Attachment actions may be brought as *in rem, quasi in rem,* or *in personam* actions. *Shaffer v. Heitner,* 433 U.S. 186 (1977). See, 66 Ky. L.J. 1, "Substantive Due Process Controls of *Quasi In Rem Jurisdiction.*" Although the attachment suit may be brought against property it is necessary to plead the case in the proper forum, as the cause of action itself may be considered transitory. Also, See, *Citizens Bank and Trust Company of Paducah v. Colllins,* 762 S.W.2d 411 (Ky. 1989) where our Supreme Court held that the basis for jurisdiction over a thing must be sufficient to justify jurisdiction over the interests of a person in the thing.

H. **Attachment Against Real Estate.** Frequently a debtor who has left the state retains ownership of real estate within the Commonwealth. This real estate may be reached by the remedy of attachment. In order to prevent transfer of the real estate, the plaintiff's attorney must record notice of the attachment in the real estate records of the county clerk. The priority of the attachment lien is established by the date of levy. KRS 426.383.

I. **Defending the Attachment Suit.** The statutory framework of the attachment suit section of Chapter 425 is much less precise than that for writs of possession. No section specifically sets out the nature of the hearing afforded a defendant who petitions for a hearing. Most judges and practitioners refer to KRS 425.031, concerning conduct of the hearing, and 425.036 (both in the writ of possession section), for the burden of proof standard.

1. **Motions to Release Attachments.** The 1984 amendments to Chapter 425 included KRS 425.302 which allows a defendant against whom an order of attachment has been levied to move that the attachment be released. A defendant making a motion under this statute is entitled to an immediate hearing.

2. **Strict Compliance.** The plaintiff's pleadings should be carefully examined to insure they have met the technical requirements of the statute since the rule of strict compliance will apply. *Duo-Therm,* 405 S.W.2d 689.

3. **Defendant's Bonds.** The 1984 amendments also resulted in the creation of KRS 425.308(2), the defendant's bond statute.

IV. CONSTITUTIONAL CONSIDERATIONS IN PREJUDGMENT REMEDY PRACTICE.

In Kentucky, the writ of possession was formerly known as an order of delivery, or replevin. The name of the remedy was changed with the enactment of the current statute in 1976. The name of the remedy of attachment has not changed; however, the statutory method to obtain the remedy was also changed in 1976. This was the legislature's response to the various United States Supreme Court cases which applied the constitutional concepts of due process to several remedies obtained by private parties through the power of the courts. The significant decisions, which should be reviewed by any practitioner who either brings or defends actions where a prejudgment remedy are sought, are:

1. *Sniadach v. Family Finance Corporation,* 395 U.S. 337 (1969). This case was the first decision to apply due process requirements to civil remedies. The decision was limited in scope and simply held that wages were a special class of property that could not be garnisheed without giving the defendant a notice and opportunity to be heard.

2. *Fuentes v. Shevin,* 407 U.S. 67 (1972). This is perhaps the most famous of the line of cases concerning a defendant's notice and opportunity to be heard before the imposition of a prejudgment remedy. This decision extended the due process requirements first given to wages to all forms of personal property.

3. *Mitchell v. Grant,* 416 U.S. 600 (1974). This decision was a slight retreat from *Fuentes* in that the defendant was not given notice and opportunity to be heard before the seizure of personal property. The Court found that a pre-levy inspection of pleadings by a neutral magistrate combined with an immediate right to a hearing after the seizure met the due process requirements.

4. *North Georgia Finishing v. Di-Chem,* 419 U.S. 601 (1975). Here the Court specifically extended due process protection, and the notice and opportunity to be heard, from strictly consumer to corporate defendants.

5. *Connecticut v. Doehr,* 501 U.S. 1 (1991). The Supreme Court overturned a Connecticut statute that allowed the *ex parte* attachment of real estate to secure an unliquidated tort claim when the defendant did not have an opportunity for hearing before the attachment. The primary point on which plaintiffs may distinguish the case is the nature of the claim for which they seek an attachment. However, the Connecticut statute did include due process protection that a judge find probable cause to believe that judgment would be rendered in favor of the plaintiff.

   a. The Ninth Circuit similarly found that a Washington statute allowing the prejudgment attachment of real property in a homeowner's suit for breach of a builder's construction contract, without notice and an opportunity to be heard, violated the builders right to due process. The court ruled that although the state statute required a bond in the amount sought by the plaintiff, and provided for an expedited post-seizure hearing, that there remained a high risk of improper deprivation of property and denial of due process.. *Tri-State Development, Ltd. v. Johnston*, 160 F.3d 528 (9th Cir. 1998).

6. *McLaughlin v. Weathers,* 170 F.3d 577 (6th Cir. 1999). The Sixth Circuit upheld a Tennessee attachment process that did not afford the defendant a pre-deprivation hearing, but where the statute required supporting documentation, affidavits, adequate bond, required an appearance before a judge to establish that the statutory requirements were met, and offered the defendant an opportunity for an immediate post-seizure hearing.

ANATOMY OF A CONSUMER COLLECTION CASE

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ANATOMY OF A CONSUMER COLLECTION CASE

ANATOMY OF A CONSUMER COLLECTION CASE

by Thomas L. Canary, Jr.

The purpose of this outline is to familiarize the reader with the legal and practical considerations involved in filing and litigating the common collection case. Special emphasis is given to consumer, collection cases, given the impact that the Fair Debt Collection Practices Act (FDCPA) may have the litigation of the suit. FDCPA is dealt with separately in these materials by Chip Bowles. Special issues concerning commercial collection cases are dealt with by Buck Lloyd. For a more in depth look at the area of Collections Law, *see generally* Kentucky Collections, by William R. Mapother, published by the Westlaw group.

I. Preparing to file suit

A. Initial evaluation of the case. Go through every scrap of paper in the file and look for the following

1. Are you within the applicable statute of limitations?
   a. General contract in writing - 15 years (KRS 413.090(2))
   b. Contract for the sale of goods - 4 years (KRS 355.2-725(1)
   c. Limitations of Actions are found generally at KRS Ch. 413

2. Are there any reasons that you should not file the suit?
   a. You are outside the statute of limitations
   b. One or more of the debtors have filed bankruptcy
      (1) There is a co-debtor stay in Chapter 13 bankruptcies
         (a) if one of two parties to a contract have filed Ch. 13 bankruptcy, you are stayed from collecting against the non-bankrupt signer
         (b) this stay can be terminated (See Chapter on Bankruptcy Fundamentals by Cathy Pike, *infra*)
         (c) if you get the Ch. 13 codebtor stay terminated, you need to file suit for the **entire** debt against the non-bankrupt cosigner, but you can only collect the amounts that you are not paid (including interest on the entire debt) through the bankruptcy court
         (d) if you file suit for only what you are not begin paid through the bankruptcy court and get a judgment, then the Chapter 13 bankruptcy is

dismissed, you have then limited what you can collect from the co-signer and may have created

(e) a defense for the former bankrupt (*See* KRS 3-605 [Discharge of Indorsers and Accomodation Makers] (*but see,* subsection (9) where this can be waived) and KRS 412.110

(f) there is **no** co-debtor stay in a Chapter 7 or Chapter 11 proceeding.

c. Lack of essential documentation
   (1) No notice of sale in an automobile collection case
   (2) Incomplete or illegible copy of the note

3. Is the debtor collectable?
   a. Are they employed
      (1) even if employed is the debtor's take home pay more than the exemption amount allowed in Kentucky
      (2) This amount is 30 times the federal minimum hou wage or 25% of their earnings, whichever is less - KRS 427.010 and AOC Form 150. *See also,* 15 USC §1673

   b. If the debtor is not employed, are there other assets from which to collect?
      (1) Bank accounts
      (2) Accounts receivable (including rents, franchises, leases, etc.)
      (3) Real property on which you can impress a lien

4. Has the debtor passed away?
   a. If so, is it too late to file a claim in the decedent's estate?
   b. You have six (6) months from the appointment of an administrator or executor, or if no personal representative is appointed, two (2) years from the decedent's death to file your claim in the estate - KRS 396.011(1)
   c. If you file your claim after this date, your claim will be barred

5. Is there any indication that the debtor has retained counsel? If so, see the next section on considerations under the FDCPA, ¶ I(B)(4), *infra.*

B. Sending an initial demand and Validation Notice

1. You must send the debtor a Validation Notice with your first communication to the debtor, or within five (5) days after that initial communication, if you are considered a "debt collector"
   a. It applies to any communication, even if that communication is oral
      (1) if the communication is in writing, the Validation Notice can be included with that letter
      (2) if the communication is oral, then you must give the Validation then, or within five (5) days thereafter. I suggest that if the first communication is oral, that you send a *written* Validation Notice to the debtor so there can be no question that you met your obligation under the statute
   b. The Act does not apply to creditors trying to collect its own debt in its own name.
   c. It applies only to the collection of consumer debts
   d. It does not apply to an attorney that regularly collects debts for another
      (1) "regularly" is not a defined term
      (2) there are some general guidelines on what constitutes "regularly", but to be safe, if you are collecting a consumer debt for another, abide by the FDCPA.
   e. The requirements of what needs to be in the Validation Notice can be found in 15 USC §1692g(a) and is covered in Chip Bowles outline on this subject

2. You are also required to include the "mini-Miranda" warnings with **every** communication with the debtor, including the initial communication. It should read: "This communication is from a debt collector and any information received will be used for that purpose."

3. The text of the letter should be very simple so your letter does not overshadow the debtor's ability to contest the debt. Again, see Chip Bowles section on the FDCPA for more detail.

4. If you have information from your client that the debtor has counsel, you **must** communicate through that attorney, not with the debtor, directly. To do so would not only be a breech of your professional obligations, but is an independent violation of the FDCPA.

II. Filing suit

A. When to file suit

1. There are two schools of thought on this:

a. Do not file suit until you have mailed a Validation Notice to the debtor with your initial commuincation

(1) any communication from a debt collector cannot "overshadow" the debtor's rights to collect the debt

(2) filing suit within this thirty (30) day validation period could be problematic in jurisdictions whose answer periods are less than thirty (30) days [like Kentucky]

(a) the argument is that the debtor gets a letter from you on day one telling him that he has thirty (30) days to contest the debt

(b) thereafter, he gets a summons that says he only has twenty (20) days to answer the complaint

(c) some courts have held that the summons overshadows the letter, and confuses the debtor, thus a violation of the FDCPA.

(3) There are two solutions:

(a) do not file suit within the thirty (30) validation period

(b) do not file suit for ten (10) days after the Validation Notice has been sent to the debtor

b. The other school of thought says that filing suit within the thirty (30) day validation period is permissable.

(1) there in noting in the FDCPA that prohibits you from suing within the thirty (30) days.

(2) even the "lease sophisticated debtor" will understand the difference between contesting the debt and filing an answer to a complaint. The contest of the debt could be the filing of an answer. The two remedies are not mutually exclusive

(3) Case law supports this premise. *See,* Sprouse v City Credits Company, 126 F.Supp. 2d 1083 (W.D. Ohio, 2000)

B. Whom to sue - While this seems like a simple question, consider the following

1. What if the purchases were by a wife for "necessaries" as defined at KRS 404.040. Should consideration be given to suing the husband?

2. What if there are co-obligors? Has your client received a communication pursuant to KRS 412.110 mandating that you seek judgment against the other obligor, first?

a. Have you met the deadlines under that statute?
b. Does your client's contract waive that right?
c. Has the debtor filed bankruptcy?
(1) was you debt listed?
(2) if so, has the debtor received a discharge?
(3) if they have not received a discharge, are there reasons that your client's debt should not be discharged? *See generally,* the discussion of this topic in Cathy Pike's outline
(4) has there discharge been denied?
(5) if it is a Chapter 13 bankruptcy, do you still have time to file a proof of claim?
(6) if it is a Chapter 13 bankruptcy, and you have a co-signer, has the co-signer stay been terminated?
d. Has the debtor died?
(1) if so, is there an estate?
(2) if not, should you consider having an estate opened?
(3) if there is an estate, have you timely filed your claim with the estate?
(4) if your claim has not been paid by the estate, but should have, do you need to file a claim against the executor or administrator?
(5) do you need to substitute the executor or administrator as a party-defendant in your action?

C. Where to sue - the interaction of the FDCPA with state venue provisions
1. Which court (jurisdiction)
a. If the debt is over $4,000 (not including interest and court costs) then you file in circuit court
b. If the debt is $4,000 or less (not including interest and court costs), then you file in district court
2. Which county (venue)
a. The FDCPA has severely restricted where consumer cases can be filed.
b. KRS Chapter 452 is filled with statutes governing where certain types of action can be filed.
c. To the extent there was no statute that dealt with your situation, you could use the catch-all, transitory action statute found at KRS 452.480
d. The "multiple defendant" rule found in that statute allowed you to file suit in any county where one of several defendants to an action could be served with summons.

e. FDCPA has restricted that statute significantly. Since it is a federal statute, it trumps the state statute, but only as it deals with consumer transactions.

f. Venue is found in FDCPA at 15 USC §1692n.
   (1) FDCPA allows you to sue the consumer:
      (a) where the contract was signed, or
      (b) where the debtor resides
   (2) Kentucky statutes must be read together with the Federal statute. Only the more liberal provisions of the state statute would be overruled by the federal statute, but the federal statute could not create venue in a state court action where none existed before.
      (a) Kentucky venue statutes did not allow you to sue a consumer simply because a contract was signed there.
      (b) the federal statute overrules the state "multiple defendant" rule
      (c) **the end result is that you can sue the consumer debtor only in the county where he or she resides.**
      (d) if the joint debtors live in different counties, then you have to file two suits, unless
         i) you file suit in the county where all the debtors signed the contract, and
         ii) where at least *one* of the debtors resides, and
         iii) you serve that debtor before any other debtor
         iv) venue is correct because you have satisfied the most restrictive aspects of both statutes.

D. Amount for which to sue
   1. You cannot sue for more than you are entitled.
   2. To do so would be a violation of FDCPA.
   3. Make sure the principal is properly calculated
      a. You should make sure that you are suing for a net claim
      b. If there is interest that should have been rebated or credits that have not yet been applied, you need to subtract that from the amount for which you are suing.
      c. If for some reason (e.g.., your statute of limitations is about to expire and you do not have rebate figures from your client)

you sue for a gross amount (i.e., you do not rebate interest), you should state that in the complaint, and you cannot begin to accrue interest until the period through which interest is already included in the note has passed.

d. Suing for the gross should be done only as a last resort

4. You can ask for interest in your suit

a. If your contract provides for the payment of interest:

(1) you can get interest at the contract rate, whether higher or lower than the statutory judgment rate

(2) from the date of acceleration until paid. - KRS 360.040, and Capitol Cadillac Olds, Inc. v Roberts, 813 S.W. 2d 287 (S.Ct. Ky. 1991)

b. If your contract or debt is not interest bearing, you can get interest:

(1) pre-judgment at the legal rate of 8% - KRS 360.010(1), and

(2) post-judgment at the judgment rate of 12%, compounded annually - KRS 360.040

c. Pre-judgment interest is awarded as a matter of course where damages are liquidated. *See*, Faulkner Drilling Inc., v Gross, 943S.W. 2d 634 (Ky. Ct. App. 1997)

5. You can ask for attorney fees, if your contract provides for payment of those fees

a. Generally: KRS 411.195 and Harper v Citizens State Bank, 652, S.W. 2d 871 (Ky.Ct.App., 1983). The attorney fees must

(1) must be agreed to be paid (i.e., a provision for the recovery of attorney fees must be in the contract), and

(2) attorney fees cannot be paid to a regularly salaried employee of the creditor

b. Suit by a bank on a revolving credit plan: KRS 287.750

(1) fees must be "reasonable", and

(2) not paid to a salaried employee of the bank or holder of the note

c. Motor vehicle installment contracts: KRS 190.100(1)(d)

(1) not to exceed 15% of the amount due and payable, and

(2) cannot be paid to a regularly salaried employee of the creditor

E. Service of Process

1. Personal delivery or restricted certified mail (delivery to addressee only) - CR 4.01

2. By sheriff or constable
3. By special bailiff, but only upon motion and order of the court because other methods have failed
4. Constructive service (warning order attorney), but note that you cannot get a personal judgment in this situation, only a judgment *in rem*. This type service is usually restricted to foreclosure proceedings where the object is to foreclose on the lien against the thing, and not necessarily a personal judgement against the person.

F. Foreign Judgements
1. Kentucky has adopted the Uniform Enforcement of Foreign Judgements Act - KRS 426.950-975
2. Notice (note, this is not service) by *ordinary* mail is allowed for "suits" on foreign judgments
3. You do not have to file a new action based upon the judgment obtained in a sister state.
4. You file the Notice along with an Affidavit of counsel for the creditor. Attached to the Affidavit is an authenticated copy of the foreign judgement
5. You must then wait twenty (20) days before you can issue execution on the judgment.
6. Prudence would dictate that you allow an additional three (3) days for mailing
7. Additionally, KRS 426.030 forbids execution for ten (10) days after judgement.
8. Therefore, you should not issue execution on a foreign judgment for thirty-three (33) days after Notice is sent to the judgment defendant
9. **NOTE:** you must *still* comply with the jurisdiction and venue rules covered in section II(B), *supra*
10. Kentucky has adopted a uniform pleading issued by the Administrative Office of the Court, AOC 160

III. Moving for judgment

A. Default Judgements - CR 55
1. The debtor has twenty (20) days to answer a complaint - CR 12.01
2. If service is by mail, you do not need to add another three (3) days to the answer period under CR 6.05. That statute specifically exempts from its scope CR 4.01(1)(a)
3. The defendant could move for an enlargement of that time, *ex parte* - CR 6.02
4. If the defendant is properly served, and fails to timely file an answer, then the plaintiff may move the court for a judgment by default
   a. Any responsive "pleading" should be considered an "answer"

for purposes of this rule

b. Even if the only thing you get is a letter from the defendant in response to the complaint, you should consider that a response. This is so even if the letter is not filed with the court by the defendant. You, as the attorney, have an ethical obligation to file that with the court and treat it as an answer.

5. Procedure for moving for default judgment
   a. File a written motion with the court
   b. Accompanied by a certificate from you as the attorney that
      (1) no papers have been served on you by the party in default - CR 55.01
      (2) and that the defendant is not in the active military service (to satisfy the Federal Soldiers and Sailors' Civil Relief Act, 50 USC Appx. §§501 et seq.)
   c. Check for local rules
      (1) some counties require that you put these on the motion docket
      (2) some require that the moving attorney appear personally before the court will consider the motion
      (3) some require that you serve a copy of the Notice, Motion , Affidavit and tendered Judgment on the defaulting party
      (4) some require the filing of an Affidavit for attorney fees (*See also*, discussion of KRS 411.195, *supra)*
      (5) some have special forms that you have to use or the motion will be summarily overruled (e.g., the Default Judgment Certificate that must be filed in Jefferson Circuit Court)
   d. Once judgment is rendered, you cannot issue execution for ten (10) days. *But see the next section for a helpful hint*

B. How to craft your judgment so you can begin execution in less than ten (10) days even if there are multiple defendants
   1. KRS 426.030 prohibits executing on a judgment for ten (10) days, unless there is a determination by the court to the contrary
   2. Your judgment has to be final as to all defendants - CR 54.01 & .02
   3. Therefore all money judgments against multiple parties should be concluded with the following sentence: "This is a final judgment and there is no just reason for delay." *See,* Singer v Arnold, 436 S.W. 2d 493 (Ky. Ct. App., 1969)
   4. This is the duty and responsibility of the drafting attorney
   5. Failure to have this language could also be a hurdle to appeal, i.e., you can appeal only a final judgment. *See*, Turner Construction v

Smith Brothers, 295 S.W. 2d 569 (Ky. Ct. App., 1956) and Hale v Deaton, 528 S.W. 2d 719 (Ky. Ct. App. 1972)

6. This is true whether you are movinf for default judgment, summary judgment, for a judgement on the pleadings or a judgment after trial

C. Judgment on the Pleadings - CR 12.03

1. Many time the "responsive pleading" filed by the defendant will not raise a defense
   a. "I cannot afford to pay this"
   b. "My husband was supposed to have paid for this as part of our divorce"
   c. "I want to set up payments"
   d. "I am thinking about filing bankruptcy, but I cannot afford an attorney"
   e. "I am a sovereign entity within these United States and I do not recognize your laws"
2. When the pleadings, taken as a whole, fail to raise any defense to the allegations in the complaint, then a Judgement on the Pleadings is appropriate
3. Procedure for filing
   a. File a written motion with the court, attaching the answer (especially if it has not been filed with the court)
   b. File a short memorandum setting out the rule and the fact the "answer" does not raise a defense at law
   c. If you are moving for attorney fees, and local rules require it, file an affidavit for attorney fees
   d. Tender a judgment to the court including the language set out in ¶ III (B)
   e. Serve a copy of the pleadings on the defendant and include a certificate of service demonstrating to the court that you have done so
   f. Place the matter on the court's docket
4. **NOTE:** If you require the court to consider any matters that are outside the court's records, then the court shall treat the motion as if it were filed under CR 56 (Summary Judgment)
5. Accordingly, sometimes it may be more prudent to simply move for summary judgment. The downside is that you have to procure an affidavit from your client to move for summary judgment, which could slow the process

D. Summary Judgment - CR 56

1. In order to move for summary judgment, you must demonstrate to the court that there is no genuine issue of any material fact to be decided by a judge or jury

2. Note that you could move for summary judgment on liability and then take further evidence on the issue of damages. *See,* CR 56.03
3. Procedure for filing motion for summary judgment
    a. File a written motion with the court with notice of a hearing (unless you are in Jefferson Circuit Court where no hearing is required)
    b. File a memorandum demonstrating that even taking the facts in a light most favorable to the defendant, when you apply the law to the facts, there is no genuine issue of a material fact to be decided by the court or a jury
    c. File an affidavit with the court
        (1) the affidavit should be from your client (the custodian of the documents)
        (2) it should have attached to it all the documents from your client's file to prove your case. E.g.:
            (a) the note
            (b) a print out or other documentation evidencing the amount asked your in your complaint
            (c) the steps you took to liquidate your collateral
            (d) basically, anything that you need to put into evidence in order to sustain your burden of persuasion and proof
    d. File a tendered judgment
4. The debtor can file a counter affidavit with the court
    a. That affidavit is to be filed on the day prior to the hearing at the latest
    b. If opposing counsel attempts to tender the affidavit on the day of the hearing, it should be rejected and you should ask the court not to consider it
    c. If the opposing counsel brings his client to the hearing to "testify", you should oppose this
        (1) the hearing on a motion for summary judgment is not an evidentiary hearing
        (2) this is nothing more than an "oral affidavit" and it should have been filed with the court on the day before the hearing at the latest
5. Many people feel that Summary Judgment is practically impossible to get after the Kentucky Supreme Court's decision in Steelvest, Inc., v Scansteel Service Center, Inc., 807 S.W. 2d 476 (1991) [**Note:** this is applicable to motions for summary judgment brought in state court, only. For the federal court standard, *see*, Celotex Corp. v Catrett, 477 US 317, 91 L. Ed. 2d 265, 106 S.Ct. 2548 (1986). I do not agree

6. Recent cases show that if the motion is properly supported that summary judgment should be granted
   a. You may have to conduct written discovery before you file for summary judgment
   b. You may have to take the defendant's deposition before summary judgment
   c. You may not be able to rely simply on the answer filed by the defendant, your memorandum of law and your client's affidavit.
   d. Welsch v American Publishing Co., 3 S.W.3d 724 (S.Ct. Ky. 1999) **specifically** held that Steelvest did not repeal CR 56: " Since rendition of our decision in Steelvest v. Scansteel [citation omitted], on the question of the proper standard for deciding summary judgment motions, much attention has been given to the use of the word "impossible." ... The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. **In the analysis, the focus should be on what is of record rather than what might be presented at trial.**" (Emphasis added) *Id.* at 730

E. Trial
   1. Proper trial techniques are a seminar in and of themselves
   2. You must be prepared to take even the most routine collection case to trial
      a. If you dodge trials, then that word will get out
      b. You will see more answers filed if you refuse to try the cases
      c. You will see fewer defendant's counsel willing to negotiate a settlement unless they know that you will take the case to the mat
   3. Many times, creditors will send you the most junior of employees as a witness
      a. They see a trial as a cost of doing business
      b. They may have already written off the debt and do not want to waste any more valuable time in sending senior people to trial
   4. You need to take the time to prepare the new witness
      a. Take them to depositions in the case
      b. Take them into the courtroom early so they can get used to the surroundings
      c. Meet with them the day before the trial and go over their testimony so they can get used to the questioning
      d. Cross examine them hard, so they will not be surprised or put off at trial

e. Make sure they have assembled the entire file. You want no surprises at trial
f. Go through that file to make sure that YOU are not getting any last minute surprises
g. Make sure the witness knows the content of the file such that they can locate any document they need quickly

IV. Navigating common defenses. The following are a synopsis of many of the common defenses filed in response to consumer collection cases. This is by no means an exhaustive list.

A. Failure to state a claim
1. CR 8.01 requires
a. a short and plain statement of the claim showing that the pleader is entitled to relief and,
b. a demand for judgment for the relief to which he deems himself entitled.
c. Relief in the alternative or of several different types may be demanded.
2. Nothing more is required to state a claim. *See generally,* Morgan v O'Neil, 652 S.W.2d 83 (1983); Caldwell v Frazier, 304 S.W. 2d 922 (1957)
3. There is also an Appendix of Official Forms found at the end of the Civil Rules
4. CR 84 states that : "The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate."
5. Official Form 2 is a Complaint on a Promissory Note
6. Official Form 3 is a Complaint on an Account
7. Official Form 4 is a Complaint for Goods Sold and Delivered
8. Official Form 5 is a Complaint for Money Lent
9. If you have used one of these forms, or a close adaptation to it, you should be able to survive this "defense."

B. Promissory Estoppel
a. Elements set out in the case of In Meade Const. Co. v. Mansfield Commercial Elec., Ky., 579 S.W.2d 105, 106 (1979)
b. Supreme Court of Kentucky referred to the doctrine of promissory estoppel as set forth in the Restatement (Second) of Contracts § 90 (1965):
(1) a promise
(2) which the promisor should reasonably expect to induce action or forbearance

(3) on the part of the promisee or a third person, and
(4) which does induce such action or forbearance
(5) is binding if injustice can be avoided only by enforcement of the promise.

c. Said another way in the case of Gray v. Jackson Purchase Prod. Credit, Ky.App., 691 S.W.2d 904, 906 (1985), the elements of an estoppel are:
(1) conduct, including acts, language and silence, amounting to a representation or concealment of material facts;
(2) the estopped party is aware of these facts;
(3) these facts are unknown to the other party;
(4) the estopped party must act with the intention or expectation his conduct will be acted upon; and
(5) the other party in fact relied on this conduct to his detriment.

d. Debtors will try to aver that some statement was made to them that formed the basis of an estoppel.

e. This should not succeed
(1) this would be contrary to the parole evidence rule, provided the contract contains an incorporation clause
(2) if the alleged statement was made before the contract was signed, then all prior negotiations are incorporated into the signed instrument
(3) if made after the contract was made, there is probably a clause in the contract that says any modifications must be in writing and signed by both parties
(4) there would be no consideration for any such modification

C. Waiver

1. Defined as:
a. A voluntary and intentional surrender or relinquishment
b. Of a known right
c. Or an election to forgo an advantage
d. Which the party at his option may have may have demanded or insisted upon
e. *See,* Greathouse v. Shreve, Ky., 891 S.W.2d 387, 390 (1995) (quoting Barker v. Stearns Coal & Lumber Co., 291 Ky. 184, 163 S.W.2d 466, 470 (1942)).

2. Any waiver must be intentional. Rarely will a creditor waive a known right or advantage

3. The defendant would have the burden to show that any waiver was

voluntary and intentional. This is a heavy burden.

D. Laches
   1. Generally, statutes of limitations guard against the prejudicial delay that the equitable docterine of laches was created deter.
   2. Usually, if a party has brought a cause of action within the applicable statute of limitations, then the docterine of laches should not lie.
   3. In some circumstances, courts have allowed laches to proceed forward even though the statute of limitations has not expired
   4. "In such case the laches of the party refused relief must be made to operate as an equitable estoppel to a recovery, in order to prevent injustice being done the opposite party." Radford's Adm'rs v Harris, 139 S.W. 963 (Ct. App. Ky., 1911)
   5. Perhaps such an argument could be made in a case where the statute of limitations is lengthy (e.g., 15 year limitation period on a note)
   6. In the situation ofa shorter statute of limitations, such an argument should not lie.

E. Commercially Unreasonable disposition of collateral
   1. This is one that you see in almost every action to collect a deficiency after the repossession and sale of collateral on a secured transaction
   2. It is believed that by pleading this, an issue of fact is automatically created preventing the creditor from obtaining a summary judgment
   3. Many defendant's and their attorneys plead this rotely for this reason
   4. An interesting perspective on the subject can be found at *THE LOCH NESS MONSTER, BIG FOOT, REPOSSESSION TITLES AND OTHER MYTHS: DEFENSES AND COUNTERCLAIMS IN A REPOSSESSION AS AN ALTERNATIVE TO BANKRUPTCY*, 27 N. Ky. L. Rev. 360, 363+ (2000) **[I loved the title of the article so I had to include it if for no other reason!!!]**
   5. However the case of Holt v People's Bank of Mt. Washington, 814 S.W. 2d 568 (S.Ct. Ky. 1991) made it clear that merely pleading this will no longer suffice to act as a complete bar to recovery to a deficiency claim.
   6. The Kentucky Supreme Court found as follows: "It begins with a presumption that the collateral is worth at least the amount of debt is secures and the burden is cast upon the secured party to prove that its commercial unreasonableness did not result in diminished proceeds, or if it did, by what amount. Upon failure of the secured party to prove that its conduct did not diminish the proceeds, the presumption that the collateral is of sufficient value to satisfy the debt would control and the claim for deficiency would be forfeited. If, in such circumstances, a secured party is unwilling to depend entirely upon the view, if any, that its conduct did not result in diminished

proceeds, it may present evidence as to the amount of damage it caused and such sum will be deducted from the deficiency. To avoid application of the presumption that the collateral is of sufficient value to satisfy the debt, a secured party whose conduct has been found to be commercially unreasonable must prove that its conduct did not cause damage or if it did, by what amount." Holt at 571.

7. The one exception to this rule is if the creditor fails to send notice. In that event, the creditor's entire deficiency balance would be deemed waived. Holt at 570
8. I have used Holt to my advantage
   a. A defendant will plead this as a defense
   b. I will, through discovery, find out what aspect of the sale or repossession the defendant deems commercially unreasonable
   c. I can many times attribute a dollar value to that perceived "wrong" and agree to decrease the judgment I am seeking by that amount (with client permission, of course)
   d. I then get an Agreed Judgment and get money coming in the door, which is really what the client wants

EFFICIENT AND EFFECTIVE JUDGMENT COLLECTIONS

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SECTION D

EFFICIENT & EFFECTIVE JUDGMENT COLLECTIONS

HYPOTHETICALS ON EFFICIENT & EFFECTIVE JUDGMENT COLLECTIONS

BY
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Hypothetical One

Wonderful Creditor has asked you to collect a judgment that he received against D.Ed Beet (Ed to his friends) 12 years ago. Since that time, Ed has moved out of the Commonwealth of Kentucky and has moved to the State of Florida. Ed is working as a regional manager for Pizza Hut. You are aware that Florida's exemption statutes on wages are healthy and executing on the judgment in Florida is impractical. What questions do you ask Wonderful Creditor and do you take the case

Points of Discussion:

1. Is the 12 year old judgment still active and collectible?
2. Can you issue execution (wage garnishment) against Ed's Florida Employer?
3. If you can, do you have to commence that action in Florida, or could you do it in Kentucky?
4. If you can institute that action in Kentucky, do you use Florida's exemption statutes or those of Kentucky?

Hypothetical Two

You have received a judgment against Will K. Pais (the "K" stands for Knott, since that is the county where he was born). Will has no job, but owns several parcels of real estate, some of which are in the Corbin area. You believe that some of the properties are rentals. You find that Will has a bank account where his some of his rentals are going, but it is his wife's name only. You find another account where he is joint with his wife.

Points of Discussion:

1. Can you put a lien on Will's real estate?
2. If you do, what county or counties should you file it in?
3. How can you get to the rental payments?
4. Can you attach the bank account that is in Will's wife's name, only?
5. Can you attach the bank account in both their names?
6. What additional information do you need and how will you get it?

Hypothetical Three

Your debtor, Ima Scamer, works for her uncle Bud at a local beer distributor, Scamer Suds. You have received a judgment against Ima and have served a wage garnishment on Bud. Three weeks have passed and you have not received an answer to your attachment. You actually get Bud to answer the phone and he tells you that she is not working there. You tell him that you saw Ima driving a Suds truck this morning and he answers that she had just returned from a leave of absence.

Points of Discussion:

1. What can you do to see if Bud is telling the truth?
2. If Bud is lying about Ima's employment, what can you do?
3. Could Bud be liable for any of the funds that you should have received from Ima's wages?
4. What steps would you have to take to get Bud to pay the garnishment?

Hypothetical Four

Shelly B. Roake's only asset is a bank account at ABC Bank. Shelly's monthly pension check is directly deposited into that account. Shelly also has some occasional employment and cashes a lottery ticket from time to time. She also deposits this into that same account. You serve a non-wage garnishment on the account and Shelly files a challenge to it, claim that all the funds in the account are exempt.

Points of Discussion:

1. Can you attach the account?
2. Can you defeat Shelly's claim of exemption?
3. If you cannot defeat the exemption, can you get any money out of the account?
4. What information do you need to make this decision?
5. How will you get that information?

Hypothetical Five

Jon Ramsey and Bennett Ramsey, husband and wife own a piece of property jointly. You get a judgment against Jon, only, and place a lien against the home.. Jon and Bennett have no other assets to collect upon.

Points of Discussion:

1. What are your rights as against Bennett?
2. Can you foreclose your lien?
3. If Jon and Bennett sold the property, could you enforce your lien?
4. If you can enforce your lien, how would you do that?
5. What is the amount you could realize upon the sale of the property?
6. If the mortgage that Jon and Bennett have was assumed and the property later foreclosed upon, could you enforce your lien then?
7. If so, what would be the limit of your recovery?

NOTES

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NOTES

COMMERCIAL COLLECTIONS:

SPECIAL CONCERNS AND TECHNIQUES

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COMMERCIAL COLLECTIONS:

SPECIAL CONCERNS AND TECHNIQUES

COMMERCIAL COLLECTIONS: SPECIAL CONCERNS AND TECHNIQUES

INTRODUCTION

While it is common for the collection practitioner to represent creditors in a variety of transactions, there are significant differences in the procedures employed and the applicable laws governing the collection of retail and commercial debts. This outline will address many of the practical as well as legal issues that confront the practitioner in the collection of commercial obligations.

The outline will touch upon a variety of substantive areas of law and procedures of which the commercial collection practitioner must be knowledgeable. The outline does not intend to provide an exhaustive analysis of these areas, but rather is designed to assist in the proper recognition and identification of important legal and procedural issues. These areas are (1) pertinent provisions of Articles 2 and 9 of the Uniform Commercial Code, Sales and Secured Transactions (codified in KRS at chapter 355); (2) Common law and statutory provisions relating to mechanic's liens, interest, attorney's fees, venue, choice of law clauses, guaranties, accord and satisfaction, and evidence; (3) Various Supreme Court Rules, relating to the Practice of Law, specifically, conflicts of interest, fees, and the unauthorized practice of law by non-lawyers; and (4) Various Civil Rules regarding Pleading and Practice, Service of Process, Discovery, and Summary Judgment.

In addition, the outline is intended to assist the commercial collection practitioner in the development and improvement of streamlined handling procedures, and "fast track" litigation techniques. In order to operate a high volume contingent collection practice profitably, it is incumbent upon the collection practitioner to establish standard operating procedures to ensure the

consistent and efficient handling of collection referrals. Periodic review of the various processes better ensures overhead minimization and profit maximization per file.

I. IDENTIFICATION OF THE COMMERCIAL CLAIM

Given the significant differences governing the collection of consumer versus commercial debt (and specifically the potential liabilities associated with the collection of retail debt), it is incumbent upon the collection practitioner to properly differentiate the two. While the differences may seem obvious, and the intent of the creditor extending the credit may seem clear, ambiguities are common. *Blacks Law Dictionary* defines "commercial" as follows:

> **Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce.**

While there is no specific definition for commercial debt, "consumer debt" is defined as:

> **Debt incurred by an individual primarily for a personal, family, or household purpose.**

The collection practitioner should adopt a conservative approach in ascertaining the nature of a given case. Probably the safest means of distinguishing commercial debt from consumer debt is by process of elimination and in effect determining that it could not be construed as a consumer transaction. The majority and prevailing view of reported decisions construing the nature of a debt under the **Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (1977), et seq.,** (hereinafter the "F.D.C.P.A.") is to examine the nature of the underlying transaction. If the nature of the underlying transaction is for a personal, family or household purpose, then the obligation to pay is a debt governed by the Act. There have been some aberration opinions including **Sluys v. Hand, S.D. N.Y.,**

831 F.Supp. 321 (1993) wherein the court cited the Act's definition of "consumer" as meaning "any natural person obligated or allegedly obligated to pay any debt." The court held "this definition covers *business debts* if incurred by a sole proprietor." In another similar decision, **Moore v. Principal Credit Corp** (not reported in F.Supp.), **1998 WL 378, 387,** the court determined that a proprietor can be considered a consumer when contacted by a collector at home. However, the majority view remains that a business obligation incurred by a natural person is not subject to the Act. See **Beaton v. Reynolds, Ridings, Vogt & Morgan, P.L.L.C., W.D. Okla., 986 F.Supp. 1360 (1998),** where the court found that materials ordered by the debtor (a self-employed CPA) were for use in her business. The court used the "underlying transaction" analysis and determined the debt to be commercial. The court found irrelevant the debtor's claim that the materials were not actually used in her business.

II. ETHICAL CONSIDERATIONS

A. POTENTIAL CONFLICTS OF INTEREST.

It is common for the commercial practitioner to receive multiple collection referrals against the same debtor. **SCR 3.130(1.7) Conflicts of Interest: General Rule,** provides:

> **(a) A lawyer shall not represent a client if representation of that client will be directly adverse to another client, unless:**
>
> > **(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and**
> >
> > **(2) Each client consents after consultation.**

(b) **A lawyer shall not represent a client if representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:**

(1) **The lawyer reasonably believes the representation will not be adversely affected;**

(2) **The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.**

There are obviously an infinite number of examples where the specific facts of any given case could impair the lawyer's ability to represent multiple clients against the same debtor. There are of course times when after proper disclosure and consultation with each client that common representation may in fact represent an advantage to the respective clients. However, one cannot overstate the importance of making the determination on a case-by-case basis. There may be occasions where merely seeking consent could run afoul of violation of confidences of the initial existing client. See **SCR 3.130(1.6) Confidentiality of Information** which states in pertinent part:

(a) **A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation ...**

A possible scenario could include a lawyer being consulted by a creditor about the possibility of filing an involuntary petition in bankruptcy against a debtor from whom the lawyer has recently garnished funds on behalf of another client. In this instance, representation of the second client could jeopardize the rights of the original client's recovery. In addition, attempting to seek consent could

result in possible violation of confidential information. Accordingly, the collection practitioner may oftentimes find the best and safest alternative is to simply decline employment.

B. UNAUTHORIZED PRACTICE OF LAW.

SCR 3.020 Practice of Law Defined, states in pertinent part,

> **The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services.**

It is common to employ lay persons in a collection practice in capacities which include paralegals and collectors. Frequently these individuals are actively involved in the pre-litigation collection and workout agreements, as well as during the litigation and post-judgment collection process. However, care should be exercised in making sure non-lawyers are not rendering services which may be considered the unauthorized practice of law. Appearing in court or signing pleadings are obvious violations of the spirit and intent of the rules. **SCR 3.130(5.3) Responsibilities Regarding Nonlawyer Assistants,** sets forth the duty to make reasonable efforts to supervise and oversee the non lawyer's conduct. In addition, **SCR 3.700 Provisions Relating to Paralegals,** is a comprehensive rule outlining the rights, duties, and responsibilities of the lawyer in regard to paralegals. **SUB-RULE 2,** recognizes the practical necessity of allowing paralegals to perform important functions which are specifically excluded from the unauthorized practice of law so long as the client understands the paralegal is not a lawyer and the lawyer supervises the paralegal in performing said duties. Paralegals and other non-lawyers should be clearly identified as non-lawyers in all communications with clients and other third parties.

C. FEES.

While the collection practitioner may be retained on an hourly basis, contingent fee agreements between creditors and their collection counsel are more common. Contingency fee agreements must be specific and must be in writing. **SCR 3.130 (1.5) Fees**, states in pertinent part:

> **(c) ... a contingent fee agreement shall be in writing and should state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon recovery of any amount in a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and showing the remittance to the client and the method of its determination.**

Needless to say, contingent fee agreements should be clear and concise, thus reducing the possibility of any misunderstanding. No attorney wants to find him or herself in the midst of a fee controversy which could result in time-consuming, as well as expensive, legal fee arbitration pursuant to **SCR 3.810, Legal Fee Arbitration.**

Once counsel has agreed to accept employment, an acknowledgment should be sent to the client confirming receipt of the matter, the fee agreement, and any other specific terms under which employment is being accepted. A sample initial acknowledgment letter is attached for reference (see Attachment No. 1). A sample contingent fee agreement is attached as well (see Attachment No. 2).

III. REVIEW AND ANALYSIS OF THE COMMERCIAL CLAIM

Without oversimplifying the nature of retail collection matters, the typical retail collection matter is a "point and shoot" collection mission. Generally the retail case is for the collection of a

debt subject to an installment note or credit card agreement for a specific liquidated balance due, from a specific individual debtor, or possibly co-debtors. The retail client usually provides substantive detailed information about the debtor which may include name, address, phone number, employment, social security information and other non-public information that may have been obtained from the debtor at the time the credit was issued or possibly from other third party credit reporting agencies.

In contrast to the detail of a retail case, the commercial practitioner may be supplied with little more than the name of a business (which may be a trade style or assumed name), a balance due, and perhaps a statement of account. The nature of open account trade debt is such that it is common for the commercial credit grantor to extend thousands of dollars of credit to a business with little, if any, specific information about the legal identity of the business, its ownership, or its financial stability.

Initial review of the commercial referral should include an examination of the client's file and all documentary evidence in support of the claim. An early determination as to the strength and any weakness of the creditor's claim will ensure a more efficient and profitable handling of the case. The initial consultation with the creditor as well as a review of the creditor's documentary evidence should reveal if the following are available:

(a) A written contract between the parties. This may consist of a variety of purchase orders and/or order acknowledgments.

(b) A signed credit application.

(c) Personal guaranties executed by the principals of a corporation or other third party guarantors.

(d) Promissory notes.

(e) Payment and/or performance bonds.

(f) Lease Agreement.

(g) Itemized invoices.

(h) Itemized statements reflecting debits and credits.

(i) Proofs of delivery.

(j) Copies of checks for prior partial payments received.

(k) Written acknowledgments of the debt from the debtor, including promises of payment.

(l) Correspondence generated by the creditor confirming prior promises of payment, disputes, and attempted resolution.

(m) Records of collection attempts and collector notes made by the credit grantor or any other third party collecting agent.

In reviewing the documentary evidence available to support the creditor's claim, counsel should be better able to evaluate and determine the following:

(a) The prospects of collection of the claim, taking into account any prior experience against the debtor.

(b) The terms of the contract between the parties.

(c) The existence of known disputes or threatened counterclaims.

(d) The quantity and quality of supporting documentary evidence, as well as availability of potential witnesses in the event a lawsuit should become contested.

(e) The possibility of litigating in a hostile venue.

(f) The creditor's expectation. Does the client want the money or its "Pound of Flesh?"

IV. IDENTIFYING SPECIAL LEVERAGE

While the vast majority of commercial collection referrals involve the collection of a debt on an open account for goods sold and delivered, the specific facts of any given case may entitle the creditor to special remedies that may enable greater leverage.

A. RIGHT OF REPOSSESSION PURSUANT TO A SECURITY AGREEMENT.

Assuming the creditor possesses a valid and enforceable security agreement against specific collateral, all pursuant to **KRS 355.9-203**, and has properly perfected that interest, the creditor is entitled to the various remedies provided to an Article 9 secured party, including, but not limited to, the right to take possession after default as provided at **KRS 355.9-609**.

B. RECLAMATION.

Many times an overlooked, but potentially effective remedy is available to the seller/creditor who has recently shipped goods to a buyer, soon thereafter discovered to be insolvent. **KRS 355.2-702 Seller's Remedies on Discovery of Buyer's Insolvency** provides in pertinent part:

> **(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten (10) days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three (3) months before delivery the ten (10) day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.**
>
> **(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this article (KRS 355.2-403). Successful reclamation of goods excludes all other remedies with respect to them.**

The remedy is limited in a number of ways. First, there is the issue of whether the buyer is truly insolvent. KRS 355.1-201(23) provides the person is insolvent when he "**either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.**"

Furthermore, the seller must make demand for return of the goods within ten days after the buyer receives them. The ten-day limitation does not apply if misrepresentations of solvency have been made to the particular seller in writing within three months before delivery. In the event the debtor should file bankruptcy within ten days of receipt of goods, written notice is required when making demand and additionally, the creditor's time for making the written demand for reclamation is extended an additional ten days in this instance.

Finally, it should be understood that the rights of reclaiming seller are subject to the rights of buyers in the ordinary course of business or other good faith purchasers. In particular, the reclaiming seller may find itself competing with the debtor's lending institution who holds a previously perfected security interest in all goods of the debtor, including inventory. While the cases are mixed, most cases seem to favor the rights of the secured lender. A detailed analysis of the rights and limitations of the reclaiming seller can be found in the reference book titled *The Uniform Commercial Code of Kentucky*. David J. Leibson & Richard H. Nowka, *The Uniform Commercial Code of Kentucky*, § 2.6(F)(5)(2d Ed. 1992).

C. MECHANIC'S LIENS/PAYMENT BONDS.

If available, Mechanic's Liens and possible payment bond rights can offer an excellent source of leverage in instances where the creditor has provided labor or furnished materials for the erection, altering or repairing, and other improvements upon real estate.

Mechanic's Liens, while effective, are subject to very specific and stringent limitation. Careful analysis should be made to determine whether pre-lien notice is required. In addition to the possibility of required pre-lien notice, careful effort should be made not to miss the appropriate lien deadlines, all pursuant to **KRS 376.010** and **KRS 376.080**.

Mechanic's Liens, being creatures of statute, are strictly construed. See **Laferty v. Wickes Lumber Co., Ky. App., 708 S.W.2d 107 (1986)** where the court noted that statutory provisions for perfecting the lien must be strictly followed or the lien claim is lost. In **Laferty,** Wickes argued that the timely filing of litigation within the mechanic's lien notice period constituted compliance with placing the debtor on written notice. The court concluded a complaint, although written and served, does not substitute for or constitute the written notice required by the statute and therefore did not serve to perfect the Wickes' lien.

Additionally, counsel should be aware that there is a completely different set of statutes relating to liens for labor and/or materials provided on public property that represent public improvements. Rather than acquiring a lien against the real estate, the claimant acquires a lien against funds due the contractor. Pertinent statutes include **KRS 376.210** defining the creation of the lien, and **KRS 376.230** detailing the necessary steps and extremely stringent time deadlines to properly

perfect and enforce a public improvement lien. Should the property on which the improvement occurred be "public work" for the use and benefit of the United States (Government), then counsel will need to review "The Miller Act," 40 U.S.C. §§ 270a-270d-1 (1994). The Miller Act provides bond rights for the protection of persons furnishing labor and materials.

Finally, even if counsel determines that any possible Mechanic's Lien rights have expired, inquiries should be made to determine the possible existence of any payment bonds. This type of bond may inure to the benefit of the client as a contemplated and intended third party beneficiary of the bond contract. Payment bonds may offer the creditor and creditor's counsel yet another source of possible collection. Like any other contract, payment bonds are not without limitation and efforts should be made to obtain a copy of any payment bond as quickly as possible to ensure compliance with any pre-suit notice requirements and to ensure that the claimant is within the scope of the intended protection provided by the bond.

D. ATTORNEY'S FEES.

Attorney's fees and collection costs are recoverable pursuant to **KRS 411.195 Enforceability of written agreement to pay attorneys fees in event of default.**

In addition to providing additional leverage during pre-suit collection, these agreements can be helpful in conjunction with settlement negotiations after suit has been filed and of course during post-judgment collection. Terms incorporating payment of attorneys/collection fees can sometimes be incorporated into pre-suit workout agreements, as will be discussed in greater detail below in

regard to workout techniques, should the client not have the benefit of a credit agreement or other contract providing for payment of these expenses.

However, the collection of attorney's fees and collection costs are not without limitation where the case is contested. See **Capitol Cadillac Olds, Inc. v. Roberts, Ky., 813 S.W.2d 287 (1991).** See also **Dingus v. FADA Service Co., Inc., Ky. App., 856 S.W.2d 45 (1993).** In both instances the courts considered "the time involved, the task assigned, and the degree of difficulty of work under the circumstances." The problem is that this assumes losing defendants will promptly pay any Judgment rendered, including any court-awarded fees. The fact is that in the vast majority of cases, more time is expended securing collection subsequent to the entry of judgment than prior thereto.

What about in those instances where the case is not contested? Many courts will still consider the circumstances of the case in awarding requested fees. In the Jefferson Circuit Court, **JRP 404** requires any request for attorney's fees to include an itemization of time expended, by date, service rendered, the nature of the service rendered, the name of the person(s) performing said service, and time expended, as well as total time, together with a reasonable amount of compensation per hour. This is to be in the form of affidavit and if the request is pursuant to **KRS 411.195,** it should be supported with a showing that the requested fees have been paid, or have agreed to be paid, by the party seeking enforcement.

E. GUARANTIES.

Personal continuing guaranties of payment are commonly used by commercial creditors to obtain a guaranty of payment from the principals and owners of corporations and limited liability entities. Kentucky has a stringent statute regarding the enforceability of guaranties. **KRS 371.065 Requirements for valid, enforceable guaranty.**

> **(1) No guaranty of an indebtedness which is either not written on, or does not expressly refer to, the instrument or instruments, being guaranteed shall be valid or enforceable unless it is in writing signed by the guarantor and contains provisions specifying the amount of the maximum aggregate liability of the guarantor thereunder, and the date on which the guaranty terminates. Termination of the guaranty on that date shall not affect the liability of the guarantor with respect to:**
>
> **(a) Obligations created or incurred prior to the date; or**
>
> **(b) Extensions or renewals of, interest accruing on, or fees, costs or expenses incurred with respect to, the obligations on or after the date.**

Certainly the statute makes it clear that guaranties represent an extraordinary remedy in Kentucky. The statute seems poorly written by any standard, and one must immediately wonder why the use of the word "instrument?" Instrument is only defined in **KRS 355.3-104(2)** as referring to a negotiable instrument. Given the fact that statutes are interpreted according to the plain meaning of the words, in a narrow and conservative manner, any guaranty not written on a negotiable instrument, or one which does not expressly refer to the negotiable instrument(s) being guaranteed, must contain the statutorily required maximum amount and termination date. Guaranties

incorporated into credit agreements or other documents, which are not negotiable instruments, are subject to the statute.

There are few cases interpreting **KRS 371.065**, but the Sixth Circuit Court of Appeals addressed the applicability of the statute in the context of a guaranty which included a Tennessee choice of law provision. **Wallace Hardware Co., Inc. v. Abrams, 6th Cir. Ky., 223 F 3d 382 (2000).** The Court, in upholding the Tennessee choice of law provision (against the Kentucky debtor and guarantors), did not find that Kentucky's statutory restrictions on guaranties to be of such fundamental interest to prevent the application of Tennessee law in enforcing the guaranty.

V. INITIAL DEMAND AND PRE-LITIGATION WORKOUT ATTEMPTS.

Whenever possible, collection without suit is more profitable. Initial written demand, followed by telephonic demand, seeking an amicable and voluntary payment of the debt is certainly recommended.

Collection of the account is the obvious mission and when collection can be effected without resorting to litigation, a number of risks and expenses can be avoided. In addition to providing an opportunity for amicable resolution, written demand and telephone follow-up will enable counsel to make some additional investigations and determinations.

A. DETERMINATION OF THE PROPER LEGAL IDENTITY OF THE DEBTOR.

If there is any question as to the debtor's correct identity, initial efforts should include a check with the Secretary of State's office to determine if the debtor is in fact a legally incorporated entity or limited liability company. The information can be obtained by calling the Secretary

of State's office at (502) 564-7330 or, alternatively, accessed on line at www.sos.state.ky.us/corporate2/entityname.asp.

The Secretary of State's office also includes listings of general and limited partnerships which can be of valuable assistance in determining the correct legal identity of a business that is not otherwise a legally incorporated entity or a limited liability company. Careful effort should be made to determine a proper match between any such local entities and the creditor's account debtor. Initial complications may arise should the debtor utilize a trade style or assumed name that may not be listed with the Secretary of State's office or the County Clerk's Office as required by **KRS 365.015**. If the debtor is an incorporated entity or a limited liability company, careful note should be made as to the date that the entity became incorporated as well as a determination as to whether the entity is in good standing or possibly has had its charter revoked for any number of reasons, which would principally include the failure to file annual reports.

For debts incurred prior to incorporation **KRS 271B.2-040 Liability for preincorporation transactions** provides, **All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this chapter, shall be jointly and severally liable for all liabilities created while so acting.** After an entity has been suspended and its charter revoked, then the owners/shareholders of the business may be personally responsible for the charges. **KRS 271B.6-220 Liability of shareholders,** states in pertinent part **(2) Unless otherwise provided in the articles of incorporation, a shareholder of a corporation shall not be personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts**

or conduct. Accordingly, if there is no longer a corporation by virtue of dissolution or revocation of the charter, the owners/shareholders may be liable as successors to the corporate entity, in their individual capacities. Prudent collection practitioners would certainly wish to consider naming all individual persons who may be liable as a result, as well as naming the entity itself which can still be sued pursuant to **KRS 271B.14-050(2)(e)**. One limitation is the ability of an entity to reinstate its charter retroactively pursuant to **KRS 271B.14-220**, thus avoiding the possibility of personal liability to any owners. This, however, requires an affirmative response from the debtor, and the leverage of possible personal liability may be sufficient to effect collection of the underlying balance.

Additional information that should be noted in regard to any corporation or limited liability company is the name and address of the process agent for the corporation as well as the entity's principal office address. **CR 4.04(5)** provides:

> **Service shall be made upon a corporation by serving an officer or managing agent thereof, or the chief agent in the county where the action is brought, or any other agent authorized by appointment or by law to receive service on its behalf.**

However, where service for any reason cannot be obtained upon the resident agent or a managing partner, there is an alternate method of service available. **KRS 271B.5-040, Service on Corporation** provides in pertinent part as follows:

> **(2) If a corporation has no registered agent or the agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail, return receipt requested, addressed to the secretary of the corporation at its principal office. Service shall be perfected under the subsection at the earliest of:**
>
> **(a) The date the corporation receives the mail;**

(b) The date shown on the return receipt, if signed on behalf of the corporation; or

(c) Five (5) days after its deposit in the United States mail, as evidenced by the postmark, if mailed postpaid and correctly addressed.

(3) This section does not prescribe the only means, or necessarily the required means, of serving a corporation.

The important point is that the statute does not seemingly require actual acceptance including a signed delivery receipt. This is analogous to the long-arm statute, and the fact that actual acceptance and an accompanying signed delivery receipt is not necessary to effect proper service thereunder (as will be covered later in the outline).

Assuming the creditor does not have the benefit of an executed credit application that will help determine the proper legal identity of the debtor, additional sources include any number of a variety of third party credit service companies, one of which is Business Credit Service which can be accessed by telephone at 888-274-5325 or online at www.businessCreditUSA.com. Additional clues may include check copies retained by the creditor from prior partial payments. Many times the checks will include the correct legal name of the business which, as stated previously, may frequently be different from the trade style used by the debtor in its day-to-day operations. Additionally, the check information could prove extremely valuable in the event that judgment is ultimately entered and execution upon the judgment is required.

Finally, an obvious means of attempting to determine the proper legal identity of the debtor is to simply ask the debtor during the course of making a telephonic demand for payment. It cannot

be overstated that in spite of the numerous technological advancements that have improved the efficiency of information-gathering techniques for the legal collection process, the telephone remains the most powerful collection tool.

B. WHY IS THE DEBTOR NOT PAYING?

Careful review of the client's file as well as personal contact with the debtor should assist counsel in determining why the account has not been paid. Is there any record of a dispute? Has the debtor currently raised a legitimate dispute or possible defense? Should a lawsuit be filed? Effective telephone demand and negotiation can help pinpoint the existence of real versus imagined disputes for nonpayment.

It is common to periodically receive cases against the same commercial debtors. Creditors' counsel handling any volume of commercial collection work will recognize the "earmarks" of the perpetual stalling debtor. Many commercial debtors are sophisticated operators who may well understand the nature of the legal collection process. All debtors want more time. Granting more time may make sense, particularly if counsel can improve the prospects of collection in return by securing additional leverage.

The sooner counsel can determine the specific reasons for nonpayment, the more expeditiously and efficiently counsel can make an informed legal recommendation to the client as to whether a lawsuit may be required as a means of effecting quicker collection.

C. WORKOUT TECHNIQUES.

1. *Securing a written acknowledgment and promise of payment*. Once counsel determines that the debtor is simply suffering cash flow problems and needs time to pay, every effort should be made to obtain a written acknowledgment of the debt and promise to pay. Preferably, there should be a letter or other document signed by the debtor acknowledging the outstanding balance and making a specific promise of payment. Obvious benefits include the possibility of extracting voluntary payments from the debtor, and at a minimum posturing the case for a much speedier resolution should a lawsuit ultimately need to be filed. A debtor who has acknowledged in writing the validity of the debt and who has made a written commitment for payment is much more inclined to follow through with voluntary payment. A debtor who is unwilling to provide a written acknowledgment of an obligation in return for more time to pay is, at best, a recalcitrant debtor who has no intention of making payment on a voluntary basis, and may perhaps be attempting to preserve the right to create a belated defense or dispute for nonpayment should a suit be filed

While a signed writing from the debtor is preferred, email is an additional method of extracting an acknowledgment and promise of payment. Additionally, should the debtor promise to provide a written acknowledgment and promise of payment and fail to follow through, it is a good idea to send the debtor a letter confirming any telephone conversations wherein the debtor has acknowledged the obligation, requesting that the letter be signed and either faxed or mailed back to counsel.

2. *Execution of a Promissory Note*. Where possible, execution of a note by a debtor is preferred for a number of reasons over and above a simple written acknowledgment and promise for payment of the debt. The promissory note, in addition to representing an absolute, unconditional promise of payment on a set date or over a specific interval, also offers creditor's counsel the opportunity to obtain additional remedies and leverage for the creditor client. For instance, should the creditor not have the benefit of a signed credit application or other written contract providing for a specific rate of interest, the promissory note offers counsel the opportunity to enhance not only ultimate collection of the creditor's claim, but ensures that the creditor is obtaining additional value for the consideration of additional time and the forbearance of suit. The note also offers an opportunity to obtain a commitment for the payment of collection costs, including attorney's fees, in the event that the creditor does not already possess a signed writing for the payment of said expenses.

The extension of additional time, and forbearance of suit, represent valuable consideration to support interest and attorney's fees. See **Murphy v. Henry, Ky., 225 S.W.2d 662 (1950)** where the court stated "It is well settled in this state, as in others, that forebearance to prosecute a doubtful claim asserted in good faith will constitute adequate consideration for a compromise agreement." In **Hall v. Fuller, Ky., 352 S.W.2d 559 (1962)**, in reviewing the three standards for determination of forbearance as valid consideration, the court stated "We believe the sound viewpoint to be that good faith is enough unless the claim is so obviously unfounded that the assertion of good faith would affront the intelligence of the ordinary and reasonable layman."

Additionally, the promissory note may offer the creditor the opportunity to obtain execution of the note by the individual owner(s) (assuming the entity is a corporation or limited liability company) in the event that the creditor does not otherwise enjoy the benefit of a personal guaranty. This is something that must be negotiated on a case-by-case basis and will, in most cases, be determined by how honest and earnest the debtor is to remain in the creditor's good graces. This is more likely in instances where the creditor may offer goods, merchandise, and/or services that the debtor cannot readily obtain elsewhere.

3. *Agreed Judgments*. Probably the most powerful pre-suit collection tool available to collection counsel is securing an agreed judgment from the commercial debtor pre-suit. Better than a written acknowledgment of the debt or a promissory note, the agreed judgment represents an immediate, absolute, and seemingly indefensible right of collection, with all of the power of a judgment, including the right to execute.

While the concept of obtaining execution of an agreed judgment prior to filing suit may seem extraordinary, there is Kentucky law upholding and supporting such a judgment. See **Ashland Armco Employees Credit Union v. Cantrell, Ky. App., 685 S.W.2d 559 (1985)** where creditor's counsel secured an agreed judgment from the debtor providing for a specific payment arrangement. When the debtor defaulted suit was filed, and four days later the previously obtained agreed judgment was submitted to the court and entered two days later. The debtor successfully filed a motion to vacate the agreed judgment as allegedly in violation of **KRS 372.140** which provides in pertinent part:

(1) Any power of attorney to confess judgment or to suffer judgment to pass by default or otherwise, any release of errors, given before an action is instituted, is void.

The Court of Appeals reinstated the agreed judgment, finding that the agreed judgment entered into between the parties was in essence a consent judgment, thereby distinguishing the judgment from an otherwise unenforceable and void cognovit note or judgment.

The important distinction is that at the time the agreed judgment is obtained, there is an existing right of action by virtue of the fact that there is a debt for a liquidated amount for which the creditor is entitled to immediate payment. This is distinguishable from the prohibited cognovit clause wherein the debtor confesses judgment prior to any default in payment and essentially waives any right to later defend. Careful attention should be made that the above-noted cases seemingly involved consumer debts and were decided prior to the loss of exemption under the F.D.C.P.A. for attorneys as third party collectors. While opinions may differ, current attempts to secure pre-suit agreed judgments on consumer obligations may be hazardous. Given the "least sophisticated consumer" standard under the F.D.C.P.A., such a collection effort could be alleged an unfair, misleading, and/or possibly a deceptive collection practice.

VI. COLLECTION LITIGATION

A. FILING THE ACTION.

1. *Assimilation of Necessary Documentation.*

Once counsel has determined that litigation will be necessary, it is recommended that counsel have available the necessary documentary evidence to establish a prima facie case for collection.

However, this is not to say that all of the documentation is required to be attached to the Complaint as exhibits thereto when filing the action. Generally, a single sheet statement of account will suffice to at least set forth the creditor's claim, all pursuant to **CR 8.01, Claims for Relief,** which in pertinent part provides:

> **1. A pleading which sets forth a claim for relief, ... shall contain (a) a short and plain statement of the claim showing that the pleader is entitled to relief and (b) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or in several different types may be demanded.**

Furthermore, **CR 8.05, Pleading to be Concise and Direct; Consistency,** provides in pertinent part:

> **(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.**

Paragraph (2) of **CR 8.05** also provides that claims may be made alternatively or hypothetically and separate claims may be stated regardless of consistency and whether based on legal or on equitable grounds or both, all subject to **CR 11.**

While not specifically required by Kentucky law, affidavits of account can be helpful, particularly in certain Kentucky courts where sworn proof of a debt may result in the speedier entry of a default judgment should there be no defense to the claim. Generally speaking, the more concise the cause of action is pled the better, keeping in mind of course that counsel should plead the cause of action with enough particularity to avoid the possibility of a nuisance motion to dismiss pursuant to **CR 12.02,** including but not limited to subpart **(f) failure to state a claim upon which relief can**

be granted (a sample Complaint and Affidavit in support of an open account debt are attached hereto as Attachment No. 3).

2. *Choosing the Proper Court*. Pursuant to **KRS 24A.120(1)(a)**, jurisdiction of district court is limited to causes of action which do not exceed $4,000.00 exclusive of interest and costs, except matters affecting title to real estate and matters of equity. For matters in excess of $4,000 exclusive of interest and costs, or matters involving title to real estate or equity, suit should be filed in the circuit court pursuant to **KRS 23A.010**.

Just as important as jurisdiction is proper venue. Suit should be filed in the appropriate venue to avoid the entry of a judgment that would otherwise be void and unenforceable. Kentucky statutory law addresses original venue in civil actions at **KRS 452.400** et seq. This compilation of statutes specifically designates specific types of actions and where their venue is appropriate. One of the primary venue rules is **KRS 452.450**. Excepting certain actions as found in this particular chapter, **KRS 452.450** dictates that **"an action against a corporation which has an office or place of business in this state, or a chief officer or agent residing in this state, must be brought in the county in which such office or place of business is situated, or in which such officer or agent resides."** Alternatively, the statute continues by stating that if **"[t]he action be upon a contract, in the above named county, or in the county in which the contract is made or to be performed; or if it be for a tort, in the first named county or the county in which the tort is committed."**

KRS 452.450 has been interpreted by Kentucky courts to include appropriate venue as being in a county where the designated registered office and agent are present, as specified by the

corporation, or if the action involves a security agreement and note, the action can be brought in the county where the payments are to be made. Kem Manufacturing Corp. v. Kentucky Gem Coal Co., Ky. App., 601 S.W.2d 913 (1980). Additionally, this statute permits an action against a corporation to be maintained in the county in which a contract is to be performed. American Oil Co. v. Brooks, Ky. 424 S.W.2d 831 (1967).

Kentucky statutory law also dictates where a transitory action may be brought. If such a transitory action is not required to be brought in a specific venue under the provisions of KRS 452.400 to KRS 452.475, then KRS 452.480 provides that the action, "**... may be brought in any county in which the defendant, or in which one (1) of several defendants, who may be properly joined as such in the action, resides or is summoned.**" Of particular interest to collection attorneys is when preferred venue is waived to permit jurisdiction in a more convenient forum. Kentucky cases that date to 1869, as in Baker v. Louisville and N.R. Co., 67 Ky. 619 (1869), acknowledge and still hold one of the most basic positions of civil procedure, namely, "a plea to the jurisdiction of a court after a defense to the merits of an action has been made, unless for want of jurisdiction over the subject matter of the action, comes too late since a defense to the merits of an action constitutes a waiver of the objection to the jurisdiction over the person of the defendant."

Another way that a defendant may waive the venue requirements of KRS, is to have executed a choice of forum clause contained in the contract. Provided the choice of forum is fair and reasonable, Kentucky courts have held that such clauses are indeed enforceable, so long as there is no fraud in the inducement. Cline v. Allis-Chalmers Corp., Ky. App., 690 S.W.2d 764 (1985).

One issue to evaluate in whether Kentucky courts will honor a choice of forum provision, is whether Kentucky has a minimal interest in the particular lawsuit. The case of **Prudential Resources Corp. v. Plunkett, Ky. App., 583 S.W.2d 97 (1979),** analyzed such issue in light of a choice of forum provision selecting the State of Texas. In upholding the lower court's decision to honor the choice of forum clause, the Appellate Court stated "assuming that Kentucky has a substantial interest to protect because of a significant relationship to the transaction and to the parties, the Jackson Circuit Court would have been warranted in refusing to enforce the forum selection agreement if the application of Texas law would have subverted an important policy of Kentucky and the choice of law rule of Texas would have been in favor of its own laws."

The collection attorney may also be faced with choosing the proper court when confronted with a non-resident defendant. For a variety of reasons, it may make more sense to file suit in the creditor's home state where "*minimum contacts*" can be established. When such an instance occurs, the creditor's attorney will normally rely on **KRS 454.210** (the "long-arm statute") for purposes of jurisdiction, service of process, and venue requirements. **KRS 454.210(4)** states, in pertinent part, that "**when the exercise of personal jurisdiction is authorized by this section, any action or suit may be brought in the county wherein the plaintiff resides or where the cause of action or any part thereof arose.**" Collection counsel will generally be relying upon subsection **2(a)(1) Transacting any business in this Commonwealth** to make effective use of this long-arm statute.

A distinction can be drawn between resident purchasers attempting to assert jurisdiction over a non-resident seller as opposed to resident sellers attempting to assert jurisdiction over non-resident buyers. See **First National Bank of Louisville v. Shore Tire Co., Inc., Ky. App., 651 S.W.2d 472 (1983).** The Court of Appeals considered three separate cases with very similar questions of law, and in a consolidated opinion made it clear that non-resident sellers who are actively promoting the sales of their products within the forum state Kentucky, are invoking the benefits of that state, and thus should be subject to the jurisdiction of Kentucky's courts. This was distinguished from the non-resident buyer who enjoys no particular privilege in purchasing from the resident seller in an *isolated* transaction. The court found that when non-resident buyers engage in interstate transactions with resident sellers, each has transacted business in both states. The more substantial in terms of frequency of transactions, time over which each has done business with one another, and the amount of money involved, will determine if the minimum contacts test established by **International Shoe Co. v. Washington Case, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945),** has been satisfied.

An important point not to be overlooked is the fact that service via **KRS 454.210** does not require a signed delivery receipt. See **Haven Point Enterprises v. United Kentucky Bank, Inc., Ky., 690 S.W.2d 393 (1985),** where the court found "The Statute says in part that the Secretary shall attach to the return the registry receipt, *if any*. The words 'if any' emphasize the fact that recovery of a signed, returned receipt is not vital to the completion of service pursuant to the long-arm statute." Another important point to be gleaned from **Haven Point** is the fact that service on the Secretary of State under the long-arm statute **(KRS 454.210)** is just as valid as service upon the

designated in-state process agent (KRS 271A.565 now KRS 271B.5-040), as an alternate method of service. The fact that the latter may arguably result in a better chance of actual notice was found unconvincing by the Court when reviewing a motion for relief from the judgment pursuant to CR 60.02. Finally, the courts have gone as far as holding service through the Secretary of State which is returned "unclaimed" is still effective service. Davis v. Wilson, Ky. App., 619 S.W.2d 709 (1980).

B. CONTESTED CASES AND DISCOVERY.

Once the Complaint is served, the defendant, pursuant to CR 4.02 and 12.01, has 20 days to file a responsive pleading. In addition to the standard general denial, counterclaims seem to be increasingly utilized by sophisticated debtor counsel to stall and delay what may otherwise appear to be a valid claim. The counterclaim of course has the additional chilling effect of exposing the creditor to additional defense costs, including discovery expenses. This is particularly true where the counterclaim seeks affirmative relief against the creditor over and above set-off of the creditor's stated claim. Aggressive and effective pre-litigation collection efforts and investigation will help reduce the odds of the nuisance answer and counterclaim which by design may be asserted for purposes of delay, and the imminent threat of additional expense.

In the event of either a general denial or a counterclaim, creditor's counsel is well advised to promptly serve initial written discovery to flush out true defenses and help distinguish between real and frivolous counterclaims. Effective written discovery may have the desirable effect of forcing the

debtor to expend time and expense, thereby posturing the case for settlement. While depositions may be more effective, they are certainly more expensive and may lead to additional time delays.

Collection counsel handling large volumes of collection work should prepare good standardized interrogatories, requests for admissions and requests for production of documents, all pursuant to **CR 33, Interrogatories to Parties, CR 36, Requests for Admissions,** and **CR 34, Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes**. An example standardized set of initial written discovery requests is attached herewith (Attachment No. 4). Standardized discovery requests can be a quick and effective means of moving the case closer to settlement or trial and should be edited depending upon the facts of each case. An often overlooked fact is that although a deposition cannot be taken by the plaintiff pursuant to **CR 30.01** prior to the expiration of 30 days after service of the summons upon any defendant, interrogatories, requests for admissions and requests for production of documents may be served upon any party <u>with</u> or after service of the summons upon that party. Accordingly, counsel who anticipates defense of an action may wish to serve written discovery upon the debtor together with Summons and Complaint.

The sooner counsel initiates discovery the better. Time delays benefit only the debtor. Delay hinders the creditor for the obvious reason that the creditor bears the burden of proof in establishing its claim to collect. Collection attorneys handling high volumes of work are well familiar with the problems associated with pursuing a collection case that has become "bogged down." Problems include:

(a) Witnesses becoming unavailable, including witnesses for the plaintiff leaving the plaintiff's employ;

(b) Inefficient file and/or document retention systems by the creditor, including missing or misplaced proofs of delivery, original invoice copies, or other important documentary evidence to prove the claim; and

(c) Creditor "fatigue" or loss of interest in pursuing a collection claim. It is common for clients to lose interest when it comes time to produce witnesses for a deposition or trial, or incur substantial time and expense associated with the continued prosecution of the contested collection suit.

C. PROTECTIVE ORDERS.

Occasionally, creditor's counsel will be confronted with an aggressive and seemingly overzealous debtor's attorney. Examples may include debtor's counsel seeking depositions from numerous representatives of the plaintiff for the apparent express purpose of causing the creditor to expend substantial sums of money and time. **CR 26.03, Protective Orders** may offer some relief. Some of the Kentucky cases offering some guidance include, **Hoffman v. Dow Chemical Co., Ky., 413 S.W.2d 332 (1967)**. A protective order should be issued where the information can be obtained by interrogatories. **Gevedon v. Grigsby, Ky., 303 S.W.2d 282 (1957)**. The trial judge exercised a sound discretion in refusing to attempt to require the appearance of a nonresident witness to give his deposition. **Wilson v. Lamb, E.D. Ky., 125 FRD 142 (1989)**. Depositions of the officers of a civil defendant corporation are to be taken at the defendant's principal place of business in Michigan where it would be very inconvenient for the officers to travel to Kentucky to be deposed, as they have no occasion to travel to the area regularly, or even sporadically on business, and where the plaintiff

has not responded to the defendant's motion for a protective order to require the depositions to be taken in Michigan.

One of the best cases on this point is **Wal-Mart Stores, Inc. v. Dickinson, Ky., 29 S.W.3d 796 (2000).** In referencing protective orders issued under **CR 26.03**, the **Wal-Mart** Court advised that if a party believes numerous requests for depositions are unduly burdensome or requested for the purpose of annoyance, such party can seek a protective order citing the reasons why such requests for depositions and/or interrogatories are redundant, repetitive, oppressive, or unduly burdensome.

D. ATTEMPTING SUMMARY JUDGMENT.

As most creditors' attorneys are all too painfully aware, summary judgment has become elusive in the Commonwealth of Kentucky. Since 1991, when the Kentucky Supreme Court decided **Steelvest, Inc. v. Scansteel Service Center, Ky., 807 S.W.2d 476 (1991)**, attorneys have been hard-pressed to meet the required burden of proof to obtain summary judgment. In part, the case provides that a summary judgment should be granted when "**as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor against the movant.**" As one might imagine, few trial judges are willing to enter a summary judgment and deprive the debtor of his day in court if there is even the slightest fact in dispute. Counsel's best chance of obtaining summary judgment may lie in those instances where the defendant has failed to properly respond to discovery, or has failed to deny requests for admissions as provided in **CR 36.02: Effect of Admission**. In addition, where the debtor has failed to respond to discovery, **CR 37** may enable counsel to first seek an order to compel and/or an order to strike the debtor's

answer and enter judgment. A sample motion for summary judgment based upon the defendant's failure to deny requests for admissions, and the deemed admission thereof, is attached hereto (Attachment No. 5).

E. PREPARATION FOR TRIAL.

Assuming all pre-trial settlement efforts have been exhausted, discovery has been completed, and summary judgment has been attempted, it is time to complete all pre-trial procedures so that the case can be set for trial. **CR 16: Pre-Trial Procedures; Formulating the Issues**, provides in pertinent part:

> **(1) In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:**
>
> **(a) the simplification of the issues;**
>
> **(b) the necessity or desirability of amendments to the pleadings;**
>
> **(c) the possibility of obtaining admissions of fact and documents which will avoid unnecessary proof;**
>
> **(d) the limitation of the number of expert witnesses;**
>
> **(e) the advisability of a preliminary reference of issues to a Commissioner;**
>
> **(f) such other matters as may aid in the disposition of the action.**

Counsel should inquire of the court in which the action is pending as to any local rules or other local procedural requirements regarding pre-trial procedure. Assuming the creditor is prepared to proceed to trial, a pre-trial conference not otherwise required by the presiding judge may simply

lead to additional time delays. Sometimes there may be benefits to be considered which include: (1) additional pressure upon the debtor to resolve the pending litigation through settlement, (2) pressure from the court for a settlement if it appears obvious to the court that there are no genuine defenses, and (3) a final determination by the trial judge as to the total number of witnesses for trial as well as the relevant facts to be tried and any governing law. This better assures no surprises at trial.

F. EVIDENTIARY ISSUES DURING TRIAL.

As counsel prepares the matter for trial, it is time to again review the particular strengths and weaknesses of the case. Factors will include the availability of witnesses with firsthand knowledge who are able to (1) prove the necessary elements of the creditor's claim, (2) refute the debtor's allegations and defenses, and (3) authenticate the documentary evidence in support of the creditor's claim. Counsel should be familiar with the various evidentiary rules that will undoubtedly come into play during the course of a contested collection suit. Pertinent portions of the **Kentucky Rules of Evidence (KRE)** include **Article VI - Witnesses**, which states at **Section 602** that personal knowledge of each witness must be shown (experts excepted). Most commercial collection cases will not require expert testimony. Witnesses for the creditor should be prepared to testify as to events of which they have firsthand knowledge. Counsel should prepare any prospective witnesses so that an appropriate foundation can be made to establish the competency of the witness to properly testify as to the facts in support of the plaintiff's claim. Witnesses should testify as to specific facts rather than as to opinion. Generally, opinion testimony of lay witnesses will be extremely limited and will result in a multitude of objections tending to fluster the witness.

Counsel should anticipate being faced in many instances with the very real possibility of attempting to establish facts from witnesses who are salespersons, credit managers or controllers with limited or incomplete firsthand knowledge of all underlying facts. Some collection practitioners attempt to utilize the debtor as the principal witness. Most would agree that depending upon the debtor as the creditor's primary witness to prove the essential elements of the case is risky at best.

While an exhaustive review of all of the rules of evidence is beyond the scope of this outline, creditor's counsel can rest assured that there will be objections during the course of the case based upon hearsay. One of the principal exceptions to the hearsay rule on which the creditor's counsel will rely is provided at **KRE Article VIII - Hearsay, Section 803(6)**, relating to business records. In pertinent part, the section provides:

> **Business Records (Includes all business, professions, and callings. Requirements: record, in any form; made at or near time by, or from information transmitted by, a person with knowledge; kept in course of regularly conducted business; regular practice just to record; all as shown by testimony of custodian or other qualified witness; unless source of information or method of preparation show lack of trustworthiness).**

In order to be admissible, records (with limited exception) must be identified and authenticated pursuant to **Article IX, Section 901 - Authentication and Identification.** Authentication is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims. Illustrations provided in the rule include but are not limited to authentication or identification by testimony of the witness who acknowledged that the matter is what it is claimed to be. Counsel should be prepared to introduce the business records, including statements, invoices, and any other documentary evidence in support of the creditor's claim through testimony of a custodian

or other qualified witness. Self authentication is sometimes possible in certain instances as set forth at **Article IX, Section 902, Self Authentication of Business Records.** This rule would require certified original or duplicates of business records to be submitted in advance, with notice to the adverse party, and made available to the adverse party for inspection in time for the adverse party to review and challenge. For purposes of the rule, certify for a domestic record means a written declaration under oath subject to penalty of perjury.

VII. CONCLUSION

Suffice to say, a collection practitioner's job sometimes only really begins upon the entry of judgment. While one would hope every collection suit would be easily resolved once the summons has been served, this rarely is the case. While default judgments are not traditionally favored in the law, the fact is that the most collection proceedings result in the entry of default judgment. Generally speaking, the easier it is to obtain the judgment, the harder it is going to be to collect.

Post-judgment collections would be the next topic of discussion. Post-judgment techniques and the various processes employed by collection counsel are being covered separately in this program, and thus will not be covered in this outline.

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October 15, 2001

VIA FAX AND FIRST CLASS MAIL
Honest John Creditor
1234 Main Street
Anywhere, USA

Re: Your File No. KY39253
Our File No. 1732013
Honest John Creditor Services, Inc.
vs: Don Deadbeat
$8,500.00

Dear John:

The above captioned collection claim has been received. Demand was made immediately upon receipt of the transmittal papers. We are attempting to establish personal contact with the debtor to obtain payment in full. The matter is accepted as a contingent collection case for the recovery of the balance due, on the terms set forth on the contingent fee agreement attached hereto. Please sign and return the agreement as soon as possible. If there is a written contract, or other pertinent documentation not yet provided, please send any other information in support of your claim.

If you are seeking any special remedies, including but not limited to mechanic's lien filings, notices of intent, reclamation of property, possession of property, or any other special remedies, we reserve the right to negotiate separate fees for these services. We will not attempt enforcement of any of the enumerated special remedies, and will limit our efforts to the recovery of the balance due, unless and until specifically requested and authorized to do so.

Please advance your file at this time 30 days in anticipation of an initial report which will enable us sufficient time to attempt personal contact with the debtor so that we may make an informed legal recommendation for further handling.

Yours truly,

LLOYD & McDANIEL

By: _____
JAMES M. LLOYD
[Direct Dial (502) 625-9263]
james@lloydmc.com

JML/mjo

OUR FEDERAL TAX ID IS 61-0861142

ATTACHMENT NO. 1

CONTINGENT FEE CONTRACT

Your firm has chosen to employ Lloyd & McDaniel, PLC for the collection of an account balance due. Lloyd & McDaniel, PLC upon beginning work has a vested interest in the underlying collection claim pursuant to this contingency fee agreement. Our fees will be computed at the rate of ____% against all recoveries, with the exception of any costs you advance. Costs which you have advanced will be returned upon full recovery of the matter or at the conclusion of any settlement. In the event we have advanced any Court costs or other expenditures authorized by your firm, we will deduct those costs from first recoveries made. Should you be entitled to special interest, collection costs, or attorney's fees, every effort will be made to make a full recovery on your behalf. Please understand that while you may have an agreement for the payment of collection costs and attorney's fees, our fees will be calculated upon all recoveries made, regardless of whether we are successful in collecting all collection costs or attorney's fees. Our fees will be assessed against any recoveries made subsequent to our involvement, whether paid directly to your office or through this office. As funds are recovered we will remit the net amount, less our fee, together with a voucher outlining the recovery as well as calculation of our fees and any expenses withheld.

Careful effort should be made to refer any contacts by your customer to this office. Continued contact with your customer will tend to dilute our efforts on your behalf and could impede recovery. Every effort will be made to establish contact with your customer to attempt to effect voluntary payment, unless you have instructed otherwise. We will attempt to determine if there is any dispute to the claim which could result in a defense should a lawsuit be filed. In addition, should we determine the possibility of a counter-claim, or the threat of a counter-claim, we will notify you in advance for review and investigation.

Should a counter-claim be asserted after a suit has been filed, you may elect to employ this firm for the defense of the counterclaim, or may retain defense counsel of your own choosing, Our normal hourly defense rate is $_____ per hour. Please be aware that this includes travel time, in the event that we are required to attend out of town depositions or court proceedings relating to the counter-claim. These charges would be billed to your firm on a monthly basis. Your firm will be billed on a time-basis for time expended in the course of the defense of the counterclaim. You will not be charged for time expended with the prosecution of the underlying collection suit.

_____

(Firm Signature)

Date: _____

ATTACHMENT NO. 2

NO. 98CI-000789 BOONE DISTRICT COURT

DIVISION

HONEST JOHN CREDITOR PLAINTIFF

vs. **COMPLAINT**

DON DEADBEAT DEFENDANT

* * * * * *

Comes the Plaintiff, by counsel, and for its cause of action against the Defendant states as follows:

1. The Defendant is indebted to the Plaintiff in the amount of $19,500.00, as evidenced by the attachment hereto referenced as Exhibit "A."

WHEREFORE, Plaintiff demands:

1. Judgment against the Defendant in the sum of $19,500.00;

2. Interest thereon at the rate of 19.8% per annum from March 25, 1997 and 19.8% per annum from the date of Judgment, until the Judgment is satisfied;

3. For Plaintiff's costs herein expended, including a reasonable attorney's fee as the proof may allow;

4. For all other relief to which the Plaintiff may appear entitled.

JAMES M. LLOYD
LLOYD & McDANIEL, PLC
Attorneys for Plaintiff
462 South Fourth Avenue, Suite 1700
Louisville, Kentucky 40202-3450
(502) 585-1880

ATTACHMENT NO. 3

AFFIDAVIT OF CLAIM

The undersigned, being duly sworn, states that:

1. The unpaid balance due HONEST JOHN CREDITOR is $19,500.00 as of March 25, 1997 at an interest rate of 19.8%.

2. Demand has been made but payment has not been received.

3. There are no set offs, or credits for which credit has not already been given.

4. I am an employee and/or agent of the Plaintiff and am a qualified person who is familiar with the business records of the Plaintiff. The said business records are made at the time of occurrence, are kept in the regular course of business, and it is part of the regular course of business of the Plaintiff to keep such records.

5. I have personal knowledge of the facts stated herein on my review of the business records of the Plaintiff.

Signed: _____

Subscribed and sworn to before me this ___ day of _____, 2001.

_____
Notary Public

My Commission Expires:_____.

NO. 01CI-000123 BOONE CIRCUIT COURT

DIVISION

HONEST JOHN CREDITOR PLAINTIFF

vs. **PLAINTIFF'S FIRST SET OF INTERROGATORIES, REQUEST FOR ADMISSIONS AND REQUEST FOR PRODUCTION OF DOCUMENTS**

DON DEADBEAT DEFENDANT

* * * * * *

The Plaintiff requests the following discovery of Defendant, DON DEADBEAT, pursuant to Kentucky Rules of Civil Procedure 33, 34, and 36. Defendant is directed to serve its verified answers, and to produce the requested documents in conformance with the above-cited rules, on or before thirty (30) days from the date certified below, at the law offices of Lloyd & McDaniel, 462 South Fourth Avenue, Suite 1700, Louisville, Kentucky 40202-3450.

INSTRUCTIONS AND DEFINITIONS

1. For the purposes of these discovery requests, the following definitions apply:

A. "Plaintiff" means HONEST JOHN CREDITOR.

B. "Defendant" means DON DEADBEAT, as well as any person who is, was, purports or has purported to be a general partner, limited partner, affiliate, employee, agent, attorney, accountant, assignee, subsidiary, or representative of DON DEADBEAT

C. "Person" means, without limiting the generality of its meaning, natural persons, groups of natural persons (such as a committee or board of directors), corporations, partnerships, associations, joint ventures, and any other incorporated or unincorporated business, governmental, public, or social entity.

D. The term "document" means the original and each non-identical copy of any writing, tape, disc, recording or other item on which or from which information, communications or data may be perceived or obtained.

2. Whenever appropriate in these discovery requests, the singular and plural forms of words shall be interpreted interchangeably so as to bring within the scope of these requests any matter which might otherwise be construed to be outside their scope.

ATTACHMENT NO. 4

3. Unless otherwise indicated, these discovery requests apply to the time period commencing January 1, 2001, through the present.

4. Except as expressly provided in a particular discovery request, all of the terms utilized in these discovery requests shall have the meaning given to them in the Kentucky Rules of Civil Procedure.

INTERROGATORIES

Interrogatory No. 1

Identify each person who was interviewed, consulted about, or participated in, the preparation or formulation of the Defendant's response to each of these discovery requests, and the date these discovery requests were answered. If more than one person answered these discovery requests, list for each person the specific discovery request which he or she answered.

Interrogatory No. 2

State the social security number of the individual answering these discovery requests or, if a corporation, state the tax identification number.

Interrogatory No. 3

Identify each document, that was reviewed, examined, or relied upon in preparing and formulating the Defendant's response to each of these discovery requests, attaching copies of each document pursuant to the request for production.

Interrogatory No. 4

State whether the Defendant has ever transacted business with the Plaintiff under a name

other than DON DEADBEAT. If yes, as to each such name, state: (a) name the Defendant used; (b) the address of the principal place or business of the operations under such name; and (c) the legal composition of Defendant.

Interrogatory No. 5

State whether the claim asserted by the Plaintiff is the obligation of a person other than the Defendant. If yes, as to each such obligation, state: (a) the name, address and telephone number of such other person; (b) the Defendant's relationship to such other person; and (c) the basis for the Defendant's assertion that the claim asserted by the Plaintiff is the obligation of a person other than the Defendant.

Interrogatory No. 6

With respect to each person that the Defendant will or may call as a witness to give testimony at any hearing or trial of this case, state: (a) the name and address of each person; (b) a detailed summary of the testimony expected to be offered by each person; and (c) the connection or relationship to the Defendant of each person.

Interrogatory No. 7

Review the attached invoices, referenced and attached as Exhibit "A". For each item listed explain if the charge is owed, and if not why not, detailing with particularity your dispute and/or defense to any the charge.

Interrogatory No. 8

State fully, completely and at length the factual basis of each defense which you now assert or intend to assert in this action.

Interrogatory No. 9

As to each defense set out in response to Interrogatory Eight (8), above, state the following as to notification to Plaintiff by Defendant of such defenses: (a) the date or dates when notification was given; (b) the manner in which notification was given; and (c) the specific party or parties to whom notification was given.

Interrogatory No. 10

What balance is reflected on the Defendant's books and records or other accounts payable records as due and owing the Plaintiff. Please attach copies of any accounts payable records, including any computer records or printouts reflecting any balance due the Plaintiff.

REQUESTS TO ADMIT FACTS

The Plaintiff requests that the Defendant answer the following requests to admit facts pursuant to, and in accordance with, Kentucky Rules of Civil Procedure 36. If the Defendant objects to any requested admission, the reasons therefor shall be stated. The Defendant's answer shall specifically admit or deny the requested admission, or set forth in detail the reasons why the Defendant cannot truthfully admit or deny the requested admission. A denial shall fairly meet the substance of the requested admission, and when good faith requires that the Defendant qualify an answer or deny only a part of the matter of which an admission is requested, the Defendant shall specify so much of it as is true and qualify or deny the remainder, again detailing the specificity of the denial or the part thereof.

Fact No. 1

That Defendant has now received originals or copies of each invoice and the statement of account (copies also hereto attached as Exhibit "A") which are the subject of Plaintiff's Complaint.

Fact No. 2

That Plaintiff furnished the goods and/or performed the services set out in the invoices and statement of account, and at the prices shown.

Fact No. 3

That the total charges of the subject invoices, as shown on the attached statement of account, were in the sum of $19,500.00.

Fact No. 4

That all of Plaintiff's invoices, statement, and billing on this account were directed and mailed to Defendant, and received by Defendant.

Fact No. 5

Written demand for payment of the charges subject of this action was made upon Defendant by Plaintiff or Plaintiff's counsel thirty (30) days or more prior to the filing of the Complaint in this action.

Fact No. 6

Except as shown in the Complaint or attachments and exhibits hereto, Defendant is not entitled to any credits, offsets or deductions.

Fact No. 7

Defendant executed the credit application attached hereto as Exhibit "B".

Fact No. 8

Defendant is indebted to the Plaintiff for the sum of $19,500.00

DOCUMENTS TO BE PRODUCED

1. All documents requested to be identified in the foregoing discovery requests.

2. All documents reviewed, relied upon, or used in the preparation of responses to the foregoing discovery requests.

3. All documents which the Defendant intends to introduce at any trial or hearing in this matter.

4. All reports, summaries, analyses, memoranda, documents or other business records maintained by the Defendant, reflecting any balance due to the Plaintiff's firm.

5. Copies of any credits, returns, payments or any indicia of payment, setoff, or credit of any kind to which Defendant would maintain entitlement, and which Defendant contends has not already been posted to the account.

6. All correspondence between the Defendant and the Plaintiff for the period from January 1, 2001, through the filing of the Complaint in this action.

JAMES M. LLOYD
LLOYD & McDANIEL, PLC
Attorneys for Plaintiff
462 South Fourth Avenue, Suite 1700
Louisville, Kentucky 40202-3450
(502) 585-1880

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed on August 24, 2001 to Joe Attorney, 1234 Main Street, Louisville, KY 40202.

JAMES M. LLOYD
LLOYD & McDANIEL, PLC
Attorneys for Plaintiff

95-3102/P508P/JML

NO. 01CI-000123 BOONE CIRCUIT COURT

DIVISION

HONEST JOHN CREDITOR PLAINTIFF

vs. **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

DON DEADBEAT DEFENDANT

MOTION

Comes the Plaintiff, by counsel, pursuant to Court Rule 56, and moves the Court to grant it a summary judgment against the Defendant. In support of its motion, Plaintiff attaches hereto and files herewith its Memorandum of Law. As grounds for said motion, Plaintiff states that there is no genuine issue as to any material fact, and therefore as a matter of law is entitled to judgment.

JAMES M. LLOYD
LLOYD & McDANIEL, PLC
Attorneys for Plaintiff
462 South Fourth Avenue, Suite 1700
Louisville, Kentucky 40202-3450
(502) 585-1880

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed on ___ day of _____, 2001 to Joe Attorney, 1234 Main Street, Louisville, KY 40202.

JAMES M. LLOYD
LLOYD & McDANIEL, PLC
Attorneys for Plaintiff

ATTACHMENT NO. 5

NO. 01CI-000123 BOONE CIRCUIT COURT

DIVISION

HONEST JOHN CREDITOR PLAINTIFF

vs. **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

DON DEADBEAT DEFENDANT

* ** *** ***

This matter stands before the Court on Plaintiff's Motion for Summary Judgment on Plaintiff's claim for collection of a balance due in the sum of $19,500.00. The Plaintiff supports its cause of action with an affidavit of claim substantiating a balance of $19,500.00.

In response to Plaintiff's Complaint, the Defendant filed an answer which is merely a general denial. Following receipt of Defendant's Answer, Plaintiff certified discovery requests to the Defendant on June 15, 2001, to which there has been no response. Defendant's failure to respond to Plaintiff's discovery requests, specifically Request to Admit Fact No. 6, represents an admission of said discovery requests pursuant to C.R. 36, and in effect precludes Defendant establishing the existence of a genuine issue as to any material fact.

ARGUMENT

I. Defendant's deemed admission of Plaintiff's discovery requests, including Request to Admit Fact No. 6, precludes the existence of any genuine issue as to any material fact.

Kentucky law has long held that a party who is served with a request for admission to which it does not respond, admits the allegations asserted therein. This provision is clearly set forth in Court Rule 36.01 which provides in pertinent part as follows:

> A party may serve upon any other party a written request for admission ... each matter for which an admission is requested ... is

> deemed admitted unless, within thirty days after service of that request, ... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection ...

This rule has been upheld in numerous decisions which have been handed down by this Court. Further, the court in Commonwealth v. Rice, Ky., 415 S.W.2d 618 (1966), held that "[f]ailure to respond properly to Court Rule 36.01 may constitute an admission justifying the granting of a summary judgment or directed verdict." Smather v. May, Ky., 379 S.W.2d 230 (1964).

Plaintiff properly served its Requests for Admissions on the Defendant by placing same in the United States Mail on June 15, 2001. Neither the Plaintiff nor its counsel has received the Defendant's response to the subject Requests for Admissions. Therefore, pursuant to Court Rule 36.01, the Defendant is deemed to have admitted each admission served upon it by the Plaintiff. And, these admissions may be used as the basis for granting a Summary Judgment in favor of the Plaintiff and against the Defendant.

II. Plaintiff is entitled to Summary Judgment as a matter of law.

This action is filed by Plaintiff for the collection of an unpaid balance pursuant to contract. The Plaintiff's claim is supported by its statement of account as well as an affidavit. In response, the Defendant has filed an Answer but has failed to respond to Plaintiff's discovery requests, thereby being deemed to have admitted Plaintiff's Requests for Admissions, which includes the admission of the balance outstanding.

The Defendant has failed to present any affirmative evidence that would create a genuine issue of material fact for trial. Therefore, Plaintiff is entitled to a judgment as a matter of law.

The purpose of the rule providing for summary judgment is to promote the expeditious disposition of cases and to avoid unnecessary trials when no genuine issues of material facts are

raised. Steelvest, Inc. v. Scansteel Service Center, 807 S.W.2d 476, 480 (Ky. 1991). Moreover, a motion for summary judgment may be based solely upon the pleadings and affidavits submitted by the parties, and it is not precluded by a denial contained in the answer of the defendant. Smith v. Hilliard, 408 S.W.2d 440, 442 (Ky. 1966).

When a motion for summary judgment is made and supported as provided for in C.R. 56, an adverse party may not rest upon the mere allegations and denials of its pleadings, but his response must set forth specific facts showing there is no genuine issue for trial. 7 Clay, Kentucky Practice, Third Edition, Section 251. Once the movant has established his right to recovery, by affidavit or otherwise, the opposing party must "present at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Steelvest, 807 S.W.2d at 483 (citations omitted).

A summary judgment should be granted when, "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor against the movant." Steelvest, 807 S.W.2d at 483 (citing Paintsville Hospital v. Rose, 683 S.W.2d 255 [Ky. 1985]). Furthermore, when the adverse party cannot prevail, the court's duty is to "render a judgment forthwith [as] there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Bennett v. Southern Bell Telephone & Telegraph, 407 S.W.2d 403, 405 (Ky. App. 1966).

CONCLUSION

This is a simple collection action for the payment of an unpaid balance due. The Plaintiff states that there is no genuine issue as to any material fact. Further, the Plaintiff submits that it is impossible for the Defendant to produce any evidence which will create an issue of material fact,

which would warrant a judgment in favor of the Defendant or which will prevent the entrance of a judgment in favor of the Plaintiff. Therefore, Plaintiff moves the Court to enter a judgment in its favor granting all relief sought in its Complaint.

JAMES M. LLOYD
LLOYD & McDANIEL, PLC
Attorneys for Plaintiff
462 South Fourth Avenue, Suite 1700
Louisville, Kentucky 40202-3450
(502) 585-1880

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed on __ day of _____, 2001 to Joe Attorney, 1234 Main Street, Louisville, KY 40202.

JAMES M. LLOYD
LLOYD & McDANIEL, PLC
Attorneys for Plaintiff

95-3102/p622C

NO. 98CI-000789 BOONE DISTRICT COURT

DIVISION

HONEST JOHN CREDITOR

PLAINTIFF

vs. **SUMMARY JUDGMENT**

DON DEADBEAT

DEFENDANT

This matter coming before the Court on Plaintiff's Motion for Summary Judgment, and the Court having reviewed the pleadings and being otherwise duly and sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that there are no genuine issues as to any material fact and that Plaintiff is entitled to Judgment as a matter of law for the sum of $19,500.00, with interest thereon at the rate of 19.8% per annum from March 25, 1997 and 19.8% per annum from the date of Judgment and until this Judgment is satisfied, for an attorney's fee equal to 25% of this Judgment balance, for all costs expended by Plaintiff, for all of which execution may issue forthwith.

There being no just reason for delay, this Judgment is final and appealable.

_____

JUDGE

_____

DATE

TENDERED BY:

_____

JAMES M. LLOYD
LLOYD & McDANIEL, PLC
Attorneys for Plaintiff
462 South Fourth Avenue, Suite 1700
Louisville, Kentucky 40202-3450
(502) 585-1880

AFFIDAVIT

Comes the Affiant, and after having been duly sworn, states as follows:

1. That the undersigned is a member of the law firm serving as counsel of record for the Plaintiff herein.

2. That the firm of Lloyd & McDaniel was retained by the Plaintiff for representation of the Plaintiff in this matter and is not otherwise a regularly salaried employee of the Plaintiff's firm.

3. That the Plaintiff is entitled to a recovery of a reasonable attorney's fee pursuant to the terms and conditions, a copy of which is attached hereto.

4. That the Plaintiff has agreed to pay the undersigned firm a contingent attorney's fee equal to 25% of the balance.

FURTHER, the Affiant sayeth not.

_____
JAMES M. LLOYD

Subscribed and sworn to before me this ____ day of _____, 2000.

My commission expires:_____

_____
NOTARY PUBLIC

BANKRUPTCY FUNDAMENTALS: WHAT THE COLLECTION LAWYER MUST KNOW

Cathy S. Pike
Weber & Rose, P.S.C.
Louisville, Kentucky

SECTION F

BANKRUPTCY FUNDAMENTALS:
WHAT THE COLLECTION LAWYER MUST KNOW

BANKRUPTCY FUNDAMENTALS: WHAT THE COLLECTION LAWYER MUST KNOW

By Cathy S. Pike
Weber & Rose, P.S.C.
2400 Aegon Center
400 W. Market Street
Louisville, Kentucky 40202
(502) 589-2200

Introduction

Bankruptcy impacts both collection actions taken prior to bankruptcy and after a bankruptcy filing. Upon a bankruptcy filing, an automatic stay is imposed which halts all collection actions by creditors, regardless of whether or not the creditor is scheduled in the bankruptcy petition. In addition, the bankruptcy filing can unwind collection actions which have been taken prior to bankruptcy. For example, liens which have been placed, prior to the bankruptcy filing, against property of the bankruptcy estate, such as garnishments and judgment liens, can be set aside and avoided. Moreover, collection actions which occur after a bankruptcy filing can result in sanctions for willful violation of the automatic stay.

Once a creditor is advised by a debtor that he has filed bankruptcy, the creditor should obtain the following information from the debtor:

(1) The location of the court in which the bankruptcy filing occurred;

(2) The date of the bankruptcy filing and the case number;

(3) Whether the creditor was listed in the debtor's bankruptcy petition, and the amount for which the creditor was listed;

(4) The type of bankruptcy which was filed (Chapter 7, Chapter 11, Chapter 12 or Chapter 13).

After the filing of a bankruptcy petition under any chapter of the Bankruptcy Code, a first meeting of creditors is held (the "341 meeting), usually 20-40 days after the filing date. (11 U.S.C. §**341**) The 341 meeting is conducted by either the Chapter 7 trustee or a representative of the U.S. Trustee's Office, depending upon the chapter under which the petition was filed. The 341 meeting is an informal meeting at which the debtor or its representative is sworn and required to respond to various questions by creditors and the trustee concerning the debtor's assets, debts and general business operations. It is an invaluable way to obtain information from the debtor, and to promptly resolve many issues which may exist between debtors and their creditors.

I. Types of Bankruptcy Cases

The Bankruptcy Code is divided into several chapters, including Chapter 7 (liquidation); Chapter 11 (business reorganization); Chapter 12 (reorganization by family farmers) and Chapter 13 (reorganization by consumers). Most bankruptcy filings will be either Chapter 7 or Chapter 13 proceedings.

In a Chapter 7 proceeding, the individual debtor[1] is seeking a discharge of his unsecured debts, which prevents the creditor from ever being able to collect the obligation from the debtor. The Chapter 7 discharge acts as permanent injunction, discharging the debtor from all debts which arose before the date of the bankruptcy filing. (11 U.S.C. §**727(b)**)

---

[1]Only individual debtors receive a discharge; corporations and other similar-type entities do not receive a bankruptcy discharge. (11 U.S.C. §727(a))

In a Chapter 13 proceeding, the individual debtor[2] is seeking to repay his creditors over a period of time, usually three-to-five years. The Chapter 13 discharge generally discharges the debtor from all unsecured debts provided for by the Chapter 13 plan or disallowed by the Bankruptcy Court. (11 U.S.C. §**1328**)

II. The Automatic Stay

Once a bankruptcy petition is filed under any Chapter, an automatic stay is imposed pursuant to 11 U.S.C. Section **362**, which stays the following actions against the debtor and/or against property of the estate:

> (1) the commencement or continuation, including the employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

---

[2]Only an individual debtor with regular income, or an individual debtor with regular income and such individual's spouse, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $269,250, and noncontingent, liquidated, secured debts of less than $807,750 may be a debtor under Chapter 13. (11 U.S.C. §109(e))

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement of continuation of a proceeding before the United States Tax Court concerning the debtor.

Under 11 U.S.C. §**362**(b), certain types of action against the debtor are not stayed, including criminal prosecutions, actions to collect alimony or support from the debtor from property that is not property of the estate and acts to perfect liens IF the perfection is retroactive to a date prior to the bankruptcy filing.

See, *In re Griggs*, 965 F.2d 54 (6th Cir. 1992) (perfection of lien post petition); *Cumberland Metals, Inc. v. Kentucky Insurance Guaranty Association*, 801 S.W.2d 339 (Ct. App. Ky. 1990) (stay does not apply to suit against bankrupt contractor's surety); *Equal Employment Opportunity Commission v. Guerdon Industries*, 76 BR 102 (U.S. District Ct. Ky. 1987) (governmental unit's action against debtor not stayed).

The automatic stay generally only protects the debtor from collection attempts; however, pursuant to 11 U.S. C. §**1301**(a), the automatic stay imposed in Chapter 13 proceedings protects co-debtors as well:

> Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless—
>
> (1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or
>
> (2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.

III. Property of the Estate

Under 11 U.S.C. §**362**, the creditor is prohibited from proceeding against "property of the estate," which pursuant to 11 U.S.C. §**541** consists of all of the following property, wherever located and by whomever held:

> (1) ...all legal and equitable interests of the debtor in property as of the commencement of the case.
>
> (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is —
>
> > (A) under the sole, equal, or joint management and control of the debtor; or
> >
> > (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.
>
> (3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.
>
> (4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.
>
> (5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—
>
> > (A) by bequest, devise, or inheritance;
> >
> > (B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or
> >
> > (C) as beneficiary of a life insurance policy or of a death benefit plan.
>
> (6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

The listing of "property of the estate" is fairly inclusive. However, pursuant to 11 U.S.C. §**541**(b), property of the estate does not include:

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.

IV. Lien Avoidance

11 U.S.C. §**547** permits a bankruptcy trustee or debtor to avoid certain transfers and/or liens which occur prior to the bankruptcy filing, subject to certain exceptions set out in 11 U.S.C. §**547**(c). In addition, 11 U.S.C. §**544** permits the bankruptcy trustee or debtor to use otherwise applicable state law to avoid certain transfers and/or liens, including Kentucky's preference and fraudulent conveyance statutes (**KRS 378.010** and **KRS 378.060**).

By way of example, judgment liens and garnishment liens may be set aside, if they were created within statutorily-prescribed time periods preceding the bankruptcy filing, and were for more than $600.

Pursuant to 11 U.S.C. §**547**(b), the trustee may avoid any transfer of an interest in the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Further, 11 U.S.C. §**547**(c) sets out the defenses which are available:

The trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent such transfer was—

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms.

(3) that creates a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property.

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—

(A) (i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; and

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

(7) to the extent such transfer was a bona fide payment of a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent such debt—

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support; or

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.

Moreover, 11 U.S.C. §**544** provides additional avoidance powers to the trustee:

(a) The trustee shall have, as of the commencement of the case, without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is avoidable by —

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution

against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b) (1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claims by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

The word "transfer" is a term of art and is specifically defined by the statute. Under 11 U.S.C. **547**(e),

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

A careful reading of the statute reveals that the trustee may avoid a "transfer". For purposes of garnishment in the Sixth Circuit, the "transfer" occurs when the garnishment order is delivered to the employer or financial institution. *In re Battery One-Stop, Ltd.*, 36 F.3d 493 (6th Cir. 1994); *In re Edwards*, 219 BR 970 (W.D. Ky. 1998) (referencing KRS 425.506); *In re*

Morehead, 249 F.3d 445, at 447 (6th Cir. 2001) (Debtor must have rights in the property before it can be transferred...debtor must have performed the services to which the garnishment order attaches.) Consequently, for purposes of determining whether an avoidable preference has occurred, the key date is the date of delivery of the garnishment order on the employer, financial institution, etc., NOT the date the funds are actually withdrawn or paid to the creditor.

Moreover, the "applicable law" which is available to the trustee for avoiding transfers, and which is referenced in 11 U.S.C. §**544**(b)(1) is **KRS 378.010** and **KRS 378.060**:

> **378.010 Fraudulent conveyances and encumbrances**
> Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to delay, hinder or defraud creditors, purchasers or other persons and every bond or other evidence of debt given, action commenced or judgment suffered, with like intent, shall be void as against such creditors, purchasers and other persons. This section shall not affect the title of a purchaser for a valuable consideration, unless it appears that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor.
>
> **378.060 Preferential conveyance, encumbrance or other act in contemplation of insolvency --Effect--Exception**
> Any sale, mortgage or assignment made by a debtor and any judgment suffered by a defendant, or any act or device done or resorted to by a debtor, in contemplation of insolvency and with the design to prefer one or more creditors to the exclusion, in whole or in part, of others, shall operate as an assignment and transfer of all the property of the debtor, and shall inure to the benefit of all his creditors, except as provided in subsection (2) or KS 378.090, in proportion to the amount of their respective demands including those which are future and contingent. Nothing in KRS 378.060 to 378.090 shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with the mortgage, if the mortgage is lodged for record within thirty (30) days after its execution.

Judgment liens can be avoided by the debtor under 11 U.S.C. §**522**(f), which provides the criteria for avoiding a lien, and the methodology for calculating whether the lien does in fact impair the debtor's exemption:

(f) (1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extend that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(A) A judicial lien, other than a judicial lien that secured a debt—

(i) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and

(ii) to the extent that such debt—

(I) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and

(II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support; ...

(2) (A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of —

(i) the lien;

(ii) all other liens on the property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property

exceeds the value that the debtor's interest in the property would have in the absence of any liens.

(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.

(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

The Sixth Circuit Court of Appeals has discussed the rationale of **522**(f)(2) in *In re Holland*, 151 F.3d 547, at 550 (1998):

> One of the purposes of bankruptcy is to allow for the fair treatment of similarly situated creditors, thus preventing creditors' rights from being determined by a race to the courthouse. Another purpose is to provide the debtor with a fresh start. It cannot be disputed that if a judgment creditor [were] allowed to retain its lien on the real property of the debtor...it [would] very likely be able to ascertain the payment of its debt that other creditors, otherwise similar to the judgment creditor, would not be able to obtain. Thus, the judgment creditor [would be] allowed to circumvent the treatment of other creditors under the Bankruptcy Code simply because it [had] raced to the courthouse, obtained a judgment, and placed a lien on the debtor's fully encumbered real property. Further, the debtor would probably be precluded from ever gaining any equity in the property, therefore impairing his fresh start.

See, also, *In re Brumbaugh*, 250 BR 605 (Bankr. W. D. Ky. 2000), which demonstrates the workings of 11 U.S.C. §522(f)(2).

A creditor confronted with a motion to avoid a lien to the extent it impairs an exemption has several possible avenues of defense available to it, including (a) arguments on valuation of the property; (b) the accuracy and validity of all creditors' liens; and (c) the debtors' entitlement to claim an exemption in the property (Does the debtor have an ownership interest in the property, and did he occupy the property on the date of the bankruptcy filing?), etc.

V. Terminating the Automatic Stay

As stated previously, the automatic stay (11 U.S.C. §**362**) prevents a creditor from taking any action to collect debts from the debtor or to recover property of the debtor on which it has a lien or mortgage. The automatic stay is terminated upon the earliest of (a) the time the case is closed; (b) the time the case is dismissed; or (c) the time the discharge is granted or denied. Moreover, the automatic stay can be terminated under 11 U.S.C. §**362**(d):

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if —
>
> > (A) the debtor does not have an equity in such property; and
> >
> > (B) such property is not necessary to an effective reorganization; or
>
> (3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief...---
>
> > (A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or
> >
> > (B) the debtor has commenced monthly payments to each creditor whose claims is secured by such real estate..., which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

See, *In re Brooks*, 26 BR 210 (W.D. Ky. 1982) (11 U.S.C. §362(d)(1)); *In re Family Investments, Inc.*, 8 BR 572 (W.D. Ky. 1981) (11 U.S.C. §362(d)(1) and (d)(2); and *In re McIntyre,* 20 BR 284 (W.D. Ky. 1982) (11 U.S.C. § 362 (d)(2)).

As stated previously, the automatic stay only protects the debtor, unless the bankruptcy is a Chapter 13 filing, in which event the automatic stay protects co-debtors as well. Consequently, if there are two obligors and only one has filed bankruptcy, the creditor may proceed against the non-bankrupt co-obligor.

The automatic stay may be terminated by either filing a motion to terminate automatic stay, or by filing an agreed order terminating the automatic stay. In a Chapter 7 proceeding, the secured creditor must also have the trustee abandon his interest in the property.

VI. Reaffirmation and Redemption

An exception to the debtor's obligation to pay after a bankruptcy filing would be if the debtor reaffirms a debt (11 U.S.C. §524) or redeems collateral (11 U.S.C. §722), which may occur when the debt is a co-signed debt and the debtor wishes to protect his co-signer, or when the debtor believes it likely that the debt will be held to be nondischargeable. These are the exclusive methods pursuant to which a debtor may retain possession of secured collateral. See, generally, *In re Bell*, 700 F.2d 1053 (6th Cir. 1983)

Under 11 U.S.C. §**524**(c), a debtor may enter into a reaffirmation agreement with its creditor. Generally, only a creditor's in rem rights remain after a bankruptcy discharge is granted; however, if a reaffirmation of the debt occurs, the debtor is legally obligated on the entire obligation, and the creditor is not limited to recovery of the value of its collateral. Reaffirmation occurs under 11 U.S.C. §**524**, which provides as follows:

> An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if —
>
> > (1) such agreement was made before the granting of the discharge...
> >
> > (2) (A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after

such agreement is filed with the court, whichever occurs later, by giving notice of such rescission to the holder of such claim; and

(B) such agreements contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of —

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement...

Even after voluntarily signing the reaffirmation agreement, the debtor can rescind the agreement within the later of 60 days from the filing with the Bankruptcy Court of the reaffirmation agreement, or entry of the discharge. Debtors have an absolute right to rescind reaffirmation agreements. See *In re Smith*, 35 BR 95 (Bankr. W.D. Ky. 1983).

The debtor can also redeem collateral by paying to the secured creditor its approximate fair market value, or the amount of the claim, whichever is less. However, such payment may not be in installments, and must be a lump-sum payment. *In re Bell*, 700 F.2d 1053, at 1054. See *In re Burba, 42 F3d 1388, 1994 WL* 7093414 (6th Cir. unpublished opinion, addressing

redemption rights when a Chapter 13 proceeding is converted to Chapter 7); *In re Breckinridge*, 140 BR 642 (W.D. Ky. 1992) (Under Kentucky law, future advance clause in purchase money security interest was not enforceable as to unrelated subsequent unsecured loan, and thus amount debtor was required to pay in order to redeem automobile was solely amount owing on auto loan.)