

2022 EDITION

# Debt Collection for Virginia Lawyers: A Systematic Approach

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## Debt Collection for Virginia Lawyers: A Systematic Approach

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## SUMMARY OF 2006 CHANGES

### OVERVIEW

The year 2006 was very quiet legislatively. This is due in large part to the retirement from the House of Delegates of Representative Gary Reese. Mr. Reese has been the sponsor of much of the recent legislation that has greatly benefited creditors and landlords. Legislation enacted in 2006 tended to benefit plaintiffs, but its effect was marginal.

Four statutes pertained to actual litigation:

Plaintiffs are no longer required to post bond when removing a case to the circuit court;

Plaintiffs have an absolute right of nonsuit in cases where the defendant has not been properly served;

In unlawful detainer actions, a landlord entitled to bad check damages may recover those damages in the unlawful detainer action without having to file a separate suit on the check itself; and

The jurisdictional limits of small claims court has been increased substantially, benefiting pro se litigants.

In response to two cases favoring defendants, the General Assembly enacted rules making it more difficult for a debtor to discharge a contested claim by sending a check marked “paid in full.”

A lien was created for companies that tow and store vehicles for municipalities or other third parties.

The only legislation that benefited defendants imposed limitations on the use and duration of written agreements not to claim the statute of limitations.

Three “housekeeping” bills were enacted that

1. Added a check-off box to Form DC-450 (Suggestion for Summons in Garnishment) that alerts the co-defendant

when the plaintiff is seeking to garnishee anything other than wages;

2. Raised court costs in all actions in general district courts and circuit courts in order to finance the technology fund of the Supreme Court of Virginia; and
3. Limited the rule requiring pro se parties to inform the court and other parties of an address change to parties that actually make an appearance in the case.

Court decisions in 2006 revealed no clear trend in favor of either party. Creditors benefited from a bankruptcy court decision, and both sides benefited from several Virginia Supreme Court decisions, including an unusual case in which the court had to resolve two federal bankruptcy issues.

Nonsuits were the topic of the year, with at least four cases bearing on the issue.

The United States Bankruptcy Court ruled that there is no statute of limitations on repayment of government-guaranteed student loans.

The Supreme Court of Virginia (i) discussed the defendant's burden in seeking to vacate a default judgment based on an allegation of fraud upon the court; (ii) distinguished a new case on its facts from *Grimes v. Suzukawa*, 262 Va. 330, 551 S.E.2d 644 (2001) (a masked assailant was not wearing the mask in order to hinder the plaintiff's attempt to file suit), in a manner which virtually overrules the original case; (iii) ruled that filing an answer in circuit court is a general appearance that waives any defects in service of process pursuant to the one-year rule; (iv) upheld the plaintiff's right of nonsuit even after a motion has been filed pursuant to the one-year rule; (v) held that a case that is before the court on a dispositive motion or on the merits, once "submitted," may not be nonsuited; (vi) allowed a nonsuit—actually, a second nonsuit—without notice to unserved parties; (viii) ruled that filing a Chapter 11 bankruptcy does not toll the statute of limitations as to sureties and that the assumption of a lease in bankruptcy does not act as a written waiver of the statute of limitations; (ix) ruled that in cases filed under the Condominium Act, the prevailing party may recover "reasonable" attorney fees; and (x) extended the rule concerning *de novo* trials in the circuit court.

Defendants also benefited from several Virginia Supreme Court rulings. The court (i) made it clear that a nonsuit does not stop the defendant from

## **CHAPTER 5**

### **GATHERING INFORMATION**

#### **5.1 INTRODUCTION**

The success of any collection practice depends largely upon the practitioner's information-gathering system. This chapter discusses direct and indirect methods of gathering information at every stage of handling a claim. The simple key to success is to look, listen, and explore.

Because of the increased accessibility of information about persons and property by means of the internet, the skip tracing of debtors and asset location has increasingly become a function of a collection attorney's case management rather than the discrete task of skiptracers and independent investigators. Information gathering begins as soon as a claim comes into an attorney's office and continues until the file is closed. Many debtors are collection problems for more than one creditor, and the attorney may find that other attorneys in his or her office or firm are pursuing claims against the same debtor. In these circumstances, while it may be advantageous to use the information contained in each file against the debtor, the consent of all clients must be obtained if the attorney is collecting against the same debtor for multiple clients.

#### **5.2 CLIENT'S RECORDS**

The client should give the attorney all the information that he or she has when the file is turned over to the attorney's office. In fact, when a client's claims are handled over a period of time, the client should be educated about what information to obtain from the debtor, including checking account information, if possible. Nevertheless, debtors move, change jobs, and change banks, and even the best client's records must be updated regularly.

#### **5.3 OFFICE LOCATION**

When choosing an office site, an attorney engaged in an active collection practice should choose a location that is (i) easily accessible to debtors; (ii) served by public transportation if possible; and (iii) centrally located. Many debtors pay accounts in person. If it is easy for them to come to the attorney's office to make the payments, the attorney will see them more often. In an urban

practice, an attorney will find that many debtors need to come by bus, and therefore, it should be convenient for them to do so. Debtors should be encouraged to come into the attorney's office, since much information can be obtained from them by the attorney or his or her staff face-to-face that could not otherwise be obtained. Additionally, some debtors may become friendly with the attorney or the office staff and, after an account has been paid, may become clients of the attorney. The office staff should be taught and constantly reminded that every debtor, paying or not, is entitled to the same courteous treatment that the attorney's clients receive.

An active collection practitioner will find it advantageous to choose an office location from which the staff can observe the debtors come and go. Often, a debtor will arrive in a company truck or will be wearing a company uniform, thus revealing his or her place of employment. Further, if the debtor's license plate can be seen, it can be used to obtain a great deal of information about the debtor from the Department of Motor Vehicles.<sup>1</sup> All of this information should be noted in the debtor's file.

#### 5.4 CONTACT WITH DEBTOR BEFORE SUIT IS FILED

**5.401 Written Correspondence.** It is important when mailing letters to debtors to use envelopes that have the notation below the return address, "Address Correction and Forwarding Requested." If the envelope reaches a debtor at an address other than that to which it was sent, the post office will, for a nominal charge, automatically provide to the sender the address to which the letter was actually delivered. Alternatively, if "Return Receipt Requested" is printed on the envelope, the post office will, at no charge, return the original letter to the attorney's office with a sticker showing the new address.

If the letter is returned marked "Moved—Left No Forwarding Address"<sup>2</sup> or "Unknown at This Address," the attorney knows that a dead end has been reached and will have to find additional information independently or from the client, or the file should be closed. Chapter 7 of this book covers filing suit against debtors who have absconded (commonly referred to as "skips" in debt collection practice). Where permitted by the Fair Debt Collection Practices Act

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<sup>1</sup> See *infra* ¶ 5.701.

<sup>2</sup> See ¶ 2.404 of this book.

(FDCPA),<sup>3</sup> the long-arm statute<sup>4</sup> can be used to serve a debtor who has absconded. However, the process is expensive, and most of these cases, when the claims are small, can be considered uncollectible accounts.

If the debtor responds to the attorney's letter by mail, the return address on the debtor's envelope or the address on the debtor's check should always be compared with the information the attorney currently has, even if the debtor's response is simply a check paying the account in full. This information may be needed again on another file. Additionally, the debtor may sometimes send a letter or a payment in his or her employer's envelope. Employer information should be marked on the file for future reference.

The debtor's letters should be read carefully. Often, the debtor may inadvertently mention where he or she works or banks. Again, all of this information should be marked and either written on the file or placed in a conspicuous place in the file.

One source of information on the debtor's envelopes, even if there is no return address, can be a metered postage stamp. A debtor who uses an employer's postage meter can be traced and become the subject of a garnishment action. Any computer system should be programmed to easily store and display employment or banking information that is gathered from these sources.

**5.402 Telephone Contact.** If a debtor calls in response to an attorney's demand letter or calls at any time during the proceeding, the attorney or staff member answering the telephone should always, after giving the FDCPA warnings, ask the debtor for certain information, such as the debtor's current address and current employment. If possible, the debtor's Social Security number should be obtained, as this may be needed later to verify employment, to verify a bank account for garnishment, or to obtain motor vehicle information. If the debtor is reluctant to give employment information directly, the debtor should be asked for his or her work telephone number so that he or she can be called if necessary. Typically, the debtor should be asked questions such as "Are you still living at 1714 Boulevard?" or "How can we reach you during the day if we have to speak with you?" If the debtor will not cooperate, neither should the attorney. Any agreement to withhold suit or to nonsuit a case should be conditioned upon the debtor's cooperation in supplying the requested information. The collection attorney's phone system, equipped with caller I.D., may also provide potential contact numbers for the debtor.

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<sup>3</sup> 15 U.S.C. § 1692 *et seq.* See Chapter 4 of this book for a detailed discussion of the FDCPA.

<sup>4</sup> Va. Code § 8.01-329.

## 5.5 CONTACT WITH DEBTOR AFTER SUIT IS FILED

After receiving a civil warrant or motion for judgment, a debtor will often call to make arrangements to pay the account, come in to do so, or appear in court and admit the bill and attempt to make arrangements to pay it. At this point, the debtor has been sued and is on the defensive. He or she would not have called or come to court unless anxious to avoid a judgment.

The mere fact that the debtor has been served with process means that the address the attorney had on file was valid. If process was not served but the debtor received the mail copy of the pleading, the attorney should receive an address correction notice from the post office showing where it was received. If the debtor was not properly served but the lawsuit nevertheless reached the debtor in the time prescribed by law, section 8.01-288 of the Virginia Code may cure the defective service.

Once the debtor has been sued, the attorney must not lose the offensive position. If the debtor calls to make arrangements for payment, the attorney should insist on being given the debtor's banking information, Social Security number, and employment information. The attorney should inform the debtor that the attorney must be advised of changes in address or employment or the attorney will proceed to take judgment against the debtor. The attorney can also condition forbearance from obtaining judgment against the debtor or allowing the debtor time to make payments on the debtor providing the desired information. Under these circumstances, most debtors will provide the information. If the attorney agrees to dismiss the case, he or she should do so only if the debtor signs an agreement acknowledging an obligation to pay and waiving the defense of the statute of limitations.<sup>5</sup>

## 5.6 INFORMATION FROM BANKS

**5.601 Debtor's Check.** One of the most fertile sources of information is a debtor's check. If a debtor sends a check to the attorney's office, the check should be photocopied and the photocopy retained in the file. This will assure that the office knows where the debtor banks. If a debtor has a checking account at a bank, he or she often will have a savings account there as well. Possibly, the debtor has financed a vehicle through the bank, and the bank will have a file on the debtor, even if the checking account or savings account has been closed. If the debtor brings an employer's check, the attorney can learn

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<sup>5</sup> See paragraph 2.503 of this book for a full discussion of this procedure. See Appendix 2-1 for a form that complies with the statutory requirements for such an agreement.

where he or she works. At a minimum, the check should be copied and the copy stapled conspicuously to the file, or the bank and checking account number should be copied and written on the front of the file for further use. Additionally, checks may contain information that the attorney has been unable to obtain elsewhere, such as the debtor's Social Security number, middle or maiden name, or middle initial.

**5.602 Direct Inquiries.** If a debtor has absconded, often a letter to his or her bank or former bank will produce valuable information about the debtor's location. On a consumer debt, the FDCPA dictates how the practitioner may contact third parties (such as banks and employers) to obtain location information or to effectuate post-judgment remedies.<sup>6</sup> Location and contact information on a consumer debtor must not be requested in a manner that identifies the individual as a debtor,<sup>7</sup> unless judgment has been obtained against the person. If the debtor is making payments on a motor vehicle financed by a bank, the bank will have his or her new address and will often give it to the attorney upon written request. This is particularly true if the attorney has levied on the vehicle or is planning to do so and advises the bank that its interest will be protected at the sale.<sup>8</sup>

**5.603 Locating a Business's Bank.** In commercial collection situations, a trip to the debtor's business will often help the attorney locate the debtor's bank. If the business honors credit cards, there will be a sign stating this on the building. Credit card proceeds can be the subject of a garnishment. Additionally, it is often possible to send an employee to the debtor's place of business to purchase a small item with a personal check. (The employee can be reimbursed for the purchase later.) When the check clears, the bank in which it was deposited will be shown on the reverse side. The bank account can thereafter be garnisheed.

Garnishments are not inexpensive. If the attorney knows where a debtor banks, it is not absolutely necessary to verify the fact that the account is still open or that there is still money in the account. However, that information can sometimes be obtained by calling the bank, giving the bank the checking account number, and asking if a check for a certain amount of money would clear the bank. Usually, if there is enough money in the bank for a \$300 check to clear, a garnishment will net the client enough money, after costs and fees, to make it worth the effort and expense. Some banks will give more

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<sup>6</sup> 15 U.S.C. §§ 1692b, 1692c(b). See paragraph 4.401(G) of this book.

<sup>7</sup> 15 U.S.C. § 1692b(2).

<sup>8</sup> See Appendix 5-1 (sample letter to bank requesting the payoff amount on motor vehicle lien).

information than others and will advise whether any account is open, if it is active, and even the amount of money in the account. Many banks now verify checking account information electronically. Some banks charge for this service.

The Department of Motor Vehicles (DMV) reports discussed in paragraph 5.701 of this chapter will list lienholders, if any, on any vehicles that the debtor owns. If a lienholder is a bank, it is likely that the debtor also maintains a checking or savings account at that bank, and a blind garnishment of these accounts is often effective. A blind garnishment means that the attorney can proceed without verifying that the account exists or that there are funds in it. The lien information given by the DMV will not usually give the actual account number, making it difficult to determine if there is, in fact, a checking account. For this reason, a blind garnishment may be necessary.

## **5.7 INFORMATION FROM THE DEPARTMENT OF MOTOR VEHICLES**

**5.701 In Virginia.** A creditor or the creditor's attorney, by completing a simple form<sup>9</sup> and sending the appropriate fee, can obtain information concerning the debtor from the DMV, subject to the limitations of section 46.2-208 of the Virginia Code.

This information may (i) enable the attorney to find a debtor who has absconded if the debtor owns a vehicle; (ii) enable the attorney to find the bank or even an employer or credit union that holds a lien on the vehicle; (iii) enable the attorney to find an asset of the debtor to levy on, if judgment has been obtained;<sup>10</sup> and (iv) guide the attorney to various other sources of information.

Even when a debtor changes his or her name, if the driver's license number remains the same, the debtor may be traceable through DMV records. In fact, the name change information given by the DMV can later be used in court as evidence that the debtor is one and the same person.

**5.702 In Other States.** Finally, if the debtor has left Virginia and the client or attorney has a reasonable idea where the debtor has gone but no address, the debtor can be followed from state to state by checking with the

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<sup>9</sup> See Appendix 5-2 (DMV request for vehicle information).

<sup>10</sup> Section 34-26 of the Virginia Code exempts a total of \$6,000 of equity in the vehicles of a householder and, in some circumstances, the entire value may be exempted as a "tool of the trade." See Appendix 5-1 (sample letter to bank requesting the payoff amount on motor vehicle lien).