

# **DEBT COLLECTION & GARNISHMENT LAW**

Presented by Jeremy T. Carvell

Mid-Minnesota Legal Aid

**11/17/14**

# Goals for this session

1. What to expect in collection
2. Exemptions
3. Defenses
4. Options at each stage
5. How to help your clients by sending FDCPA letters
6. How to claim exemptions
7. Referrals & resources

# Introduction to Consumer Debt Collection

Some debts are sold, some are not.

The collector could be representing the original creditor, an intermediary debt buyer or the plaintiff in a collection action.

Some collectors only collect, others also litigate.

Some collectors are deterred by exemptions, others aren't.

Inverse relationship between outrageousness and collectability?

# Overview of Consumer Debt Litigation

High-volume business model & high rate of defaults.

The lawsuits almost always start as pocket-suits.

Some collection attorneys and debt buyers have minimal information & documentation when they commence their collection actions.

Many collection attorneys don't file in court until they can get a default or summary judgment.

(But Minnesota now has a one year deadline.)

# FDCPA Basics

FDCPA was intended to curb abusive and deceptive practices (not prevent all collection).

FDCPA doesn't apply to original creditors.

FDCPA only applies to consumer debts.

FDCPA includes a fee-shifting provision.

# Permitted Collection Behavior

1. Collectors can communicate with third-parties to find location information.
2. Collectors can ask for payment.
3. Collectors can explain the consequences of nonpayment.
4. Collectors can use the judicial system to obtain and enforce judgments.
5. Collectors can report debts to credit reporting agencies.

# Limitations on finding location information

- Collectors cannot reveal any information to third-parties about the debt or that they are a collector.
- Collectors must stop looking for location information if they know that the consumer is represented.
- Collectors usually cannot contact the same third-party more than once.

# Limitations on asking for payment:

- Collectors must stop contacting consumer if requested by the consumer.
- Collectors cannot contact the consumer at work if the collector has reason to know that the consumer isn't permitted to receive collection calls at work.



# Limitations on explaining the consequences of nonpayment

- Collectors cannot threaten to take actions they do not intend to take. For example, they cannot imply or threaten to sue if that collector doesn't sue.
- Collectors cannot threaten to take actions that are illegal or not permitted by law.

# Limitations on using the judicial system to obtain and enforce judgments

- Collectors cannot collect on any amount (including interest, fees, charges, expenses, etc.) unless expressly authorized by the agreement creating the debt or permitted by law.
- Nor can they falsely imply that a document is not legal process or that a document does not require action by the consumer.
- Collectors must stop all collection activity when asked to verify a debt (within 30 days of the 1692g notice) until they verify the debt.

# Limitations on reporting to credit reporting agencies

If the consumer has disputed the debt, this particular fact must also be reported when the collector reports the debt to the credit reporting agencies.

Note: consumers can get a copy each of their credit reports for free once each year at [www.annualcreditreport.com](http://www.annualcreditreport.com).

# What debt collectors cannot do

- they cannot engage in or threaten illegal behavior
- they cannot engage in abusive, deceptive or harassing behavior
- they cannot disclose information about the debt to third-parties (other than credit reports or as permitted for litigation and garnishment)
- they cannot make false, deceptive or misleading statements about the debt
- they cannot call after 8pm or before 9am or call repeatedly with intent to harass
- they cannot swear or use offensive language

# Exemptions for Property

- Property exemptions are fairly straightforward.
- The list of exempt personal property is in Minn. Stat. 550.37.
- The list of exempt real property (homestead) is in Minn. Stat. 510.02.
- The amounts of these exemptions are adjusted every two years by the Department of Commerce – check their website.

# Income Exemptions

For purposes of exemptions, income will fit into one of three categories:

- Income which is completely exempt and the exemptions will not expire;
- Earnings, which may be partially or completely exempt; the exemption will expire after either 20 days or 60 days; and
- Not exempt income

# Income Exemptions

There are two types of non-earnings exemptions:

- Income that is exempt because it is “Government Assistance Based on Need.” (“ABN”) This also creates an exemption for the debtor’s earnings while the debtor receives ABN and for six months afterward.
- Income that is exempt but is not “need-based.” Receipt of this does not affect any other income or property.

# Common Non-ABN Exempt Sources

- Retirement, Survivor and Disability Insurance (a.k.a. RSDI or Social Security)
- Unemployment and Worker's Compensation Benefits
- Child Support
- Student Loans\*\*\*
- Life insurance proceeds & Death Benefits
- Earnings of the debtor's minor child
- Disbursements of funds from Pensions and Annuities are exempt pursuant to MINN. STAT. § 571.912. However, the principle amounts are only exempt up to a present day value of \$69,000 (adjusted by the Minnesota Department of Commerce every two years.)



# Government Assistance Based on Need?

(see Minn. Stat. 550.37, subdiv. 14)

- MFIP – MN family investment program
  - EA - emergency assistance or county-crisis funds
  - GA - general assistance,
  - MA - medical assistance,
  - GAMC - general assistance med care,
  - EGA - emergency general assistance,
  - SSI - Supplemental Security Income
  - MSA - Minnesota supplemental aid,
  - MSA-EA - MSA emergency assistance,
  - Energy or fuel assistance
  - MFIP Diversionary Work Program,
  - Work participation cash benefit,
  - Food Support,
  - MinnesotaCare,
  - Medicare part B premium payments,
  - Medicare part D extra help
- This list is not exclusive and other programs may also qualify.

# Earnings Exemptions

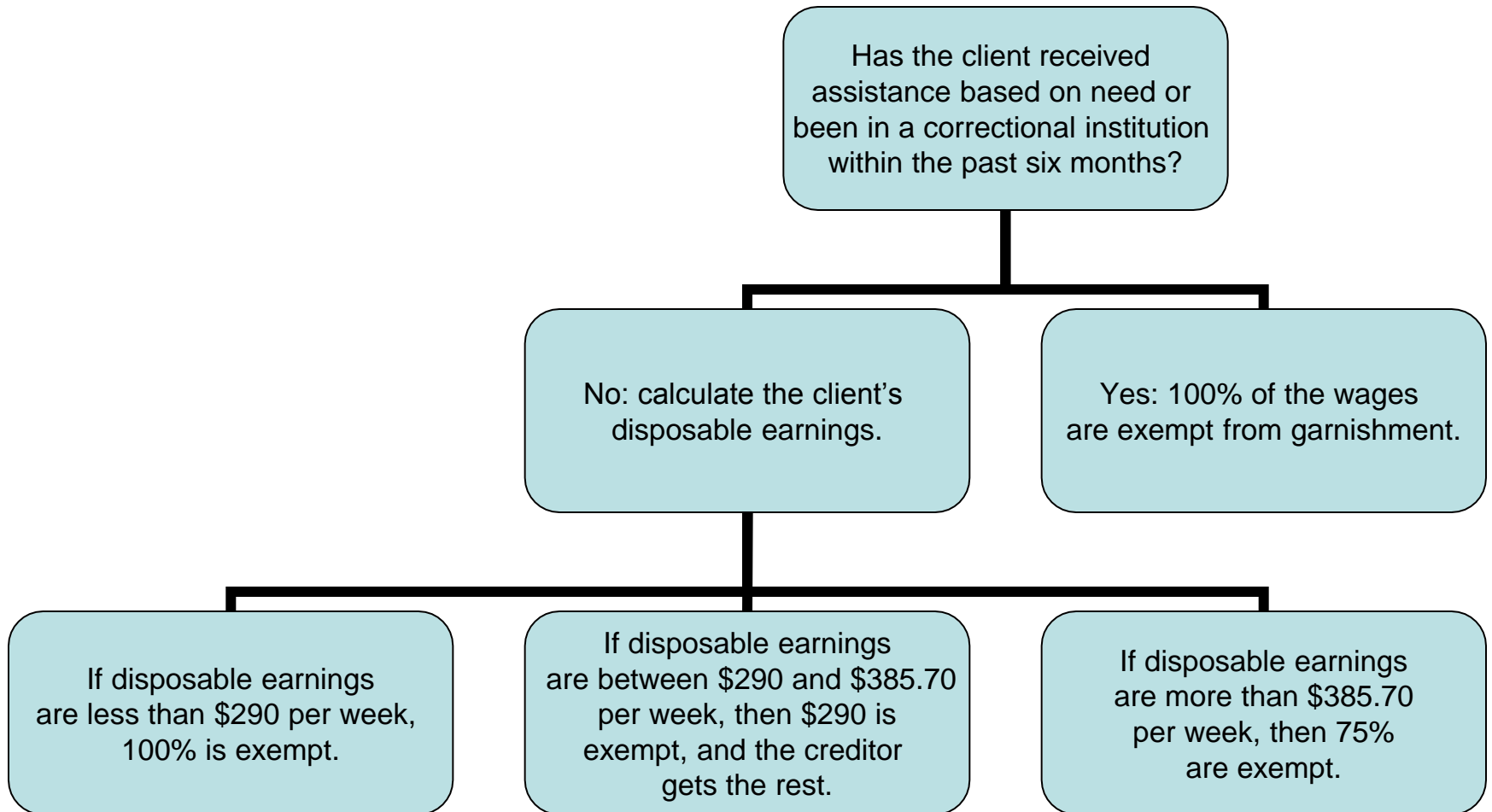
The paycheck is entirely exempt when:

- the debtor received ABN within the past 6 months;
- the debtor was in a jail or correctional institution within the past 6 months; or
- the disposable earnings are less than minimum wage (\$290/week)

Disposable earnings is the take-home pay plus any voluntary deductions.

If none of these apply, then up to 25% of disposable earnings can be garnished (subject to the minimum wage floor.)

# Earnings Exemption Flowchart



# Bank Account Exemptions

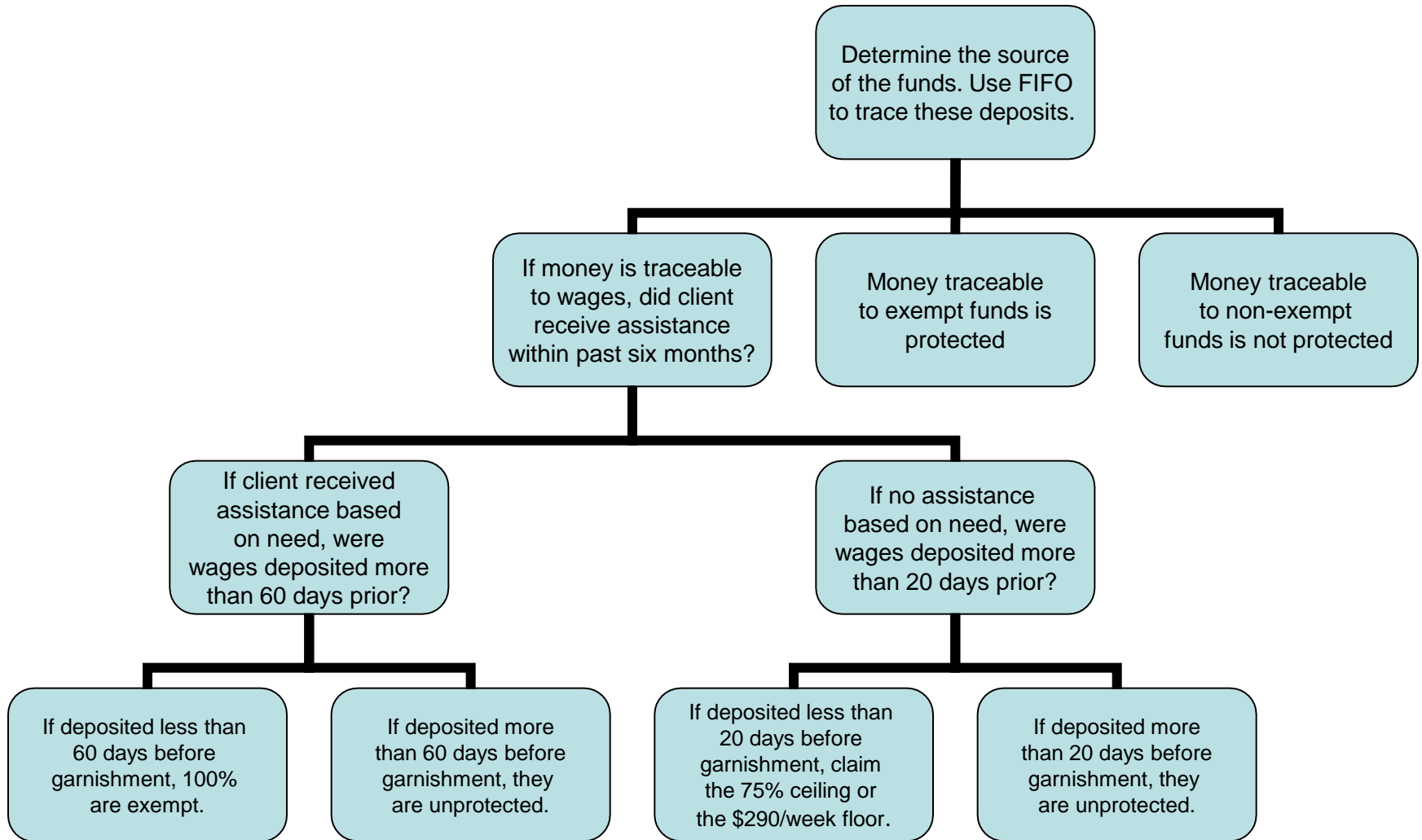
For purposes of garnishment, every cent in an account is traceable to only one of four categories:

- Always Exempt Sources: this money is always protected, no matter how long it sits in the account
- Earnings: this money might be completely or partially protected and will expire 20 days after deposit (or 60 days if debtor received ABN)
- Not Exempt Sources: this money is never protected, no matter what else is in the account or whether debtor receives ABN
- Someone else's money: (e.g., funds in a joint account)

# Bank Account Exemptions for Earnings

1. All earnings are exempt if the debtor has received ABN or was in a jail or correctional institution within the past 6 months. In this case, the earnings are protected for 60 days after deposit.
2. When #1 does not apply, the debtor gets a 20 day exemption for:
  - All earnings if the debtor's disposable earnings were less than the minimum wage, currently \$290/week (wage exemption "floor")
  - 75% of disposable earnings – as long as the collector's 25% does not cut into the debtor's minimum wage exemption (wage exemption "ceiling")

# Bank Exemption Flowchart



# Self-Executing Exemptions

Three automatic exemptions shouldn't need to be claimed:

- The “75% of disposable earnings exemption” should be calculated by the employer – no exemption claim should be needed.
- The “less than minimum wage exemption” should be calculated by the employer – no exemption claim should be needed.
- The 2011 Federal Treasury Rule (31 C.F.R. 212.1 et seq.) created an automatic exemption for some federally exempt benefits.

# Federal Treasury Rule

Upon receipt of the garnishment summons, banks are required to check the account for any auto-deposits of federal exempt benefits:

- Social Security
  - SSI
  - Veteran's Pension
  - Federal Railroad Retirement
  - Civil Service Retirement
  - Federal Employee Retirement System benefits
- 
- If there are any of these benefits auto-deposited, the bank cannot freeze the account if it has less than two months of benefits.



# Federal Treasury Rule (cont.)

## Notes:

- The rule does not protect funds that exceed the last two months' worth of benefits.
- The rule does not protect funds that have been transferred into other accounts.
- This rule does not preempt, replace or supersede any other federal or state exemptions – the client just has to follow state procedure for claiming the exemption and getting their money unfrozen/returned.

# Options for Responding to Pre-litigation Debt Collection

1. Dispute the debt with:
  - a. Creditor or Debt Buyer;
  - b. Collector; and/or
  - c. Credit reporting agencies.
2. Settle the debt.
3. File for bankruptcy.
4. Send an FDCPA “Stop contacting me” letter.
5. Claim exemptions and ask to be left alone.

# FDCPA letters

(#1- 4 are usually only effective before litigation)

1. *“I dispute this debt.”*
2. *“Please send written verification of the account.”*
3. *“Stop contacting me.”*
4. *“My employer doesn’t allow me to receive collection phone calls at work.”*
5. *“I am represented by an attorney...”*

# Options for Responding to a Debt Collection Lawsuit

1. Defend against the debt.
2. Settle the debt.
3. File for bankruptcy.
4. Allow default judgment to be entered.
5. Claim exemptions.

# Options for Responding to a Default Judgment

1. Evaluate merits to vacate:
  - a. When judgment is less than 1 year old, does client have a defense plus a reasonable excuse?
  - b. Regardless of judgment's age, can the client prove that she wasn't served?
2. Settle the debt.
3. File for bankruptcy.
4. Show exemptions to discourage future garnishment.
5. Claim exemptions to retrieve garnishment money.

## Fun fact!

There is no time limit for claiming exemptions. In other words, there is no deemed “waiver” if the debtor fails to claim an exemption at the time of the garnishment.

# Answering the Complaint: Understanding the Claims

Many debt buyers (and even some original creditors) do not have the terms of the contract or the account history.

For this reason, they assert other theories such as

- Account stated
- Quasi contract
- Unjust enrichment
- Money had and received
- “You owe me money”

# Understanding the Claim (Jeremy's 3 point argument)

1. Consumer accounts are based on written contracts which create conditions under which the consumer borrows money or receives credit.
2. The contract controls how the money gets repaid and the consequences if the consumer doesn't pay as agreed.
3. If the consumer breaks the contract, the creditor has a claim for breach of contract which is calculated by applying the terms of the contract to the account history.

Conclusion: a consumer debt claim requires evidence of the contract terms and evidence of the account history.



# Answering the Complaint: A detour through the “account stated” theory

## Account Stated Elements:

1. There was an underlying account; (doctrine doesn't apply when client is victim of identity theft or is not sure if plaintiff is suing on correct account);
2. Final statement of account; and
3. Acknowledgment of debt or assent to the debt (i.e., no objection within reasonable period).

# Answering the Complaint: A detour through the “account stated” theory

## Account Stated (cont.)

- 15 U.S.C. § 1666: consumers get extra rights if they dispute a charge within 60 days.
- Plaintiffs turn this on head and argue that consumer lose right to dispute a transaction after 60 days.
- FTC has rejected this argument; SCOTUS says FTC’s opinion is conclusive.

# Answering the Complaint: Identify disputed facts

Review every single fact in the complaint with your client.  
For every single fact, your client will:

(a) know that its wrong,

(b) know that its correct, or

(c) not have enough information to know if it is correct or not.

# Answering the Complaint: Identify disputed facts

Assume nothing!

Neither you nor your client should assume that the plaintiff's statements, pleadings or documents are accurate.

# Answering the Complaint: Identify disputed facts

Common confusions/questions:

- An exemption is not a defense against the debt.
- Credit limits are for the customer, not the credit card company.
- You can get sued on a “charged off” account/debt.
- You can get sued for a vehicle loan even if the vehicle was repossessed.

# Answering the Complaint: Identify other common defenses

Once you've identified the factual disputes look for general defenses such as statutes of limitations or standing issues.

- Assignees are often subject to the standing defense (and hearsay objections.)
- Statutes of Limitation.
- Accord & Satisfaction.

# Answering the Complaint: Identify statutory defenses

Look for statutory defenses and counterclaims relating to the specific type of debt.

- Credit cards: cases often turn on plaintiff's burden of proof (15 USC §§ 1642 & 1643)
- Vehicle Loan: cases often turn on affirmative defenses in Article 9 of the U.C.C. (Minn. Stat. § 336.9-610, -611, -625)
- Both credit cards and vehicle loans allow you to raise issues arising from the underlying transaction.

# Whether to Defend?

## Options for Responding to a Debt Collection Lawsuit

### 1. Should client defend against the debt?

- + Stronger defenses against entire debt
- + Non-exempt income
- + Posture: client was just served with S&C
  
- Weaker defenses against portion of debt
- No non-exempt income for the foreseeable future
- Posture: collector has default judgment or is moving for summary judgment



# Rules of thumb regarding strength of defenses vs. procedural posture

	Answering the Complaint	Opposing Summary Judgment	<i>Finden</i> Factors - Defense on the Merits in a Motion to Vacate (notwithstanding personal service issues)
Defendant disputes the entire account/contract	Yes	Yes – client’s affidavit constitutes a fact dispute	Yes
Defendant admits to account but has an affirmative defense	Yes	Yes – client’s affidavit constitutes a fact dispute	Yes
Defendant admits to account but disputes amount of claim.	Yes	Yes – client’s affidavit constitutes a fact dispute	Probably – will depend on defendant’s ability to articulate/document the dispute
Defendant admits to account but doesn’t know how much they owe or about Plaintiff’s standing	Yes	Maybe - SJ will turn on admissibility of Plaintiff’s evidence	Probably not – most courts will hold that this is not a “defense on the merits.”
Defendant admits to account and amount of claim but has no information about Plaintiff’s standing	Yes	Maybe - SJ will turn on Plaintiff’s evidence but the hearsay rule may be less central depending on the number of links in the chain-of-title,	No – it is not likely that any courts will conclude this is a “defense on the merits.”
Defendant is certain Plaintiff’s claim is correct and that there are no affirmative defenses.	No	No	No

# Whether to Defend?

## Options for Responding to a Debt Collection Lawsuit

### 2. Should client settle the debt?

- + Client acknowledges debt and feels responsible for paying
- + Client wants certainty or finality
- + Client has non-exempt income
  
- Client disputes that it was their account

# Whether to Defend?

## Options for Responding to a Debt Collection Lawsuit

### 3. Should client file for bankruptcy?

- + Client has many outstanding claims dischargeable in bankruptcy
- + Client will be subject to garnishment that will prevent them from getting back on their feet
- + Client may have trouble claiming own exemptions
  
- This current account is their only debt
- Client has permanent self-executing exemptions

# Whether to Defend?

## Options for Responding to a Debt Collection Lawsuit

4. Should client allow default judgment to be entered?
  - + Client has permanent self-executing exemptions
  - + Client knows that the claim is correct and that they have no defenses that could be raised in good faith
  - *Anything other than the above two conditions!!*

# Whether to Defend?

The terms “collection-proof” and “judgment-proof” are misnomers.

People are never exempt. Only property and income have exemptions.

However, it wouldn't be inappropriate to tell someone that they are “collection-proof” if all of their money and property is protected from all of their creditors.

# Whether to Defend?

A judgment means that garnishment is always hanging over the debtors' heads and they are always at risk of having their funds frozen without warning and having several hundred dollars in bank fees imposed.

It can take 1-3 weeks to get their exempt money released and they are unlikely to have any legal recourse regarding the bank fees.

# What does it mean to be “collection-proof” or “judgment-proof”?

There is one exception: an account should not be frozen if it contains:

1. Federally exempt funds,
2. that were direct-deposited (i.e., not transferred) and
3. the balance is less than the total benefits deposited in the preceding 60 days.

Important– this rule does not apply to any Minnesota statute based exemptions.

# Whether to Defend?

## Options for Responding to a Debt Collection Lawsuit

### 5. Claim exemptions and ask to be left alone

There is no harm in making this request in the Answer's cover letter. Depending on the strength of the client's defenses and their exemptions, the collection attorney may voluntarily dismiss.



# Initial advice for a garnished client

- I. Do not close the bank account before the garnishment is resolved.
- II. Immediately cancel all auto-deductions.
- III. You don't need to cancel automatic deposits (e.g., RSDI direct deposits).
- IV. Will you need emergency assistance during the pendency of the exemption claim?
- V. Consider whether to apply for other forms of government assistance.

# The exemption claiming process

Pre-step 1 – review the underlying debt and the case's posture to evaluate whether it is appropriate to bring a motion to vacate or otherwise dispute the debt.

Pre-step 2 – review the client's overall financial situation to evaluate whether they should be referred for bankruptcy

# The process when the creditor is attempting to garnish a paycheck:

1. If client receives ABN, send exemption form + proof of the ABN to creditor.
2. Watch to make sure creditor doesn't proceed with garnishment.
3. If client does not receive ABN, watch to make sure employer correctly calculates the 75% or minimum wage exemption.
4. If there are any problems (the exemption isn't honored or employer is withholding the wrong amount), try to resolve with phone call and, if unsuccessful, file a request for an exemption hearing.

# The process when the creditor has already garnished a paycheck:

1. If client was receiving ABN, send exemption form + proof of the ABN to creditor.
2. Request that the garnishment be cancelled and the exempt funds released back to client.
3. Wait 3-4 business days for a response from creditor. If none, follow up with a phone call. (e.g., “I’m just checking to make sure you received the exemption claim and that you don’t have any questions.”)
4. If client was not receiving ABN, check to see if employer applied the 75% or minimum wage exemptions.
5. If the creditor objects (or the employer withheld the wrong amount), try to resolve with phone call and, if unsuccessful, file a request for an exemption hearing.

# The process for garnished bank accounts: (part one)

1. Review bank records to determine which deposits were garnished.
2. For each of the garnished deposits, get documentation of the source.
3. If any of the garnished deposits were from earnings, determine whether the earnings had been deposited within 20 days (or 60 days if the client received ABN.)
4. For each of the garnished deposits, identify if the money is from an exempt source.
5. Send to the creditor: (a) exemption claim, (b) bank records, (c) other documentation to trace deposits, (d) proof of ABN (if needed), (e) copies of paystubs if you're claiming an exemption for any earnings, and (f) a cover letter to show your work. Request that the garnishment be cancelled and the exempt funds released back to client.

# The process for garnished bank accounts: (part two)

6. Wait 3-4 business days for a response from creditor. If none, follow up with a phone call.
7. If creditor doesn't object within 6 business days of receipt, bank should automatically release the money.
8. If creditor wants to object to a bank account exemption claim, they must contact the court to request a court hearing. (The debtor can request a hearing too.)
9. If a hearing is requested, prepare your client to testify and offer exhibits (just in case it turns into an evidentiary hearing.)
10. Court is required to issue decision within three days.

# Will the creditor object?

Common reasons for objections include:

- Debtor didn't identify and document the source of deposits;
- Debtor didn't provide documentation of government assistance;
- Debtor didn't provide bank statements that are recent enough to show the date of the garnishment;
- Debtor didn't provide bank statements old enough to show source of money that was deposited more than 60 days earlier; and
- Debtor didn't provide records for all of the garnished accounts when more than one account was garnished

# Yellow Flags:

scenarios with unclear/unsettled law  
(i.e., slow down, research and consult)

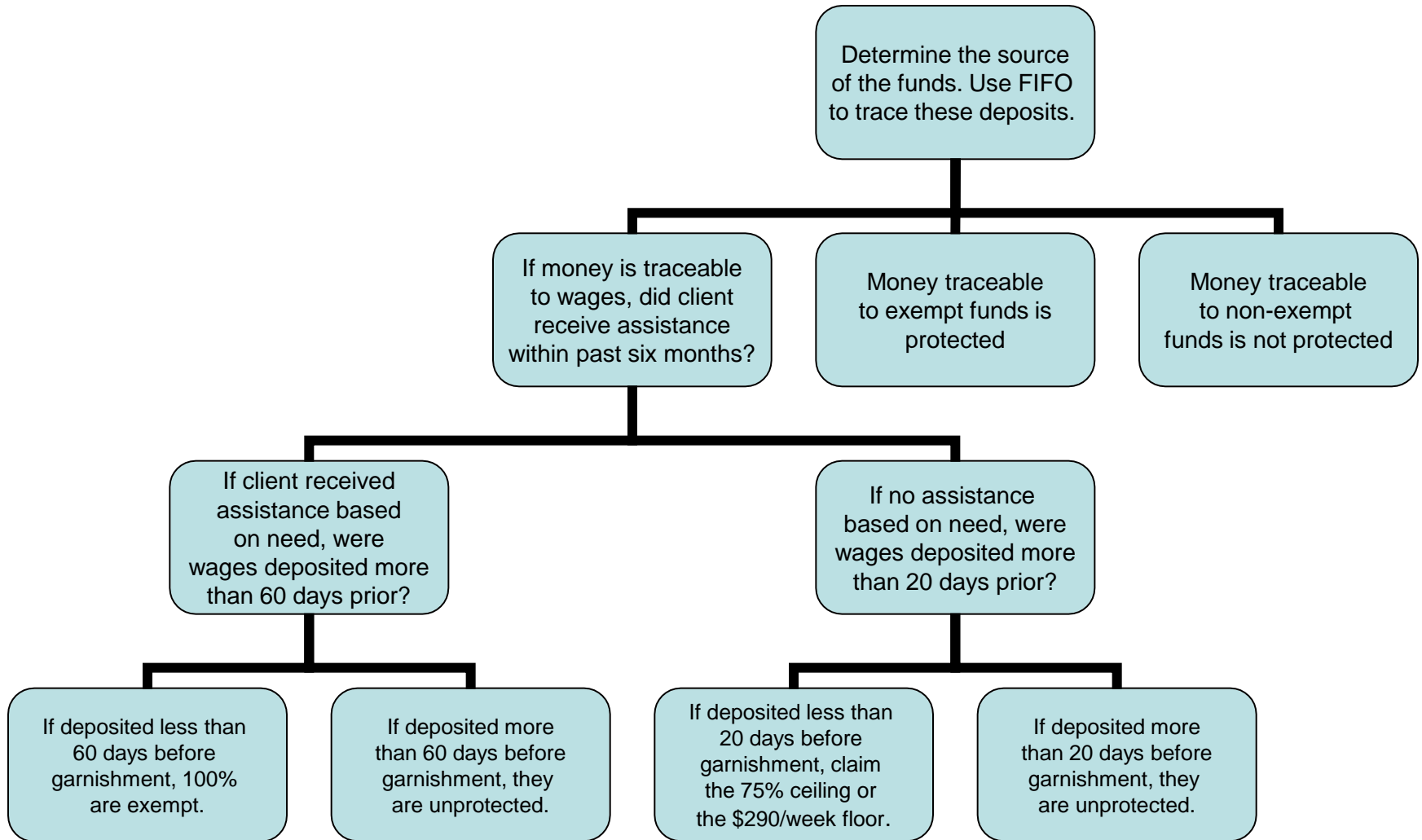
1. Earnings exemptions for non-employees (i.e., self-employed, independent contractors, etc.).
2. Debtor receives government assistance which is not listed in 550.37 or 571.912.
3. Debtor had other people's money in a non-joint bank account.
4. Debtor receives government assistance for family members but not for themselves.
5. Debtor is garnished on an out-of-state judgment that has not been transcribed in Minnesota.



# Post-garnishment steps

- Make sure the client has reviewed their other options – i.e., motions to vacate, payment plans, bankruptcy, etc.
- Counsel the client on how to avoid messy exemption claims in the future.
- If the client receives government assistance, they should send proof of the assistance to the collector every 5-6 months.
- Send a withdrawal letter to the collector (unless you want to be the contact person for all subsequent collection attempts on the debt.)

# Bank Exemption Flowchart



# Fun with FIFO (First-In, First-Out)

- Think of the bank account as the checkout line in the grocery store.
- At one end, the cashier scans each item and puts it on the belt – these are your deposits.
- At the other end, you take each item as it comes down and you put it in a bag – these are your withdrawals.



# Fun with FIFO (First-In, First-Out)

- When someone garnishes the account, it is like stopping the belt to take a snapshot picture of what is on the belt at that single moment (what is still in the account.)
- Only the items left on the belt are subject to the garnishment.
- It doesn't matter what was already withdrawn and it doesn't matter what is deposited after the garnishment occurs.



# All you really need to know about FIFO:

1. Ignore the withdrawals (seriously!)
2. FIFO is how you trace the frozen money to the deposits.
3. Start on the day of the garnishment and go backwards (reverse chronologically) through the deposits until you have enough to cover:
  - the amount frozen, plus
  - any money that was leftover after the garnishment.
4. Once you have your deposits identified, follow the flowchart and identify whether each deposit is exempt.

# FIFO Example #1 (a)

Date	Transaction	Deposit/Withdrawal	Resulting Balance
Jan 3	Paycheck	+ \$500	\$500
Jan 7	Bank fee	- \$100	\$400
Jan 7	Garnishment	- \$400	\$0

The client works part-time, earning \$500 every two weeks, and does not receive any assistance based on need.

# FIFO Example #1 (b)

Date	Transaction	Deposit/Withdrawal	Resulting Balance
Jan 3	Paycheck	+ \$500	\$500
Jan 17	Paycheck	+ \$500	\$1000
Jan 27	Bank fee	- \$100	\$900
Jan 27	Garnishment	- \$900	\$0

The client works part-time, earning \$500 every two weeks, and does not receive any assistance based on need.

# FIFO Example #2(a)

Date	Transaction	Deposit/Withdrawal	Resulting Balance
Jan 3	Paycheck	+ \$1600	\$1600
Jan 7	Bank fee	- \$100	\$1500
Jan 7	Garnishment	- \$1500	\$0

The client works full-time, earning \$1600 every two weeks after taxes, and does not receive any assistance based on need.



# FIFO Example #2(b)

Date	Transaction	Deposit/Withdrawal	Resulting Balance
Jan 3	Paycheck	+ \$1600	\$1600
Jan 7	Bank fee	- \$100	\$1500
Jan 7	Garnishment	- \$1500	\$0

The client works full-time, earning \$1600 every two weeks after taxes, and receives SNAP a/k/a Food Support.

# FIFO Example #3(a)

Date	Transaction	Deposit/Withdrawal	Resulting Balance
Jan 3	Child Support	+ \$1000	\$1000
Jan 5	check: Rent	- \$500	\$500
Jan 6	Groceries	- 50	\$450
Jan 7	Bank fee	- \$100	\$350
Jan 7	Garnishment	-\$350	\$0
Jan 8	check: Utility Co.	- \$100	- \$100
Jan 8	Overdraft fee	- \$35	- \$135

# FIFO Example #3(b)

Date	Transaction	Deposit/Withdrawal	Resulting Balance
Jan 3	Child Support	+ \$1000	\$1000
Jan 4	Help from friend	+ \$500	\$1500
Jan 5	check: Rent	- \$1000	\$500
Jan 6	Groceries	- 50	\$450
Jan 7	Bank fee	- \$100	\$350
Jan 7	Garnishment	-\$350	\$0
Jan 8	check: Utility Co.	- \$100	- \$100
Jan 8	Overdraft fee	- \$35	- \$135

# FIFO Example #3(c)

Date	Transaction	Deposit/Withdrawal	Resulting Balance
Jan 2	Help from friend	+ \$500	\$500
Jan 3	Child Support	+ \$1000	\$1000
Jan 5	check: Rent	- \$1000	\$500
Jan 6	Groceries	- 50	\$450
Jan 7	Bank fee	- \$100	\$350
Jan 7	Garnishment	-\$350	\$0
Jan 8	check: Utility Co.	- \$100	- \$100
Jan 8	Overdraft fee	- \$35	- \$135

# FIFO Example #4(a)

Date	Transaction	Deposit/Withdrawal	Resulting Balance
Jan 1	Deposit of \$500 paycheck and \$500 child-support	+ \$1000	\$1000
Jan 7	Attachment and bank fee	- \$1000	\$0

The client works part-time, earning \$500 every two weeks, and does not receive any assistance based on need. Client also receives \$500 per month in child support.

# FIFO Example #4(b)

Date	Transaction	Deposit/Withdrawal	Resulting Balance
Jan 1	Deposit of \$500 paycheck and \$500 child-support	+ \$1000	\$1000
Jan 27	Attachment and bank fee	- \$1000	\$0

The client works part-time, earning \$500 every two weeks, and does not receive any assistance based on need. Client also receives \$500 per month in child support.