Debt Collection in North Carolina
Understanding your legal rights and options

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Debt Collection in North Carolina

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When you wait for months or years to seek legal advice after your financial position takes a turn for the worse, your choices and flexibility for dealing with your problems are limited.

Let’s be clear at the start of this guide that although the North Carolina State Bar has certified me as a bankruptcy specialist, my goal is not to lead you to that action; not every person in financial difficulty needs to file for bankruptcy protection. However, if you wait too long, bankruptcy might be the only viable choice available to you.

I wrote this guide to help North Carolina debtors understand their legal rights, and to know what possible solutions they can employ to get back on their financial feet again—with or without filing for bankruptcy protection. If you live in another state, different laws will apply to your case.

We’ll start at the beginning, when you miss payments and creditors begin to take action.
Overview of how debts are collected in North Carolina

Creditors collect debts in two general ways:

1. **Extra-judicial procedures** include mailing demand for payment, emails, telephone calls and even personal collection visits.

   None of these debt collection methods can force a debtor to pay. Payment is voluntary. Although, when debt collection calls come day after day, it can feel like making a payment is anything but voluntary (see below).

2. **Judicial procedures** mean that the creditor will invoke the statutory provisions of the State of North Carolina for enforcing collection of an obligation. This form of debt collection is coercive.

   In other words, the creditor can use the law to grab the debtor’s property.

Dealing with creditors using extra-judicial procedures

For most people, missing a credit card payment or not being able to pay the entire balance due is the first step on a slippery slope to further financial difficulties.

It doesn’t take long before creditors and collection agencies begin calling you using so-called “robo-dialing” technologies that automate calling debtors at work, home and on their cell phones day after day.

These calls can jeopardize not only your peace of mind, but also your job. The best advice is to not talk to them, unless you have a proposal for repaying the debt in full.

If you have a smart phone, you can set it to “reject” the call, but of course this won’t make your debts go away. We will address this later.

You can send a cease and desist letter

When creditors call the workplace, debtors need to know that they have a right to mail a letter to their creditors, instructing them not to make contact by telephone. This is known as a cease and desist letter.

You have the right to tell creditors that they are interrupting your work. You can send a letter advising them not to contact you at work and that they are “endangering your employment,” which puts them on notice.

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Please note: While creditors are prohibited by the Fair Debt Collection Protections Act from doing things like ignoring a cease and desist letter, many of them will do so anyway.

Federal protection from creditors who call at work

If creditors continue to call after you have put them on notice not to do so, you can file an action under Fair
Debt Collection Practices Act. The Federal Trade Commission has an excellent page advising of this right, and how to exercise it, step-by-step; it also answers many other frequently asked questions about the federal Fair Debt Collection Practices Act.

Yes, you can find templates for cease and desist letters online. Use such templates at your discretion—this is not legal advice.

While a cease and desist letter won’t make the debts go away or stop collections activities from escalating through the court system, it might make it easier to go to work every day knowing that you won’t be called to the phone to speak to a creditor making demands for payment.

Eventually, if you do not repay your debts, you will begin dealing with creditors using judicial procedures.

Debt consolidation and repayment proposals

In my bankruptcy practice I have dealings with many people who, in response to financial difficulties, have sought help from companies that purport to help settle, consolidate or otherwise manage the debt. By and large, most of these people have learned of these companies from advertising.

While there are few legitimate firms that provide these services, most simply draft the debtor’s funds from their bank account for payment to creditors and payment of their fees.

There are no value-added services provided by these companies, and many of them are actually owned and operated by credit card companies. Why do I end up meeting with these debtors? The answer is that these debt settlement plans hardly ever work and the debtors eventually in up in bankruptcy.

Should a debtor choose to attempt debt settlements with creditors, my advice to the debtors is that they negotiate repayment plans directly with their creditors. This has two major advantages.

First it avoids being misled as to what a debt settlement company can actually accomplish. In addition, it gives the debtors some certainty early on as to whether debt settlement is attainable.

If you feel you need an emotional buffer between yourself and your creditors, consult an agency that is non-profit, and in good standing with the Better Business Bureau, and a member of the National Foundation for Credit Counseling. I suggest Consumer Credit Counseling Services, which meets each of
People want to do the “right thing” by paying their debts to the best of their abilities, but creditors have no incentive to tell them that making partial payments can have a worse effect on a credit score than a bankruptcy.

Dealing with creditors using judicial procedures

The creditor begins using judicial procedures by filing a law suit against the debtor. A law suit must allege the debt and how the debt came into existence. It is filed in the court along with a summons.

The summons is issued by the clerk of court and becomes a legal order for the debtor to respond to the matters raised in the complaint when the summons is served on the debtor.

Once the summons and complaint are filed, the creditor is known as the plaintiff and the debtor is known as the defendant. What follows below is the judicial process between plaintiff and defendant.

Serving the complaint

The basic idea behind service of the complaint is that the defendant is put on notice of the suit and given an opportunity to defend the suit. Unfortunately, because service can be done in a number of ways it is possible that the defendant may not know of the suit until a judgment is entered; yet, the law will regard the service as good.

The traditional way of serving a complaint is by hand delivery to the defendant by the sheriff or a deputy. We have all heard of “ducking service.” The defendant is simply never around when the sheriff shows up. “Ducking service” is why the rules on service have been relaxed. In some instances, persons not employed by the sheriff may be authorized to effect personal service.

Service may be accomplished by actual delivery to the defendant at the defendant’s residence by a person and leaving the summons and complaint with a person of suitable age and discretion who resides there. If left with a six year old, the service would not be good; however, if left with an absent minded spouse at at the defendant’s residence—look out.

In addition, registered or certified mail can be used for service. The letter must be sent return receipt requested and signed for by the defendant.

Finally, a summons and complaint may be served by courier service provided that the defendant actually receives the documents and a delivery receipt is obtained.

Answering the complaint

Once service is accomplished, the plaintiff will file the document evidencing the service with the court. At that point, the defendant has thirty days to answer in North Carolina. The time periods vary in other jurisdictions.

The time period may be extended for another thirty days as a matter of right by motion to the clerk of court. The time can be further extended by the court for good cause. This takes a motion that is heard by the court, and the defendant better have real good cause.

At the expiration of the time for answer and any extension, the defendant must answer the law suit or face a default. When a defendant defaults, the suit is deemed closed in favor of the plaintiff. At this point, a judgment is entered against the defendant and the law can be used to take the defendant’s property to settle the judgment (see below).

If the defendant does not answer the suit

First, let’s deal with the situation in which the defendant does not answer the suit. In this event, the plaintiff can move for entry of default and a default judgment.

In the case of an entry of default, the clerk of court will do the entry upon motion of the plaintiff that shows that no answer
has been filed. The entry of default deems that all of the things that the plaintiff has complained of are true, and that the plaintiff is entitled to a judgment.

That can raise one of two scenarios:

The first one involves a suit on a sum certain. A sum certain is a suit in which the damages are clear. For instance, the plaintiff is obligated for a credit card debt.

Thus, the amount of the debt is the total of the charges plus accrued interest. In this case, the plaintiff can move the clerk of court to enter a default judgment.

The second scenario deals with the situation in which the damages claimed are not a sum certain. For instance a negligence claim based on an auto accident. For example, the defendant crossed the center line of a highway and struck the plaintiff’s car. The defendant is clearly liable. The clerk can enter a default; however, the clerk cannot enter a default judgment as the amount of the damages is not known.

For sums not certain, a court proceeding called a default and inquiry must be held. In this proceeding evidence of damages is presented in order for the court to determine the damages. From this determination, an entry of default judgment is made.

Motions that can be filed with or prior to answer

Before we get to an answer, I will briefly discuss some of the motions that can be filed with or prior to answer. Generally, these motions are designed to short circuit an improperly filed suit.

Among other motions, there are:

- A motion to dismiss for failure to state a legal cause of action upon which a suit can go forward
- A motion to dismiss for lack of jurisdiction
- A motion for a more definite statement, which requires the plaintiff to clearly set out the facts that are the basis for the suit.

These motions are ruled on by the court and an answer does not need to be filed until the court rules on these motions.

Now is the time to discuss the answer. It is nothing more than a response to the plaintiff’s complaint. It must address each allegation. Failure to address a point raised by the plaintiff is deemed to be an admission of that point.

The answer may contain a counterclaim. A counter claim is simply a legal claim that the defendant has against the plaintiff.

As an example, let’s suppose the suit is by a contractor on a contract to build a home. The contractor sues alleging that the defendant has not paid the contract amount. The answer denies that any money is due because of faulty construction work.

The defendant files a counter claim alleging that the contractor backed his truck into the defendant’s auto causing damage for which the defendant seeks to recover.

Pleadings are the answer and counter-claims

The complaint, answer and counter-claims are known as the pleadings. When the pleadings have been filed, a period of time in which discovery can be conducted begins.

Discovery

The idea behind discovery is that both sides in a law suit should have the ability to have all the information available from the opposite side before going to trial. The concept is that there should be no opportunity for “trial by ambush.”

Discovery can take the form of interrogatories, which are written questions to be answered under oath; depositions, questions answered in person before a court reporter; requests for admission, written requests to admit facts alleged by the other side of the suit, and requests for production of documents among others.

Note that discovery is not required. A party may elect to not do any discovery.

Motion for summary judgment

Once the discovery period has run, the suit is ready for trial or for a motion for summary judgment. Once again, summary judgment is short cut method to end a law suit that does not have a sound legal foundation. It is a request to the court to enter judgment either for the plaintiff or defendant because the law is
Clear and the facts are clear.

If there is a question of fact, summary judgment cannot be granted.

**Trial**

Assuming that summary judgment is not granted, it is time for the trial. How the trial is conducted is beyond the scope of this post. However, at the end of the trial a judgment will be rendered.

The judgment may be a money judgment, although it could be something other; for instance, a permanent injunction. If it is a money judgment, the process of enforcing the judgment begins, we are at the same point as we would have been had the judgment been a default judgment that is discussed above.

**What to do when a creditor has obtained a judgment against you**

The judgment constitutes a lien on your real estate (land and buildings) in the North Carolina county in which the judgment was obtained and in any North Carolina county into which it has been transcribed.

The judgment creditor can have the sheriff seize personal property—anything other than land or buildings, including your automobiles and recreational vehicles.

Upon seizure, the creditor will have a lien on the personal property.

The question I’m often asked when liens are placed and property is seized is, “Can I do anything about this?”

Of course, it depends.

**Your creditors must go through the correct procedures to seize your property**

In order for real property to be sold to satisfy the judgment, or for personal property to be seized and sold to satisfy the judgment, the creditor must have an execution issued by the clerk of court authorizing the sheriff to take these actions.

For an individual, before an execution can be issued, the creditor must give the debtor the right to claim exempt property. In order to afford this opportunity, the creditor must serve the debtor with a motion to claim exempt property.

Please note that this does not apply to entities created bylaw such as corporations, limited liability companies, partnerships and the like. The debtor individual must be given an opportunity to claim exempt property.
How to claim your property is exempt from liens and seizures

The concept behind the allowing a debtor to claim exempt property is that seizing all of a person’s property will virtually leave the debtor destitute. Nobody wants this.

Thus, the debtor can claim property that a creditor simply cannot reach. In theory, this is a minimum level of property that will allow the debtor to live on. As we will see, it can be significantly more than a minimum level.

Items that can be exempted are set out in various places in North Carolina and Federal law.

The primary set of exemptions as set out in N.C. Gen. Stat. §1C-1601(a). Other exemptions covering specific items are found in numerous Federal acts, North Carolina statutes and the laws of other governmental entities.

There are numbers of other exemptions set out in the

Property that is exempt from seizure by creditors

First, I want to discuss §1C-1601(a). This statute sets out a laundry list of exempt property. These are as follows:

(a)(1) $35,000 in equity in the primary residence including a manufactured home or burial plot. In the case of the survivor of a deceased spouse the amount is $60,000; provided that the real estate had been acquired jointly and the debtor is over 65.

(a)(2) $5,000 in any unused (a)(1). (a)(3) $3,500 in a motor vehicle. (a)(4) $5,000 in household goods with $1,000 for each dependent up to a total of $4,000.

(a)(5) $2,000 tools of trade or professional books.

(a)(6) Life insurance cash value to the extent that a spouse or children are solely the beneficiaries in an unlimited amount.

(a)(7) professionally prescribed health aids for the judgment debtor or a dependent in an unlimited amount.

(a)(8) compensation for personal injury for the judgment debtor or a dependent in an unlimited amount; however, claims related to the injury such as funeral, medical or the like can reach the compensation.

(a)(9) individual retirement accounts (IRA) including inherited IRAs in an unlimited amount.

(a)(10) $25,000 in a college savings plan under §529 of the Internal Revenue Code.

(a)(11) retirement plans from other states and governmental units in an unlimited amount.

(a)(12) alimony, separate maintenance and child support received or to be received to the extent reasonably necessary for support of the debtor or dependents.
North Carolina statutes. These include such things and state and municipal pensions of various kinds. N.C. Gen. Stat. §1-362 provides that income earned within sixty (60) days of the execution is exempt.

In addition, there are numerous Federal exemptions of such things as social security benefits, military pensions, qualified retirement plans such as 401(k) and 403(b) plans and others.

Your spouse's interest in real property might be protected

Finally, while not a true exemption, real property that is owned by husband and wife by the entireties can only be reached by creditors who are creditors of both husband and wife—not by creditors of either husband or wife.

Ownership by the entireties occurs when husband and wife acquire the property during marriage and do not specifically provide in the deed that the property is not entireties property. The entireties ownership ceases to exist upon divorce or upon a dissolution by separation agreement or property settlement agreement.

Note that the entireties exemption is not limited to a single property such as the residence. It applies to all real property owned by husband and wife in North Carolina without limitation in number of properties or amount.

Sheriff or certified mail will provide notice

At this time we go back to the debtor’s motion to claim exempt property.

This means that the sheriff can seize property that could not have been touched had the exemption motion been property filed

A notice to claim exempt property together with the motion is served by the creditor upon the debtor. This can be by the sheriff or by certified mail. Generally, certified mail is the preferred method.

The notice will advise the debtor that he or she must file the motion to claim exempt property within twenty (20) days of service. The debtor must complete and sign the motion setting out the property claimed as exempt. The motion itself has various sections that generally follow the provisions of N.C. Gen. Stat. §1C-1601(a).

Unfortunately, there are no sections in the form for items discussed in the section above “A laundry list of exempt property.” A debtor who is unfamiliar with the process of claiming exempt property will often miss some available exemptions. A knowledgeable
attorney will not miss these exemptions.

When the motion is complete, it is filed with the clerk of court, and a copy is served on the creditor’s attorney. The creditor has a right to contest the claim of exemptions, which could result in a hearing. The creditor can contest anything in the debtor’s claim of exemptions. These contests rarely happen.

What happens when the judgment debtor fails to file the motion to claim exemption property? The right to claim exempt property is waived. It is gone and there is no way resurrect it in the North Carolina courts. It can be revived by filing a bankruptcy case.

However, not all property can be seized. For instance, a 401(k) could not be seized because it is protected by Federal law.

Nevertheless, a debtor would not take kindly to have his or her $35,000 exemption in the residence or his or her cash surrender value of life insurance taken away by the sheriff.

A bankruptcy case may be the only way to stop seizure and revive exemptions

Finally, if the judgment debtor fails to file a motion to claim exempt property, all is not lost. The debtor can still file a bankruptcy case. This revives the right to claim exempt property.

In this situation, the claim of exemptions is not controlled by the motion to claim exempt property, but rather through property claimed as exempt pursuant to §522 of the Bankruptcy Code.

I very often find that people are reluctant to use their bankruptcy option because they falsely be-
lieve their lives will be more difficult after bankruptcy. This free download will explain life after bankruptcy and how to rebuild your credit.

Q: Do creditors watch you for years waiting for your financial situation to improve? What happens if you win the lottery six weeks later? Six months later? Six years later?”

A: An execution on the judgment expires in 90 days. If you have demonstrated that your assets are exempt from liens and seizures (covered above) the sheriff returns the execution unsatisfied. Thus, it will die when returned.

This doesn’t mean that the judgment goes away; I cover that below.

Subsequent executions can be made over the life of the judgment. It is highly unusual for a creditor to continually reissue the execution; more than likely this would only occur when assets were discovered that the creditor did not know about or when a debtor comes into property in a public way, such as an inheritance or lottery winning to answer this question.

Any asset acquired by the debtor while a judgment is in effect (outstanding) becomes subject to an execution on the judgment during the term of the judgment.

With each execution on the judgment comes an opportunity to claim exempt property.

Q: How long does a judgment last?

A: A judgment is good for 10 years from the date of docketing. It cannot be renewed but it can be sued upon within the 10-year period to extend the judgment period.

If the creditor obtains a judgment based on the first judgment the second judgment is good for another 10 years. The second judgment dates not from the original but from the date that the new judgment is entered. This is why the question about creditors watching your financial wherewithal for years is a good one.

Selling property with a judgment lien

As an example, A gets a judgment against B, who owns a home. The judgment constitutes a lien on B’s home.

Three months before the judgment expires, A files suit on the judgment. B answers the complaint, and a period of four months later the new judgment is entered. Thus, there is a one month gap between the expiration of the first judgment and the docketing of the second.

During the gap, B sells his home. There is no lien because the first judgment has expired, and the second has not been docketed.

Most debtors will need assistance from a knowledgable attorney to successfully pull this off.

NOTE: The creditor may sue on the judgment only once. Note that this does not mean the judgment is continuous. There can be a time between the expiration of the original judgment and the docketing of the second.
How to keep judgment creditors away for good

The only way to be certain your creditors do not pursue collections is to reorganize your financial life through the orderly process of a bankruptcy case. My website covers Chapter 7, Chapter 13 and Chapter 11 bankruptcy in detail, so I will not try to reiterate it here.

When the debtor owns real estate that is subject to the judgment lien, the complexity of the case escalates. For these debtors the option of Chapter 13 bankruptcy is often the best remedy.

I wrote a free guide to dealing with troubled real estate assets that you are welcome to download without providing me with your contact information.

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Case study for Chapter 13

Let’s say the execution is issued, and the debtor claims the equity of $30,000, for example as exempt, which leads the sheriff to return the execution unsatisfied.

A smart creditor will calendar the matter eight to nine years in the future (because the judgment is only good for 10 years from the date of docketing).

At eight to nine years the smart creditor will issue another execution. If the home equity has grown to $75,000 the debtor has a real problem because the maximum exemption is $35,000. This means the debtor has $40,000 in equity that could be due to the creditor.

Time has worked against the debtor in two ways. First, there will be appreciation over time. Second, each payment that the debtor makes will decrease the debt on the property.

If the debtor files for Chapter 13 bankruptcy, the home and its equity might be protected from creditors. This option is discussed in detail on my website.

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Why Debtors Don’t File for Bankruptcy Protection

The most common reason debtors do not investigate bankruptcy is misinformation. They may believe they cannot qualify for bankruptcy protection, or that their debts cannot be discharged. They may misunderstand the process itself or how to rebuild their credit rating after bankruptcy. This is why I wrote a guide to Life After Bankruptcy, available for free. No registration required.
Have Any of These Happened to You?

Here’s a checklist to consider before calling our office. If several of these apply in your situation, bankruptcy is a viable consideration:

- Your wages have been garnished or your bank account has been attached
- Most of your debts are unsecured debts like credit card bills, hospital or doctor’s bills, etc.
- Your total debt, not including your car or house loan, is more than you could pay, even over five or more years
- Collection agencies are calling you at home and/or at work
- Your payments are more than 30 days behind on more than one bill
- There are lawsuits pending against you
- You have high medical bills not covered by insurance
- You owe income taxes that you are currently unable to pay
- You have few assets
- You have little or no savings
- You have had property repossessed (such as a vehicle)

Call my office to set an appointment.

Together, we will determine the best strategy for legally handling your financial troubles.

Rick Mitchell

My 30+ years as an attorney representing creditors, bankruptcy trustees, and debtors in consumer and business bankruptcy cases, gives clients a wealth of practical and legal knowledge to draw upon. In addition, the North Carolina State Bar has certified me as a specialist in consumer and business bankruptcy.

I welcome the opportunity to discuss your situation. Picking up the phone to make an appointment with me is the most difficult step in the process of finding a legal resolution to your financial difficulty.