

When the Creditor Sues, What Are My Rights?



The Legal Aid Society
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This booklet gives general information for low-income consumers and advocates. The booklet is not a substitute for specific legal advice from an attorney about your case. If you have any questions about your legal rights or how to proceed with your case, you should get advice from an attorney.

To learn more about the Legal Aid Society or to find a Legal Aid office serving your area, call (212) 577-3300. There is also a list of resources at the end of the booklet.

Who can sue me?

Any creditor can sue you in Civil or Supreme Court for a debt the creditor claims you owe. A creditor can be a credit card company, a hospital, a bank or any other entity claiming that you did not pay money you owed to a creditor. The party suing you is called the plaintiff. You are the defendant and have the right to defend yourself in court.

I have been sued by a company I never heard of.

Do not ignore the action. The original creditor may have sold your debt to another company such as a collection agency. That company may have the right to bring the action.

I have been served with a summons—what can I do?

If you have been served with a summons and complaint you must answer within the period stated on the summons. If the court papers were handed to you personally by a process server, then you have 20 days to answer. If you got the court papers by any other method, you have 30 days to answer.

If you do not answer within the required time, the creditor will ask the judge for a decision or judgment in your absence. This is called a “default judgment.” If you think the court papers were not served correctly you may object as part of your answer. Do not ignore the papers.

How do I answer?

The answer is your chance to raise any defenses and counterclaims that you may have against the creditor. Defenses may include a “general denial” of the creditor’s claim. You may also raise “affirmative defenses” and “counterclaims,” depending on your particular case.

What affirmative defenses can I raise?

Here are examples. Some or none of these may apply to you. You also may have other defenses:

- You have paid the money but it was not properly credited to your account
- You are current in your payments
- The creditor miscalculated the amount due
- The creditor is trying to collect more than you agreed to pay
- You did not receive the goods or services under a contract
- There are defects in the goods or services you received
- The creditor waited too long to sue you (usually six years)
- The debt has been discharged in bankruptcy
- You were improperly served with the court papers.

Can I raise counterclaims in my answer?

Yes. A counterclaim is a claim you have against the plaintiff. For example, the creditor may owe you money or damages.

What if I do not know the basis for the creditor's claim against me?

Along with your answer, you may serve the plaintiff's attorney with a list of questions seeking an explanation of the creditor's claims. For example, you can ask for a breakdown of the debt claimed, what the charge was for, when it occurred, etc. This list of questions is called a "Bill of Particulars."

How do I file and serve the answer?

This involves several steps:

- Serve a *copy* of the answer on the plaintiff's attorney, either by mailing it or by delivering it to the attorney's office;
- Prepare a statement about how you served the papers. This is called an Affidavit of Service and it must be notarized;
- After you have served the copy of the answer on the plaintiff's attorney, file the *original* together with the "Affidavit of Service" with the court. Make sure to keep a copy of the answer and affidavit of service for your records.

How do I get the legal forms I need to answer?

You may go to a stationary store that carries legal forms (sometimes called "Blumberg" forms because of the company that produces them). Blumberg forms are available for the "Answer," the "Bill of Particulars" and the "Affidavit of Service." You can also get a form to use for your answer from the court clerk's office, or online at www.courts.state.ny.us/courts/nyc/civil/civil.shtml (select "Legal and procedural information").

What happens after I answer?

Both sides in a legal case have the right to get more information from each other before a trial. This is called "discovery." Either side may:

- request documents from the other ("document request"),
- put questions in writing that the other party must answer ("interrogatories"), and
- interview the other in the presence of a court reporter under oath ("deposition").

Going to trial

At trial, the creditor must prove its claim and you will have to prove your defenses and counterclaims. You can do this with your own testimony, or through other witnesses and documents. Documents may include photographs. After each side has presented his or her case, a judge will make a decision.

Can I settle the case with the creditor?

Although both sides have the right to go to trial, the court will often urge the parties to settle. Depending on the strength of the claim and your defenses, you may consider settling. For example, the creditor may agree to settle for a lower amount than claimed, or agree to allow you to pay the amount claimed over time. Be careful if you consider paying over time. Many settlements will say that the full judgment will be due if you miss even one payment. Also consider whether the creditor can enforce a judgment, and whether you are "judgment proof." This is discussed below.

What happens if the court grants the creditor a money judgment against me?

The creditor who sued you and obtained a money judgment against you is now the judgment creditor and you are the judgment debtor. The judgment creditor can enforce the judgment in various ways. The judgment creditor can seize your bank account after serving you with a restraining order, and have the sheriff garnish your salary or seize your property. If you own real estate, a money judgment automatically becomes a lien against the property for 10 years. Ways to enforce judgments and how to protect your rights are discussed below.

I never knew that there was a money judgment against me.

Frequently, a creditor will bring an action many years after you failed to pay the debt claimed by the creditor. You may not have received the court papers because of improper service, including service at an address where you no longer live. If the creditor sues you and you do not appear, the creditor will obtain a “default judgment.”

How do I remove or “vacate” a default judgment?

Once you find out there is a default judgment, go to the court where the judgment was obtained. You can file an “Order to Show Cause” asking the court to vacate the default judgment and put the case back on the calendar so you can explain your side of the story. You have to:

(1) explain why you did not appear (“Excusable Default”); and

(2) say that you have defenses (“meritorious defenses”) to the action.

The court clerk may assist you in filling out the papers which will be submitted to a judge for signing. If the judge signs the Order to Show Cause, the case is restored to the calendar, and you can raise any defenses you may have against the creditor’s claim. The court will give you a date on which to appear, and you will have to serve the papers on the creditor’s law office.

How does the judgment creditor find out what they can try to take from me?

The judgment creditor may investigate what property you have, where your bank account is, and where you are employed. The judgment creditor may serve you or any other party with a subpoena to get information on any matter related to satisfying the judgment. The attorney for the judgment creditor may subpoena you to appear at a deposition to answer questions under oath, provide documents (“Subpoena Duces Tecum”), or require you to answer in writing and under oath written questions (“Information Subpoena”).

Do I have to respond to the judgment creditor's subpoena?

Yes. You must respond to the subpoena and answer questions under oath truthfully. If you fail to comply with a subpoena or provide false answers you may be held in contempt of court. However, if the attorney for the judgment creditor abuses the process, you may apply to the court for a protective order.

How is a money judgment enforced?

Here are some of the ways that an attorney for the judgment creditor can enforce the judgment:

► garnishing your income

This means that money will be taken out of your paycheck to pay back the judgment amount. To do this, the judgment creditor will ask the sheriff to serve you with an "income execution" and a notice stating that the income execution will be served on your employer unless you start paying the judgment amount in installments to the sheriff.

Your income may be garnished at 10% of your gross income or 25% of your disposable income whichever is less. However, your weekly income after taxes cannot be reduced below 30 times the minimum wage. (Currently, the current minimum wage in New York is \$5.15. $30 \times \$5.15 = \154.50).

The "income execution" will also explain that you have the right to challenge the income execution.

► restraining notice

The attorney for the judgment creditor may serve a restraining notice on you or other persons. The purpose of a restraining notice is to prevent you or any person or entity from selling or transferring any property that the creditor may seize in order to satisfy the judgment.

If your bank is served with a restraining order, it will put a freeze on your account for double the amount of the judgment plus fees.

No later than four days after the service of the restraining notice on the bank, you must receive a notice advising you that certain funds are exempt from a judgment:

- Supplementary security income (SSI)
- Social Security benefits
- Public assistance (PA)
- Alimony or child support
- Unemployment benefits
- Disability benefits
- Workers compensation benefits
- Public or private pensions
- Veterans benefits

If you receive a restraining notice do not ignore it. If you believe that the judgment creditor may seize or has already seized any exempt funds immediately contact the judgment creditor's attorney with proof that the funds are exempt.

► seizure of personal property

A judgment creditor may also get a sheriff to seize personal property from you that is not exempt. Exempt property generally includes household goods, one television, radio and personal items like your wedding ring or a watch. If you can show that a computer or a car are indispensable to your work, they may be exempt as “tools of the trade.”

► lien on your home

The filing or docketing of a judgment with the clerk in the county where the real property is located automatically places a lien on your home for 10 years. If you refinance or sell your home you must satisfy the lien by paying off the debt.

Resources

For more information about consumer and credit issues, or to file a complaint contact:

The Federal Trade Commission (FTC)
1-877-FTC-HELP (1-877-382-4357)
<http://www.ftc.gov/ftc/consumer.htm>

New York State Attorney General's Office
1-800-771-7755 (info & complaint line)
www.oag.state.ny.us

“Guide to Surviving Debt,” (2002 edition), published by
The National Consumer Law Center (NCLC), cost \$19.00.
To order contact:

NCLC, Publication Dept.
77 Summer Street, 10th Floor
Boston, MA 02110-1006
(or call 1-617-542-9595)

To find a lawyer, contact:

The Legal Aid Society
Queens Neighborhood Office
1-718-286-2450 or 1-212-577-3300
www.legal-aid.org

Legal Services for the Elderly in Queens
1-718-286-1500

The Association of the Bar of the City of New York
1-212-626-7373 (English) or 1-212-626-7374 (Spanish)
www.abcnyc.org (click on “Consumer Resources”)

The National Association of Consumer Advocates (NACA)
maintains a list of attorneys specializing in consumer law:

NACA
1730 Rhode Island, NW, Suite 805
Washington D.C. 20036.
<http://www.naca.net>

Lawhelp.org/ny can help you find a lawyer and learn more about
your rights in New York State.

If you do not have a lawyer and are representing yourself, visit the
New York State courts online for information and forms used
when representing yourself:

www.courts.state.ny.us/courts/nyc/civil/civil.shtml