



Williams, Charles & Scott LTD.

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A Lawsuit is a process initiated by a party commonly referred to as the "Plaintiff" who is attempting to have the court resolve a dispute, or to otherwise order judicial relief on behalf of the Plaintiff, such as obtaining payment of a debt.

The party against whom the litigation process is initiated is referred to as the "Defendant."

Commencing a Lawsuit

In both state and federal court, a lawsuit is initiated by the Plaintiff by filing a "Complaint" with the clerk of the court. The Complaint sets forth the factual allegations on which the Plaintiff's case is based and also requests the court to grant the appropriate relief. In most instances, the relief sought is judgment on behalf of the Plaintiff and against the Defendant for the balance owed. When the Complaint is filed, a "summons" is also filed, which is served upon the Defendant together with the Complaint, serving as notice to the Defendant that a lawsuit has been initiated. A summons contains directions and specifically puts the Defendant on notice of not only the fact that a lawsuit has been initiated, but also setting forth the time limitations during which an "answer or other response must be filed. Commonly, the period for responding to a Complaint is 20 to 30 days. The answer is filed by the Defendant may contain general denials or may even admit the allegations set forth in the Complaint.

Sometimes an answering Defendant will file a motion to dismiss the proceeding, which will be explained in further detail later.

Service

Service refers to the process wherein the Defendant is "served" with the summons and Complaint. This is accomplished through personal service by having either the sheriff or private process server physically deliver the documents to the Defendant in person. Many states provide for other means of service, sometimes referred to as "substitute service" or "constructive service." Rules regarding service of process vary from state to state. It is important to note that the Defendant's time to answer the allegations set forth in the Plaintiff's Complaint is measured from the date that service is accomplished rather than the date the lawsuit is filed with the court. After the Complaint has been filed and the summons served, all other documents served in the lawsuit are served simply by mailing copies to the Defendant. Anything served in this manner will contain an "affidavit of mailing" or "certificate of service" verifying the date and person to whom the papers have been mailed. Original pleadings and documents are always filed with the court with copies actually being served upon all other parties to the lawsuit.

Discovery

Once the Defendant files its answer to the Plaintiff's Complaint, the parties are given the opportunity to "discover" all evidence the other side possesses to support its position in the lawsuit. Some of the common methods are as follows:

Interrogatories – These are written questions, which must be answered in writing under oath.

Depositions – Depositions can be based upon written questions, but typically are done orally before a court reporter who reduces the statements to a written transcript that can be used at trial.

Requests to Admit Facts – These are statements the responding party must either admit or deny and generally any admission or denial can be explained or supplemented.

Requests to Produce Documents – This is a mechanism whereby one party requests the other party to produce any documentation that may ultimately be admissible at trial.

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Counterclaims

In addition to responding to the Plaintiff's allegations by filing an answer, the Defendant is entitled to assert any affirmative causes of action that it may perceive it has against the Plaintiff. These are referred to as "counterclaims."

Counterclaims may be related to the Plaintiff's underlying cause of action, but may also be completely unrelated to the transactions for which Plaintiff is seeking relief. If the Defendant's counterclaim is related to the transactions on which the Plaintiff's Complaint is based, then any counterclaim would be considered "compulsory" in nature, meaning that the Defendant must either bring the counterclaim in that proceeding or be deemed to have waived that claim.

Motions

A motion is a written request to the court after the suit is filed for specific relief. Common motions include the following:

Motion to Dismiss – This is generally filed before or together with an answer. The motion to dismiss must be supported with some legal reasoning as to why the lawsuit should not go forward, such as expiration of the statute of limitations (time within which a claim must be brought), or some other allegation, such as lack of jurisdiction over the cause of action (subject matter jurisdiction) or over the person of the Defendant (personal jurisdiction).

Motion for Summary Judgment – This is a request that the court decide some or all of the issues of the lawsuit as a matter of law rather than on any particular facts. This occurs prior to trial and represents an effort to dispose of the lawsuit without the necessity of trial. Summary judgment procedure is traditionally disfavored in the law since it deprives the parties of their right to their "day in court." It necessitates a finding by the court that there are no issues of fact in dispute and that the case can be determined by existing law in that jurisdiction.

Trials and Judgements

When both sides have completed discovery, and have exhausted efforts to settle the case, cases are generally set for trial. Many courts require a pre-trial conference wherein the parties appear by counsel, and the court determines exactly what issues are going to be tried, and also exhausts final efforts to settle the case. If trial is ultimately necessary, most state and federal courts only allow the introduction of evidence through witnesses with firsthand knowledge. Any attempt to introduce evidence that is not based on firsthand knowledge will be met with an objection that the evidence is "hearsay." There are a variety of technical exceptions to the hearsay rule, but for purposes of this outline it is important to note that first-hand knowledge is imperative. Documentary evidence must be "authenticated" or "verified" through witnesses who can establish that the contents have been prepared by persons with firsthand knowledge of the information contained therein.

It should be noted that the Plaintiff bears the burden of proof. The burden of proof in civil cases is by a "preponderance of the evidence" as opposed to the more stringent standard in criminal cases of "beyond all reasonable doubt."

After hearing from all witnesses and allowing the parties to present their respective cases, the court will render a judgment. The trier of fact, whether it be a judge at a bench trial or a jury in a jury trial, must decide the facts of the case that may be in dispute, and then the judge applies the law to those facts to determine the outcome. Many times this is referred to as making "findings of fact" and "conclusions of law."

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Upon the entry of judgment, both sides have the opportunity to appeal to a court of higher jurisdiction.

Default Judgements

If a Defendant has been served with summons and Complaint and fails to respond within the time required, the Plaintiff may be awarded a default judgment. If entered, the default judgment will automatically grant the Plaintiff the relief requested in the Complaint. Default judgments are normally entered without the necessity of a formal hearing, although this may vary from state to state. A default judgment, like any other judgment, can be enforced through a variety of post-judgment remedies. Federal court judgments can be "docketed" in any federal court of the country should the Defendant have assets in another federal district. State court judgments can sometimes be registered via the "Uniform Enforcement of Judgments Act" if adopted in that respective state. Otherwise, the state court judgment must be re-sued like an original cause of action in any other sister states. Pursuant to the United States Constitution, judgments are entitled to enforcement among the various states through what is commonly referred to as "Full Faith and Credit."

Stipulations/Agreed Judgments

Commonly, when parties to a lawsuit reach an agreement after the suit has been filed, but before the entry of judgment, an agreement is reduced to writing referred to as a "stipulation" or an "agreed judgment." This enables the parties to resolve the litigation without the necessity of a formal trial on the merits. These agreements are filed with the court for purposed of enforcement should there be a default in the agreement reached.

Post-Judgment Remedies

Once the judgment has been obtained, there are a variety of procedures available to satisfy the judgment. These remedies vary from state to state, and also vary in terms of the costs required to perform the various steps involved in attempting to obtain the relief sought.

Post-Judgment Deposition/Discovery – These types of depositions differ from the pre-judgment discovery process in that the Plaintiff now possesses a judgment. These depositions, sometimes referred to as "proceedings supplemental hearings," are usually performed before the court. Again this will vary from state to state, but generally the judgment Debtor is required to appear before the judge or other court officer, and testify under oath regarding assets and liabilities. The judgment Defendant may also be required to produce business records to establish further proof of assets and liabilities.

Bank Garnishment – This is a procedure wherein the judgment Debtor's bank account is attached. Bank garnishments are normally effective on the date served, and are not continuing in nature. In other words, the judgment creditor is entitled to whatever funds are on deposit in the judgment Debtor's account on the date that service of the bank garnishment is achieved. Many states do not permit bank garnishment or the remedy is limited. Again, this will vary depending upon the laws of each state.

Wage Garnishment – If the judgment is against an individual, wage garnishment is available in many states. This, like the other remedies, does vary and many states completely exempt a judgment Debtor's wages from garnishment. Federal law limits wage garnishment to 25% of net wages per pay period.

Levy of Execution – A levy of execution is a process wherein the sheriff of the country in which the judgment Defendant resides is empowered by the court to "seize" inventory, fixtures, real estate as well as many other tangible assets. Many states require that substantial bonds of other deposits be

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posted by the judgment creditor before the sheriff will continue with execution. This is to provide a cost deposit for the sheriff's expenses incurred in moving and storing any assets that may be seized. In many states it is possible for the sheriff to simply make a demand for cash and then, if unsuccessful, continue with processing the execution by levying against specific assets.

Execution is most successful when the sheriff is able to locate assets that are not encumbered by a prior lien or mortgage, such as to a bank or other secured creditor. Execution against specific assets may also be limited by certain exemptions to which the Debtor may be entitled. Exemptions vary from state to state, but all states exempt certain assets from execution. Examples may include retirement benefits, some items of jewelry, medical aids, etc.

Conclusions

Many times a lawsuit is unavoidable.

However, every effort should be made to resolve a collection matter with the necessity of a lawsuit if at all possible. As set forth initially, lawsuits can be expensive and time-consuming. In addition, the various uncertainties associated with a lawsuit as well as possible problems, such as lack of witnesses and /or documents to support the creditor's case, may diminish the viability of proceeding with suit.

It is important to remember that the collection process begins when the account is first established, not when you first perceive slowness in payment. Failure to implement standard procedures initially such as (a) execution of credit applications, (b) document retention (invoices, purchase order, letters, collection notes, etc.), and (c) records of all persons knowledgeable about the account will impede the ability of your collection agency and ultimately your lawyer to obtain the relief to which you are entitled.