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## Section Review

### Revisiting Debtors' Hell: More Work Needed to Protect Consumer Defendants

By Robert J. Hobbs and José I. Vazquez

"The 'people's court' has become the collector's court," *The Boston Globe* concluded in its 2006 award-winning series entitled "Debtors' Hell."<sup>1</sup> The series uncovered the surprising - if not shocking - practices of some debt collectors in Massachusetts, as well as the vulnerability of the hundred thousand overwhelmed, unrepresented consumers sued each year in unfriendly small claims and district courts.<sup>2</sup>

The *Globe* found that there was virtually no representation of consumer defendants in the commonwealth's small claims courts. With small amounts of debt being litigated, it made no economic sense for consumer defendants to hire private attorneys to represent them in court. Most legal aid organizations could not afford to give priority to small claims cases when they could barely provide urgent representation in evictions, domestic abuse cases and other emergencies.

Lack of representation allowed debt collector lawyers to obtain quick default or agreed judgments and payment orders, often without any evidence of the original debt or of a valid assignment. Default judgments were sometimes entered against defendants who were not properly served notice of the underlying suits. Rather, the court often assumed that defendants were notified unless notices were returned undelivered to the court by the U.S. Postal Service.<sup>3</sup> Nevertheless, most defendants were convinced to settle debts that collectors could not legally prove were owed or could not even identify by account number.

Nearly four years after the *Globe's* report, many of these problems persist and are exacerbated by an economic recession that has forced thousands of Massachusetts families to fall behind on payments and leaving them unable to catch up because of exorbitant interest rates and late fees. Debt collection suits continue to swamp civil court dockets, and debt buying - the process in which companies purchase uncollected debt portfolios from creditors for a small fraction of their face value - has become a busy, lucrative industry.<sup>4</sup> Though the commonwealth's courts and legal service organizations are working to create a fairer playing field for debtors and collectors, it will be the efforts of pro bono lawyers that are likely to make the difference.

#### Courts work to create a level playing field

In response to the explosive growth of debt collection suits in the commonwealth's small claims courts, the Supreme Judicial Court amended the Uniform Small Claims Rules, based on recommendations from the District Court's Small Claims Working Group.

The amended rules, which went into effect on Oct. 1, 2009, include the addition of mandatory address verification requirements, under which a plaintiff must certify that he or she has verified the defendant's mailing address.<sup>5</sup> If followed, this rule increases the likelihood that debtors will receive notice of any claim against them. Debt collectors not complying with this rule will have their cases dismissed without prejudice. The amended rules also expressly allow debtors to move the court to vacate a judgment if they did not receive actual service, reflecting the due process requirements in Mass. R. Civ. P. 60(b)(4).<sup>6</sup>

The amendments include two other significant changes. First, the amended rules now require substitute or "covering" attorneys to file an appearance for each case they answer.<sup>7</sup> These attorneys, whose law firms had informal agreements authorizing them to answer cases on behalf of collection attorneys from other offices, historically did not file formal notices of appearances with the small claims courts. This amendment allows substitute counsel to file a time-limited appearance, enabling the court to maintain accurate records for all attorneys appearing before it.<sup>8</sup> Second, the amended rules make it inappropriate for the court to endorse any voluntary payment agreement relying on exempt sources of income.<sup>9</sup> While certain property is already exempted from execution on judgment, this amended rule reaffirms that standard and informs legally unsophisticated parties that protections are available to them under state law.

Additionally, several organizations have collaborated to curb debt collector abuses. In 2007, the National Consumer Law Center and WilmerHale Legal Services Center of Harvard Law School developed the Debt Collection Justice Project to expand access to representation for low-income debtors. The project allowed law students certified under Rule 3:03 to represent debtors in small claims disputes at the Dorchester District Court. The students' involvement led to surprising results. Of the cases chosen for representation, every one was dismissed with prejudice prior to trial due to the debt collector's lack of evidence.

With this success, the Debt Collection Justice Project recently expanded its efforts to other courts. This year, in collaboration with the Volunteer Lawyers Project, Senior Partners for Justice and the Boston Bar Association, the Debt Collection Justice Project has worked to establish a Lawyer for the Day program as well as limited assistance representation programs for debtors at the Central Division of the Boston Municipal Court.

Attorneys interested in participating in these programs can contact Emily Jarrell of the Volunteer Lawyers Project at (617) 423-0648 or via e-mail at [\[e-mail ejarrell\]](mailto:ejarrell).

### **Modernizing the commonwealth's property exemptions**

In addition to recommending changes in the Uniform Small Claims Rules, the District Court's Small Claims Working Group emphasized the commonwealth's need to review its list of property exempted from seizure by creditors. These state law exemptions, which were last revised in 1975, are woefully antiquated and have not accounted for inflation or changes in technology. Moreover, they depart dramatically from federal law exemptions, which are available to Massachusetts consumers only if they can afford to file for bankruptcy.

Originally enacted in 1698, the exemptions permitted under state law provide varying levels of protections for personal property. Government aid and retirement plans are protected entirely.<sup>10</sup> On the other hand, certain personal property is protected up to specified, often inadequate values.<sup>11</sup> Most notably, state law allows consumers to protect up to \$700 for an "automobile necessary for personal transportation or to secure or maintain employment."<sup>12</sup> While \$700 may have represented a reasonable price for a used car in 1975, roadworthy used cars in 2010 cost considerably more. Other outdated state exemptions include protections for rent (up to \$200 per month), for weekly wages (up to \$125), and for two cows, 12 sheep, two swine and four tons of hay.<sup>13</sup> The state exemptions currently provide no protections for household computers so critical to job searchers.

In contrast, federal bankruptcy law affords stronger protections, and the exemptions are readjusted every three years to account for inflation.<sup>14</sup> Under federal law, debtors are allowed to protect up to \$3,450 of the *equity* in a car, not of its total value.<sup>15</sup> Hence, if the debtor has a car worth \$8,000 with a \$5,000 car loan balance, the debtor has \$3,000 in equity and can fully protect the car through the exemption. In addition, the federal exemptions also allow for exemptions of certain property not exempted under state law, such as jewelry.

In the debt collection context, the purpose underlying the federal and state law exemptions is to protect debtors' property to the extent that continued possession of the property would allow them to regain financial stability. The exemptions are not designed to shield debtors from paying their obligations. For debtors who must drive to work because public transportation is not available, the low value for the automobile exemption is not effective if it means the debtor must surrender the automobile and thus be unable to earn a living. As uncollected judgments against debtors skyrocket, the need to bring state exemption limits in line with current property values becomes more apparent. Therefore, the Legislature should act swiftly to make these common sense revisions to the values of property exemptions, thereby assisting families to rebound from overwhelming debts during a period of widespread unemployment.

### **Conclusion**

Rebalancing the rights of debtors and creditors is critically needed to assure that more Massachusetts families are able to participate in and strengthen the economic growth that has been so elusive for the last two years.

## Notes

1. The four-part *Debtors' Hell* series is available online. See Special Reports, *Debtor's Hell*, The Boston Globe, [www.boston.com/news/specials/debt/](http://www.boston.com/news/specials/debt/).
2. *The Boston Globe* estimated that 575,000 suits were filed from 2000 to 2005 by professional collectors in Massachusetts district courts. Michael Resendez & Francie Latour, *No Mercy for Consumers*, The Boston Globe, available at [www.boston.com/news/special/spotlight\\_debt/part1/page2.html](http://www.boston.com/news/special/spotlight_debt/part1/page2.html).
3. To emphasize this flawed system, *The Boston Globe* conducted a simple experiment, in which it sent 100 letters to the same person at incorrect addresses across the state. Of letters sent, only 52 were returned. Beth Healey, *Debtors' Hell Part 2: A Court System Compromised*, The Boston Globe, available at [www.boston.com/news/special/spotlight\\_debt/part2/page4.html](http://www.boston.com/news/special/spotlight_debt/part2/page4.html).
4. In 2005 alone, debt buyers purchased over \$66 billion in delinquent credit card accounts, paying pennies on the dollar for the right to collect from consumers and creating high profit margins.
5. Massachusetts Uniform Small Claims Rule 2(b) available at [www.lawlib.state.ma.us/source/mass/rules/tc/small2.html](http://www.lawlib.state.ma.us/source/mass/rules/tc/small2.html).
6. Massachusetts Uniform Small Claims Rule 8 available at [www.lawlib.state.ma.us/source/mass/rules/tc/small8.html](http://www.lawlib.state.ma.us/source/mass/rules/tc/small8.html).
7. Massachusetts Uniform Small Claims Rule 7(e) available at [www.lawlib.state.ma.us/source/mass/rules/tc/small7.html](http://www.lawlib.state.ma.us/source/mass/rules/tc/small7.html).
8. Commentary to 2009 Amendments, Massachusetts Uniform Small Claims Rule 7(e) available at [www.lawlib.state.ma.us/source/mass/rules/tc/small7.html](http://www.lawlib.state.ma.us/source/mass/rules/tc/small7.html).
9. Massachusetts Uniform Small Claims Rule 7(a) available at [www.lawlib.state.ma.us/source/mass/rules/tc/small7.html](http://www.lawlib.state.ma.us/source/mass/rules/tc/small7.html).
10. The following is a listing of statutes providing protected government benefits and retirement plans: Mass. Gen. Laws c. 152, § 47 (2006) (Worker's Compensation); Mass. Gen. Laws c. 115, § 5 (2006) (Veteran's Benefits); Mass. Gen. Laws c. 118, § 10 (2006) (Aid to Families with Dependent Children); Mass. Gen. Laws c. 151A, § 36 (2006) (Unemployment Insurance); Mass. Gen. Laws c. 235, § 34 (15) (2006) (General Public Assistance); Mass. Gen. Laws c. 246, § 28 (2006) (Pension or Retirement Plans); Mass. Gen. Laws c. 235, § 34A (2006) (IRA Plans).
11. Common items protected under Mass. Gen. Laws c. 235, § 34 include: monthly amount needed for fuel, heat, water, hot water and light, not to exceed \$75; provisions and money necessary for use by the family, not to exceed \$300; homes or amount of money each rental period necessary to pay the rent for the dwelling unit, not to exceed \$200 per month; cash, savings or other deposits in a banking institution or money owed to the debtor each pay period as wages, not to exceed \$125; car necessary for personal transportation or to secure and maintain employment, not to exceed \$700; necessary household furniture, not to exceed \$3,000; tools, implements and fixtures necessary for carrying on his trade or business, not to exceed \$500; and materials and stock designed and procured necessary for carrying on trade or business, not to exceed \$500.
12. Mass. Gen. Laws c. 235, § 34 (16) (2006).
13. Mass. Gen. Laws c. 235, § 34.
14. 11 U.S.C. § 104(b) (2006).
15. For a list of federal exemptions, see 11 U.S.C. § 522(d) (2006).

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