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***EVERYONE'S SMALL CLAIMS BOOK***

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# ***SMALL CLAIMS COURT***

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## INTRODUCTION

Money is hard to get and even harder to keep. Therefore, everyone should always pay their just debts. Unfortunately, many people are professional deadbeats. These people deliberately run up debts for services or property and refuse to pay. Such people count on the fact that litigation through the normal court system is expensive and that it would usually cost more to collect the debt than it is worth. The cost for an attorney is usually at least \$150 per hour. The normal debt collection runs at least \$5,000 in attorney costs. Unless there is a written agreement that the prevailing party will get attorney fees, each side must pay their own attorney fees. It is this reality that the unscrupulous use to avoid paying their just debts.

In response to this situation, all states have adopted laws establishing small claims procedures. Under these laws, small claims, usually no more than \$5,000, are heard before special judges, commissioners or attorneys serving as judges pro tem. The small claims court employs simplified procedures which make it easier for the parties to present their cases. Small claims courts are truly the people's court. For most individuals a small claims appearance will be their only contact with the judicial system except for the occasional traffic ticket.

Small claims court exists as an alternative to the highly structured, complex and expensive traditional court system. Small claims courts are a cheap, fast and efficient means to settle disputes concerning small amounts of money.

There are many "How To" books on the market that instruct a person as to what he must do to file a small claims action. This chapter addresses most of the fundamental concerns people have concerning small claims court without having to buy expensive books that merely expand this information. Through this chapter the average person should be able to understand the small claims court procedure. The reader should be able to go to the clerk of the small claims court, get the forms and the local rules of court and intelligently start the action.

The reason this chapter is appearing in this book is to educate people on the advantages and simplicity of the small claims court. There is no reason that a person should forgive debts of hundreds or thousands of dollars because it is not cost effective to hire an attorney to sue for such money. Money represents a person's future and safety. Money's protection and its recovery from those who should not have it makes the knowledge contained in this chapter vital. Knowledge is power, power is money, and money is security. It is important to know how to go to small claims court to preserve one's financial interest.

CHAPTER ONE  
OVERVIEW OF SMALL CLAIMS COURT PROCEDURE

I. DEFINITION OF A SMALL CLAIMS COURT

The small claims court is a specially created court in which most disputes can be tried inexpensively and quickly. The rules of the court are simple and court procedure is relatively informal. Lawyers are not permitted to present or try the case. Claims vary from state to state. In California, for instance, disputes of \$5,000 or less can be heard in small claims court. The regular filing fee for most small claims courts is between \$6 and \$15.

A small claims case is usually heard within forty (40) to seventy (70) days from the filing of the claim. While most small claims cases involve money damages, most small claims courts have the power to grant other remedies. For example, most small claims courts have the authority to grant injunctive relief which means authority to order a person to do or not do something (mandamus or injunction) if the value of the act ordered or restrained is within the monetary limits of the court.

II. FILING A SUIT IN SMALL CLAIMS COURT

Nearly anyone can sue in small claims court. The person bringing the suit is called the plaintiff and the person being sued is the defendant. An individual can sue other individuals or businesses and vice versa. Most states deny collection agencies

the right to sue in small claims court, nor can someone file a small claims action for another. Most states deny assignees, persons who buy the debt of another, to sue in small claims court for collection of that debt.

A person must be over eighteen (18) years of age and mentally competent to file in small claims court. The plaintiff need not be a U.S. citizen to file a small claims complaint. The plaintiff does not have to speak English to file the complaint. Interpreters are permitted in court if a witness does not speak competent English.

It is imperative that a plaintiff file a small claims action in the proper court. Failure to file in the proper court may result in the action being transferred to proper court or dismissed altogether. Generally, a small claims action is filed in the court of the judicial district or area where the defendant lives or the business is located. Sometimes state laws permit the plaintiff to sue in the court district where an accident or tort (a civil wrong) occurred although it may not be where the defendant lives. Most states permit a small claims suit involving a breach of contract to be filed:

1. Where the defendant lives.
2. Where the defendant signed the contract.
3. Where the defendant lived when the contract was signed.
4. Where the contract was to be performed.

If it is possible to file in more than one judicial district, the plaintiff may choose the one most convenient for the plaintiff

and witnesses. A judicial district may be chosen where the defendant does not live, thereby requiring longer notice and delaying when the case can be heard. All of the forms for small claims court are obtainable from the clerk of the small claims court. Many stationary stores also sell small claims forms to the public.

### III. ATTORNEYS USUALLY ARE NOT PERMITTED IN SMALL CLAIMS CASES

Most states preclude the appearance of an attorney in small claims court as an advocate of a party. In most states the attorney cannot give legal advice in court to either plaintiff or defendant, nor can an attorney comment in court as to the presentation of evidence. The fact that most states do not permit attorneys in small claims actions is unique. There are no other instances in American courts where the parties are denied the right to have an attorney speak for them in court.

Although an attorney cannot appear in many small claims courts, the parties are permitted to speak with attorneys outside court and ask for advice in preparing their cases. The reason attorneys are not allowed in court is they are not necessary under the abbreviated procedures of the court. Both sides merely tell the court what happened and produce evidence they have to support their explanation. The trial is informal, sometimes to the extent of becoming a community forum or pulpit for the expression of individual beliefs.

An attorney is permitted to testify as a witness. There is no

prohibition against calling an attorney or other professional to present facts and testimony germane to the case. The attorney is simply prohibited from assisting a party presenting his case in the courtroom. Regardless of whether an attorney is permitted to appear or not, the case is handled in the same manner by the court. The court, however, may stand more on strict compliance with state procedure when an attorney is present, which is a benefit to the party with an attorney: evidentiary objections, particularly as to hearsay, are more likely to be upheld.

#### IV. ALL CLAIMS MUST COMPLY WITH THE STATE'S STATUTE OF LIMITATIONS

Every claim has a statute of limitations: a period of time in which a lawsuit must be filed or the right to bring the lawsuit will be lost. Statutes of limitation vary from state to state. The theory behind statutes of limitation is that no one should sit on their rights. The courts want to have claims decided as promptly as possible. Therefore, if a person waits too long to sue for damages, even though legitimately owed, the court will dismiss the complaint.

For example in California, the statute of limitations for various claims is as follows:

1. Claims for personal injury (physical injury to a person) have a one-year statute of limitation.
2. Breaches of a written contract have a four-year statute of limitation; while oral contracts have a two-year statute of limitation.

Checking the civil code for the state where the small claims court is located will give the appropriate statute of limitations for the appropriate claim.

Suits against most governmental agencies require special handling. First, the plaintiff must file a claim with the agency within a certain period of time following the injury or breach, normally around one hundred (100) days, but this varies. If the agency rejects the claim, the plaintiff must file his action within a very narrow time period, usually six months, or lose the right to sue altogether. Claims against government agencies should be pursued with all dispatch.

An agency is usually allowed 60 days after receipt to accept or reject. The claim is automatically rejected if the agency has not accepted within the allowed time.

#### V. THE DEFENDANT

The plaintiff must state the names and addresses of the defendants: the people or business being sued. Therefore, the plaintiff must know the identity of the defendant. If the defendant is a business or corporation, the business' legal name and address can be found with the city's licensing agency, the tax assessor's office, the fictitious business names files in the county clerk's office, or the office of the secretary of state's corporate division. All corporations incorporated in a state and foreign corporations doing business in a state are usually required to designate a person to receive process (service of complaints)

for the corporation.

The correct names and addresses of the defendants are needed so they can be properly identified and served with the complaint, which is required before the court will hear the case.

#### VI. PRESENTATION OF THE PARTIES BEFORE THE COURT

Because attorneys, in most states, are not permitted in a small claims action, both parties must usually represent themselves. In the same vein a corporation may appear in small claims court only through an employee or an officer or director of the corporation. Usually a corporation may not be represented in small claims court by someone whose job is to represent the corporation in small claims court. In other words, a corporation in states not permitting attorneys in small claims court, can not use an attorney, whose job would be to represent the corporation.

Certain other businesses such as partnerships or joint ventures, may appear in small claims court only through a regular employee of the entity, but not an attorney in states not permitting their use. The representative usually may not be someone whose sole job is to represent the business entity in small claims court. A trustee may represent a trust in small claims court.

#### VII. THE MONETARY LIMITS OF A SMALL CLAIMS CASE

The most important consideration in a small claims case is the amount of the claim sought. A plaintiff cannot exceed the jurisdictional limit of the court. If a plaintiff asks for more than the court is allowed to award, the entire case may be

dismissed. If the plaintiff sues for less than is owed, he forever waives the balance. For example, assume that the plaintiff is owed twenty thousand dollars (\$20,000) and sues for five thousand dollars (\$5,000), the plaintiff forever loses the right to sue for the remaining fifteen thousand dollars (\$15,000). The plaintiff could have sued in a regular court for the full \$20,000, but he might have waited years to have the case heard and incurred large fees and costs preparing for the trial.

#### VIII. FILING FEES

There is always a filing fee for any complaint filed in any court. Courts are not free. In California the basic fee is around \$15 per case. Multiple filers, those with over 13 cases per year, pay around \$20 per case in California. In most states a person unable to pay the filing fee can request the court grant a waiver of fees. This waiver is called a "forma pauperis," Latin for "form for a pauper." If the plaintiff qualifies for the waiver, the fee is waived and subsequently recovered if the plaintiff wins. Put it another way: if the plaintiff wins the case, the defendant pays the filing fee as a court cost to the plaintiff.

#### IX. PLAINTIFF'S RECOVERY OF COURT COSTS

Most of the costs related to pursuing a small claims action are recoverable from the defendant if the plaintiff wins. Examples of court costs that are recoverable are filing fees, service of process fees, witness fees and mileage. There is usually no recovery for expert witness fees in small claims cases. Also

recoverable are fees for subpoenas of individuals and for subpoenas duces tecum for documents. Interest on the judgment is always awarded, and, sometimes, it is awarded before judgment. Prejudgment interest (interest running from a date prior to the date of judgment) is governed by the laws of each state. A plaintiff should always investigate to determine if it is awardable in his case.

After the trial the plaintiff presents a summary of his costs to the court for approval. Once approved, the costs are included in the court's judgment against the defendant.

#### X. SUBPOENAING WITNESSES FOR TRIAL

Some states permit statements by witnesses in small claims actions to be used instead of the witness actually appearing. In such states the statements must be in writing and signed under penalty of perjury. The statement should state, "Signed under penalty of perjury that the foregoing is true and correct." It is always best to have your witnesses available at trial. Since the other party can not question an absent witness, judges do not have to accept the statement.

A plaintiff can subpoena a witness. A subpoena is a court order that the person appear at the court to testify or face charges of contempt of court. Likewise, a subpoena duces tecum can be issued for documents. A subpoena duces tecum requires the person served to bring specified documents to court on the day of trial. A subpoena can only be served in person. It cannot be

mailed. The person serving the subpoena must be over 18 years of age. In some states the plaintiff can serve the subpoena; in other states the plaintiff cannot serve it.

Whoever serves the subpoena must fill out a "proof of service" form stating the date and location where the person was served. The proof of service is filed with the court. If it becomes necessary to compel attendance, the court will rely on the proof of service for jurisdiction over the witness.

Most states require the party issuing the subpoena to pay the witness a fair fee and mileage round trip. Example: In California this is presently \$35 per day and \$.20 per mile. Always bear in mind that a subpoenaed witness may be hostile to a case, and it might be better not to subpoena a witness who might "forget" key items.

#### XI. SERVICE OF THE COMPLAINT ON THE DEFENDANT

A defendant must be served (presented the small claims complaint) in such a manner that the court will know that it was done. The procedural requirement must be correctly followed or the action may not proceed and may be dismissed altogether.

A plaintiff cannot serve the small claims action on the defendant. In some states, such as California, the court clerk will mail the complaint to the defendant's address by certified mail. Service is complete if the defendant signs for it. The fee for this is around \$10 in California. If the defendant does not accept delivery of the certified mail, the plaintiff must serve the

defendant with the small claims complaint in another way.

The defendant can also be served by personal service. Personal service requires a person over 18 years of age to deliver the complaint to the defendant personally. A sheriff will do it for about \$25 or a commercial process server will do it for about \$75. Once the complaint is filed, a proof of service is filed with the court stating the date and location of service. The case will not be dated for trial until proof of service is filed with the court.

In most states the defendant may be served by substitute service. Substitute service requires the process server to leave a copy of the complaint with an identified person at the business or residence of the defendant and to mail a copy of the complaint to the defendant at that address within 10 days. Proof of service must be filed by the process server stating the name of the person who accepted the complaint.

#### XII. FAILURE OF THE DEFENDANT TO APPEAR AT TRIAL

If the defendant does not appear at trial, the court first will determine if the defendant was properly served. The court then must determine if service was validly made. If service was procedurally invalid, the court will dismiss the case for want of jurisdiction over the defendant. If service was valid, meaning the complaint was properly served on the defendant, the case will continue.

Judgment is not automatic for the plaintiff just because the

defendant fails to appear. The plaintiff must still put on evidence proving his entitlement to damages. This is called a "prove up" hearing. The judge will hear only the plaintiff's case and decide if damages should be awarded. Just because a defendant does not appear does not mean that a judge can award damages. Perhaps the plaintiff cannot show liability or there would be a violation of state or federal law.

If the plaintiff wins the action, the court will issue its judgment. Part of the judgment will be an award for the damages suffered by the plaintiff, the court costs in bringing the suit and the amount of interest permitted under state law.

#### XIII. DEFENDANT MAY FILE A COUNTERCLAIM AGAINST THE PLAINTIFF

The defendant may file a claim against the plaintiff in small claims court. The claim does not have to be over the same fact pattern as the plaintiff's claim. Example: The plaintiff may sue over a car accident, and the defendant may countersue over a broken refrigerator totally unrelated to the car accident.

The defendant's claim is subject to the same restrictions as the plaintiff's claim. The defendant may not sue for damages over the court's jurisdictional limit and must comply with the statute of limitations. Any amount exceeding the limit is forever waived, as with the plaintiff's claim.

The defendant may file his complaint in the regular courts, municipal court, superior court, district court or whatever that state calls its courts or even in federal court if appropriate.

The plaintiff's small claim action will be transferred to the regular court if it arises from the same fact pattern as the defendant's action. In regular court the plaintiff may then increase his claim for damages and hire an attorney to handle the action as a regular lawsuit.

#### XIV. PRESENTING THE CASE BEFORE THE JUDGE OR JURY

The burden of proof is borne by the party seeking some form of relief from the other. The plaintiff has the burden of proof on his claim against the defendant. If the defendant files a claim against the plaintiff, the defendant has the burden of proof on his claim against the plaintiff. Most states have small claims cases tried only before a judge, but a minority of states permit jury trials of small claims cases.

The burden of proof is the standard of evidence needed to prevail in a case. In a small claims action the party having the burden of proof must convince the judge that it is more likely than not that he should win. In a fifty-fifty case of one person's word against another, the judgment should go to the defendant. Without this standard, anyone could sue and collect judgment without ever being damaged. The result would be unfair. Before anyone files in small claims, he should consider whether there is enough evidence to convince a total stranger to render judgment in his behalf.

Experience shows that the average small claims case takes each side between 10 and 15 minutes to present his case when tried by a judge. To accelerate speed of presentation, most judges require

the parties to stand unless they are disabled. Standing causes the parties to present their case in a concise manner. It has been shown that where the parties in the small claims case are seated, the presentation usually takes over half an hour to present. The use of witnesses will obviously extend the case. Most small claims cases do not involve more than one witness.

After both sides have presented their case, the judge or jury will make a decision. When a jury is used, the decision is announced in open court before the parties. Occasionally, when the judge tries the case, the judge will take the case under submission and decide later. A case is taken under submission for several reasons. The judge may want to conduct research, conduct an investigation or simply not want to upset the parties while in court. When the case is taken under submission, the judge's decision will usually be mailed to the parties within a month. The judgment will state any monetary award along with any court costs that the judge finds should be recovered.

#### XV. THE SMALL CLAIMS JUDGE

Most small claims court judges are full judges of the local court. Many states permit private attorneys to sit as temporary small claims court judges called judges pro tem. In order to hear a small claims case as a judge pro tem, the attorney must have the written consent of both parties. If both parties agree to have a private attorney serve as the judge, the attorney will hear the case and render the decision in the same manner as a regular judge.

The judgment of an attorney serving as a judge pro tem is treated for all purposes as a valid court judgment. Generally, pro tem judges are not used if the case is to be tried by a jury.

If the parties do not stipulate to the use of a private attorney, the case will be continued to a time in the future when a regular judge is available. Usually, the first notice to the parties that a regular judge is not available is on the date of trial, when the clerk asks the parties to stipulate to a private attorney.

#### XVI. THE APPEALABILITY OF A SMALL CLAIMS JUDGMENT

In most states, including California, a plaintiff may not appeal the judgment of a small claims action. If the plaintiff loses, the case is over and cannot be relitigated.

The defendant, however, can appeal the judgment of a small claims court. Usually in an appeal, the case is retried in a regular court and before a real judge. The new trial is called a "trial de novo", which means a completely new trial. In California, small claims appeals are heard in Superior Court. In California, when a small claims case is appealed, both parties may then use attorneys, but that is the exception to the general rule that attorneys may not appear in small claims cases.

In like manner, a plaintiff is entitled to appeal a judgment against him awarded to the defendant on the defendant's claim, and a defendant is not entitled to appeal a loss of his claim against the plaintiff: the defendant's counterclaim places him in the

position of plaintiff. For example, assume that a plaintiff sues a tenant for \$3,000 back rent. The tenant, who is the defendant, sues the plaintiff for \$2,000 retaliatory eviction. The court rules for the defendant and awards him \$1,500, and he cannot raise the argument that he should have been awarded more.

Some states, such as California, permit a judge to fine a defendant for filing a frivolous appeal. In California, if the court finds that the appeal was frivolous, it can award the plaintiff \$250 as attorney fees. It is rare that the court will find the appeal was frivolous. "Frivolous" means the appeal was without merit and intended solely to harass, delay or encourage the other party to abandon the claim. If state law permits sanctions for filing a frivolous small claims appeal, there is no harm in asking for them.

#### XVII. COLLECTING THE JUDGMENT

Once the court issues a money judgment, the prevailing party, the person being awarded the money, becomes a judgment creditor of the losing party, who is now the judgment debtor.

The judgment may specify that the amount of money is to be paid in full to the judgment creditor or allow the judgment debtor to make periodic payments. Periodic payments are usually ordered in the judgment only if the parties entered a settlement agreement ordering them. Interest is usually computed on a judgment from the date of its award. The legal rate of interest varies from state to state but is around 10% per year.

Once the judgment is issued it is up to the judgment creditor to collect. Collecting a judgment is the most frustrating part of the small claims process. A judgment does not guarantee payment. A judgment debtor may be without assets, "judgment proof", or be uncooperative, causing extra effort or costs.

The court is not a collection agency. It will not collect the award for the judgment creditor. It will supply orders and documents to help collect the judgment. Often an attorney or collection agency is hired to collect the judgment.

#### A. ATTACHMENT OF WAGES

The court issues its judgment in favor of the prevailing party. The prevailing party is the winner and can be the plaintiff winning on his complaint or the defendant winning a judgment against the plaintiff on the defendant's claim. The judgment is taken by the winner to the clerk of the court. The clerk of the court issues a writ of execution containing the information in the judgment.

A writ of execution is a court order directing the sheriff or marshal to take control of or levy upon the assets of the losing party to satisfy the judgment. It is the responsibility of the judgment creditor to tell the marshal or sheriff where the property is located so it can be seized.

Wages can be attached ("garnished") to pay the judgment. Most states have laws to prevent employees being fired because their wages have been attached.

All states provide debtors statutory exemptions from collections. A debtor is allowed to earn a certain amount of money in wages and have a certain amount of property that cannot be attached or seized to satisfy the judgment. Only property over these statutory amounts can be taken to satisfy a judgment.

#### B. SEIZURE OF REAL PROPERTY

Real property can be seized and sold by a marshal or sheriff executing a small claims judgment. Every state has its own procedure for execution on real property. The Sheriff or Marshall advertises in a newspaper of general circulation that on a certain date (usually after 30 to 60 days notice to the debtor) the real property will be sold to the highest bidder at a public auction at the sheriff or marshal's office.

At the sale, the highest bidder purchases whatever interest the debtor had in the property. If the debtor owes \$100,000 on the real property, the purchaser will take the real property subject to that \$100,000: the \$100,000 debt still remains on the property. Several years ago in Florida a tenant sued his landlord, a large residential apartment owner, for return of a security deposit. The tenant won the case in small claims court. The tenant then executed against the real property and purchased it at the sheriff's sale for approximately \$1,500. After the sale the landlord tried to set the sale aside, but the courts affirmed it. The tenant bought a \$1 million dollar piece of property for \$1,500.

In most states a person can file a homestead on the real

property he owns and on which he resides in any amount not to exceed a fixed maximum between \$10,000 and \$40,000. This means that if the real property is seized and sold, the debtor is first given the homestead amount before any proceeds are applied to the judgment. A court will not permit execution on real property unless the debtor has equity in the property over the homestead amount because the creditor would not receive anything. A few states have no homestead exemption.

#### C. PLACING A JUDICIAL LIEN ON ALL OF THE DEFENDANT'S REAL PROPERTY

A judgment creditor can request that the clerk of the court issue an abstract of judgment. An abstract of judgment is an official recordable court document which states the amount owed to the plaintiff. When recorded in the county recorder's office, the abstract of judgment places an automatic lien on all of the real property of the debtor located in the county where the abstract is recorded. An abstract of judgment must be recorded in every county to cover all of the property that a defendant may own in a state.

Once a lien is placed on real property, it remains on all current and future property of the debtor until released by the creditor. No one will purchase any of the debtor's real property without having the lien removed. Once an abstract is recorded, it stays on the real property for a fixed number of years, for example 10 years in California, or until the judgment is paid. Both the abstract and the judgment, depending on state law, usually can be renewed for a fixed number of years, California permits renewals in

increments of 10 years. When any of the debtor's real property is sold, the lien must be paid with all interest before clear title can be passed. Recording an abstract of judgment places a cloud on the title of all the debtor's current and future real property. Therefore, recording an abstract virtually assures that someday the judgment will be paid with interest if the debtor has or acquires any real property. For this reason, recording an abstract of judgment makes good sense even if nothing else is done to collect the judgment.

#### D. EFFECT OF A DEFENDANT'S BANKRUPTCY

When a debtor files bankruptcy, there is an immediate "automatic stay" on any collection lawsuits being filed against the debtor. A person in bankruptcy cannot be sued in small claims court. Any judgment taken against a person while a bankruptcy proceeding is pending is void and unenforceable.

Furthermore, under the bankruptcy law, all judgments obtained within three months of a debtor's bankruptcy are set aside and must be relitigated again in the bankruptcy court. Older judgments are treated as unsecured claims in the bankruptcy proceeding except for judicial liens against real property. That means they are paid in a percent equal to the ratio of debts to assets in the estate after secured debts and allowable expenses have been paid. Assume, for example, that a creditor has an unsecured judgment of \$4,000 against a bankrupt debtor. Assume the bankrupt debtor's estate is \$20,000 after payment of all allowable debts and expenses and the

unsecured debts are \$80,000. The creditor's debt will be 5% of the distributable estate: \$1,000. Moral: A creditor should attempt collection immediately after the judgment is obtained in order to assure full recovery.

#### E. SATISFACTION OF THE SMALL CLAIMS JUDGMENT

When everything works right, the party with the judgment, the judgment creditor, is paid in full or whatever lesser amount that might be agreed among the parties. The judgment creditor is required to file a form with the court after the judgment has been paid, called a "satisfaction of judgment." The recordation of satisfaction of judgment removes the liens placed on the debtor's property by the prior recording of an abstract of judgment.

Failure to record a satisfaction of judgment could expose the judgment creditor to a lawsuit for slander of title. Failure to file (record) the satisfaction of judgment would keep a lien on the debtor's property and thus prevent the defendant from obtaining loans or selling his property. Such would make the creditor liable for extensive damages.

#### F. EXAMINATION OF THE DEBTOR FOR ASSETS

It is the judgment creditor's responsibility to collect the award, and the creditor is given certain rights that help him. Many courts require the debtor to file a statement of assets once the judgment is entered. Using this statement of assets, the creditor is able to obtain the writ of execution from the court clerk. All states permit the creditor to apply for an "order to

appear for a judgment debtor's examination." This is a court order for the debtor to appear on a certain date and time to be questioned under oath about his money and property.

A judgment debtor's exam is usually limited to one every six months until the judgment is satisfied. In addition, most states require a debtor to file a financial statement and list all of the assets he owns. A debtor is required to file it as a tool for the creditor in discovering property that can be seized and sold to pay the judgment.

#### XVIII. SMALL CLAIMS SUITS FOR BAD CHECKS

Small claims courts were established primarily to handle bad check complaints. These are complaints for bad checks of relatively small amounts. Most people have seen a list of bad checks in small restaurants to embarrass the writer. Every state has some type of bad check law that permits a business, and in some instances individuals, to sue for several times the amount of the bad check. In California, Civil Code Section 1719 permits a suit to be filed for value of the check plus three times the amount of the check. The additional amount will be at least \$100 with a maximum of \$1,500.

Some states, like California, require that the debtor be given notice by certified mail of the bad check before the court will award the additional amount. Anyone given a bad check can always sue in small claims court for the amount and for the penalty also.

#### XIX. VALIDITY OF SMALL CLAIMS JUDGMENT

A small claims judgment is a valid judgment by a state court and is fully enforceable throughout the state in which it was issued. Under the United States Constitution all judgments of a state must be given full faith and credit by other states. So a small claims judgment is fully enforceable in another state. The normal procedure is to have it adopted by the court of another state as a sister state judgment. Doing so makes the creditor's small claims judgment enforceable under the other state's law and gives the creditor access to that state's collections procedures.

An out-of-state small claims judgment can serve as a lien on the real property of the out-of-state debtor if the prior steps have been taken to have it adopted as a sister state judgment. Once adopted as a sister state judgment, an abstract of judgment can be recorded, placing the lien on the real property of the debtor.

CHAPTER 2  
PREPARING TO SUE

At this point you are ready to file a lawsuit to collect the money or other relief to which you feel you are entitled. When you reach this point, you have already done everything to resolve the matter out of court. You have probably met with the person and sent the obligatory demand letter which has been ignored. Most people ignore demand letters and threats to go to small claims court expecting it will be too much of a hassle for the creditor to pursue collection of the obligation.

A true story is that once a beginning attorney was hired as in-house counsel for a small manufacturer. Amazed by the large number of collection cases that were filed against the company, he questioned the boss. The attorney was told that bills were never paid until after a suit was filed. It was the policy of the boss to see if people were upset enough to sue. If they did not sue, he kept his money. If they did sue, he offered to settle for less than the amount sought by telling the people that his settlement amount was more than they would receive after they paid their attorney. After hearing this explanation, the attorney tendered his resignation because he did not approve of this morally questionable tactic. The attorney would have quit immediately but the canons of professional responsibility forbid an attorney from quitting without giving the client an opportunity to replace him.

While distasteful, the above tactic is a common practice among the unprincipled. Most debtors will not settle just because they are threatened with a lawsuit. The advantage of making a demand in writing is that a copy of the demand letter can be presented at court. This is proof that you attempted to resolve the matter out of court, and this attempt should not be discounted. Judges like to have these matters resolved out of court and they look dimly on parties who deliberately refuse to pay their just debts and force the other party to take less than is actually owed.

From this point on it is assumed that the reader has decided to sue. Therefore, hereafter, this book deals with the practical considerations in preparing a case for trial in small claims court.

#### I. WHO CAN SUE IN SMALL CLAIMS COURT

In order to bring a suit in small claims court, the plaintiff (the person who is filing the suit) must be the real party in interest. By definition "a real party in interest" is a person actually affected by the actions of the defendant that caused the injury described in the complaint. Example: A person is hit by a car in a cross walk. The person may sue the driver for negligence, but the person's brother or sister may not sue the driver because they are not the real parties in interest to the accident. For example, assume that a person borrows a car and is in an accident. Since the driver of the borrowed vehicle is not the owner, he is not the real party in interest and cannot sue the other driver for the damage to the borrowed car. Only the owner can do that. If the owner sues the borrower, the borrower can sue the other driver

because the borrower then becomes liable for the damage and is a real party. Fortunately such complicated issues regarding real parties in interest seldom arise in small claims actions.

Agents for real parties in interest can file small claims action for the real parties. Such agents are persons holding powers of attorney for the real parties or are court appointed conservators, guardians, or personal representatives. Example: The person entered a coma and cannot file the suit himself. This person's sister has a durable power of attorney from the injured party. The sister can file the suit for her sibling.

Custodial parents have a legal right to file suits on behalf of their children. In doing so, they assure the court that the child's estate is handled properly. The parent or guardian usually must first receive court approval to bring suit for the child. This is an order signed by a local judge affirming that the parent or guardian is appointed the guardian of the estate of the child and is permitted to maintain the suit. The parent or guardian then files the suit in the same manner as any other. A phone call to a local attorney will apprise a parent or guardian of local procedure. It might be necessary to have the parent or guardian appointed as the guardian ad litem to bring the suit in small claims court. The parent or guardian may then proceed with the small claims action. The costs of the appointment as guardian ad litem are recoverable from the defendant if the small claims action is successful.

Most small claims actions are by individuals and seek money to

cover damages which the defendant is alleged to have caused the plaintiff. Any individual can bring a suit in small claims court if he is above the age of majority (more than 18 years of age) and has not been declared mentally incompetent by a court.

When a person who owns his business files a small claims action, the owner's name followed by the name of the business should all be listed as the plaintiff. Example: George Harper owns Harper's Garage. The plaintiff should be listed as George Harper, doing business as Harper's Garage.

A partnership is a legal entity. Thereafter, debts owed to a partnership must be recovered by the partnership. In such an event, the partnership is listed as the plaintiff with the names of the partners listed for reference. For example, assume that MG Partnership seeks to sue John Roddy. The plaintiff on the small claims complaint would read MG Partnership, a general partnership, with Mark Hallen and Lloyd Garger individually. Since all general partners have the right to act for the partnership, only one partner has to sign the small claims complaint on behalf of the partnership. Except for having a partner sign the complaint for the partnership, the suit is handled the same as any other action. New York is unique in that in most of its counties partnerships are precluded from filing small claims actions.

A corporation is a separate legal entity from its shareholders. In order for a corporation to bring a small claims action, the complaint must be signed by either an officer of the corporation or a person authorized by a resolution of the board of

directors of the corporation to file the complaint. Except for having an officer or other person sign the complaint for the corporation, the suit is handled the same as for any other plaintiff. An exception exists in New York wherein corporations are precluded from filing small claims complaints.

Licensing requirements may hamper filing or prevailing on a small claims complaint in certain circumstances. Most states require certain individuals engaged in business to be licensed to maintain a small claims complaint for work done in the business. Example: Most states require real estate brokers, contractors (painters, carpenters, cement workers, plumbers, etc.), automobile mechanics, TV and VCR repairmen to be licensed. If such persons are not licensed, then they are precluded by law from bringing a small claims suit to recover business debts.

Most states permit bill collectors to appear in small claims courts. In those states, the creditor assigns the claim (they transfer the claim against the debtor) to the bill collector, who becomes the new owner. The bill collector then brings the suit in his own name and after recovery usually pays 60% to the original creditor. While permitting all other types of small claims complaints, Kentucky and Texas preclude small claims actions involving interest for money lenders. The following states do not permit bill collectors (assignees) to use small claims court: California, Michigan, Missouri, Nebraska, New York and Ohio. In New Jersey, assignees of corporations but not individuals or partnerships may use small claims court. As a practical matter, it

makes no sense to hire a bill collector to file the suit in small claims court. The bill collector takes from 40% to 50% of the judgment when an average person could get the judgment himself for between \$25 to \$50. Collection is discussed in Chapter 12 .

## II. WHO SHOULD BE SUED?

### A. GOVERNMENT

Almost everyone can be sued in small claims courts. State governments cannot be sued without the plaintiff first giving the state agency in question written notice of the claim against the agency. A suit cannot be filed before the state agency rejects the claim or a fixed time has lapsed since the service of the claim. The time for filing the claim against the state agency is quite short. In California it is just 100 days from the incident giving rise to the claim. If the claim is not filed in a timely manner the person loses all right to bring the suit. A person having a claim against a state agency should contact that agency's legal representative and ask for the claim form. If the agency does not have a claim form, the person should contact the city clerk or county clerk or board of supervisors and ask for the claim form. With the forms will come the appropriate procedure and time limits for filing.

If a person has a claim against the federal government, he is usually out of luck. There is no federal small claims court and the federal government cannot be hauled into a state's small claims court without its consent. Suits against the U.S. government must be brought in federal court and is usually too much bother for the

amounts involved in small claims actions.

#### B. INDIVIDUALS

Most of the defendants in small claims cases are individuals. The suits against individuals are for what they did in their own individual capacities and not for what they did in business or as a partner or employee. This makes it easy to draft a complaint. The plaintiff simply lists each individual who caused the damage. The point to remember is that if a person is not named in the complaint as a defendant, a judgment cannot be obtained against him. There is no liability by association under the law. If a person is not named in a complaint then a judgment cannot be taken against him. For that reason all defendants must be identified in the complaint. For example, George was driving Bill's car when he hit Mary in an auto accident. If Mary names only Bill in the complaint, she will only be able to recover damages from Bill and not from George.

#### C. DEFENDANTS ENGAGED IN BUSINESS

The second most common defendant in small claims cases is a self-employed individual where the debt is business related. A self-employed individual is treated the same as a regular individual. A self-employed individual is personally liable for the consequences of all his acts and all of the acts of his employees in the scope of their employment. This means that the owner is responsible to pay the damages that he or his employees cause while doing their jobs.

In order to bring a small claims action against a self-employed person, the plaintiff should list as defendant the name of

the owner plus the business name he usually uses. Many states require persons doing business under names not their own to file a fictitious name statement with the county clerk. This fictitious name statement is a public document that lists the true names and addresses of the owners of the business. Persons having claims against the business can find the true names of the owners and file a small claims action. Example: John, an employee of TALK Enterprises, had a car accident, hitting Joan, while driving the company truck. The fictitious name statement lists the owner of TALK Enterprises as Bill Crayon. Joan files a small claims action against Bill Crayon, doing business as TALK Enterprises and owner of the company and John the driver as defendants respectively.

Besides a fictitious name statement, information about the owner of the business can also be obtained from the city or county business license office provided businesses are required to have business licenses in order to operate.

Many attorneys feel that since the employer is responsible for the actions of the employee it is unnecessary to name the employee who actually caused the injury as a defendant. On the other hand, the court may find the employee exceeded the scope of his employment (exceeded his orders or authority) the employer is therefore not liable for the damages. If the employee is not named in the action, the plaintiff will have to refile.

#### D. PARTNERSHIPS

A partnership is two or more individuals engaged in business for profit together. All general partners are individually liable

for all of the debts and obligations of the partnership regardless of their percentage of ownership. If four persons own a partnership equally (25% each), they are all nevertheless 100% liable to pay all the debts of the partnership. If one partner cannot pay his share the other partners must do so for him, and if three partners cannot pay, one must pay it all.

A partnership is a legal entity. This means that the partnership can enter its own contracts and both sue and be sued. When a partnership is sued in small claims court, both the partnership and the individual partners should be named as defendants. The reason for naming both the partnership and the partners is to avoid having to go back later and require a court judgment ordering the partners to pay the partnership debts.

For example, ABC Garage improperly fixed Jill's car. The fictitious name statement shows ABC Garage is a partnership composed of Marty Cabel and Bill Linen. Jill files a small claims complaint listing as defendants ABC Garage, a partnership, and Marty Cabel and Bill Linen, individually. The procedure for identifying partners is the same as outlined above in the subsection Individuals Engaging in Business.

#### E. CORPORATIONS

Corporations are also legal entities. Corporations may sue and be sued. A corporation is sued just like an individual: by listing its name on the complaint as a defendant. The shareholders of a corporations (its owners) are not personally liable for the corporation's debts or obligations. The officers or directors

cannot be sued for the actions of the corporation unless they themselves do the act that cause the plaintiff's injury. This is the limited liability aspect of corporations, their most important asset.

The full name of a corporation must be listed on the complaint. Many corporations will use fictitious names just as individuals use them. The reason for fictitious names is usually to create a warmer, more comfortable business atmosphere. For example, a business named Aunt Milly's Restaurant sounds better than Millicent Cramer's Restaurant, Inc.

Corporations are licensed by the state in which they operate. Contacting the Secretary of State will give a wealth of information. The Secretary of State's office will provide the full name of the corporation, its principal place of business and the designated agent for the receipt of process (the person who is to be served the small claims complaint for the corporation). Armed with this information, the complaint can be completed and filed.

#### F. SUING AN ESTATE

A common lawsuit is one against the estate of a deceased person. When a person dies, if the person has a large enough estate, a probate must be opened. In opening the probate, the probate judge appoints a personal representative and sets a fixed date for the termination of creditor claims. Under the laws of most states the personal representative is required to notify all known creditors of the decedent's death and publish notice of the death in a paper of general circulation. All creditors are thereby given

actual or constructive notice of the decedent's death and the time for filing the claims against the estate. If claims are not filed within the set period of time, the creditor loses all rights forever to present them and be paid.

If the claims are filed in a timely manner, the personal representative must either accept or reject them within a set time. If the claims are not accepted, they are automatically rejected. Once the claims are rejected, either expressly or by operation of law, the creditor can file suit for collection. Some states require the creditor to file the complaint for collection in the probate court, while other states permit the collection to be filed in any court including small claims court. The attorney for the estate will tell the creditor whether or not the state's law permits collection actions in small claims courts.

### III. WHERE TO FILE THE COMPLAINT

Naturally, a plaintiff would like to bring a suit in his home city. That is not always permitted. Each state has its own requirements as to where the suit may be maintained. The suit must be filed where the incident giving rise to the action occurred (such as the site of the accident) or where the defendant resides. Corporations may be sued in the city where their principal place of business is located. All states permit suits based on breach of contract to be brought in the jurisdiction where the contract was signed. A few other states permit a contract suit for damages to be brought in a jurisdiction where the contract was to be performed. Chapter 15 (State Laws) lists the various form

requirements among the states.

#### IV. STATUTE OF LIMITATIONS

Every state has enacted laws limiting the time in which various lawsuits may be brought. The states wish to keep their dockets manageable and do not want cases over a certain age cluttering their courts. The rationale behind this philosophy is that a person should look out for his own interest. There is an equitable adage at law, "He who sits on his rights loses them." Nothing is gained by belaboring the effect of the law. Until the law is changed, it is in effect. If a lawsuit is filed after the appropriate statute of limitations has run, the action will be dismissed with prejudice which means it cannot be filed again.

As a practical matter, all small claims matters have a reasonable statute of limitations. The major exceptions exist where there are special time limits for government agencies (see above), otherwise there usually are no immediate statute of limitation problems. Concern should start to arise, however, as the date of the event which gave to the cause of action approaches one year. Chapter 15 (State Laws) lists the general period of statute of limitations for each state.

The specific statute of limitations of each state can be obtained from state law volumes under the Index "Limitations of Actions" or "Statute of Limitations." Example: In California there is a one year statute of limitations for personal injury, a two year statute of limitations for breach of an oral (unwritten) contract, a three year statute of limitations for fraud and a four

year statute of limitations for breach of a written contract.

The specific statute of limitations for each state starts to run from the time of event causing the injury. The time period for filing for damages for an auto accident starts to run from the date of the accident. The period for filing for breach of contract runs, not from the date the contract was executed, but from when the defendant stopped performing his obligations under the contract. For example, assume George had a written contract requiring him to provide Harry 1,000 bushels of corn for 10 years for \$1,000 per year. After seven years George refused to deliver any more corn. Harry, in California, would have four years to sue George for the corn. The fact that the contract was signed seven years earlier is irrelevant because the statute of limitations runs from the date of the breach, not the date of execution of the contract.

The statute of limitations can be tolled (suspended) from running under certain conditions. If the plaintiff is unable to file the suit because of severe medical or mental reasons, the running of the statute of limitation will be suspended until the plaintiff is able to file. If the defendant tricks or deceives the plaintiff from filing his complaint, such as by promising to pay if the plaintiff does not file or concealing information that the plaintiff needs to file the suit, the statute of limitations will be suspended for the term of the defendant's improper actions. The best thing for any plaintiff to do is to file the action as soon as possible. We are talking about the collection of money that the

plaintiff feels is legitimately owed him. A delay in filing the suit only complicates collection and runs the risk the defendant may die or disappear, which would only further complicate collection.

#### V. EQUITABLE RELIEF

The vast number of lawsuits filed in small claims actions involve only money. Every so often a case is filed which involves what is known as a request for equitable relief, which is a request for a party be ordered to do or not do something. Equitable relief is known more generally to the public as an injunction or restraining order. The type of equitable relief available in small claims court is limited to rescission of a contract (canceling it), reformation of a contract (rewriting it to comply with the true intent of the parties or the law), restitution of property (ordering a person to return it to its proper owner), or specific performance (ordering the performance of a contract in accordance with the terms as written).

The value of the equitable relief sought in the small claims complaint cannot exceed the monetary jurisdiction of the court. If the value of the equitable relief exceeds the monetary jurisdiction of the court the court cannot grant relief. Example: Plaintiff seeks restitution of a car worth \$20,000 in a small claims court having a jurisdictional limit of \$5,000. Restitution will be denied because the car is worth more than the jurisdictional limit of the court. In contrast, if the car was worth only \$1,400, the small claims court could order restitution to the plaintiff because its

value does not exceed the court's monetary jurisdictional amount. The states permitting equitable relief are listed in Chapter 13 (State Laws).

#### VI. JURY TRIALS

Most states do not permit jury trials in small claims actions. The prohibition is intended to accelerate the proceeding so more people can participate. If a person wants a jury, he can always get it by going through the normal lawsuit procedure, which is cost prohibitive for the small case. Jury trials take longer to schedule, which is a major reason not to have a jury trial. It could extend the trial of the case from six weeks for a non-jury trial to several months.

The states permitting jury trials are listed in Chapter 13 (State Laws). In states permitting jury trials, the person requesting the jury trial must post jury fees of between \$50 and \$200 to have the jury. If the jury fees are not posted, there will be no jury. If the person requesting the jury wins, the other party must pay the jury fees.

#### VII. HOW MUCH DAMAGES TO SEEK

There is a maximum amount of damages that a small claims court can award. In California the maximum award is \$5,000 in damages. Just because a court can award a maximum amount is not a reason to ask for it. The plaintiff in every action has the burden to prove the nature, scope and extent of damages. No damages can be legally compensated until after the plaintiff has proved to the satisfaction of the judge or jury that they were actually suffered

and incurred.

Most people tend to sue for too less rather than too much. A case heard in Los Angeles concerned an unlicensed contractor who improperly installed wallpaper in a single mother's bathroom. The contractor charged \$900 and used both improper paper and the wrong type of glue. The moisture caused the paper to shrink and the glue to peel from the wall in sticky globs. The plaintiff had to pay nearly \$2,000 to repair the damage caused by the unlicensed contractor. The plaintiff was unfamiliar with small claims court and only sued for the \$900 she actually paid the defendant. At the time the maximum amount recoverable in small claims court was \$1,500. The plaintiff had pictures of the bathroom before the repairs were commenced. She had the licensed contractor who did the repair work testify. The licensed contractor testified the work done by the defendant was substandard and that the job should have cost about \$900 had it not been for the correction of the defendant's work. The defendant, an unlicensed contractor, had a number of complaints on file with the Better Business Bureau, and his defense was that the plaintiff improperly cared for the wallpaper by having him install it in the bathroom. The judge awarded the plaintiff the maximum of \$1,500 under the court's equitable power to grant such further and proper relief. The judge stated that the plaintiff could have sued for her full damage of \$2,000 in Municipal Court and collected. The evidence fully proved the extent of the plaintiff's damages.

Whenever a suit is brought for damages to property that has

been destroyed, the plaintiff will receive the fair market value of the property rather than its replacement value. That is the same principle used by insurance companies. The damages legally recoverable in court for injury to property are the property's fair market value at the time of the injury. This sometimes works an injustice, such as where a new engine had just been placed in a car that has been totaled. To avoid endless and prolonged suits over replacement value, the concept of fair market value is used. Fair market value is the concept used in the tax code for depreciation and using it makes the affixing of a dollar value easier.

Generally, all reasonable out-of-pocket expenses that were incurred by the defendant's actions can be recovered in small claims court to the court's jurisdictional limit. The keyword is "reasonable." A woman once told the court that a car dealer wrongfully repossessed her car, forcing her to rent a car for a month and spend nearly \$1,200 in rental until she bought another car. She asked the judge if she could recover the \$1,200 in small claims court. The opinion was that while the repossession was wrong the rental costs were excessive. A plaintiff has a duty to mitigate damages. The woman did not reasonably attempt to get her rental costs down. She had another car that would have been driveable with only a few hundred of dollars of work, but she chose to rent instead.

Punitive damages is an award of damages that is intended solely to punish the defendant for acting in a particularly nasty manner. Punitive damages are rarely given in small claims cases.

When they are awarded, they are done so as punishment for intentional bad acts such as assaults, batteries, etc. There is no harm in asking for punitive damages if the case merits them. Example: The lawsuit is for damages to a vehicle caused by the defendant's drunk driving. Punitive damages can be sought in addition to the amount necessary to repair the car. If it is not granted, the denial will not effect the merits of the rest of the case. Acts that are specifically intended to hurt people or their property along with those acts which are so grossly negligent as to create the likelihood of injury are the types for which punitive damages can be awarded. Nothing is lost in asking for them when the facts justify it. If they are awarded it is a bonus; if not, nothing is lost.

CHAPTER 3  
FILING THE COMPLAINT

Now is the time that tries the hearts of all plaintiffs. For now is the time that the complaint is drafted and filed. Up to this point, everything was speculative. Most people decide before reaching this point not to sue for a variety of very practical reasons: the process is too cumbersome, the money is not enough, it takes too long, the moon is in the seventh heaven, Jupiter is aligned with Mars. The fact is that many people are intimidated with the process. This is unfortunate but nonetheless all too true. Hopefully, this book should convince the reader that there is nothing to fear regarding the small claims court. It really is easy to use, but being easy to use does not translate into always winning when using it. Plaintiffs still must produce evidence to support their case in order to win. The burden of proof is always on the plaintiff.

I. FILING FEES AND COSTS

One of the most important questions a person asks regarding small claims court is, "How much does it cost?" This is an understandable and totally appropriate question. There is always a filing fee for any complaint filed in any court. Courts are not free and small claims courts are no exception. The usual filing fee is between \$10 and \$25, rarely any more. In California, the basic fee is \$18 per case. Multiple filers, those with over 13 cases per

year, pay more. A person unable to pay the filing fee can, in most states, request that a court grant a waiver of fees. This waiver is called a *Forma Pauperis*, which is Latin for "Form of a Pauper." If the plaintiff qualifies, the fee is waived and subsequently recovered if the plaintiff wins the case. The defendant pays the filing fee as a court cost to the plaintiff if the plaintiff wins the case.

The most expensive cost in a small claims action is usually incurred in serving (delivering the complaint) to the defendant. State law is formalized in the manner and method of serving the complaint on the defendant. Many times a professional process server (a person who delivers complaints on defendants for a living) is employed. The process server will usually charge \$50 to \$100 to make the service on the defendant. In many states a county sheriff's office or police department will serve a complaint for a fee. Use of the sheriff or police officer is cheaper than a private process server, but it usually takes much longer to have the service done because service of civil process is not their primary duty.

The next item of major cost is witness fees. If a witness will not appear voluntarily, the witness can be compelled to attend by subpoena (see Chapter 5). Most states require a person being subpoenaed to live within a certain distance of the court (usually between 100 and 150 miles) and to be paid a daily fee (usually \$35) and a mileage fee (usually 18¢ per mile). A judge will not order the loser to pay the winner's witness unless it finds that the

witness was vital or at least important to the proof of the winner's case. This is policy prevents the prevailing party from incurring unnecessary witness fees with which to saddle the loser.

Most of the costs related to pursuing a small claims action are recoverable from the defendant if the plaintiff wins or from the plaintiff if the defendant wins on a cross-claim against the plaintiff. While court costs of filing fees, service of process fees, witness fees and mileage are usually recoverable, expert witness fees usually are not. Also recoverable are fees for subpoena of individuals and for subpoena duces tecum for documents. Interest on the judgment is always awarded and sometimes it is awarded before judgment. Prejudgment interest (interest running from a date prior to the date of judgment) is governed by the laws of each state. A plaintiff should determine if it is awardable in his case. After the trial, the plaintiff presents a summary of his costs to the court for approval. Once approved, the costs are included in the court's judgment against the defendant.

## II. FILLING OUT THE FORMS

The basic complaint for small claims courts does not change much from state to state. The same basic information has to be included in every complaint. Since small claims courts are intended to be user friendly, the information needed to be set forth on the complaint is very easy to provide. Almost all states tend to follow the same basic format and request the same information on the complaint. For some states, such as California, the preparation of a small claims complaint involves little more than the filling in

the blanks. The plaintiff always is required to state enough information to the defendant to show him why the plaintiff is suing. Many states do not even use the term small claims complaint but instead refer to it as a small claims court claim to signify the simplicity of the pleading.

In California the form is simplicity itself with only seven questions to answer. For example, Michael Roddy is suing John Stinemeyer for \$1,500 for damage to a car. Michael Roddy, the plaintiff, will provide the following information on a California small claims complaint.

1. Write or type his name, Michael Roddy, and address in the box titled "Plaintiff."
2. Write or type the defendant John Stinemeyer's name and address in the box titled "Defendant."
3. On line 1 write or type the sum \$1,500, and in the space below it write or type "On August 1, 1993, the defendant damaged my car."
4. On line 2 check box 2 (a) to show that the defendant has not paid the claim after a demand was made for such payment.
5. On line 3 insert the letter representing the reason the suit is being filed in this particular court (usually either because the incident which is the basis of the suit occurred in the court's district or it is where the defendant lives).
6. If the plaintiff has filed more than 12 small claims in the last year, he must check box 4 (so he will be charged a higher filing fee). In this case the plaintiff has not

filed more than 12 claims in the last year; so he leaves it blank.

7. The plaintiff prints his name and signs the claims.

Once the seven questions are answered, the complaint is now ready to be taken to the clerk's office and filed. Once the complaint is filed, the clerk will keep the original and return two copies to the plaintiff. The plaintiff will then keep one copy of the complaint and serve the other copy on the defendant. When there is more than one defendant, the plaintiff will make a photostatic copy of the complaint to be served on each defendant.

All but a few states permit a landlord to bring an eviction or unlawful detainer action in small claims court. Warning: Do not sue in small claims court for unlawful detainer even if it is legal. All states have a summary unlawful detainer procedure that is faster and cleaner than a small claims case. The normal unlawful detainer action takes about 30 days and deals only with the right of possession. The tenant is not permitted to remain on the property pending an appeal after losing the case.

A small claims action for unlawful detainer is not so neat. In many states, the defendant can appeal and while appealing is allowed to remain on the property. The appeal of a small claims action can take months. In a real California example, a tenant had a terrible landlord who threatened and bullied his tenants. The tenant would not take the abuse. Therefore, the landlord served notice to vacate and then filed suit for unlawful detainer in small claims court in Chula Vista, California. Judgment was obtained

against the tenant, who promptly appealed. While the small claims action was on appeal, the tenant remained on the property. The tenant, then, requested a finding of fact from the judge in the small claims action, which delayed the appeal. The result was that nearly nine months later the tenant was still in the apartment without having paid any rent. By then, the landlord had enough and agreed to drop the complaint if the tenant would simply move out so the apartment could be rented. The fellow tenants threw him a wild "going away" bash.

Small claims judge pro tems in Los Angeles are instructed to inform plaintiffs before hearing their cases that defendants can appeal adverse decisions and remain on premises while the appeal is pending. The courts in California do not like the use of small claims court for unlawful detainer actions because they are terribly inefficient and cumbersome. Since the legislature has given the small claims courts jurisdiction to hear unlawful detainer action, the courts must continue to hear them if they are filed there.

### III. SERVICE OF THE COMPLAINT ON THE DEFENDANT

After the complaint is filed, each defendant must be given notice of the suit filed against him. This is known as "service." Each defendant must be provided with the small claims complaint in such a manner that the court will know that it was done. The procedural requirement for service must be followed correctly or the action may not proceed or may be dismissed altogether. A plaintiff cannot personally serve the small claims action on the

defendant.

#### A. BY CERTIFIED MAIL

Most states (such as California and New York) will permit service of the complaint on a defendant by certified mail. The court clerk will post the complaint to the defendant's address by certified mail. If the defendant signs for it service is made. The fee for this is \$3 in California. It is about the same in most states.

The problem with certified mail service is obvious. If the defendant does not accept delivery, the defendant is not served. The professional deadbeat knows better than to accept any certified mail. A few states (such as Alaska and Arkansas) have adopted statutes which hold that service by certified mail is effective even if refused by the defendant, but that is a minority view. Estimates are that nearly 60% of all small claims complaints sent by certified mail are accepted. That means defendants reject over four out of every 10 certified mailings.

When the court clerk serves the complaint by certified mail, the plaintiff should contact the clerk before the hearing date to ensure the defendant accepted service. Many clerks will inform a plaintiff before the hearing date if the defendant refused service. Some clerks do not, and the plaintiff is surprised at the time of the hearing to discover for the first time that service was not made. The court then has no jurisdiction to proceed, and the case is continued to give the plaintiff time to serve the defendant in another manner. Discovering before the hearing that there was no

service causes the plaintiff the inconvenience of a needless court appearance. When service by certified mail has not been made, the plaintiff must serve the defendant with the small claims complaint in another way.

#### B. PERSONAL SERVICE

Next to service by certified mail, the most popular method of service of a complaint is by personal service directly on the defendant. Personal service of a complaint can be accomplished in one of two ways:

1. By law enforcement officers. Every state permits civil process, such as a small claims service, to be served by its law enforcement officers (sheriffs, constables or police). The fee charged is usually \$25 to \$50. In some states, this is the only manner of serving civil process except for certified mail. A disadvantage in using law enforcement officers is that civil service of process is not a high priority on their list of duties. It often takes an inordinate length of time to effect service. The real advantage of using law officers for civil service is that the defendants are far less likely to attack or abuse the process server. Several process servers have told horror stories of fights and assaults while attempting to serve process over the years.
2. Private process servers. Many states (check the appendix to determine your state's law) permit an adult over 18 who is not a party to the action to serve process. Some

states have professional process servers who will serve process on a party for a fee of \$50 to \$100. Personal service of the complaint means just that. The complaint must be delivered personally to the defendant. It is not necessary to force the defendant to take the papers. Once the process server has properly identified the defendant, if the defendant refuses to take the complaint, the process server simply leaves the papers in the defendant's presence and departs. It is a fiction of the movies that a person can stand before the process server and refuse to take service and boast that he is not served. The key is that the defendant knew the papers he refused to accept were a complaint.

#### C. SUBSTITUTED SERVICE

The least popular and most contentious means of service of process is that of substituted service. Many states have statutes which hold that when a defendant cannot be served exercising and using the normal methods of certified mail or personal service, reasonable diligence the plaintiff can serve the complaint by substituted means. In these states the plaintiff is permitted to leave a copy of the complaint at the defendant's home or business with a person over 18 years of age and in charge. The plaintiff then must mail a copy of the complaint to the defendant at the same address. Service is usually deemed complete 10 days after the mailing.

Because the defendant is never personally given the complaint,

it is obvious that many defendants will simply disregard the whole matter and claim that they never got the complaint. The courts require that before a plaintiff use this method of service that the plaintiff file an declaration stating the steps previously undertaken to serve the defendant. Substituted service requires the process server to leave a copy of the complaint with an identified person at the business or residence of the defendant and to mail a copy of the complaint to the defendant at that address within 10 days. A proof of service must be filed by the process server stating the name of the person receiving the complaint.

#### D. TIME FOR SERVICE

Procedural due process under the United States Constitution requires the defendant be served with the complaint enough days before the trial to prepare a defense properly to the allegations in the complaint. If the clerk is not serving the complaint on the defendant by mail, the plaintiff should ask how many days the state's law requires the defendant be served prior to trial. The number of days varies but is usually between 10 and 30. The day of service of the complaint is not counted but weekends and holidays are counted because those are days that are available to the defendant to prepare his defense.

The plaintiff is required to file with the court a proof of service form prior to trial that states when the defendant was served. If the defendant was not given the minimum amount of time to prepare, the trial will be rescheduled unless the defendant waives the defect and agrees to go ahead with the trial. The

defendant should appear at any scheduled hearings in order to protect his interest even though he may not have been served properly. Such an appearance is not a waiver of service, and the defendant can still insist on the full number of days to prepare as promised under the law.

#### IV. SERVICE OF A BUSINESS

The rules of service of a complaint on a business depends on the type of business which is being sued. A sole proprietorship (a business owed by one person or a husband and wife) is sued by naming the business and the owner (the husband and wife if owned jointly). Service is made by delivery of the complaint on the owner (husband or wife if owned jointly).

A partnership is served by delivery of a copy of the complaint to any general partner. Each partner being sued must also be served with an individual copy of the complaint.

Corporations are different from both sole proprietorships and partnerships. Corporations are required to maintain records with the Secretary of State's office in every state where they do business. Part of the information that the corporation must maintain with the Secretary of State is the mail address of the person authorized by the corporation to receive all service of process for the corporation in the state. This person is called the "designated or resident agent for process." This is the person to whom the complaint can be sent by certified mail. A corporation's resident agent may not refuse to accept service by certified mail if authorized by state law. In addition to serving the complaint on

the designated resident agent for process, a plaintiff may personally serve the complaint on any officer of the corporation by personal service. Customarily it is much easier to serve a corporation by posting it as certified mail to its designated agent for service. Many corporations that do business in several states retain the services of a professional resident agents who are the mailboxes for forwarding all correspondence to the home office. Such agents may represent hundreds of corporations

#### V. SERVING A DEFENDANT IN THE MILITARY

There are problems in suing people in the military. Congress passed the Soldier's and Sailor's Relief Act in 1940. The point of this Act is that a soldier or sailor on active duty cannot be sued in state courts for civil matters. If a person wishes to sue a soldier or sailor on active duty (does not include the reserves) the serviceman may stop the whole proceeding by simply invoking this Act.

A San Diego law firm once represented several car dealers in their collection actions. It was not and still is not uncommon for sailors to purchase vehicles and then not pay for them. The cars were repossessed and subsequently sold by the dealers under appropriate law. The dealers then obtained deficiency judgments, but they could not collect because of this Act. There is no distinction under the Act between a person stationed across the world and someone stationed down the street who lives near a base with a wife and three kids. In many instances, the intent of this Act has been abused to obtain property without the intent to ever

pay for it. This conduct is little better than theft, and use of this Act in that manner is an insult to all of the decent men and women in the military who properly pay their just debts.

#### VI. FAILURE OF THE DEFENDANT TO APPEAR AT TRIAL

When the defendant is on active duty and does not appear at the trial, nothing happens. Under the Soldiers and Sailors Relief Act of 1940, default judgments cannot be taken against servicemen on active duty. What happens when a nonmilitary defendant fails to appear at the trial depends on whether or not the defendant was properly served. The court will determine if the proof of service is valid. If the proof of service is procedurally invalid, the court will dismiss the case for want of jurisdiction over the defendant. If the proof of service shows service was properly effected, the case will continue.

The court will not automatically grant judgment to the plaintiff just because the defendant fails to appear. The plaintiff must still present evidence to prove that he is entitled to receive the requested damages. This is called a "prove up." The judge will hear only the plaintiff's case and decide if damages should be awarded. Just because a defendant does not show does not mean that a judge can award damages. If no liability can be shown or an award would otherwise be in violation of state or federal law, the plaintiff receives nothing.

If the plaintiff succeeds in convincing the court that damages should be awarded, the plaintiff wins the action. The court will issue its judgment for the amount of damages and other relief that

it is awarding. Part of the judgment will be an award for damages suffered by the plaintiff, the court costs in bringing the suit and the amount of interest permitted under state law.

## CHAPTER 4

## WHAT THE DEFENDANT CAN DO WHEN SUED

The first three chapters dealt with small claims procedure from the viewpoint of the plaintiff, the person bringing the suit. This chapter will discuss the various options that should be considered by the defendant. Actual preparation for trial should be the same for both the plaintiff and defendant. Chapter 5 (Preparation for Trial) details the steps that both parties take to prepare to present their case before the judge or the jury.

Usually, the defendant knows the basis of the plaintiff's case and why he is being sued. The defendant already has a significant advantage over the plaintiff: the defendant can reasonably compute plaintiff's damages and how the plaintiff will go about proving those damages. On the other hand, the plaintiff does not know how the defendant will present his defense. Never discount this uncertainty. The worst thing that a plaintiff can do is appear uncertain and unsure in the presentation of his case. The defendant can play upon that uncertainty to maximize his defense.

## I. THE NECESSITY OF FILING AN ANSWER

Few states require the defendant to do anything but appear at the small claims court trial and tell his side of the story. The defendant has an advantage because the plaintiff does not know if the defendant is going to contest the action or even appear at court. The plaintiff may not know all of the defense theories the

defendant can expound. The plaintiff may be caught unaware at trial with the presentation of a wholly new and previously unannounced defense that he is unprepared to disprove. Because of the uncertainty regarding whether or not the defendant will appear, the plaintiff will be forced to go through the time-consuming and potentially nerve-wracking experience of preparing the case for trial. The plaintiff may unnecessarily have assembled and interviewed witnesses and have left work to attend the trial. His lost pay will not be compensated by the court.

A few states require the defendant to file with the court a responsive pleading (called an "Answer") in order to appear and defend himself against the allegations in the complaint. The court clerk in such states has a simple form that is used for this purpose. The defendant simply denies the plaintiff's claim or objects to the size of the claim. A copy of the answer is usually mailed to the plaintiff. Those states that require an answer to be filed also have fixed time limits for the answer to be filed. If the answer is not filed within the appropriate time limit (usually five to 10 court days before the trial), the defendant will be denied the opportunity to file the answer, and a default will be entered against the defendant.

Even though the defendant does not appear for trial, the court will not automatically grant judgment to the plaintiff. "Due process" still requires that the plaintiff present evidence that he is the one entitled to receive the requested damages. This process

is called a "prove up." The judge will hear only the plaintiff's case and decide whether or not damages should be awarded. Just because a defendant does not appear does not mean that a judge can award damages. Perhaps no liability can be shown or the award violates state or federal law, and the judge is thereby prevented from awarding damages.

If the plaintiff presents sufficient evidence to convince the judge or jury that damages should be awarded, the plaintiff wins the action. Once the judge or jury decides for the plaintiff, the judge will issue a "Default Judgment" for the amount of damages and other relief that it is being awarded the plaintiff. Part of the judgment will be an award for the proper damages suffered by the plaintiff, the court costs in bringing the suit and the amount of interest permitted under state law.

If a default judgment is taken against a defendant, most states delay enforcement of the judgment for a period of 10 to 60 days. The purpose of this delay is to give the defendant the opportunity to file with the court a "Motion to Vacate Judgment." This is a request by the defendant that the default judgment be set aside and a new trial be held in which the defendant will appear and present his side. The form for the "Motion to Vacate" is obtained from the court clerk and is as simple to complete as other small claims court forms. The court will usually grant a motion to vacate a default judgment only on one of the following grounds:

1. An emergency arose that made attendance impossible. This

can be any reasonable excuse acceptable to the court. The court must be convinced that but for the happening of the unexpected event, the defendant would have attended the trial.

2. The defendant was never notified of the hearing. The defendant must prove that he was never served with the complaint. This argument occurs most often when substituted service of the complaint was made on the defendant. If the defendant was not properly served the judgment, is null and void.

Judges are not disposed to grant motions to vacate judgments. The longer a defendant waits before moving to vacate the judgment, the more unlikely it will be granted, except where the defendant was never given proper notice of the hearing.

## II. FILING A COUNTERCLAIM

A defendant in a small claims case has the same right as any other defendant to countersue the plaintiff. This means that small claims court is not a one-way street for the plaintiff. A defendant can also seek justice in the form of damages and equitable relief. Important Reminder: In nearly all states, if a defendant has a cause of action against the plaintiff arising from the same set of facts that serves as the basis of the plaintiff's suit, the defendant must either file a claim against the plaintiff or have the case transferred to a formal court. Otherwise, the plaintiff will not be able to sue the plaintiff on the claim later.

The purpose of requiring the defendant to file a claim for all damages arising under the same set of facts as the plaintiff's claim is to have a final one-time resolution of all claims arising under one event. States vary concerning the procedure to be followed by a defendant in presenting a claim against the plaintiff.

In a few states the defendant has the advantage of being able to wait until the day of the trial to file his claim against the plaintiff. These states permit the defendant's claim to be filed on the morning of the trial and sometimes even permit the filing at the beginning of the trial. The defendant has an advantage because the plaintiff does not know if the defendant is going to file a cross claim and if so, on what grounds. In fact he does not know if the defendant will appear to contest the action. The plaintiff is usually caught unawares and may not even know prior to trial the claims against him. The plaintiff without knowledge prior to trial of these totally unexpected claims is unprepared to refute them.

When the defendant surprises the plaintiff with a last minute filing of claim, the plaintiff has one of two options. The plaintiff may:

1. Seek a reasonable continuance to prepare a defense against the allegations contained in the defendant's counterclaim. If a continuance is sought, it will always be granted. All of the work and preparation that the plaintiff has undergone to prepare for the trial that day

will have to be redone again for the new trial. The plaintiff will be forced to go through the time-consuming and potentially nerve-wracking experience of preparing the case for trial again. The plaintiff may unnecessarily have assembled and interviewed witnesses and been absent from his job to attend the trial. The court will not compensate him for the lost pay of his efforts.

2. Bite the bullet and stand at trial with the evidence at hand and refute the defendant's claims to the best extent as possible.

The surprise caused by a defendant's last minute filing will severely affect the plaintiff's presentation of his case. Many plaintiffs cannot overcome such a surprise and adjust their case.

A helpful tactic is for the plaintiff to call the defendant as his first witness. Most defense attorneys rehearse the testimony of their client and tell him to listen to the plaintiff's testimony in order to color his testimony to the most attractive shade. Calling the defendant as the first witness is most unusual and unexpected. In one case the defense attorney was the former president of the county bar with decades of experience. When called as the first witness, his client nervously asked, "I'm first? What do I do?" His attorney objected to the calling of his client first, but the judge had to allow it. His client was so shaken that he made a terrible witness and the case was lost. After the trial the attorney said that in 20 years as an attorney he had never seen

that tactic before. Two weeks later he had a jury trial in which he was the plaintiff's attorney. He called the defendant as his first witness and won.

Most states require a defendant to file his counterclaim against the plaintiff with the court by a certain date (usually five to 10 days before the trial). Once the claim is properly filed, the defendant's counterclaim will be heard on the same date as the plaintiff's claim. Some states will automatically reschedule a small claims case when a defendant's counterclaim is filed to give the plaintiff adequate time to prepare.

The defendant's counterclaim has the interesting effect of making the plaintiff the cross-defendant to the counterclaim. The defendant has the same obligation to prove by a preponderance of the evidence the allegations contained in the counterclaim as the plaintiff has to prove the allegations of his claim. It is possible for both the plaintiff and defendant to prevail and be granted relief in part on their cases.

Following this chapter for reference purposes is a completed defendant's claim as used in California. Nearly all states follow the same format. It really is that simple. The defendant merely states the basic reason for suing the plaintiff as the plaintiff did in his claim.

### III. TRANSFER TO REGULAR COURT

The last quiver in the sheath of a defendant is the ability to request the small claims case be transferred to a regular formal

court. Transferring a case to a formal court has advantages and disadvantages to a defendant. The advantages to a defendant in transferring a case are:

1. A long delay before the case will be heard. When a case is transferred to a regular court's docket, it is placed on the last of the civil calendar. All criminal cases have precedence over civil cases. So criminal cases, which have a statutory dead-line problem, will be heard before the civil cases. Certain civil cases, such as those involving elderly parties, are given precedence on the calendar and moved to the front.
2. Attorneys are permitted to represent parties in regular court. Some states do not permit attorneys to represent parties in small claims court. A defendant may want to be represented by an attorney, especially in the situation where the defendant knows he is not able or competent to present his own case in a state which does not permit attorneys in small claims cases.
3. A defendant can recover more in damages in a formal court than in the small claims court. Example: In California the most that a person can receive is \$5,000. If the defendant has a meritorious claim against the plaintiff under the same set of facts for \$25,000 and the case is heard in small claims court, the most the defendant can receive is \$5,000 (a loss of \$20,000). In contrast, if

the case is heard in a municipal court in California, which has jurisdiction to \$50,000, the defendant can get the full \$25,000 if he wins.

The disadvantages that could result to a defendant from the transfer to a formal court are:

1. The plaintiff could amend his suit to sue for more money. If the case is transferred to a formal court, the plaintiff is no longer bound by the limits of small claims court and can sue for damages equal to the jurisdictional limit of the court.
2. If the dispute is over a contract and the contract provides for attorney fees to the prevailing party and the defendant loses, he will have to pay the plaintiff's attorneys fee, which will be higher than if the case had been heard in small claims court. Of course, if the defendant wins, the plaintiff must pay defendant's attorney fee pursuant to the clause.

Whether or not a defendant can transfer a plaintiff's small claims case to a formal court depends on state law. If the defendant files a counterclaim exceeding the jurisdictional amount of the small claims court, the entire case with both plaintiff's and defendant's claim will be transferred to the higher court. A few states permit the transfer at the request of the defendant even though the defendant has not filed a claim or his filed claim is within the small claims jurisdictional amount. Other states

transfer the case whenever a jury trial is requested by either party. Only a few states absolutely refuse to transfer a small claims case regardless of the size of the defendant's claim. Chapter 15 (State Laws) lists the transfer provisions of the various states.

CHAPTER 5  
PREPARING FOR TRIAL

A plaintiff gets just one shot to present his case in small claims court. Most states do not permit a plaintiff to appeal a losing small claims decision. A defendant on the other hand is given the chance to appeal a judgment taken against him. For this reason it is all the more important that the plaintiff (and the defendant when presenting a counterclaim against the plaintiff) present his case in the most concise and professional manner.

It is amazing how many people seem to feel that they will win if they yell the loudest or act the most indignant in the Court. These people fail to grasp the concept of burden of proof is the same in small claims courts as any other court. The plaintiff (or defendant with counterclaims) has the burden and sole responsibility to present enough proof to convince the trier of fact, be it a judge or jury, that he should win. No degree of indignation nor sarcasm can replace the legal requirement of proof. Many seem to forget that neither the judge nor jury knows anything about the parties before the trial. The parties approach the trial with a clean slate and the judgment rendered by the court is written by the parties themselves through the presentation of their cases. For this very reason, it is important that parties present their cases in the most complete and professional manner possible.

## I. DOCUMENTARY EVIDENCE

The most common type of evidence produced in a small claims court is the type known as documentary evidence. As the name implies, documentary evidence is that of a written nature that tends to prove or disprove the material elements of the plaintiff's or defendant's case. Examples of documentary evidence are canceled checks used to prove that actual payments were made on a debt.

Documentary evidence is most often needed in situations involving the Statute of Frauds. All states have laws requiring that any contract for the sale of goods worth over \$500, the sale of land, or any interest that will touch and concern land for over a year (such as a lease, easement, condition, covenant or restriction) must be in writing to be enforceable. A court may order specific performance of such a contract that is not in writing if it can be proven that a contract did exist between the parties along with one or more of the following acts:

1. The purchaser has taken possession of the land or property.
2. The purchaser has made substantial improvements to the real property.
3. The purchaser has paid for the property.
4. The party seeking to enforce the contract against the other party has fully performed his obligation under the contract.

In other words, before a person can win a suit for damages based on

the sale of goods worth over \$500, he must show that a contract existed for the sale of the goods or that the defendant has taken possession of the property. A landlord cannot sue a tenant for breach of a lease specifying occupancy longer than one year that is not in writing. For example, assume that George rents a building for five years but doesn't sign the lease. After two years, George moves out. Since the lease was not in writing, the landlord may not sue for the unpaid rent for the remainder of the unused term of the lease because the lease extended over one year and was not in writing.

In addition to the Statute of Frauds, there is another procedural rule called the Best Evidence Rule that can come into play if contracts are involved. Under the Best Evidence Rule, a summary of a written document, either oral or written, is not admissible as evidence in place of the original document unless it can be shown that the original document is unavailable. The unavailability must not be the fault of party using the summary as evidence. This is a terribly legalistic objection that will only come into play in those states permitting attorneys to appear in small claims case. Assume this rule is applied, and the plaintiff has the only copy of a contract and cannot find it. Before he can present what the contract said he must satisfy the court that he actually lost the contract. He must convince the court that he is not just hiding it from the court so that a different interpretation of its clauses can be alleged.

In addition to contracts, documentary evidence also consists of bills, estimates, police reports and any other tangible proof of a party's case or defense. All of this evidence must be assembled and brought to court. Any documentary evidence not in court when needed does not exist. The court will not accept as evidence that which is not in the courtroom at the time of trial because the opposing side is unable to see, verify or refute it. This is just basic fairness.

In addition to written materials, photographs and video tapes are also sources of documentary evidence. In a California case, temporary restraining order was once sought for an illegal dump on a person's property. Photographs showed that stuff was dumped on the property but it did not give the depth and detail needed. A video tape camera was placed on the property and photographed the property from several angles. Instead of arguing for an hour about the extent of the problem, the tape was played for the judge. The tape showed the extent of the depth far better than the flat pictures ever could. The case was won, and the injunction to clean the property was granted.

Another example of documentary evidence arose in a case in which a woman arrested for worker's compensation fraud. This woman was on a full disability for a bad back after telling a worker's compensation doctor that she could hardly move. Yet, despite her disability she was a participant in a rodeo. Video cameras caught her doing trick riding and also doing heavy yard work. The tape was

introduced into evidence to assure that the woman gets a prolonged rest for her back at state expense.

Another form of documentary evidence is the damaged item itself. An auto body repair shop was sued by a woman because it did not repair the car to her satisfaction. The woman had pictures that really did not show the reason for dissatisfaction. The defendant claimed she was being unreasonable in her expectations and that he had done a good job. Before rendering his decision, the judge asked where the car was located and told that it was in the parking lot. The judge continued the case to the end of the docket and personally inspected the car. After examining the work, he found it to be fair but, by no means, the first-rate standard represented. The judge gave the defendant the option of redoing the work or reducing its bill by one-third to reflect what was considered the true value of the work. This was acceptable to the plaintiff, and the defendant agreed to the reduced bill. The judge would not have been able to reach this ruling had the plaintiff not brought her car to the court.

## II. DEMONSTRATIVE OR RECREATIONAL EVIDENCE

One of the most persuasive forms of evidence is called demonstrative or recreational evidence. The most common form is use of charts or maps. We have all seen on television the police officer testifying in court that an accident occurred while a car was going south and another car turned in front of it. The district attorney or defense counsel would be tracing the car's path on a

large map of the intersection as the officer talked.

Judges and juries both appreciate visual displays. The fastest growing field in computer graphics is computer simulations for personal injuries. That is not to say that such simulations will be used in small claims cases. If the case is worth several thousand dollars, it might be worth asking a computer specialist what it would cost to make a simulation.

Another way to create a simulation is to restage the event exactly as it happened with a video tape present. Naturally, there is always a question in the back of the mind as to whether or not the event is being accurately portrayed. As with all evidence it is for the trier of fact, be it the judge or , to give the appropriate weight to such evidence.

### III. USE OF WITNESSES

All triers of fact, be they judges, juries or judges pro tem, give greater credence to the testimony of impartial third parties than to the testimony of either the plaintiff or defendant. This is only common sense: the third parties are relatively disinterested because they are not sharing in any award. They tend to be viewed as more reliable than a party who although honest may be swept away by the emotion of the case.

Some states permit statements by witnesses in small claims actions to be used instead of the witness actually appearing. The statements must be in writing and signed under penalty of perjury. The statement should declare, "Signed under penalty of perjury that

the foregoing is true and correct." Still, it is always best to have your witnesses available at trial. Since the other party cannot question a witness who is not present, judges do not have to accept a written statement or give it much effect. The court clerk would know whether or not the judge admits witness statements when the judge is the trier of the case. When the case is tried by , witness statements are not admitted.

Sometimes a judge will be willing to take testimony of a witness over the telephone. The only way to determine if a court will permit it is to ask the clerk. If the clerk doesn't know, he will ask the judge. Many judges will allow telephone testimony if they are the trier of fact. If a is deciding the case, telephone testimony of witnesses is denied because the cannot see them. The judge cannot see the witness either, but that doesn't seem to matter.

When a party wants a person to testify at trial, he can subpoena the person to attend the trial. A subpoena is a court order that requires a person to appear at the court to testify; failure to appear brings charges of contempt of court. Another type of subpoena called a subpoena duces tecum can be issued for the production at trial of designated documents. A subpoena duces tecum requires the person served with it to bring specified documents to court on the day of trial.

A subpoena can be served only in person and cannot be mailed. The person serving the subpoena must be over 18 years of age. In

some states a party can serve the subpoena in other states if the plaintiff cannot serve it. To be safe, the subpoena should not be served by a party to the case. The subpoena form can be obtained from the court clerk. The party places on the forms the name of the person whose attendance at trial is requested along with the date and time. The completed subpoena is then copied and served (delivered) personally to the person being subpoenaed. Whoever serves the subpoena must fill out a "proof of service" stating the date and location where the person was served. The proof of service is filed with the court. If it becomes necessary to compel attendance, the court will rely on the proof of service for jurisdiction over the witness.

Most states require the party issuing the subpoena to pay the witness a daily fee and round trip mileage compensation. In California this is presently \$35 per day and 20¢ per mile. Always bear in mind that a subpoenaed witness may be hostile to a case. It might be better not to subpoena a witness who might "forget" or "misremember" key items. Most states require a person being subpoenaed to live within a certain distance of the court (usually between 100 and 150 miles) and to be paid a daily fee (usually \$35) and a mileage fee of .18¢ per mile. A judge will not order the loser to pay the winner's witness unless it finds that the witness was vital or at least important to the proof of the winner's case. This is a sound policy because it prevents the prevailing party from saddling the loser with unnecessary witness

fees.

As an example, a copy of the form of subpoena used in California follows this chapter. This is the basic subpoena form used in all states. It really is just a matter of filling the blanks with the name of the person being subpoenaed and the date, time and place of the appearance.

#### IV. REVIEW SMALL CLAIMS CASES

Before going to trial a party should ask the court when hearings on small claims cases are heard. The person should then attend one or more sessions to see how cases are handled. In some part of the United States, the television show "The People's Court" is shown. This syndicated show covers cases that were filed in California's small claims courts. The parties agreed to the dismissal of the small claims case and agreed to have the dispute settled on the television show. The host, Judge Wapner, is a retired California Superior Court judge who tries the case in accordance with California law. Although The People's Court tends to have parties who are more emotional than normal, it does give a reasonable presentation of small claims court procedure.

It is always a good idea to see the local small claims court in action. An important reason for this is to become familiar with the judge who will be trying the case. Attorneys do this all the time in their cases. There are books published that list the background of most judges. The sole purpose of these books is to provide attorneys an insight into the mental workings of the judge.

Knowing what to expect from the judge before going to court is important. If a judge is light-hearted and slightly off-beat, his good will might be earned by a light joke; a serious no-nonsense judge might be affected by a dour, dignified personage. By having a hint as to the personality of the judge, a party is able to practice his presentation in the mode most agreeable to the Judge. This is a great trial tactic. In important cases, attorneys will hire consultants to help ascertain biases and predilections of the jurors so that the case presentation can work upon them. Knowing the judge is personally, helps the a party in a small claims case do the same thing.

#### V. REHEARSAL

No matter what else a person does in preparing a case, that person should practice the presentation to the judge or . Attorneys practice their delivery, elocution and mannerisms to develop their great presence. That is not to say the case should be presented totally on memory alone; notes have their place. No matter how completely someone knows the facts of a case, no one knows how much will be missed, forgotten or overlooked until an orderly presentation is attempted.

Remember the average small claims case takes 10 to 15 minutes total for both sides to present. That means that both parties tend to use no more than 10 minutes each to present their cases, and the parties are usually standing. Courts have found that it is difficult for the average person to compose long coherent

paragraphs of thought while standing in one spot and speaking to an authority figure. The average person accelerates delivery, mentioning only the high points and then stops. The courts count on this and even exacerbate the parties' discomfort by removing the chairs so they must stand. The judges do not stand, the audience does not stand, the clerks do not stand nor do the bailiffs. Only the parties are forced to stand in a sly attempt to encourage them to get to the point.

## CHAPTER 6

## THE TRIAL

Everything the plaintiff has done in previous chapters has been to reach this stage: the trial. Now is the moment of truth. The parties have their day in court. They stand before the trier of fact and present their case. After all of the time, aggravation, delay, work and preparation, the parties finally have their opportunity to present their case.

A small claims court is the court, with the possible exception of traffic court or divorce, with which the average person, whether layman or attorney, will, most likely, have some contact during his life. Most people are not sued for large amounts of money in their life. When they die, their estate might have to be probated in court but they are not present. On the other hand, statistics show that most people will be a party to a small claims court at least once in their life.

The small claims court is a specially created court in which most disputes can be tried inexpensively and quickly. The rules of the court are simple, and court procedure is relatively informal. Lawyers are usually not permitted to be present or to try the case. Claims in small claims cases vary from state to state. In California disputes not more than \$5,000 can be heard in a small claims court. The trial of a small claims case is usually heard within 40 to 70 days from the date of filing of the claim. While

most small claims cases involve money damages, most small claims courts have the power to grant other remedies such as ordering a person to do or not do something if the value of the act ordered or restrained is within the monetary limits of the court.

This chapter informs the reader on what is to be expected in appearing for trial. After the reader completes this chapter he will feel reasonably competent to present the case. There really is little of great concern when presenting a case. Small claims courts are justly called the "people's courts" for valid reasons. The presentation is relatively informal with each side simply stating their case and the judge dispensing the justice with the wisdom of Solomon. The judge's authority is limited. He cannot divide children in half or exceed the monetary jurisdictional amount of the court. Except for those limitations, the judgment of the small claims court is final and binding on the plaintiff.

#### I. CONDUCTING YOURSELF IN COURT

A party appearing in any court should do everything possible to present his case in an agreeable light and to garner the maximum amount of good will. That should strike everyone as common sense but it is amazing how many people do not seem to get the message. Judges in small claims courts sometimes have rude, mean-spirited, argumentative, disagreeable and unprepared people appear before them. Most judges disregard the unprofessional persona of the parties. It is suggested that anyone appearing before a judge follow these simple guidelines:

1. Dress for success. The judge and the court staff are professionals. The judge wears a formal judicial robe. The bailiff wears a uniform, and the clerk is professionally attired. Common sense dictates that the parties dress in a subdued and business-like manner. Studies show that juries psychologically think better and higher of those individuals who dress conservatively. Whether or not such impressions are right or wrong is arguable, but if they do exist you should use them to your benefit or at least make sure that any good appearance of the opposing side is canceled.
2. Present the case professionally. A party presenting a case before a court is acting as his own attorney. All have seen attorneys present cases in the movies and television, and everyone knows when a case has been presented well. A party should attempt to present a case as professionally as an attorney. The party must be prepared. He should have gathered the evidence to be presented, brought the witnesses to court who will be called and rehearsed his presentation.

No party should ever argue with or interrupt the other side. Arguing makes good drama, but it also wastes valuable time that could otherwise be used in presenting the case. Arguments usually alienate the judge. Nothing is more disagreeable to a judge than the screaming of a person's high pitched voice or profanity. Being

impolite to a judge or arguing is about as intelligent as shooting yourself in the foot.

## II. EXCHANGING INFORMATION WITH THE OPPOSING PARTY

Before the beginning of a small claims court session the bailiff usually goes into the hall where the parties are sitting. He announces that each must show the opposing side any and all documents before the court is called into session. This is the first time that a defendant will see the physical evidence that the plaintiff will use against him. This will be the first opportunity a plaintiff will have to see the evidence that the defense will introduce to defeat the plaintiff's claim.

This exchange of information before the court is called in session is a practical step of the court to accelerate the case. The normal small claims case takes 10 to 20 minutes. The judge does not want to waste precious minutes with the parties milling around in open court exchanging documents. Therefore, parties should expect to both show and be shown all documents to be presented in court.

## III. TRIER OF THE CASE

In most states, a small claims action is tried only by a judge. In some states juries are permitted. The use of juries in small claims cases is archaic and inhibits the intent in establishing small claims courts: to provide a fast, non-formalized court to resolve simple disputes. Even in states that permit juries, the juries are seldom used. trials cause delay and

increase costs by requiring payment of jury fees.

Most small claims court judges are full judges of the local court. Many states permit private attorneys to sit as temporary small claim court judges called "judges pro tem." In order to hear a small claims case as a judge pro tem, the attorney must have the written consent of both parties. If both parties agree to have a private attorney serve as the judge, the attorney will hear the case and render the decision in the same manner as a regular judge. The judgment of an attorney serving as a judge pro tem is treated as a valid court judgment. Generally, pro tem judges are not used if the case is to be tried by a jury.

The first time the parties become aware that a regular judge is not available is the date of trial when the clerk asks the parties to stipulate to a private attorney to serve as Judge Pro Tem. If the parties do not stipulate to the use of a private attorney, the case will be continued to a time in the future when a regular judge is available. Use of a Judge Pro tem, is a chancy but for expediency's sake most people agree. For example, a California businessman repeatedly his experience before a Judge Pro Tem. His company was sued for a \$350 for a debt he did not owe. After the Plaintiff put on his case, the Judge Pro Tem asked him how much his company was worth. The Defendant answered "\$10 million". The Judge then said, "You can afford pay this amount, judgment for Plaintiff". The defendant was shocked that he was not even permitted to present his case. The Judge Pro Tem's bias

against business was unknown when the defendant stipulated to his hearing the case. The defendant could have appealed the judgement in California but it would mean taking yet another day off work to present the defense which the judge pro tem did not allow. So for convenience, the judgement was grudgingly paid.

#### IV. ATTORNEYS USUALLY ARE NOT PERMITTED IN SMALL CLAIMS CASES

An unique aspect of small claims courts is that many states preclude the appearance of an attorney in them as an advocate of a party. There is no other instance in American courts where parties are denied the right to be represented by an attorney. The reason that some states do not allow attorneys is that the abbreviated procedures of the court do not require an attorney's expertise. Both sides merely tell the court what happened and produce evidence they have to support their explanation. The trial is informal, sometimes to the extent of becoming a community forum or pulpit for the expression of individual beliefs.

While in some states an attorney cannot represent a party in a small claims case, an attorney is permitted to testify as a witness. There is no prohibition to calling an attorney or other profession to present facts and testimony germane to the case. The attorney is simply prohibited from assisting a party from presenting his case to the judge in the courtroom. In Chapter 13 (State Laws) each state's law concerning whether or not an attorney is permitted to appear in court is covered. Regardless of whether or not an attorney is permitted to appear, the case is handled in

the same manner by the court. The court may require stricter compliance with state procedure when an attorney is present, which is a benefit to the party with an attorney. In such case, evidentiary objections, particularly as to hearsay, are more likely to be upheld.

An exception to the general no-attorney rule exists when a corporation is a party. As a legal entity, a corporation may appear in a small claims court only through an employee or an officer or director of the corporation. A corporation may not be represented in small claims court by someone whose job is to represent the corporation in small claims court. A corporation cannot use an attorney in court if the function of the attorney is to represent the corporation in small claims actions.

In addition to corporations, other legal entities such as partnerships or joint ventures may appear in small claims court only through a regular employee of the entity. The representative may not be someone whose sole job is to represent the business entity in small claims court. An attorney cannot represent such entities provided the attorney's main function is to appear in small claims court for the party (be in charge of collection for the entity). A trust (which is also a legal entity) can only be represented by the trustee unless in a state which permits attorneys to appear in the court.

#### V. BURDEN OF PROOF

The burden of proof is the standard of evidence needed to

prevail in a case. In a small claims action, the party having the burden of proof must convince the judge that it is more likely than not that he as plaintiff should win. In a 50-50 case, one person's word against the other person, judgment should go to the defendant. Without this standard, anyone could sue and collect judgment without ever being damaged. The result would be unfair.

Before anyone files in small claims, he should consider whether or not there is enough evidence to convince a total stranger to render judgment in his behalf. Many people do not understand the concept of burden of proof. Many appear to believe the court should rule in their favor because its obvious they're telling the truth. A woman once asserted in court that she would not be there if the defendant did not owe her the money. The defendant had the presence of mind to state he would not be there fighting her case if he did owe her the money. That is the reason behind the premise of burden of proof: to set a reasonable basis for determining who should win.

The burden of proof is borne by the party seeking some form of relief from the other. The plaintiff has the burden of proof on his claim against the defendant. If the defendant files a claim against the plaintiff, then the defendant has the burden of proof on his claim against the plaintiff. Most states have small claims cases tried only before a judge, but a small minority of states permit jury trials of small claims cases. The party bearing the burden of proof must convince the trier of fact that he should win because of

the evidence.

#### VI. TIME TO PRESENT THE CASE

Experience indicates that the average small claims case takes both sides 10 minutes to 15 minutes to present when tried by a judge. To speed the case, most judges require the parties to stand unless they are disabled. Standing causes the parties to present their case quickly in a short and concise manner. It has been shown that where the parties in the small claims case are seated, the presentation usually takes over a half an hour to present. In Los Angeles they do not use chairs, and the average case takes about 15 minutes. Once they had chairs in the courtroom; the parties started using them before they could be removed. The average case took nearly half an hour despite all efforts to accelerate. From that time forward the chairs were removed prior to opening the courtroom. The use of witnesses obviously extends trial time. Most small claims cases do not involve more than one witness; so the time of the trial is not extended unduly.

After both sides have presented their case, the judge or jury will make a decision. When a jury is used, the decision is announced in open court before the parties. When the judge tries the case, the judge will take the case under submission and decide later.

A case is taken under submission for several reasons. The judge may want to conduct research or an investigation or simply not want to upset the parties while in court. When the case is

taken under submission, the judge's decision is usually be mailed to the parties within a month. The judgment will contain any monetary award along with any court costs that the judge finds should be recovered.

#### VII. THE JUDGMENT AND COSTS

The most important consideration in a small claims case is the amount of the claim sought. A plaintiff cannot exceed the jurisdictional limit of the court. If a plaintiff asks for more than the court is allowed to award, the entire case may be dismissed. If the plaintiff sues for less than is owed, the plaintiff forever waives the balance. For instance, if the plaintiff is owed \$20,000 and sues for \$5,000, the plaintiff forever loses the right to sue for the remaining \$15,000. The plaintiff could have sued in a regular court for the full \$20,000, but he will normally wait years to have the case heard and incur large fees in the meantime preparing for the trial.

Most of the costs related to pursuing a small claims action are recoverable from the defendant if the plaintiff wins. Examples of court costs that are recoverable are filing fees, service-of-process fees, witness fees and mileage. There is usually no recovery for expert witness fees in small claims cases. Also recoverable are fees for subpoena of individuals and for subpoena duces tecum of documents. Interest on the judgment is always awarded, and sometimes it is awarded before judgment. Prejudgment interest (running from a date prior to the date of judgment) is

governed by the laws of each state. A plaintiff should always determine if it is awardable in his case.

After the trial the plaintiff presents a summary of his costs to the court for approval. Once approved, the costs are included in the court's judgment against the defendant.

#### VII. FAILURE OF THE DEFENDANT TO APPEAR AT TRIAL

The defendant may not appear at the trial. The court must then determine if the defendant was properly served and if the defendant was on active duty with the military. A defendant on active duty in the military cannot be sued in civil court without his consent by virtue of the Soldiers and Sailors Relief Act of 1940. If the defendant is in the military and on active duty, the case cannot be tried. There is nothing the court can do. The plaintiff can notify the commanding officer, who might order the serviceman to appear but do not count on it.

If the defendant is not on active duty with the military, the court will determine if the proof of service for the complaint is valid. If the proof of service is procedurally invalid, the court will dismiss the case for want of jurisdiction over the defendant. If the proof of service is valid (meaning the complaint was properly served on the defendant) the case will go forward.

Judgment is not automatic for the plaintiff just because the defendant fails to appear. The plaintiff must still present evidence proving his entitlement to damages. This is called a "prove up" hearing. The judge will hear only the plaintiff's case

and decide if damages should be awarded. Just because a defendant does not show does not mean that a judge can award damages. Plaintiff must prove liability and show he has not violated state or federal law. If the plaintiff wins the action, the court will issue its judgment. The judgment will include an award for the proper damages suffered by the plaintiff, the court costs in bringing the suit, witness fees and the amount of interest permitted under state law.

CHAPTER 7  
LANDLORD-TENANT

Most of the people in the United States live or will live in rented property. For every tenant there is a landlord with superior ownership rights and control of the property. At one time the landlord was supreme and the tenant had virtually no rights to the premises. The property was rented "AS IS" under the doctrine of caveat emptor (buyer beware). Tenant occupancy was based solely upon payment of rent regardless of the condition of the property. Over the years, courts and state legislatures have eroded the landlord's omnipotent rights in the property. Tenants today have significant rights to their rented properties, and the landlord's violations of these rights can result in serious fines and penalties.

It is only to be expected that a body of law would have developed over the years to govern the respective duties and obligations of both landlords and tenants. Entire treatises have been written to discuss in detail their rights. This chapter presents in a concise fashion the rights of both the landlord and the tenant in the five most common areas of dispute. This chapter discusses a landlord's filing of a small claims action for lost rent and damages to the property. On the other side, this chapter will discuss a tenant's cause of action for Costs of repair,

Retaliatory or constructive eviction, and the rent of the rent deposit.

I. LANDLORD'S LIABILITY FOR INJURIES CAUSED BY DEFECTS

IN THE PROPERTY

At common law, the general standard used throughout the United States was a landlord was under no obligation to deliver the real property to the tenant in a good or satisfactory state of repair. The lessor was not liable to the tenant or his guests or invitees for injuries suffered on the real property as the results of the defects on the property. The lessor's common law immunity from injuries to persons on his property has been greatly reduced. Now, in most instances, liability will be assessed against an owner for injuries caused by undisclosed defects on the property.

The landlord is obligated to disclose the existence of latent defects on the property. A latent defect is one that the tenant could not discover after making a reasonable inspection of the property. The landlord does not warrant that the property is free from latent defects. To avoid liability for injuries, the landlord merely has to disclose the existence of those defects that he actually knows exist or has reason to suspect exist. If the disclosure is made, the landlord is immune from liability for injuries suffered by the tenant from the disclosed defects. If the landlord fails to disclose the existence of the latent defects, the landlord is liable for the injuries or damages caused by those latent defects.

The common areas of multi-unit buildings are not part of a tenant's leased property. The responsibility remains with the lessor to maintain the common areas in a safe manner. Lessors have been found liable for negligence in maintaining the common areas when injuries occurred because of the owner's negligence. The lessor must use ordinary care to make the area safe for tenants and invitees (business guests) to the property. The latest extension of liability for common areas occurred when courts found lessors liable for crimes committed by third parties. The court held that the lessors were negligent when they failed to install locks on gates leading into the common areas. The negligence theory was based on the belief that the landlord should never act in such a way as to create or promote a foreseeable risk of harm to the tenants. The landlord had notice that criminals had been passing through those gates in order to commit crimes and yet he did nothing to protect the tenants.

## II. LANDLORDS MAY BE SUED FOR DAMAGES CAUSED BY FAILURE TO MAINTAIN THE PROPERTY IN A SAFE CONDITION

Under the common law, the lessor had no duty to maintain the rented property unless there was an express covenant in the lease requiring him to do so. The modern trend in landlord tenant law is that landlords have a general duty to use reasonable care with respect to residential tenants. The landlord will be held liable for personal injuries suffered by the tenants and their guests as the result of the landlord's ordinary negligence. Liability will be

imposed for such negligence only when the landlord had notice of the problem and failed to repair it after a reasonable opportunity to do so. The California Supreme Court has held landlords strictly liable for injuries caused by defective conditions of their property without proof of negligence (knowledge).

Many state courts have held the landlord liable for injuries caused by the landlord's failure to comply with housing codes. All a plaintiff has to show is that his injury was caused by a violation of the housing code. The landlord's knowledge of the violation is irrelevant for liability. Punitive damages cannot be assessed for injuries resulting from a violation of housing codes unless it is proven that the landlord knew or should have known of the violation through normal reasonable inspections.

### III. THE IMPLIED WARRANTY OF HABITABILITY

More than half of the states have adopted the implied warranty of habitability. Under this legal doctrine, a landlord is held to the standard of an implied warranty that rented residential property is reasonably suited for use as a human residence. State law gives the tenant specific remedies against the landlord if the property is or later becomes uninhabitable. The remedies for a breach of an implied warranty of habitability are:

1. The tenant may leave and terminate the lease.
2. The tenant may make the necessary repairs and offset the costs against future rent.
3. The tenant may abate the rent, reduce it to the fair

market rental value of the property with the defects.

4. The tenant may pay the full rent and sue the landlord for damages caused by the defects.

Retaliatory eviction is the eviction of a tenant for reporting housing codes violations to the proper authorities. Many states make it illegal for a landlord to evict a tenant for reporting housing codes violations. In those states a landlord may be fined for committing a retaliatory eviction. A tenant may sue in small claims court for the damages incurred as a result of a landlord's violation of the implied warranty of habitability or for any retaliatory eviction.

#### IV. A LANDLORD MAY SUE A TENANT FOR FAILURE TO MAINTAIN THE PROPERTY

In most instances unless the lease agreement imposes an express duty to do so, a tenant has no duty to make any substantial repairs on the property. The tenant does have the duty to make minor repairs and to take such other steps as are necessary to prevent damage by the elements. If the tenant does not make the minor repairs, he will be liable to the landlord for the damages caused because the minor repairs were not made. The tenant will not be liable for the actual cost of making the repairs but only for the damages actually caused by not making the repairs.

A small number of states have passed laws specifically requiring tenants to:

1. Refrain from violating any housing codes.

2. Keep the property free of vermin.
3. Use plumbing, utilities and appliances in a reasonable manner.

A landlord may sue a tenant in small claims court for the damages incurred to the property by the tenant's violation of housing codes or failure to make minor repairs. The landlord is not required to evict the tenant as part of the action in order to bring the suit.

When the tenant covenants to keep the property in good repair, the condition of the property at the beginning of the lease and at the end of the lease must be compared to determine if there was a breach. If the covenant to repair does not contain any exceptions, the tenant may be liable for normal wear and tear to the property. If consideration (rent) is given for the use of the property, most courts will exclude normal wear and tear from the duty to repair. Under the covenant to repair, the tenant is liable to repair the damage to the property regardless of the cause (third persons, act of God) unless expressly excepted. When a tenant had breached an express covenant to repair, the landlord may sue for the damages incurred by the breach of the covenant in small claims court without having to evict the tenant as part of the action (although he can do so.)

#### V. A LANDLORD MAY BE SUED FOR CONSTRUCTIVE EVICTION

Every lease agreement contains an implied covenant of quiet enjoyment. The covenant implies the landlord will do nothing to

interfere with the possessory rights of the tenant. Constructive eviction is some act by the lessor or failure to act when he has a duty to act which makes the property uninhabitable. The following conditions of constructive eviction must be met:

1. The act or failure to act must be by the landlord or his agent, not third parties.
2. The result of the act is to render the property uninhabitable.
3. The tenant must vacate the premises as a direct result of the landlord's act. If the tenant does not move out, there is no constructive eviction.

A tenant may declare the lease terminated because of the constructive eviction and sue in small claims court for damages suffered or sue the landlord for the return of possession and damages suffered.

A relative of constructive eviction is the interference with the tenant's right of quiet enjoyment of the leased property. Virtually all states have held that a landlord can not anything that interferes with the reasonable use and enjoyment of the property. Interference with such rights must, by their very nature, be determined on a case by case basis. Interference with quiet enjoyment does not require that the property be rendered uninhabitable but only that it is no longer comfortable or safe in which to reside or utilize as a result of the landlord's actions. Such interference with the right of quiet enjoyment can be any type

of obnoxious behavior performed by the landlord or by other which is tolerated by the landlord which seriously impairs the safety or enjoyment of the property by the tenant.

The most prominent cases of constructive eviction involve tenants suing the landlord because of the presence of other drug dealing tenants. Trafficking in illegal drugs, especially in the inner city, has turned neighbor against neighbor. It has always been permitted for people to sue a property owner or tenant whose of property creates a private nuisance. When it is shown to the satisfaction of the court that the use unreasonably interferes with the enjoyment of the neighbors' uses of their property then the defendant will be held liable for damages and continued improper use of the property enjoined. In fact, cities themselves are now declare the buildings inhabited by active drug dealers to be public nuisances and the cities are demolishing them.

In the landlord-tenant area, tenants have taken the next step and sued their landlord for failing to evict drug dealing tenants. The claim, upon which the tenants almost always prevail, is that the drug dealing tenants pose an unreasonable risk to the safety of the other tenants and that their criminal activity interferes with the other tenants' enjoyment of their property. A suit for interference with a tenant's right of quiet enjoyment requires that the tenant prove that the landlord knew that other tenants were selling drugs and that the landlord did not evict them. This is relatively easy to prove. A complaint can be made to both the

police and the landlord. If sufficient evidence exists the police will get a search warrant and investigate. Even if the police do not investigate, if the tenant produces enough evidence to the court to convince them that drug sales were going on at the premises, the court could still enter judgment against the landlord.

In a suit for quiet enjoyment, the tenant may be awarded monetary damages and even punitive damages. The Plaintiff in such a case is entitled to compensation for the reduced value of rental space during the period of the drug dealing and may even receive punitive damages up to the jurisdictional limit of the court. If there are several tenants suing a landlord for the same drug tenant, the costs of the suit to the landlord may be very high. This is a valid threat to the landlord to get his act together and evict the criminal element in his building.

#### VI. A LANDLORD MAY SUE A TENANT WHO ABANDONS THE LEASE

When a tenant abandons property with time still remaining on the lease, the landlord has the following options available:

1. The landlord may consider the abandonment as an offer to surrender the property. If the landlord accepts the surrender and resumes possession of the property, the tenant is relieved of further liability on the lease. The fact that the landlord enters the property to make repairs or offers to rent the property to others on behalf of the tenant does not constitute acceptance of

the surrender.

2. The traditional option still available in many states allows the landlord to do nothing and simply sue the tenant each month for the rent as it becomes due or wait for the end of the term and sue for the whole amount.

Many states require a landlord to attempt to mitigate his damages and try to rent the premises and apply the rent received to the damages owed by the tenant. The tenant is then liable for the difference. If the property cannot be rented, the tenant is liable for the full remaining rent owed for the unexpired term of the lease.

Once the tenant has left the premises, the landlord's suit is a simple suit for money; so it would not qualify for the summary unlawful detainer procedures of a formal court. This means that the case would be placed at the end of the civil calendar and not given any precedence over the other cases in the court docket. A better procedure is to sue in small claims court provided the damages are within the small claims court jurisdictional limit. The case will be heard much faster than in the regular court system.

#### VII. UNLAWFUL DETAINER

Unlawful detainer is the legal remedy available to a landlord against a tenant who:

1. "Holds over" after the lease has terminated.,
2. Continues in possession of the property without payment of rent when due.

3. Continues in possession after failing to perform the duties required under the terms of the lease or after breaching the terms of the lease.
4. Continues in possession after a valid notice to quit has been served.

Unlawful detainer is a summary remedy where a "notice to quit" is served. It calls for the tenant to vacate the premises within a fixed period (usually three days). If the tenant does not leave, the landlord files a complaint in court and serves the tenant with it. The tenant will have a short period of time (usually five days) to answer the complaint. If the tenant fails to answer, the court will enter a default judgment against the tenant. If the tenant does answer, the case is set for preference on the calendar and usually heard within two weeks to a month.

It is recommended a landlord not use small claims court for an unlawful detainer action even though it is legal to do so. All states have a summary unlawful detainer procedure which is faster and cleaner than a small claims case. The normal unlawful detainer action takes 30 days and deals only with the right of possession; the case cannot be clouded by unrelated counterclaims raised by the tenant.

Once the tenant loses in the normal unlawful detainer action before a regular court, he is not permitted to remain in the property pending an appeal. This is not usually the case in small claims actions. In many states, the defendant can appeal and remain

in the property rent free while the appeal is pending. The appeal of a small claims action can take months. A California case highlighted the pitfalls present in bringing a small claims case for unlawful detainer. In this case, the tenant, who happened to be an attorney, had a terrible landlord who often threatened and bullied his tenants. The tenant would not take the abuse which led to confrontations. Predictably, the landlord to serve the tenant a notice to vacate and filed suit for unlawful detainer in small claims court in Chula Vista, California. Judgment was obtained against the tenant who then promptly appealed. While the small claims action was on appeal the tenant remained on the property. The tenant requested a findings of fact from the judge in the small claims action that delayed the appeal. Nearly nine months later the tenant was still in the apartment without having paid any rent. By now, the landlord had enough and agreed to drop the complaint just to have the tenant move out so the apartment could be rented. To prevent, such future cases in its small claims courts, California amended its California Code of Civil Procedure Section 116.220 bar the use of small claims courts to evict tenants. California small claims courts can still be used for determining other landlord-tenant disputes.

In Los Angeles, plaintiffs are informed before hearing their cases that defendants can appeal any adverse decisions and remain on the premises while the appeal is pending. The courts in California do not like the use of small claims court for unlawful

detainer actions because they are terribly inefficient and cumbersome. Since the legislature has given the small claim courts jurisdiction to hear unlawful detainer action, the courts must continue to hear them if they are filed there.

#### VIII. A LANDLORD MAY BE SUED FOR "LOCKING A TENANT OUT"

It used to be permitted for a landlord to "lock a tenant out" of the premises after the lease expired. This form of "self-help" was widely used. Few states now permit a landlord to evict a tenant unilaterally. All states have unlawful detainer statutes to evict tenants wrongfully in possession. The unlawful detainer action is a summary procedure and therefore given preference on the court's calendar. Most states recognize that "self-help" can result in breaches of the peace and have abolished it altogether.

Forcible entry and detainer is a tort whereby a person, usually the landlord, unlawfully evicts a tenant from the leased premises. States that do not permit "self-help" remedies to the landlord will find the landlord liable for damages suffered by a tenant who is evicted or whose possession of the property is inhibited by the lessor. California makes it a crime for a landlord to terminate utilities to a tenant for any reason and fines a landlord \$100 per day for any forcible entry or detainer act.

#### IX. TENANT'S AGREEMENT TO LIQUIDATED DAMAGES ON BREACH

The parties in a lease may agree that a breach of the lease by either party will entitle the other only to the remedy of payment

of a fixed amount of money. These clauses are enforceable if they represent a true attempt to limit damages before a breach has occurred and are entered in good faith. Generally, these clauses are used more in a commercial setting where rent might be based on a percentage of monthly gross income. As long as the parties agreed to accept a fixed amount of rent in the event of a breach, the stipulated amount is what the court will award in the event of the breach, even if the actual damages are less than the stipulated amount.

#### X. A SECURITY DEPOSIT

A security deposit is a payment in addition to rent that is a guarantee against damages to the premises. From this security deposit, the landlord pays for repair of any damages caused by the tenant. A security deposit is not rent. The purpose of the security deposit and its uses are clearly defined by statutes in most states. Many states require a security deposit to be kept segregated in an interest bearing account. A security deposit is refundable. The laws of many states, including California, impose penalties on the landlord that wrongly fails to return a security deposit. A security deposit cannot be made nonrefundable in most states.

A landlord is required within 10 days after termination of the lease to inform the tenant in writing how the security deposit was applied to satisfy damages allegedly caused by the tenant. The landlord then must return the balance of the deposit.

If the tenant feels that more of the security deposit should have been returned, he should sue the landlord in small claims court for the amount in dispute plus any damages that the state law imposes on a landlord for misusing a security deposit.

A tenant can sue a landlord in small claims court for the return of the security deposit. The burden of proof at the trial is on the landlord if he wishes to keep the deposit. If the landlord refuses to return the deposit, he will have to prove to the court that it cost as much or more than the security deposit to clean the premises. It is a common tactic for landlords to repaint, remodel, shampoo or replace rugs and sometimes even replace air conditioning by claiming that the wear caused by the tenant was unreasonable.

In order to assure return of the security deposit the following might be considered. Photographs should be taken of the property both before moving in and before moving out. If it is not possible to take photographs at both times, the pictures (video is better) should, at least, be taken before moving out. Often, the landlord's claim for clean-up or damage is inflated. A common bill is \$50 to \$75 for cleaning an oven. Generally, a court only awards the landlord \$25 for such cleaning (after all it is not much more than spraying the oven with oven cleaner and wiping it clean after letting it set over night).

The burden of proof in an unlawful detainer action is on the landlord. Without pictures, witnesses, or proof from either side, it becomes a war of words. The tenant always tells the judge that

the premises were clean and the landlord vehemently denies it. The judge tends to split the deposit with the belief that the property would probably have needed some cleaning.

If all of the security deposit is not going to be returned, then the landlord should take detailed pictures before cleaning the premises. Having the premises viewed by independent witnesses before the cleaning is also a good idea. Remember, the landlord in this situation must provide that the property needed cleaning or repair in order to keep some or all of the security deposit. For example, in a California small claims case, a former tenant claimed the property was immaculate when she left. The landlord merely smiled and, in his defense, brought forward several pictures showing a messy yard, crayon marks on the walls and an apartment not particularly messy but certainly not spotless. The tenant argued this was normal wear and tear, but on questioning she admitted the apartment was not that way when she rented it. The new tenant was present to testify the property was clean and habitable when she rented it. This is the key to the judge's determination. One person's word is totally acceptable to another. The landlord won because of the consistent manner he used to maintain the property and his visual evidence in court.

CHAPTER 8  
MOTOR VEHICLE CASES

One of the most common type of cases to appear in small claims court involves damages arising from motor vehicle accidents. The only cases of this type that should be brought to small claims court are those involving damages to vehicles and other personal property. Only claims for minor personal injuries should ever be brought to small claims court. The normal settlement or award for personal injuries is usually more than the small claims jurisdictional amount. In practice, insurance companies tend to settle legitimate cases for three times the medical bills to cover pain and suffering. Example: A person has an arm broken, and the medical bills are \$2,000. The insurance may settle for \$6,000. In a situation where the car incurred \$2,000 in damages in addition to a broken arm to the driver, the plaintiff could sue in California's small claims court for \$5,000 (which is only the compensation for the car and medical bills) or sue in the municipal court for the car damage, medical bill and pain and suffering.

It is important to check individual state law to ensure small claims courts can be used to collect damages for motor vehicle accidents. Several states do not permit suits for either property damage or personal injury arising from motor vehicle accidents in their small claims courts. New Jersey does not permit personal injury suits but does permit property damage suits arising from

motor vehicle accidents.

This chapter presents the procedure of small claims courts in the motor vehicle accident case and explains how to prepare and present a case before the judge. Most cases are poorly presented, and it is difficult to decide the cases when the proper presentation has not been undertaken. Through this chapter the reader will understand the basic standard of competent preparation needed to handle the case.

#### I. EFFECT OF NO-FAULT INSURANCE ON SMALL CLAIM COURT

Nearly 15 states have adopted no-fault auto insurance in some form. The implementation of no-fault insurance in those states has the effect of limiting the right of an injured to sue in both regular and small claims courts. To pursue a suit in a no-fault state, the plaintiff is first required to comply with the terms of the state's insurance code. This usually means that a claim must be submitted to the plaintiff's insurance company for processing before a suit can be filed. The plaintiff cannot sue the defendant until after the plaintiff's insurance company has ruled on the claim. Most no-fault states follow the Massachusetts model that treats small claims court as an appeal court to review the administrative determination of the insurance companies on whom should be paid and how much.

If a person suffers damage as a result of an accident in a state having no-fault insurance, the person should contact his insurance agent for a determination of what his rights are under

the state's insurance law and his policy. No-fault insurance means that each party's own insurance will fix each insured's car and pay for property damages. The only issue of contention is which insurance company will pay for the personal injuries suffered by the parties.

As a practical matter, an insurance company does not care if the other one is sued by its insured. Any award the insured might get would reduce the amount that the insurance company of the insured might have to pay. For that reason, each insurance company will work with their insured and explain the rights that the insured has to sue. Speaking with the insurance company is the easiest way to determine the injured party's rights in a no-fault state. Another way is to consult with an attorney who specializes in auto accident cases.

## II. THE DEFENDANT

Under the laws of all states, an owner of a vehicle is responsible for the negligent injuries caused by that vehicle when driven by a person with the consent of the owner. Some states make the owner entirely liable for the full amount of injuries caused by the driver whereas other states (such as California) have limits of \$15,000 on the amount that an owner can be liable for the accident caused by a person driving his car.

Obviously, if a car is stolen and the thief runs over a person, the owner will not be liable based upon the consent theory. An exception to this rule exists in some states if a person leaves

his keys in the car, and the car is stolen. The owner might be sued for the accident based upon a negligence theory. Such vicarious liability is based on the belief that the car would not have been stolen and the accident would not have happened if the owner had not left the keys in the car. In some states, the act of leaving keys in a car is viewed as gross negligence because it is foreseeable that such cars will be stolen and used in committing crimes.

Many states impose liability on the owner of a car under the theory of "negligent entrustment." Under this legal doctrine, if an owner loans a vehicle to a person in a negligent fashion, the owner is liable for any damage that the driver causes. Under this theory owner liability is not limited. The most common example is an owner who loans a drinking driver his car. The owner is liable for negligence when the drunk driver gets into an accident.

Negligence is a legal term stating no one should do anything that creates a risk of harm to anyone else. If a person does such an act and someone is injured, the person who did the act causing the injury is liable. When a vehicle is loaned to a person under circumstances that dictate it is foreseeable that the driver would cause an accident, the owner will be held liable for the damages of any accident in which the driver becomes involved.

### III. WITNESSES

It is absolutely imperative that a party to a accident case have all favorable witnesses present at court. One good

disinterested witness is better than five friends and relatives (unless they happen to be priests and nuns). Often the only way to explain the strange situation of the cars after the accident is through witnesses. A client and his wife once witnessed a horrible accident while driving north on Interstate 101 in California. A car several lengths in front of them swerved onto the shoulder and without stopping made a sharp right angle, shot across all the lanes and was hit on the side by a car going south. The car going south spun around and hit a small truck head on. The south bound car was up on the shoulder of the south bound lane; the truck that it last hit was spun around facing north. To all appearances it looked as if the truck had caused the accident. The client's wife was a former nurse, and they stopped and administered first aid. The driver causing the injury was obviously drunk. At least six people were seriously injured. The client and his wife were the only disinterested witnesses. They waited for the highway patrol and gave their statement. The officer had thought the driver of the truck was the cause and was going to cite him until the client told him how the accident happened. Because he was available as a witness, a drunk driver did not get away with his crime.

#### IV. POLICE REPORTS

Whenever there is an accident and police are called, a police report is usually prepared. Some police departments will not write a report unless the property damage is over a fixed amount (usually \$100) or a personal injury has occurred. When a police report is

made, it always makes sense to get a copy the report. If it is favorable, then it should be used. If the report is unfavorable, it is good to have the information so it can be refuted. It is best to assume that if a police report is unfavorable the other side knows of it and will use it.

Almost all states permit police reports as evidence without the police officer having to be present to testify. The only way to refute an unfavorable report is to have the police officer prepare a supplemental report, subpoena the police officer for cross-examination (which usually does not change the content of the report) or refute the report through an accident reconstruction expert.

Usually the police report decides the case. The court tends to give great import to the opinion of a trained police officer as to the interpretation of what caused an accident. The well founded belief is that an independent, disinterested and trained investigatory officer is in the best position to observe, collect and interpret the facts preceding and involving an accident. Police reports are critical whether they help or hurt a case.

Occasionally police reports are in error as to the facts and if that error is not caught before trial, it can mean disaster. A judge tried a case involving an accident where the plaintiff produced a police report that showed a diagram of the accident scene. The officer was not present, and the report was written a week after the accident. The judge was familiar with the area. The

officer had drawn the scene in reverse. The explanation of his conclusions did not fit the scene, nor did the officer's explanation fit the scene if it was reversed and corresponded to the story of the defendant. The defendant had not reviewed the police report before the trial. As the judge reviewed it in court, it was he who realized that the officer got the sketch wrong and the facts backward. The defendant, who happened to drive across the scene of the accident frequently, recognized that the gas station and store were on the wrong corners.

When a police officer writes a report, he often cites the driver he believes is most culpable for the accident. The citation is for a violation of the state's motor vehicle code. If the driver is charged by the district attorney for a traffic offense and convicted before the small claims case is tried, the plaintiff can introduce that conviction to prove the accident was caused by the convicted person's violation of the vehicle code. Example: A person arrested for drunk driving will have a hard time proving to a judge that the accident in which he was involved was not caused by his drunk driving.

#### V. ACCIDENT RECONSTRUCTION

One way to refute a police report or to prove the cause of an accident when no police report was made is through accident reconstruction. Most police departments have officers who are trained in accident reconstruction. These officers are trained to judge speed of a car by skid marks and the force of collisions by

the damage caused. These officers can be hired to give private opinions on cases not before their departments. They might be hired for from \$200 to \$1,000, depending on the scope of the case.

Sometimes an accident reconstruction is a godsend. A judge had a case where a person was turning left across a southbound lane and was hit. The officer investigating the case cited the driver who was hit for failure to yield. The judge had pictures taken of the accident and paid special attention to the other driver's skid marks. The judge measured the skid marks and took that information to an accident reconstruction expert. After reviewing that information, the expert opinion was that the other driver had been traveling about 50 mph on street with a speed limit of 35. Given the point of impact of the vehicle, the expert opinion was that there would not have been an accident if the other driver had been traveling one mph slower (still speeding by 14 mph). The judge took that reconstruction expert's opinion to the district attorney and convinced him not to charge the client.

#### VI. DEMONSTRATIVE EVIDENCE

Whenever a person is involved in a case involving a motor vehicle accident, it should be expected that demonstrative evidence such as charts, maps and diagrams will be used. All courts will have either a blackboard or a large tablet on an easel. A good visual presentation of the scene of the accident via a large drawing will help fix the locale and circumstances in the mind of the court. The diagram will not in itself decide the case, but it

will help clarify the issues and make it easier for the trier of fact to reach the right decision.

In addition, maps, diagrams and photos (particularly videos) are always appreciated in auto accident cases. These are especially useful in showing the nature and extent of the damage to the vehicles. Since fault is indirectly related to the degree of damage to vehicles, photos are one of the most important tools available in presenting a case. A picture is worth a thousand words.

#### VII. DAMAGES

Proving a person caused an accident is just half the battle. Next, the nature and extent of the damages caused by the accident must be proven in order to get recovery. Example: A person will not recover for a loss of leg if the leg was not lost as a result of the accident. Sounds simple yet a number of plaintiffs forget to prove a defendant's liability for damage beyond the cause of the accident. This is especially true concerning physical injuries.

When a person claims to have physical injuries as a result of an accident, that person must prove those injuries actually were incurred. The only way to do that is through medical testimony. This means a treating physician must write a medical report or otherwise appear in court to testify to the nature and extent of the injury. The doctor must render an opinion on the extent of permanent disability along with the cost of future medical treatment for the injury.

There is a special type of soft-tissue injury commonly called

"whiplash," that does not show on X-rays and normal diagnostic tests. For years insurance companies assumed claims of pain not documented by physical injuries were fraud. A law firm in Bakersfield pioneered the use in California of thermography which is heat sensing. Thermography is a heat picture of the body. Parts of the body that are hotter than others yield a yellow-to-white picture on the film. Looking at the picture it is possible to determine which parts of the body are hotter. Parts of the body corresponding to areas of pain in a plaintiff are hotter than they should is evidence of soft-tissue injury. This medical technique has become accepted in the legal community in the last 10 years. A person with soft-tissue injury should be sent by the treating physician to a thermography specialist to have the test performed. If the test shows soft-tissue injury it should be introduced into evidence.

Medical awards are the actual medical expenses times three for pain and suffering. Punitive damages can be awarded in small claims cases, but such awards are rare, being reserved only for the most egregious cases of misconduct (drunk driving personal injuries, physical attacks, etc).

The repair costs of the vehicle along with other types of property damages are easier to prove because the bills of the actual repairs or the estimates are produced in court. It is better to have the actual person who made the estimate or who did the work present in court to testify rather than rely on a written

statement. Some courts will permit a person to testify by phone, but that is rare and should be arranged with the court prior to the trial.

Naturally, the defendant will dispute any contention of liability for causing the accident and for the extent of the damage. The point a plaintiff must remember in presenting his case is the evidence must convince a total stranger that the defendant caused the injury and that damages suffered are in the amount which have been presented. Doubts must be resolved by the trier of fact in the favor of the defendant . The plaintiff must present all the proof available to support his case. A judge once had a case where he had repeatedly asked in writing for a client to assure his witnesses would be present at the trial. The attorney wanted to subpoena the witnesses but the client refused to let him do so, considering it an inconvenience to his friends. On the day of trial, none of the witnesses appeared and the client lost solely because he could not refute the defense's case without the witnesses. The client sought to blame the attorney for the loss, but he produced copies of his letters to the client before the trial where the attorney stated that he was relying on his representation that the witnesses would be there. The attorney stated in the letter that it was the client's decision to not subpoena the witnesses for the trial. This highlights what has been repeated throughout this book: if there are favorable witnesses they should be subpoenaed. Don't rely on their promises to appear.

CHAPTER 9  
SUITS FOR MONEY OWED

The most common type of small claims case is one for the collection of money owed. The claim arises in a contract situation such as landlord-tenant (Chapter 7) or the more simple loan arrangement. Where the claim is to pay money, it is of paramount importance that the debtor (usually the defendant) had an absolute obligation to pay the money to the creditor (usually the plaintiff).

A suit for money owed is initiated like any other small claims case. The plaintiff (the person who is owed the money) must be the real party in interest. Example: Mary Hope loans Alice Chambers \$5,000. Mary must file the suit. Mary's brother, sister or parents lack standing to commence the suit on Mary's behalf unless one of them has been appointed by a court as her legal representative or they have been granted a power of attorney by Mary. In such case the representative would be filing the suit in Mary's name. If Bill was the representative the caption would read, "Bill Jones, representative of the Estate of Mary Chambers, Plaintiff vs. Alice Chambers, Defendant.

Usually, small claims actions are usually filed directly by the individuals who seek recovery on money they claim is owed to them. These individuals can bring a suit in small claims court if they are above the age of majority (more than 18 years of age) or

minors legally emancipated and have not been declared mentally incompetent by a court.

#### I. TURNING THE CASE OVER TO COLLECTION

Many businesses and individuals with large numbers of accounts (such as doctors, lawyers and other professionals) do not have the time or wish to be involved with the inconvenience of collecting accounts. As a service to such businesses and individuals an entire industry has developed called "collection agencies." For a fee (40% to 50%) these agencies will attempt to collect money owed on straight forward contracts. The fee for the collection service appears excessive but what must be remembered is that the agency collects nothing unless it recovers and executes on a judgment. Most of the risk is on the collection agency. The fee paid is deductible on the creditor's income tax return as a business expense, reducing the net effect of the fee to about 25%.

While many states permit individuals and businesses to sue in small claims court for collection of personal and business debts, not all states permit collection agencies to sue in their small claims courts. While permitting all other types of small claims complaints, Kentucky and Texas preclude small claims actions involving money lenders for interest. New York is unique in another way: forbidding corporations and insurers from using its regular small claims court. Instead, it has created a special commercial small claims court where only corporations, partnerships and other business associations may sue. The following states do

not permit bill collectors (assignees) to use small claims court: California, Michigan, Missouri, Nebraska, New York and Ohio. In New Jersey, assignees of corporations, but not of individuals or of partnerships, may use small claims court.

## II. SMALL CLAIMS SUITS FOR BAD CHECKS

Probably one of the most recurring type of collection cases in small claims court involves bad checks. In most states the district attorney will not seek criminal charges unless there are three or more checks that total over a fixed amount (usually \$100). If the check is large enough (perhaps \$1,000) the district attorney might institute criminal charges with one check. When a person is given a bad check in a large enough amount to make the effort worthwhile, the person should go to the district attorney's office and file criminal charges. If the district attorney will prosecute, the creditor need only sit back and let the district attorney prosecute the defendant criminally. If a conviction is obtained and the defendant is given probation, the court will order restitution (payment of the bad check) as a condition to avoid jail. If the district attorney decides the case is too small to prosecute, the creditor can sue in small claims court for the value of the check.

Small claims courts are ideally prepared to handle bad check complaints. The average small claims court complaint for a bad check involves a relatively small amount. Because of the size of the check some businesses do not sue and instead choose a path of embarrassment as punishment for the offender. There was a business

man who ran an ad in the paper listing the name and addresses of all the writers of the bad checks he had cashed. Within a week he received payment on about a quarter of the bad checks. Most states have some type of bad check law that permits a business, and in some instances individuals, to sue for several times the amount of the bad check. In California, Civil Code Section 1719 permits a suit to be filed for value of the check plus three times the amount of the check. The additional amount will be at least \$100 with a maximum of \$500.

States like California require that the debtor be given notice by certified mail of the bad check before the court will award the additional amount. Regardless of whether or not the additional sum is sought as penalty under a bad check law, anyone given a bad check can always sue in small claims court.

### III. STATUTE OF LIMITATIONS

The most common block to collection on a complaint for money owed is the statute of limitations (the plaintiff waits too long to sue). Every state has adopted specific time limits in which various lawsuits may be brought. These limits are called statutes of limitations. The reason for such limits in bringing suits is that the states wish to keep their docket manageable. Without such limitations ancient cases without any chance of winning because of dead witnesses or lost evidence would clog the courts. If a lawsuit is filed after the appropriate statute of limitations has run, the court usually has no alternative but to dismiss the action. If the

defendant can show that the plaintiff knew that the action was barred by the statute of limitations and filed the suit anyway just to annoy the defendant and cause him to waste money defending a frivolous case, the defendant can probably sue the plaintiff for malicious prosecution.

Usually the statute of limitations is not a problem for collection cases because the creditor sues promptly when payment is not made. Usually a creditor will file a collection action within one year of the event giving rise to the payment's default. Except where special time limits for commencing lawsuits against government agencies exist (Chapter 2), there is no statute of limitation problem. A creditor should become concerned with the statute of limitations when a suit against nongovernment defendants is filed over one year after the date of the delinquent payment or the event creating the debt. Chapter 15 (State Laws) lists the general periods of statutes of limitations for each state.

The specific statute of limitations of each state can be obtained by looking in a particular state's laws in the Index for "Limitations of Actions" or "Statue of Limitations." For example some of the statute of limitations for California are

Negligent Personal Injury - Two years with the Discovery rule. California amended the SOL in 2003 to 2 years (from one year) with respect to negligent torts.

Products Liability: Two years with discovery rule.

Wrongful Death: Two years with discovery rule. EXCEPTION

Asbestos or malpractice.

Medical Malpractice: Three years from date of injury, or one years from date of discovery, whichever occurs first. There are exceptions to this rule.

Intentional Torts: One year from date of injury

Legal Malpractice: Two years with discovery rule, two years from discovery or four years from wrongful act, whichever occurs first.

In California, there is a statute of limitations a two year statute of limitations for breach of an oral (unwritten) contract, and a four year statute of limitations for breach of a written contract.

The statute of limitations starts to run from the event causing the injury. In the collection case, the time for the statute of limitations starts to run from the time of the last payment on the debt or when the debt was incurred, whichever was later. Example: George borrowed \$5,000 from Ed and paid it back at \$1,000 per year for three years. In the 4th year, he refused to pay any more. The statute of limitations would start to run from the date of the last payment, not when the loan was taken out.

If the loan was not reduced to written form, such as a promissory note, then it is an oral loan and governed by the state's statute of limitations for oral contracts. In the above example, if the statute of limitations for oral contracts was one year and Ed filed suit one year and one month after the last

payment, Ed is barred from collecting. On the other hand, if the loan was documented by a promissory note, it is treated as a written contract and governed by the statute of limitations for written contracts. In the above example, if the state's statute of limitations for a written contract is two years, then Ed's suit one year and one month after the last payment would be valid.

The statute of limitations can be tolled (suspended from running under certain conditions). In rare instances, where the plaintiff is unable to file the suit because of severe medical or mental reasons the running of the statute of limitation will be suspended until the plaintiff is able to file. More often the statute of limitations is tolled or even revived where the defendant has tricked or deceived the plaintiff from filing his complaint by promising to pay if the plaintiff does not file or concealing information that the plaintiff must have to be able to file the suit. In many states, if a defendant promises in writing to pay a debt that is barred by the statute of limitations, the promise acts as a revival of the statute of limitations. In the above example if George promises to pay Ed the remaining \$2,000 in writing after the court has dismissed it as being time-barred, the letter will revive the statute and give Ed another year to file suit. To avoid problems the plaintiff should file the action as soon as possible. A delay in filing the suit only complicates collection and runs the risk that the defendant may die or disappear, which would only further complicate collection.

## IV. JURY TRIALS

In states permitting jury trials of small claim matters, a plaintiff can bring a collection suit for money owed. Fortunately most states do not permit jury trials in small claims actions. There is a sound basis for denying jury trials in small claims cases: the use of the jury lengthens the time required to try the case unnecessarily. The purpose of the small claims court system is to provide fast and streamlined justice. Some of the more time consuming elements of the regular court system are usually dispensed with: to wit, the jury trial. Jury trials take longer to schedule and arrange. This is the major reason not to have a jury trial. It can extend the trial of the case from the usual six weeks for a non-jury to several months for a jury trial. If a jury trial is requested, the person requesting the jury trial must post jury fees: pay between \$50 and \$200 to have the jury. If the jury fees are not posted, there will be no jury. If the person requesting the jury wins, the other party must pay the jury fees.

Trial before a jury is the same as before a judge. The arguments and presentation of evidence are the same. The main difference is that the plaintiff must convince twelve strangers of the merits of his case rather than just one. Also, the judge has greater experience than the jury in trying cases. A judge is usually better able to tell when someone is acting as opposed to someone earnestly telling the truth. A woman judge can be particularly adept in telling when another woman is "turning on the

waterworks" for effect or for real. A jury trial is a waste of time for all the parties concerned.

#### V. HOW MUCH DAMAGES TO SEEK

The most that a person can seek in a small claims court is the court's maximum jurisdictional amount the court is allowed by law to award a party. In California, for example, the maximum that a small claims court can award is \$5,000 in damages. Just because a court can award a maximum amount is not a reason to ask for it. The plaintiff has the burden to prove the nature, scope and extent of his damages. No damages can be legally compensated until the plaintiff has proved to the satisfaction of the judge or jury that they were actually suffered and incurred.

In a complaint for money owed the burden is on the plaintiff to show how the debt for that money was incurred. If the debt was for a loan, the plaintiff must produce proof that the money was actually delivered and received by the defendant. This proof can be shown by canceled checks or a letter, note or memo written by the defendant that acknowledges the debt. Moreover, witnesses who can testify to the validity of the debt can prove its existence.

Another type of debt is defined as one deriving from a quasi contract. This is known generally as "unjust enrichment." The theory is based on the belief that no person should unjustly benefit at the expense of another. The theory is that if a person spends money or services for the benefit of another, the person who is so benefited should pay for such expenditures. The general test

is whether or not a reasonable person would have expected payment for the benefits. Example: A person found a lost dog and cared for the animal until the owner was found. The owner should pay the board bill for the animal since the animal was boarded for the owner's benefit. Another example: After an auto accident, the victim was taken to the hospital. The hospital should be paid for the care bestowed on the victim in keeping him alive. The most common example of unjust enrichment is where a person pays the debts of another person. The person paying the debts becomes the new creditor of the person for whom the debts were paid.

Once the plaintiff proves the liability of the defendant for the money owed, the court will enter a judgment for that amount. In some states, if the judgment is based on the breach of a written contract (such as a promissory note or a purchase agreement), the court will also award prejudgment interest at the legal rate from the date of the breach of the contract. The court will award interest from the date of the judgment at the legal rate until the judgment is paid in full.

CHAPTER 10  
REPAIR CASES

A major source of litigation in small claims court stems from excessive charges or improper repairs. Most people have experienced overcharging for work not done or work not done correctly. Most people do nothing but grumble and absorb the loss. That unfortunately is exactly what the repairman expects. In most cases the overcharge is not high enough to go to court or the people being cheated do not live in the area, and bringing a small claims action is just not practical.

In 1995, a national news magazine show did a segment about the widespread practice of service stations watering or otherwise diluting their gas. What was most intriguing was the fact that most of these practices took place in western states where most of the defrauded customers were tourists. These people were deliberately targeted for these illegal practices with the knowledge that the chances of being sued were slight.

We live, today, in a technological society. Most of what is sold today cannot be repaired at home by the average person. Just twenty years ago, the average man used to be able to do most of the basic maintenance on his car. Now, with nearly everything on a car computer controlled, there is little except changing the oil, muffler, hoses or belts that the average person can do on a vehicle. Fuel injection is an illustration of something that the

average person cannot repair when it is needed. Clogged fuel injectors (such as caused by bad gas sold at service stations) will cost several hundred dollars to fix, whereas a clogged carburetor is well within the ability of the average owner to clean. Over the years a fortune can be spent to keep fuel injection in tune.

The most obvious representative of the modern age is the computer. Where for years John used a manual typewriter and was able to maintain it quite easily. He finally "moved up" to a dedicated word processor and used it for years. One day the machine began jamming on screen when John used the phrase memory function, and it finally reached a point where the machine was useless. With trepidation, he took the machine to a repairman whom he did not know. The machine had a short in the keyboard and cost \$75 to get it fixed. After taking it home, John was only able to use it for a week before the same problem occurred. Taking it back he insisted that it be permanently repaired. Instead, John was told that the machine could not be permanently repaired without replacing a memory board which, alone, cost \$300. The dilemma facing John was that the machine only cost \$400 new. It made no sense to pay that much to get it fixed and still have a five year old machine. John had the memory cleared, took the machine and has used it ever since by avoiding the phrase memory function. To this day, John still does not know if what he was told is correct. It was not worth \$80 to him to get a second opinion. John paid \$75 to have the machine memory cleared so that he could continue to use it. For him, it was

worth \$75. If it had been more, he would have demanded a partial refund. If John did not get it, he does not know if he would have sued since he would have had to file the small claims suit 60 miles from his home. This example is mentioned to show poor service is not limited to one particular person but is inflicted on everyone at some time.

#### I. GET THE OLD PARTS

The fact that a car, computer or other item does not work after a repair has been made or does not last as long as it should certainly is evidence that it was not repaired correctly. As a matter of law, a person has suffered a legal damage when he has been deprived of the use of an item because of an improper repair. The amount of that loss is another matter of proof to be presented after the bad repair has been substantiated.

Most often the best proof of a bad repair is where the repairman does not return the old parts to the customer. Parts not returned or offered to be returned is evidence that a judge would be very interested in hearing. Keeping the useless parts is an indication that the repairman had something to hide. A few years ago Sears was cited by the State of California for performing needless repairs on cars. Sears reached a settlement wherein it promised to pay its mechanics based on commissions. Whether or not that will cure the problem is in question because a store that it is in financial straits might still overcharge just to stay afloat. The fact that a Fortune 500 company would adopt policies that led

to this state of affairs further highlights the fact that the consumer should not assume all repairmen are honest. Many states have laws which require the repairman to return the parts and provide a written estimate for the work before it is done.

Getting the replaced parts will help to prove that the repair was done. If the part is not defective, the repairman did an improper repair and cheated the customer. Taking that part to the judge with testimony from an expert, either written or oral, that the part is not defective will help prove the repair was needless and wrongfully done. Do not always assume that the parts returned are those that actually came from the item that was supposedly repaired. In 1992, a fantastic television expose showed a series of appliance repairman called to repair a dishwasher. The only thing wrong with the dishwasher was that a wire was deliberately disconnected. A hidden video camera was trained on the repairman. The customer left the room while the repairman worked in private. Eight out of the 10 repairman charged for work that was not done. Most of the crooked repairmen claimed that a broken switch they brought with them came from the dishwasher, and then they charged for a switch they never replaced.

The ideal way to assure that the correct work is actually done is for the customer to remain with the repairman throughout the repair. That is no guarantee that the repairman will not palm and switch parts, but it reduces the chances. The parts once obtained from the repairman can be taken to another repairman for an opinion

as to whether they were defective.

## II. HAVE THE REPAIR REVIEWED BY A PROFESSIONAL

When in doubt as to the quality of a repair, the customer should take the item to another repairman and pay for an inspection. Before taking it for the post-repair inspection, the customer should make sure that the repairman would be willing to testify in small claims court as to his opinion as to what was found. The more estimates that a customer has regarding the damage the better. At least three estimates are preferred by both judges and insurance companies. If the estimates are not in the same ballpark, a judge tends to award a figure between the first and second estimate while disregarding the third estimate.

Most states do not require that the repair be redone prior to small claims action being filed. A few states, most notably New York, do require the work to be redone and proof of the repair produced at trial. The requirement of these few states that the repair work must actually be redone before trial is unfair in the situation where a person may not have the money to have the work redone because the money for the repair had already been spent in payment to the defendant in the first place.

## III. ATTEMPT TO SETTLE BEFORE FILING

The stronger a customer's case is against a repairman, the more likely it is that the repairman would settle instead of going to trial. While that statement is without dispute, the truth is contrary. Many unscrupulous repairmen view such suits as just a

necessary cost of business. Such crooks know that most will send a letter and not follow with a suit for a variety of reasons. The legitimate repairman will try to settle a dispute rather than have his professional reputation sullied. The crook does not really care because there are always unwary people that he can defraud.

The main purpose of the settlement letter is to state the basis of your claim and the amount necessary to resolve the matter. The letter is written as much to the judge as it is to the repairman. Many states require that a plaintiff must first notify the defendant of dissatisfaction with the repair prior to filing a suit in small claims court. That requirement is almost completed as a matter of course when the person informs the repairman of dissatisfaction with the work. A repairman should reasonably expect to be sued whenever a dissatisfied customer appears. In a minority of states, the notification must be in writing. For example, Massachusetts, under its General Law, Chapter 93A permits a person to seek triple damages from a business in small claims court but only if the notification letter is sent 30 days prior to filing the suit.

An offer out of court for less than is actually owed is not binding on the plaintiff if the defendant does not accept it. For example, assume that George's Garage improperly fixed Bill Claus's car. The work had to be redone for \$500. Bill Claus writes a letter to George's Garage offering to settle for \$300 which is ignored. Bill Claus can then sue for the full \$500. The judge will see the

demand and will appreciate the reasonability of the plaintiff in attempting to resolve the case out of court and will probably award the plaintiff the full \$500. The defendant cannot force the plaintiff to accept as a judgment the amount of the rejected settlement offer.

A settlement letter can be simple and straightforward.

Dear Sir:

On July 14, 1993, I left my 1980 Toyota Pickup with you for a complete clutch job. I paid \$435.96 for the work. The bill shows that I had a new pressure plate and throwout bearing installed.

On September 15, 1993, my clutch went out again. The garage that repaired the clutch the second time, Agran Garage, found the old clutch completely destroyed. I have the clutch that was taken from the truck.

Agran Garage believes you rebuilt the old clutch instead of replacing it with a new one. Because the work was improperly performed and had to be redone, I have been forced to expend an additional \$450 in repairs and another \$150 in renting a replacement during that time.

I am willing to settle for a return of the \$435 that I paid. If I do not receive that payment within 30 days from the date of this letter, I shall file suit in small claims court for all of my damages in addition to reporting this incident to the appropriate state licensing board.

Respectfully,

Michael Roddy

#### IV. CRIMINAL CHARGES FOR NEEDLESS OR UNPERFORMED WORK

When a repairman intentionally charges for work that has not been done or tricks a person into having work done that is not needed, that person has committed a crime in all states. If the

customer has absolute proof, such as the returned parts or a video, that proof should be taken to the police. Most district attorney's offices have consumer fraud departments. All state licensing boards have investigatory departments as well.

There is no reason for a person to let a repairman get away with defrauding. Even if the amount is small or it is too inconvenient to bring a small claims suit, the district attorney or state licensing board might undertake the prosecution. The key to winning is being able to prove that the repair was improperly done. If proof of such an improper repair cannot be obtained, the suit should not be filed. The key to any repair case is the presence or absence of expert testimony. Once a plaintiff has an expert who will testify that the work was improperly done, the burden shifts to the repairman to prove that his work was properly done.

Another source of frequently overlooked evidence is the number of complaints filed by the better business bureau. A repairman who has had numerous complaints against him with the better business bureau is vulnerable. Even if the persons filing the complaints with the better business bureau did not file small claims suits, they can still testify in most courts to show a pattern of deceptive practices. Most small claim judges will let these persons testify as witnesses for a plaintiff. A district attorney will always accept witnesses to prove an ongoing criminal practice. Therefore, always check the complaints with the better business bureau for potential witnesses.

CHAPTER 11  
VEHICLE SALE DISPUTES

Disputes involving the sale of vehicles is one of the most common type of cases brought before small claims courts. Such disputes take the form of three general types: new vehicle sale, used vehicle sales with dealers and private party sales. Generally how a court will rule is predicated in large part on the type of sale involved. Most commonly the vehicles involved in such disputes are automobiles but can easily be motorcycles, boats , planes or even wagons. The operative word is vehicle denoting transportation. Just as there are a myriad ways of transporting oneself from one point to another so to can the purchase of such a means of transportation result in a dispute that calls upon a small claims court for resolution.

There are two ways for which a Plaintiff may bring an action before a small claims court for a claim involving a vehicle. The first is if the prayer for damages does not exceed the jurisdictional limit of the court. The second method is for the Plaintiff not to seek a monetary damage award but instead to seek equitable relief of some type from the court.

Irrespective of the jurisdiction limit of the court, many states permit their small claims court to grant equitable relief in certain instances. Equitable jurisdiction of a court is the authority bestowed upon it by the state to "do that which should be

done". In other words, it is governed by the goal of achieving justice. The most common type of equitable relief exercised by a small claims court is rescission and restitution of a contract when the facts warrant it. California, for example, under California Code of Civil Procedure section 116.610(a) grants authority to small claims courts to grant such equitable relief as rescission, restitution, specific performance and reformation of a contract. Rescission and Restitution are very similar remedies for the misconduct of a party calling for the termination of the contract. On the other hand, reformation and specific performance require that the contract be performed but possibly with some changes. In determining what type of equitable relief is to be sought, the Plaintiff must understand the differences if these types of relief.

Rescission and restitution are so closely related that, in practice, they are often considered to be the same. By definition, rescission is the remedy to be used when a contract was entered as a result of fraud, duress, undue influence or mistake of law that is so egregious that it would be manifesting unfair for the court to allow the contract to stand. Rescission is simply the cancellation of the contract as a result of the improper conduct of the other party. Restitution could be considered as the implementation of the rescission. Once a contract is rescinded, both parties must return to the other all of the money and property received under the contract, this is called restitution. In other words, the parties are put back into their pre-contract position.

Whenever property has been exchanged under a contract and that contract is later rescinded, then restitution, the return of the exchanged property, must be made as well.

Reformation of a contract is an equitable remedy not as extreme as rescission and restitution but gives rise to most acrimonious disputes. In employing the remedy of reformation, the court keeps the contract in force but changes its terms so as to reflect what was originally promised. For example, if an auto dealer promised four white wall tires but did not include that promise in the written contract, the court might not find the false promise insufficient to justify rescinding the contract but will instead rewrite the contract so as to include the provision of furnishing the four white wall tires. Reformation of a contract almost always pertains to promises made outside a written contract that were not made part of the final contract. This is probably the most common source of lawsuits regarding vehicles sales. It is not uncommon for both new and used car salesmen to make outlandish promises of future performance that are not set forth in the contract and then after it is signed refused to perform on those promises because it is not in the contract.

Specific performance is the last of the four most popular forms of equitable relief. It is employed when one party has a change of mind and no longer wants to sell an item. Under this remedy, the court simply orders both parties to perform the contract as written (one party buys and one party sells). Specific

performance usually requires that there be something special about the item being sold. The payment of money is not considered unique enough to justify specific performance. On the other hand, land is considered unique under the law and the court will always order the specific performance of any contract involving its sale. Likewise, where a contract involves the sale of a special vehicle, such as a one-of-a-kind the court also will enforce the contract. If the failure of the sale will cause unreasonable harm to Plaintiff, the court will order the sale completed even though the object is not unique. For example, assume that a dealer was to sell a 1988 Chevy to a handicapped person and the dealer later changed his mind. Ordinarily, a court would not order specific performance of the contract because the Plaintiff could sue for damages instead. However, if the Plaintiff need this particular right now because of handicap, the court could order that the sale go ahead instead of paying damages.

The determination of the rights and remedies of the parties in any suit involving vehicles depends on the type of relief being sought. Understanding this enables the Plaintiff to better structure his or her small claims complaint and prepare for its presentation.

#### A. NEW VEHICLE DISPUTES

At first blush, it would seem that disputes involving new vehicles sales would be beyond the jurisdictional limit of a small claims court. As stated repeatedly throughout this book, a small

claims court has only limited jurisdiction to resolve disputes, This means that a small claims court can only hear certain types of cases and are usually limited to a maximum monetary amount. In California, for example, a small claims court can only hears cases where the Plaintiff is seeking damages of no more than \$5,000 not excluding claims for equitable relief.

The cost of most new vehicles, certainly those involving cars and trucks, will exceed the jurisdictional monetary amount of a small claims amount. The question before the court is what relief the Plaintiff is seeking from the court and will it exceed the jurisdictional limit. For example, the car may cost \$50,000 but the Plaintiff is only suing for a new engine which may be \$4,000 and therefore within the jurisdictional limit of the court. Nonetheless, where the complaint is based upon fraud, equitable relief may be pled in many states seeking rescission and restitution or reformation.

It is a rare situation where a buyer sues a dealer for specific performance of a contract to sell a vehicle, but it has happened. In the late 1980's, Honda was selling the most popular cars in the country. There were huge back orders and some models were selling for above dealer suggested prices. As a result, some dealers were actually canceling or delaying the performance of their contracts at lower prices so as to sell the vehicles to new buyers at much higher prices. Some of these dealers were sued by their customers for specific performance of the contract at the

price originally contracted. This problem became so wide spread that some states actually began criminal investigations for unfair business practices against such dealers.

Generally, the most common complaint heard in a small claims court regarding a new claim is the allegation that it is a lemon. many states have enacted laws called "lemon laws" for new cars which experience an inordinate number of repairs. California set the precedent for the first lemon law under California Civil Code Section 1793.2. California's lemon law requires that the manufacturer of a car either replace or reimburse the buyer for the car if within one year or 12,000 miles the car has had to have the same problem fixed four or more times or has been out of service more than 30 calendar days. As a result of lemon laws, many car manufacturers have created customer complaint departments to help buyers with their complaints. Before filing a small claims complaint for a lemon, it is a good idea to contact the manufacturer in an attempt to determine if there is anything that it will do to correct the problem in addition to anything the dealer may be doing.

In any problem involving a new car, the written warranty should first be consulted. If the problem is not completely covered by the warranty, then the state's lemon law should be consulted. If the problem persists after repeated repairs, then the issue of a lemon exists. Even if a state does not have a lemon law, a person may still be able to sue the dealer and manufacturer for rescission

and restitution if it can be shown that the car is a lemon. Such a suit is based upon the court's jurisdiction to render equitable relief, that which is fair rather than legal relief based solely upon the contract.

In the early 1980's General Motors got into problems when it began selling its Cadillacs with Oldsmobile motors without telling its customers. When the story broke, General Motors claimed that the engines were virtually identical and refused to replace the engines or refund any money for the differences in the values of the cars. After losing a series a lawsuits, General Motors eventually agreed to a settlement with all of its customers who had purchased what was referred to derisively as the "Cadimobile". The buyers won there suits based upon the equitable theory of reformation, they were not given what they were promised and the courts reformed the contract to make it the way it should have been from the beginning.

Suits for rescission based upon the fact the vehicle was a lemon have prevailed throughout the United States on a case by case basis. In such a suit, it will be necessary to document all of the repairs to the vehicle, the type of driving made and number of miles between each breakdown. In such an instance, the court is probably more likely to rule for the buyer than the dealer when a new car, that has been properly maintained, self-destructs within 20,000 miles even though out of warranty.

Before commencing a suit against a dealer for selling a lemon,

the buyer should consult a car magazine or specialist to determine if the car has developed a reputation for such problems. If so, such knowledge would help in a lawsuit but, most importantly, it might help settle the matter outside of court. Once the suit is filed, the dealer may feel constrained to fight it to the fullest in order to protect his reputation. On the other hand, if the dispute could be settled quietly, that is worth something to a dealer and the manufacturer. Fear of a government ordered recall is a very good incentive for a manufacturer to deal with a lemon complaint quickly. Several years ago, a very expensive import automobile had a highly publicized series of accidents resulting from the automatic transmission jumping from park into drive. In one instance, one such car was at a dealer auction when it jumped into gear and ran into several persons killing and maiming others. The entire scene was caught on video tape. Up to this point, the manufacturer had been successfully claiming that such accidents were driver's error. After this tape was aired on a national tabloid, the manufacturer issued a recall just days before the Federal Government was going to open hearings on the car. Safety complaints can be filed not only with the National Transportation and Safety Board but also with various state agencies as well. As a result, it is not a good idea or in its best interest for a manufacturer to ignore a lemon complaint.

#### B. USED VEHICLE SALES

Just as dealers sell new vehicles, they also sell used

vehicles. Unfortunately, it is often more difficult to recover from a dealer for a defective used vehicle than for a defective new vehicle. The main reason for this increased difficulty in bringing a suit is that the manufacturer usually will indemnify the dealer for a lemon but that is not the case for a sued vehicle. It is also more difficult to prove that a used car was a lemon when it was sold and that the dealer knew it. By its very name, a used car is used. It is not new. By not being new, it is not expected to last as long as a new vehicle. The only then is whether the car was sold in good faith or if its condition was somehow misrepresented to the buyer.

This problem most often arises in the "AS IS" contract. In this case, the vehicle is sold as it stands with all faults. Yet, at the same time the salesman is making all types of claims that are not represented in the contract. The intention behind these claims is to get the person to buy the vehicle. Yet at the same time, the salesman has no intention of proving or standing behind his statements when they are relied upon.

A real danger in buying a used car is the mistaken belief held by most buyers that the dealer must disclose everything that he or she know about the car. Such is not the case when the car is being sold "AS IS". In such an instance the car is simply being sold as it stands. A few years ago, a small claims action was brought in California. The buyer purchased a car from a dealer "AS IS". The dealer made no representations regarding the car and the buyer

acknowledged that no representations has bene made. After the car was purchased, a few months later the engine blew up. it was then discovered that the engine was a Pontiac in a Chevy frame. A suit was brought claiming that the dealer had a duty to inform the buyer if the different engine. The buyer cited the General Motors suit for its switched Cadillac engines. At the trial, the judge heard the evidence and ruled for the dealer. It was true that the Chevy had a Pontiac engine. No evidence was produced that showed that Pontiac engine had a lower life expectancy than the Chevy engine or that car was worth less money because of the different engine. The Judge noted that the dealer made no representations as to the car in any manner. The pivotal point as stated by the Judge is that the buyer produced no evidence to show that she would not have purchased the car if she had known the engine was not a Chevy. It was also not proven that the dealer knew that the engine was not a Chevy. Without that knowledge there could not be a duty imposed on the dealer to disclose that which he did not know and even if there was such knowledge, the buyer did not prove that she would have acted differently if the she was aware of the fact. This is very close decision, other judges have stated that they would have ruled differently.

Some states have enacted laws to aid the consumers in purchasing used vehicles from dealers. In some states, dealers are required to furnish the names of prior owners of vehicles so potential purchasers can contact them and ask questions regarding

the vehicles. This is an excellent means of cross-checking the representations of the dealer. In the same vein, in any lawsuit against a dealer for a used lemon, the prior owner is a good source of information to prove that the dealer was aware of the problem and subsequently concealed it from the buyer.

In order to sue a dealer it is important, if fact vital, for a buyer to prove to a stranger, the judge, that the buyer was defrauded. The legal definition of fraud is; "The misrepresentation of a fact upon which the Plaintiff relied when the reliance was reasonable, and as a result of that reliance the Plaintiff was damaged." Statements, no matter how false are not fraudulent if the buyer did not rely upon them in making the purchase. For example, a statement after the sale was made by the dealer that the car will get 50 miles per gallon is not fraudulent because the sale the sale had already taken place. Such a statement prior to deciding to buy the car could very well be fraudulent if it was reasonable to believe it. If the car is a 1976 Chevy such a statement would not be believable so there would not be justifiable reliance upon it. On the other hand, reliance on such a statement regarding a Honda might well found to be justifiable.

The real difficulty in suing a dealer is lack of proof. all of the paperwork including the ad for the car, if any, should be brought to court. Unfortunately, it is usually difficult to produce evidence of the dealer's oral statements and that is exactly what the dealers rely upon when making the false statements. A case in

point a woman purchased a 1996 Subaru in Carson City, Nevada. The dealer promised that she could return the car if her credit union would not give her a loan. The loan documents did not reflect this promise. It turned out that the credit would not give the loan but the loan document listed another bank from which the loan would be taken. The dealer then insisted on completing the sale despite the protestations of the woman. There was nothing in writing to support the woman's version and as such she was forced to complete the purchase the automobile.

The obvious method to protect one's interest in such a case is to insist that all statements be put in writing. In practice, that will not happen. The dealers simply refuse to do so. The next alternative is to carry a small self-contained voice activated tape recorder. Such a recorder will catch the statements made by the dealer which may be used in court. A point on doing this is to assure the legality of tape recording in each state. In California, it is illegal to tape record a person, without the person's consent even though he or she is speaking to you. Any such improper tape recording is not permitted to be used in a California court. The exception would be if the conversation is not considered confidential. In the situation of the purchase of a car, a court might very well find that statements to induce a purchase are not confidential and permit the tape recording. Under Federal law, there is no prohibition against tape recording a conversation as long as one person in the conversation consents to it. Therefore,

if the state has no prohibition against tape recording or follows the federal law, the tape recording would be legal.

One of the varieties of fraud is the concealment of a material fact upon which the other party is detrimentally relying. This is hard to prove in the vehicle purchase area but none the less it exists. To prevail for concealment, the buyer must prove three specific elements:

1. the buyer believed that item was in good shape,
2. the conveyed that belief to the dealer;
3. the buyer conveyed to the dealer that the purchase was taking place because of that belief; and
4. the dealer concealed the fact from the buyer that the belief was false.

A example of fraudulent concealment could be where the buyer believed that the car had a 450 horsepower engine and specifically told the dealer that was the reason why he was purchasing the engine. The dealer, however, knew that the car did not have a 450 engine and did say anything. As such, even if the car was sold "AS IS" that would not protect the dealer in a lawsuit because he will have duty imposed on him, under the laws of most states, to disclose such a mistake of fact. This scenario is different from the above example with the Chevy that contained the Pontiac engine. In that case, the dealer may not have known of the switched engines and even if he did know, the buyer was not buying it to specifically get a Chevy engine of a particular type.

It is important in any small claims case involving vehicles for the Plaintiff to prove the damages suffered. This will most usually be done by having the car inspected by licensed mechanics. The licensed mechanics can then be called to testify in court as to their professional opinions. In addition, some states, such as California, permit statements of witnesses and bills to be produced into evidence in place of the testimony of the person. In a regular court, this would not be permitted as violative of the hearsay rule but small claims is an exception to the rule.

As a practical matter, it is more difficult to prevail against a private seller than as against a dealer. The same degree of proof must still be produced at the court. However, there is no regulation of private sellers of vehicles. Since private sellers are not licensed, they are not worried about having their license to do business lifted for unfair business practices. In addition courts tend not hold private sellers to same standard of reputable conduct as they do dealers. Statements which might be actionable against a dealer may not be when made by a private seller. In many instances, courts have held that statements regarding mileage and longevity, are only non-actionable opinions when made by private persons but become actionable statements when made by professional dealers. The reason being is that such professionals are held to possess greater knowledge and expertise than individuals and are therefore held to a higher standard of care.

In essence, private sellers of vehicles can be sued the same

as dealers. The methods of suing, causes of action and the relief sought will be the same. The only difference may be how the court interprets and applies the evidence against the private seller as opposed to the dealer. The best way to prevail in such a suit is to be fully prepared with witnesses (or their statements if not available, estimates, appraisals, photographs, etc. Believability of the Plaintiff is the most important piece of evidence that can be brought to court. No one should be afraid to stand on their rights when they can produce evidence of misconduct by the defendant. A small claims court exists more than any other court to deliver justice.

CHAPTER 12  
JUDGMENT AND APPEAL

After both sides have presented their case, the trier of fact, whether judge or jury, will make a decision. When a jury is used, the decision is announced in open court before the parties. In contrast, when the judge tries the case, the judge will sometimes take the case under submission and decide it later. A judge will take a case under submission for several reasons. The judge may want to conduct research or conduct an investigation or simply not want to upset the parties while in court. When the case is taken under submission, the judge's decision is usually mailed to the parties within a month.

The procedure is somewhat different when the defendant failed to appear at trial to defend himself. Whether or not the court can issue a valid default judgment depends on whether or not the defendant is a serviceman on active duty. Under the Soldiers and Sailors Relief Act of 1940, default judgments cannot be taken against servicemen on active duty. Under this Act, no small claims court will have jurisdiction to hear the case, and therefore no valid judgment can be issued, as long as the defendant is on active duty and refuses to appear in court to answer the complaint. The plaintiff should consult a military judge advocate because there may be administrative means through the military to resolve the

matter. When a nonmilitary defendant fails to appear at the trial, the court will determine if the defendant was properly served with the complaint. If the defendant was not validly served with the complaint which legally places the defendant on notice of the complaint, the court will dismiss the case for want of jurisdiction over the defendant. If the defendant was properly served with the complaint, the court will hear the case. When a nonmilitary defendant has failed to appear at trial and valid service was delivered to him, the court will hear evidence from the plaintiff as to nature, quality and amount of damages being sought from the defendant. Should the plaintiff convince the trier of fact that damages should be awarded, the plaintiff wins and will be awarded a judgment in the amount that the judge or jury feels is compensation for the defendant's injuries.

Any judgment obtained from the court may include not only the compensatory damages but any equitable relief that the court feels is just and proper. Courts often award prejudgment interest on breach of contract suits dating from the date of the breach of the contract. All courts render interest at the state's legal rate from the date the judgment is entered (the date the clerk enters it in the court's book of judgment, which is usually the day after the judge signs the judgment).

An element of damages in all judgments is the plaintiff's costs in presenting the action. It is awarded only if the plaintiff wins the case. Such recoverable court costs include

filing fees and service of process fees. Expert witness fees are not recoverable in small claim courts, but ordinary costs for witness fees, mileage fees, reasonable fees for the serving of a subpoena on individuals and of a subpoena duces tecum for documents are all recoverable. After the trial, the plaintiff presents a summary of his costs to the court for approval. Once approved, the costs are included in the court's judgment against the defendant.

A concern that all plaintiff's have is how valid is a small claims court judgment, especially since the judgment was not rendered by a formal court. A small claims judgment is treated for all purposes and by all courts as a valid judgment issued by a valid state court. A plaintiff can take a certified copy of a small claims court judgment and have it enforced anywhere in the state in which it was issued. Under the United States Constitution all judgments of a state must be given full faith and credit by other states. This translates to mean that a small claims judgment of one state will be fully enforceable in another state. The normal procedure is to have it adopted by the court of another state as a sister state judgment. Doing this makes the creditor's small claims judgment fully enforceable under the other state's law and gives the debtor full access to that state's collections procedures.

Most judgments are valid and in force for a set period of time, usually 10 years. During this time the plaintiff can institute collection proceedings simply by producing a certified

copy of the judgment. If the judgment has not been collected before the period has expired the plaintiff must return to court and ask to revive and continue the judgment in force for another period of time. This is a mere formality. If the collection has not occurred in 10 years, it probably never will be collected. A judgment should be renewed if the defendant owns real property and the judgment places a lien on the property. That property will never be sold or even transferred to the debtor's heirs without the judgment being paid; in the meantime the interest on the judgment is accruing. The uncollected judgment may actually serve as a retirement nest egg for the plaintiff.

#### I. THE APPEALABILITY OF A SMALL CLAIMS JUDGMENT

The issue of whether an appeal can be taken is an important consideration in bringing an action in small claims court. A plaintiff may not wish to file in small claims court if he knows that he may be able to appeal if he loses the case in a regular court. A defendant may not wish to appear in small claims court if he is not able to appeal a judgment that is rendered against him. Not all states permit appeals. Some of those states that do permit appeals seriously limit the scope of what can be decided in the appeals.

#### A. STATES NOT PERMITTING APPEALS

The following states do not permit appeals by either the plaintiff or defendant:

ARIZONA

CONNECTICUT

HAWAII

LOUISIANA (SMALL CLAIM CITY COURT)

MICHIGAN (EXCEPT FOR MAGISTRATE'S JUDGMENT)

NORTH DAKOTA OREGON (DISTRICT COURT) SOUTH DAKOTA

B. STATES PERMITTING ONLY THE DEFENDANT TO APPEAL

The following states do not permit the plaintiff to appeal a judgment rendered in a small claims court. These states do permit a defendant to appeal a judgment taken against them in small claims court:

CALIFORNIA

MASSACHUSETTS

NEW YORK

OREGON (JUSTICE COURT)

RHODE ISLAND

The remaining states and the territories of the Virgin Islands, Puerto Rico and the District of Columbia permit either party to appeal a small claims judgment pursuant to its own procedures.

In California, a plaintiff may not appeal the judgment in a small claims action. If the plaintiff loses, the case is final and cannot be relitigated. The defendant can appeal the judgment of a small claims court. Usually in an appeal, the case is retried again in a regular court and before a real judge. The new trial is called a "trial de novo" (a completely new trial). In California, small claims appeals are heard in the superior court. In California, when a small claims case is appealed, both parties may use attorneys, but that is the exception to the general rule that attorneys may not appear in small claims cases. In California, a plaintiff can

only appeal when a judgment is rendered against him on the defendant's cross claim. A defendant is not entitled to appeal a loss of his claim against the plaintiff. Example: A plaintiff sues a defendant for \$3,000 worth of damage to his car caused in an accident. The defendant files a cross claim for \$5,000 for the damage to his car. The court rules for the defendant and awards him \$1,500, and the plaintiff gets nothing. The plaintiff can appeal the judgment of \$1,500 awarded against him, but he cannot raise the argument that he should have been awarded \$3,000. Because the defendant was awarded some money on his claim against the plaintiff, he cannot raise the argument on appeal that he should have gotten more money from the trial court. Under California law and those other states that preclude a plaintiff from appealing, the winners cannot appeal and must accept the award the court gives them.

A few states, such as California, permit a judge to fine a defendant for filing a frivolous appeal. This is an appeal that was intended for harassment without a good faith belief in its merit. In California, if the court finds the appeal was frivolous, it can award the plaintiff \$250 for attorney fees. It is rare the court will find that the appeal was frivolous. By "frivolous" is meant the appeal was without merit and intended solely to harass, delay or encourage the other party to abandon the claim. If the state law does permit sanctions for filing a frivolous small claims appeal, there is no harm in asking for them.

## II. TYPES OF APPEALS

There are two types of appeals which are split among the states permitting appeals. Slightly more than half of the states permitting appeals conduct the appeals by having a trial de novo.

Slightly more than half of the states permitting appeals, conduct the appeals by having a trial de novo. As discussed in the California example above, a trial de novo is an entirely new trial. Everything is repeated from scratch before a new judge. Usually a trial de novo is before a regular court. The procedural rules for a regular court must be followed whereas procedure was more relaxed in the small claims court. The trial de novo will require compliance with formal rules of discovery (meaning written questions called "interrogatories" and depositions may be required). Depositions of course, require the services of a court reporter which is an additional up front cost which is recoverable if the party wins. Most important, the hearsay rules of evidence that are usually suspended in small claims actions will be followed. The hearsay rule forbids the use of written testimony. The witnesses must appear in court to testify or their testimony will not be heard by the court.

Many states do not permit trial de novo on appeal. In those states the appeal is limited to questions of law. The appeal can only question whether or not the judge applied the correct law in applying the facts to the case. Example: A state permits appeals only on questions of law. The defendant in an auto accident case

can argue that the judge improperly applied the contributory negligence statute in determining the damage award; he cannot argue that he was not the driver of the vehicle. In these states a defendant can win only if he can show that the law was not followed by the judge. Most small claims cases do not involve misapplication of the law but only a possible misapplication of the facts. Therefore, states that allow appeals rarely have small claims decisions appealed because the facts do not change whereas an interpretation of the law might change between different judges.

### III. FILING AN APPEAL

If a party wishes to appeal and is in a case with the right to appeal, he must act promptly. Time is of the essence in seeking an appeal. For those states that permit appeals, a "notice to appeal" must be filed to initiate the appeal. The notice of appeal must usually be filed 10 to 20 days after issuance of the small claims court's judgment.

A notice of appeal form is usually obtained from the clerk of the small claims court. The form consists of places for the insertion of the case number, the name of the case, a short summary of the reason for the appeal and the amount of the judgment being appealed. There is a filing fee for a small claims case: \$25 to \$180. The filing fee is a cost usually awarded to the appellant (person appealing) if he wins the appeal.

A few states, such as California, require an appellant to post a bond to prevent collection on the judgment while the case is on

appeal. If the bond is posted, the opposing party can still institute collection proceedings on the judgment. If the appellant later wins, the other side must return the money collected during the appeal. Posting of the bond is intended to prevent debtors from filing frivolous appeals to delay payment of the judgment.

Some jurisdictions have review courts that decide whether or not a hearing should be granted on appeal. Iowa, Wyoming and the District of Columbia each have appellate requests reviewed by a court before deciding to grant a hearing. These courts attempt to weed out frivolous appeals and pointless appeals (usually because no questions of law are presented). The Superior Court for the District of Columbia announced that 53 of the 68 small claims court appeals filed in 1988 were rejected without a hearing.

It makes little sense to file an appeal if you are almost certain to lose. For that reason, before an appeal is filed in a state that does not grant a trial de novo, it is wise for the reader to determine if valid grounds exist for the appeal. For those states that permit appeals only for mistakes of law, it often is pointless to attempt to appeal. In those cases the person is merely throwing additional money down the drain for filing fees and preparation.

CHAPTER 13  
COLLECTION OF JUDGMENT

The case is over once a court enters its judgment. If the court issues a money judgment, the person being awarded the money becomes a "judgment creditor" of the losing party, who is now the "judgment debtor." Occasionally the judgment may specify that the amount of money awarded is to be paid in full to the judgment creditor in periodic payments by the judgment debtor. Periodic payments are usually ordered in the judgment only if the parties entered a settlement agreement ordering them. Periodic payments are ordered when the judgment debtor convinces the judge that in the interest of justice the payments should be made periodically. Usually the court does not order periodic payments. When a payment schedule is not ordered by the court, the judgment creditor may begin collection procedures immediately for the entire outstanding judgment award.

Interest, as an element of the judgment, is usually awarded from the date of the judgment. The legal rate of interest varies from state to state but is generally 10% per year. Many courts will also award prejudgment interest on breaches of contract for money due from the date that money should have been paid. Certainly the judgment creditor should request prejudgment interest in the event the court might grant it.

Collection of a judgment is totally the responsibility of the

judgment creditor. Collecting a judgment is the most frustrating part of the small claims process. Having a judgment does not guarantee payment. However, there is no right to demand payment without a judgment. A judgment debtor may be without assets, "judgment proof," or be uncooperative, causing extra effort and costs. One should never assume that just because he may possess a judgment the debtor will quickly and voluntarily. In the real world, collection on a judgment can be time-consuming and sometimes not very successful.

Many people mistakenly believe that the court will take care of the collection of the judgment. That, unfortunately is not the case. The court will not collect the award for the judgment creditor. The extent of the court's involvement in collection is to supply the orders and documents needed to help collect the judgment. Often, in order to collect a judgment, a judgment creditor turns to a collection agency.

Most often the Court's judgment is an absolute sum of money due and payable immediately. The judgment creditor can therefore begin collection procedures for the entire sum so awarded. In some instances, however, the Court will fix the value of the judgment but may decree that it be paid in installments. Whenever a judgment is ordered to be in installments, the court will award interest at the state's prevailing interest rate, usually ten percent per annum. If the installment payments are not made, the judgment creditor is given the right to return to court and request that new

judgment be issued for the full amount payable immediately.

When collecting a judgment, the judgment creditor must obey the same collection laws as any other creditor. More specifically, the judgment creditor must comply with the **Fair Debt and Practices Act**. Congress enacted the **Fair Debt and Practices Act** to correct abuses in collection activities that were prevalent in the past. Under the Act, a judgment creditor can not harass a debtor or engage in any abusive or unfair conduct in an attempt to collect a judgment. Prohibited conduct is contacting an employer or calling the judgment creditor at unreasonable times. In addition, if the debtor requests that attempts to contact him or her cease, then the creditor must do so and resort to a lawsuit to collect the judgment. Penalties for violating the **Fair Debt Practices Act** are severe and may expose the judgment creditor to fines in a greater amount than the judgment itself.

#### I. AMENDING A JUDGMENT TO ATTACH HIDDEN ASSETS

It is not uncommon for people to do business using an alias name. One need only look to Hollywood to quickly see how prevalent it is for people to use different names. As strange as it may seem, it is usually not illegal for a person to change his or her name without court approval. Most states will permit the use of aliases as long as their use is not intended to defraud people. The debtor's use of aliases as such can cause a problem when seeking to collect a judgment.

Most judgment only list the given name of the individual. As such, only assets in the actual name of the judgment creditor can be attached and seized to satisfy the judgment. Professional deadbeats have used this fact to conceal their assets under other alias names. If the debtor is not asked about assets being held under other names, he or she can simply keep quiet and create the false impression of being judgment proof when in reality assets are being concealed.

When a judgment creditor discovers the fact that the debtor has used a particular alias in the past, the judgment creditor may ask the Court to amend its judgment to add the alias along side the given name of the debtor. Such an amendment is easy done is accordance with the procedure set forth under state law. In most instances, it is simply done by virtue of a declaration filed with the court. A sample of the declaration that may be used follows:

I, \_\_\_\_\_, declare as follows:

1. I am the Plaintiff in the case \_\_\_\_\_  
 \_\_\_\_\_ CASE NUMBER \_\_\_\_\_
2. On \_\_\_\_\_ judgment was rendered in the case  
 against \_\_\_\_\_ in the sum of \$ \_\_\_\_\_  
 \_\_\_\_\_.
3. Following the issuance of the judgment, I have discovered  
 that \_\_\_\_\_ uses the alias of \_\_\_\_\_  
 \_\_\_\_\_.
4. I know that \_\_\_\_\_ uses this alias because  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
5. I request that the judgment be amended to reflect the

alias \_\_\_\_\_ which is used by the  
defendant.

I declare under penalty of perjury that the foregoing is  
true and correct under the laws of the State of \_\_\_\_\_.

## II. ATTACHMENT OF WAGES

The commonly utilized method of collection of a judgment is attachment of the wages of the judgment debtor (called "garnishment" in some states). An attachment of wages is accomplished with the judgment being taken by the winner to the clerk of the court. The clerk of the court issues a "writ of execution" containing the information in the judgment. Each state sets the amount of wages that be garnished from a debtor. All states set a minimum amount of wages which are exempt from attachment, in California for example, a judgment creditor is usually permitted to get 25% of a debtor's net wages to satisfy a debt. Where, however, the debtor has extremely low income the amount that can be garnished in California can be extremely less than 25% or none at all.

A "writ of execution" is a court order directing the sheriff or marshal to take control or "levy upon" the assets of the losing party to satisfy the judgment. It is the responsibility of the judgment creditor to tell the marshal or sheriff where the property is located so it can be seized.

Wages, like other assets of a debtor, can be attached ("garnished") to pay the judgment. Most states have laws to prevent

employees from being fired just because their wages have been attached. All states provide debtor statutory exemptions (see Chapter 15, State Laws) on certain property of the debtor to protect it from collections. All states permit a debtor to exempt a certain amount of wages that cannot be attached or seized to satisfy the judgment. Only property over these statutory exempted amounts can be taken to satisfy a judgment. In Texas, for instance, wage garnishment is not permitted. In those states that allow wage garnishment, the sheriff's or marshal's office will provide the debtor with the local forms and rules for garnishment.

Special rules apply to the garnishment of the wages of federal employees. State courts lack authority to order a federal agency to attach wages unless there exists a specific federal law allowing it. To date, attachment for federal wages is only permitted in the area of a judgment for child support or spousal support. For other types of judgment a federal agency will not honor an attachment request. The wages of postal workers and federal housing may, however, be attached as any those of any other person because they are not considered to be direct federal employees. Attaching the wages of most other federal employees, including seamen, longshoremen and harbor workers is more usually barred.

An alternative to attaching federal workers's wages and also for regular debtors as well, is to obtain a court order directing the debtor to assign the portion of his wages which are attachable to the creditor. This order will be recognized and honored by the

federal agency. A request for a wage assignment may be made in court at the time of the trial otherwise it will have to be made by a separate pleading called a "motion" after the trial. Obtaining a wage assignment can be a cumbersome process depending on individual state law. If pursued after a judgment has been entered, then the creditor should consult with an attorney as to procedure. **NOLO PRESS** publishes a book, **COLLECT YOUR COURT JUDGMENT** which sets forth a simple procedure, with forms, for obtaining a wage assignment under California law. Generally, for federal workers, it is easier to concentrate on the other collection methods rather than seeking to attach wages.

### III. SEIZURE OF REAL PROPERTY

Another method of collection on a judgment that is available is the seizure and sale of the judgment debtor's real property. This collection method isn't used often in small claims cases because of the formalized steps and procedures that must be followed. Real property can be seized and sold by a marshal or sheriff executing on a small claims judgment. Every state has its own procedure for execution on real property. The sheriff or marshal advertises in a newspaper of general circulation that on a certain date (usually after 30 to 60 days notice to the debtor) the real property will be sold to the highest bidder at a public auction at the sheriff's or marshal's office.

At the sale the highest bidder purchases whatever interest the

debtor had in the property. If the debtor owes \$100,000 on the real property, the purchaser will take the real property subject to that \$100,000: the \$100,000 debt still remains on the property. Several years ago in Florida a tenant sued his landlord, a large residential apartment owner, for return of a security deposit. The tenant won the case in small claims court. The tenant executed against the real property and purchased it at the sheriff's sale for approximately \$1,500. The landlord tried to set the sale aside, but the courts affirmed it. The tenant bought a million dollar piece of property for \$1,500.

In most states, a person can file a homestead on the debtor's real property that is the debtor's residence. The statutory amount varies from \$5,000 to unlimited. This means that if the real property is seized and sold, the debtor is first given the homestead amount before any proceeds are applied to the judgment. A court will not permit execution on real property unless the debtor has equity in the property exceeding the homestead amount because the creditor wouldn't receive anything anyway.

#### IV. PLACING A JUDICIAL LIEN ON THE DEFENDANT'S REAL PROPERTY

The most common and effective means to assure collection of a small claims judgment is to record a lien against all of the real property owned by the debtor. This kind of lien ensures that no real property of the debtor can be sold or have loans taken against it until the debtor's judgment is paid. A judgment creditor places a lien on the real property of the debtor by first requesting that

the clerk of the court issue an "abstract of judgment." An "abstract of judgment" is an official recordable court document which states the amount owed to the plaintiff.

Under the laws of some states, such as Nevada and California, the recordation in the county recorder's office of the abstract of judgment places an automatic lien on all the real property of the debtor located in the county where the abstract is recorded. To cover all the property that a defendant may own in a state, an abstract of judgment must be recorded in every county. In a few states, when issued, a judgment operates as an automatic lien on all of the debtor's real property in the county where it is issued.

In most states, the judgment creditors record the abstract of judgment against each individual piece of property that the debtor owns in order to have the lien placed on that particular piece of property. The reason for this multiple recordation is that most states do not use the grantor-grantee index that lists all documents recorded by or against a person. Instead these states use a plat index which lists all documents particularly filed against the property. A general filing against a person would not show against the property. The court recorder will provide details that will clarify whether or not the abstract has to be filed against each piece of property.

Once a lien is placed on real property, it remains on all current and future property of the debtor until released by the creditor. No one will ever purchase any of the debtor's real

property without having the lien removed. Once an abstract is recorded, it stays on the real property for 10 years or until the judgment is paid. The abstract and the judgment usually can be renewed in increments of 10 years. When any of the debtor's real property is sold the lien must be paid, along with all interest, before clear title can be passed. Because of the cloud that the lien places on the title of all the debtor's current and future real property, recording an abstract virtually assures that someday the judgment will be paid with interest if the debtor has or acquires any real property.

The recordation of the judgment may be considered as an element in the creditor's retirement portfolio. The judgment is growing because of interest. One day the judgment will have to be paid. Since the interest rates on judgments are higher at this time than interest on bank accounts, it might make sense for a debtor not to collect a judgment and let the interest accrue against a solvent debtor.

#### V. ATTACHMENT OF BANK ACCOUNTS AND PERSONAL ASSETS

A judgment creditor may attach a debtor's bank account. The attachment is done in the same manner as an attachment of wages. The judgment creditor takes his abstract of judgment to the marshal's or sheriff's office along with the name of the debtor's bank. It is generally not necessary for the judgment creditor to know the account number of the debtor only the bank and the branch for which the attachment is directed.

The local Sheriff, Marshall or Constable's Office will inform a judgment creditor as what it will need to perform an attachment of a debtor's bank account. At the bare minimum, it will need a certified copy of the judgment and usually a writ of execution from the court clerk as well. Both the certified Copy and Writ of Execution are issued by the Court Clerk usually for a small fee which is a recoverable court cost from the debtor.

Many states have enacted laws that exempt certain amounts in bank accounts. The marshal's or sheriff's office will provide the information on the state exemptions. Most states tend to exempt 75% of wages placed in bank accounts within 30 days of their payment to the debtor. Social security payments paid into a bank account are totally exempt.

Just as a debtor's bank accounts can be seized over a certain value so can any personal asset of the debtor which is not exempt under state law. The general rule is that all assets of a debtor can be attached to satisfy a judgment unless exempt under state law. Each state has a list of property which is exempt from attachment to satisfy a judgment. Property that is not exempt can be attached. The attachment of such non-exempt property is very similar to that of a bank account. The property is identified by the judgment creditor, usually through a "Writ of Execution" issued by the Court Clerk. The Sheriff's, Marshall's or Constable's Office will, acting upon the writ of execution, seize the designated property and sell it pursuant to state law. The proceeds from the

sale will first go to paying the costs of the sale, then to paying the judgment with the remaining amount, if any, being returned to the debtor.

#### VI. COLLECTION OF A JUDGMENT AGAINST A BUSINESS

In one very important aspect, small claim judgments against businesses are easier to collect than against individuals. This is in the area of a "till tap". When the judgment is against a business, the "writ of Execution" may permit the Sheriff, Marshall or Constable to seize all of the business receipts as they come in until the judgment is paid.

In practice, a till tap is usually only done on a day by day basis because of the loss of manpower in the law enforcement community. The fees charged by the Sheriff, Marshall or Constable Office is usually quite high and are assessed against the Judgment Creditor put are reimbursed by the Debtor. The procedure of obtaining a till tap can be obtained from the local Sheriff's, Marshall's or Constable's Office.

In addition, to a till tap, the assets of a debtor business can be seized as sold in the same manner as that of an individual debtor. In practice, the collection of a debt from an existing and on-going business is best done through a till tap rather than inconvenience of an attachment of assets.

Another advantage in collecting from a business over an individual debtor is that some businesses are required to be bonded under state law. Many states require certain businesses such as

travel agencies, funeral parlors, contractors and credit repair agencies to be bonded as a requirement to do business in the state. If the defendant is required to be bonded in order to do business in the state, then the judgment creditor might be paid in full by the bonding company. In such an event, the judgment creditor would send a demand letter to the bonding company along with a copy of the judgment. If the claim is of the type covered by the bond, then the bonding company should pay. If the bonding company does not pay a legitimate claim, then the debtor should consult with an attorney because there could be a new cause of action against the insurance company for failure to pay a legitimate claim.

#### VII. EXAMINATION OF THE DEBTOR FOR ASSETS

As stated throughout this book, it is the judgment creditor's responsibility to collect the award. A court renders the judgment but it is up to the judgment creditor to collect it, if he can. To aid in collecting a judgment, a creditor is given certain rights. Many courts, such as California, require the debtor to file a "statement of assets" once the judgment is entered. From this statement of assets the creditor is able to obtain the "writ of execution" from the court clerk. All states permit the creditor to apply for an "order to appear for a judgment debtor's examination." This is an order from the court that the debtor appear on a certain date and time to be questioned under oath about the debtor's money, property and locations.

A judgment debtor is usually required to submit to no more

than one exam every six months until the judgment is satisfied. Most states require a debtor to file a financial statement and list all of the assets owned. A debtor is required to complete it as a tool for the creditor to use to discover property that can be seized and sold to pay the judgment.

#### VIII. STATE EXEMPTIONS FROM ATTACHMENT

Every state has its own list of property that a citizen may claim as exempt from attachment. This list of exemptions determines what property a debtor is allowed to claim as exempt from attachment to pay an outstanding court judgment. Property to the extent that it is classified as exempt cannot, in any way, be taken and sold by the judgment creditor. Example: George has a car that is worth \$3,000. A creditor of George has a judgment against him for \$4,000. Under state law there is an exemption of \$1,000 for a motor vehicle. The judgment creditor can execute his judgment against the vehicle by selling it for \$3,000, but he must give \$1,000 of the proceeds back to George as the exempt amount for a motor vehicle. George will still owe the judgment creditor the remaining \$2,000. The state exemption just prevents the creditor from taking all of his payment of the judgment from the motor vehicle proceeds. If George has other property that is not exempt under state law, the judgment creditor can seize and sell that property also for payment of the judgment.

Chapter 15 (State Laws) contains the exemptions of the 50 states and the District of Columbia. A judgment creditor should

review the exemption schedule of the judgment debtor's state of residence (or the District of Columbia, if that is where the person resides) to be sure what property can or cannot be sold for payment of the judgment. If a creditor attempts to execute against property that is exempt, the judgment debtor must file a "claim" or "exemption" or an "objection to attachment" (whatever it is called in the defendant's domicile) to stop the attachment. If the objection is not filed, it is presumed that the debtor agrees to the execution of the judgment on the otherwise exempt property and it will go forward.

An interesting situation exists when a judgment creditor seeks to attach a debtor's retirement plan for payment of the judgment. Many states have specific exemptions for retirement plans established in conformity with the provisions of the federal retirement act known as ERISA. Some states exempt the entire plan while others exempt only those payments needed for support. The United States Supreme Court in Mackey vs. Lanier Collections Agency & Service, Inc. ruled in a collection case that a state could not grant an exemption for ERISA plans. In that case Georgia had a law, as many states do, that prevented a creditor from attaching a debtor's ERISA plan. The Supreme Court held that the federal ERISA superseded state law and therefore permitted the attachment of the ERISA plan by a judgment creditor when it is stated:

"We hold that ERISA does not forbid garnishment of an ERISA welfare benefit plan even where the purpose is

to collect judgments against plan participants. Moreover, we agree with the Georgia Supreme Court that the anti-garnishment provisions found in Section 18-4-22.1 is pre-empted by ERISA, the judgment is affirmed."

Since ERISA does not forbid creditors attaching the plan, state law cannot prevent the attachment. This means that a judgment creditor might be able to seize a debtor's pension in satisfaction of the judgment. The holding of this case is being challenged in Congress. A number of consumer groups are seeking legislation to have ERISA amended to forbid attachment by creditors if state law forbids attachment of ERISA plans.

#### IX. EFFECT OF A DEFENDANT'S BANKRUPTCY

It is a common tactic for a defendant to claim before a small claims action is filed or judgment is taken that he will file bankruptcy to avoid paying the debt. The proper response has always been, "Fine, do it. At least you're going to pay for your debts one way or the other." Why should a creditor just forgive a debt because the collection of it would inconvenience the debtor?

When a debtor files bankruptcy there is an immediate "automatic stay" on any collection lawsuit against the debtor. A person in bankruptcy cannot be sued in small claims court. Under the bankruptcy law all judgments obtained within three months of a debtor's bankruptcy are set aside and must be relitigated again in the bankruptcy court. Older judgments are treated as unsecured claims in the bankruptcy proceeding except for judicial liens

against real property. That means they are paid in a percent equal to the ratio of debts to assets in the estate after secured debts and allowable expenses have been paid. For example, assume that a creditor has an unsecured judgment of \$3,000 against a person who after four months files for bankruptcy protection. Since the judgment was over three months old when the debtor filed for bankruptcy protection, the judgment creditor will not have to relitigate the case in the bankruptcy court. The judgment will be treated as an unsecured creditor for the amount of \$4,000. In this example assume the bankrupt debtor's estate, after payment of all allowable debts and expenses is \$20,000 and the unsecured debts are \$80,000. The creditor's debt is 5% of the total debts ( $\$4,000/\$80,000$ ). Therefore the creditor gets 5% of the distributable estate which is \$1,000.

In the alternative, if the debtor had filed for bankruptcy protection either before the trial or within three months after judgment was rendered, the judgment would have been voided. The creditor then must submit a claim in the bankruptcy court. If the claim is denied by the trustee, the creditor then must file a complaint in bankruptcy court to have the claim litigated.

What a debtor does is beyond the control of the creditor or plaintiff. The only thing that a judgment creditor can do in an attempt to maximize recovery on the judgment is to collect immediately after the judgment is obtained.

#### X. COLLECTION A JUDGMENT AGAINST A STATE AGENCY

Collecting a judgment against a state agency, of any type, pose several unique problems. A state agency can only be sued in a state court if state law permits it. It is the crux of the legal doctrine of Sovereign Immunity that citizens can not sue the government without the government's consent. The sole exception to this immunity is where the suit is against the state for the violation of a Constitutionally protected right. In such instances, however, the suit would normally not be brought in a small claims court but rather instead in the regular state court system.

Most states have enacted laws permitting certain suits to be filed against them in their state courts. Such suits usually involve recovery for accidental damages caused by a state employee in the performance of his or her state duties. State law almost always imposes special notice activities of the Plaintiff before the suit can be filed. Such activities usually involve the filing of a claim against the agency thirty or more days prior to the instituting a lawsuit. Likewise, many states require that the claim be filed within a period of time, such 60 days ( in California it is six months), of the accident or incident, or a suit is thereafter forever barred. If a judgment is obtained without filing the appropriate claim, the judgment will be set aside and if the time for filing the claim has run then the Plaintiff may be barred from bringing the suit. As such, it is important to determine if the state has a claim statute and if the Plaintiff's action is the type for which the state has waived sovereign immunity.

Federal agencies can not be sued in state courts without their consent. In fact, even federal employees can not be sued in state courts for actions resulting from their employment without the applicable federal agency's consent. Such a suit must be brought in Federal Court but, unfortunately, there is equivalent Federal Small Claims Court. The result is that most small claims against the Federal Government are simply written off by the taxpayer who can not afford the expense and inconvenience of trying to collect small sums from the government.

State Codes will set forth the procedure for filing a claim against an agency. Usually, the agency employing the employee must be contacted and a request for a claim form made. In California for instance, claims forms for county agencies are obtained from the County Clerk. Claim forms against state agencies can usually be obtained from the state agency. In California, claims against state agencies are filed with the State Board of Control. Given the importance of filing a claim to maintaining suit, as soon as the claim against the agency occurs, a Plaintiff should send a letter to the agency setting forth the desire to sue. This could, in some states, constitute the filing of the claim while the Plaintiff is attempting to determine the actual procedure to follow. The claim form should always be sent by certified mail in order to show that it was actually mailed. There is no leeway for filing a claim late. Under the law, late filings of a claim are to be ignored. As such it is important to file the claim promptly. An example of a letter

serving as a temporary claim is as follows:

March 29, 1996

California State Board of Control  
926 J Street. Suite 300  
Sacramento, CA. 95814

Dear Sir:

On March 15, 1996 , I was injured when a State of California employee for the California Highway Patrol by the name of Harold Evans rear ended by vehicle.

Harold Evans is a California Highway Patrol trooper stationed in Mendocino County. On March 15, 1996 at 3:345 P.M. I was driving north bound of Highway 101 when Trooper Evans pulled out of a rest stop and struck my vehicle in the right rear quarter.

My car endured \$1,800 in damage and I have had medical treatment for whiplash to the extent of \$300.

Please send to me immediately, any state claim forms that I may need to process this claim. In the interim, this letter will serve as my tentative claim form until I have received the official form from your agency.

I am also sending this letter to the California Highway Patrol in an attempt to speed up the claim process and to request the official claim form from them. In the event that I do not receive an official claim form in time to process the claim, this letter is to be considered my claim.

Respectfully,

Tyler Equipp

Most attorneys will often freely inform a person of the state time limits for filing a claim against a state agency. it is important to remember that a person should not rely on any oral advice or statements made by officials at a state agency. There have been instances where Plaintiffs claim that they were given

erroneous information regarding the length of time for which they had to file a claim and relying on that misinformation failed to file in time. In such instances, where the Plaintiffs were unable to prove the content of the conversation, which is next to impossible without witnesses, the courts were forced to dismiss the Plaintiffs' claims as being filed too late.

If the claim was properly filed and the suit is of the type for which sovereign immunity does not apply, then the action will go forward. From this point, the case will be treated the same as any other action.

If after the trial, the plaintiff were to win then the collection would usually be easier than if judgment were taken against an individual. The procedure in such case usually involves getting a certified copy of the judgment or an Abstract of Judgment from the Court Clerk and sending it to the judgment debtor with a letter stating that payment should be made immediately. A sample of such a letter could be as follows:

California State Board of Control  
926 J Street. Suite 300  
Sacramento, CA. 95814

Dear Sir:

On June 23, 1996 judgment was rendered in the Plaintiff's behalf in the case TYLER EQUIPP vs. State of California, Case Number 34789, Mendocino Municipal Court. I have enclosed a certified copy of the judgment rendered in the case.

Please remit payment immediately to my address at 1256 Dower, Ukiah, CA. 95482.

I declare under penalty of perjury that the foregoing is true and correct.

If you should have any questions, my phone number is (717) 468-0682.

Respectfully,

Tyler Equip

Such a procedure must be followed when the judgment was by default (no one for the agency appeared to defend the suit) and should also be employed even where the state had someone appear and defend its position. The demand letter must contain the Plaintiff's current address or else the check may be misdirected and cause months of needless delay.

#### XI. SATISFACTION OF THE SMALL CLAIMS JUDGMENT

Once the judgment creditor is paid in full, or whatever lesser amount that might be agreed among the parties, the judgment creditor is required to file a "satisfaction of judgment" with the court immediately. The recordation of satisfaction of judgment with a county recorder removes any and all liens placed on the debtor's property by virtue of the recording of an abstract of judgment.

Failure to record a satisfaction of judgment could expose the judgment creditor to a lawsuit for slander of title. Not filing the satisfaction of judgment with the court will keep a lien on the debtor's property in the state where the lien is automatic. Not recording the satisfaction of judgment will keep the lien on the debtor's real property in those counties where the abstract of

judgment was recorded. The defendant would wrongfully be kept from obtaining loans or selling of the property. If such happened because the judgment creditor failed to file a satisfaction of judgment, the creditor would be held liable for whatever damages the debtor suffered because the satisfaction of judgment was not filed. It only makes sense and is entirely prudent to comply with the law and avoid that potential for onerous and unnecessary liability. The judgment creditor should record the satisfaction of judgment immediately upon satisfaction of the judgment.

The Satisfaction of Judgment becomes, upon filing, part of the legal file. As such, a certified copy can be obtained from the court if it is ever needed to prove that the judgment has been paid. This issue sometimes arises when an Abstract of Judgment was recorded which placed a lien on all of the real estate of the debtor in the county. In order to remove the Abstract of Judgment it is necessary to record the Satisfaction of Judgment. In such an event a certified copy of the Satisfaction of Judgment can be obtained from the Court Clerk for recordation.

Occasionally, a judgment debtor will forget to get a Satisfaction of Judgment from the creditor when the judgment is paid off. Thereafter, the judgment creditor may move or die and therefore is no longer available to give the Satisfaction of Judgment. In the meanwhile, the debtor's property may be encumbered by the Abstract of Judgment or the debtor's credit report still shows the judgment as unpaid. In such an event, the debtor may go

back to court with proof of having paid off the judgment and have the court issue a satisfaction of judgment. In such an instance, the debtor must submit a statement under penalty of perjury to the effect that the debt has been paid, that the judgment creditor failed to file the satisfaction of judgment at the time and the judgment creditor is can not be found to do so now. Such a declaration would be generally be as follows:

I, \_\_\_\_\_, declare as follows:

1. I am the defendant in the case \_\_\_\_\_  
\_\_\_\_\_
2. On \_\_\_\_\_ judgment was rendered in the case against be in the sum of \$ \_\_\_\_\_.
3. I have made full payment of the judgment to \_\_\_\_\_  
\_\_\_\_\_ as required by the Court.
4. Attached hereto are the canceled checks to \_\_\_\_\_  
\_\_\_\_\_ showing that the full payment of the judgment was made.
5. Following the pay off of the judgment, \_\_\_\_\_  
\_\_\_\_\_ failed to file the Satisfaction of Judgment as required by law.
6. I have attempted to contact \_\_\_\_\_ to get a Satisfaction of Judgment but to no avail because \_\_\_\_\_ has moved without a forwarding address.
7. I request that a Satisfaction of Judgment be issued to reflect my pay off of the judgment.

I declare under penalty of perjury that the foregoing is true true and correct under the laws of the State of \_\_\_\_\_

\_\_\_\_\_

If the judgment creditor has refused to file the Satisfaction of

Judgment out of pure spite and can be found, then the Judgment Debtor can seek sanctions including attorney fees and costs incurred in getting the Satisfaction of Judgment issued.

CHAPTER 14  
BUSINESS OWNERS LIMITING THEIR LIABILITY  
FOR THE BUSINESS DEBTS

This section of the book is for those persons who are or will be engaged in business and look to limit their personal liability for the debts of their company. Just because a person owns a business does not mean that the person has to become personally liable for the debts of the business. While a small claims judgment is usually not enough to put a company out of business it is symptomatic of a financial problem. Enough small claims judgments can collectively put a company out of business but saddling the company with such a debt that it can not recover.

It is not necessary for a business owner to be personally liable for the debts of his or her business. In fact, it is most business owners attempt to segregate their personal and business financial affairs, By doing so they attempt to limit their personal liability for business debts to only tort actions (civil wrongs, that they themselves may cause.

Limiting liability is especially important when there will be two or business owners or the company will have employees. In such instances, unless the company will be incorporated, organized as a limited liability company or formed as a limited liability partnership, each owner will be personally liable to pay all business debts incurred by the company including debts arising by

accidents or torts of employees during the course of their employment. This potential liability can bankrupt a small business.

A true case on point occurred in California. An owner of three fast food franchises visited an attorney for simple legal advice. During the interview, the attorney discovered that the client did not have any of the franchises incorporated. The attorney advised the client to incorporate each franchise separately to protect himself from personal liability. The client declined to do so stating that he was required, under his franchise agreement, to carry \$3,000,000 in insurance which would be enough to handle every contingency. A little over two months later, the attorney open his newspaper to see the heading that a hepatitis outbreak at one of the client's franchise affected nearly 300 people, one person died one had irreversible brain damage and the rest had various degrees of illness. The client called that day and asked for advice. Nothing could be done except to refer the claim to the insurance company. The client, thereafter incorporated, but that would not protect him from personal liability for the claims arising prior to the incorporation. The ultimate liability was expected to exceed the policy limits for which the client will have to pay himself. Had each franchise been incorporated the extent of the liability would have been the \$3,000,000 and the value of that particular franchise. Instead, the client now faced personal bankruptcy as a result of the hepatitis passed on by his employee. This example points out the necessity of a business owner protecting himself

from liability for the business debts especially when it relatively inexpensive to do so.

When two or more people, not married to each other, wish to conduct a business together they have only three options available in structuring the business. They may incorporate and operate as a corporation, they may organize and operate as a limited liability company or they may operate as a partnership (in a general or limited liability form). A limited partnership is not applicable if the limited partners intend to participate in the management of the business because if they do so, they lose their limited liability protection and be treated as a general partner anyway.

**IT IS TO EDUCATE BUSINESS OWNERS OF THE METHODS TO AVOID OR REDUCE PERSONAL LIABILITY FOR BUSINESS DEBTS THAT THIS CHAPTER IS DIRECTED. TO DO SO, THE THREE MAJOR ALTERNATIVES OF LIMITED LIABILITY PARTNERSHIPS, CORPORATIONS AND LIMITED LIABILITY COMPANIES ARE DISCUSSED INCLUDING HOW THEY ARE FORMED AND OPERATE.**

#### A. PARTNERSHIPS

##### INTRODUCTION

Partnerships are used because they are simple. A partnership is not required to be in writing to be legal; although it makes a great deal of sense to have it in writing. Partnerships are usually created between family members or close friends. There are three types of partnerships: general partnerships, limited partnerships and a new type called a limited liability partnership. Each one has

it own body of law and differ from each other in significant ways.

While partnerships are simple to form and operate, that does not mean they are unregulated. On the contrary, a complete body of partnership law has been developed both by case law and statutory law. The rights and obligations of partners and those persons dealing with partnerships are covered by a state's partnership law in the absence of written agreement of the partners to the contrary.

Partnerships are treated for federal tax purposes as "pass-through" vehicles. All profits and losses of the partnership pass through the partnership and are attributed to the partners. The effect of this pass through of profits and losses is that the partnership itself is not taxed. Partnership income is not subject to double taxation as is the income of a regular C corporation. To achieve this same tax benefit for small corporations, Congress created the S Corporation.

#### 1. PARTNERS' LIABILITY FOR PARTNERSHIP DEBTS

The main drawback to any general partnership is the fact that the partners are personally liable for the debts of the partnership. By forming a partnership the partners have agreed to guarantee payment of any debts or judgments taken against the partnership. Partners are not liable for the personal non-partnership related debts of the other partners.

Under the Uniform Partnership Act the partnership (and thus the partners) are liable for "any wrongful act or omission of any

partner in the ordinary course of the business of the partnership. Where loss or injury is caused to any person by the partnership, the partners are individually liable for payment of the damages. In addition, the partners are liable for money damages that arise from the actions of any partnership employee or the other partners during the course of their work for the partnership. Example: A partner is involved in a car accident and kills two people while engaging in partnership work. All of the other partners will be liable to pay the damage award that the heirs of victims receive in wrongful death action against the partnership. If the award is \$1,000,000 and the partnership only has assets of \$200,000, a personal judgment will be taken against each partner for \$800,000.

This is the main drawback of the partnership. The general rule of thumb is if a partnership is formed and it has employees, the partners should either carry a great deal of insurance or incorporate. Either of these entities will carry their individual personal liability for the partnership's debts.

## 2. CONSIDERATIONS BEFORE DECIDING TO FORM A PARTNERSHIP

Before forming a partnership, the parties should consider the following issues and decide for themselves how they should be addressed:

1. Name of the partnership.
2. Term of the partnership.
3. Purpose of the partnership.

4. Scope of objective: joint venture or partnership.
5. Capitalization: funding the partnership.
6. Distribution of profits and losses.
7. Admission of new partners.
8. Expulsion of old partners.
9. Withdrawals of contributed assets.
10. Expense accounts.
11. Salaries and draws of income by partners.
12. Responsibilities of partners.
13. Dissolution of the partnership.
14. Staffing and management.
15. Comparison with the alternative of incorporating.
16. Extent of possible personal liability for partnership debts.

These are important considerations. They are not the only ones. Each partnership is different because each is composed of different people with different viewpoints. What must be remembered is that anything not covered in the partnership agreement will be decided in accordance with the state's Uniform Partnership Act. If the partners do not want the UPA to apply on a particular point, they must expressly create their alternative provision.

### 3. TERMINATION OF A PARTNERSHIP

Termination means that business is no longer being carried on by the partnership except to the extent necessary to discharge its affairs. A partnership will one day end. It is not like a

corporation that has perpetual existence. The partnership agreement usually lists the conditions under which a partnership will terminate. A partnership agreement may have a clause in it stating that the partnership will terminate:

1. When the partnership purpose is accomplished (in a joint venture).
2. On a certain date stated in the partnership agreement.
3. If a partner becomes insolvent or bankrupt. Under the Uniform Partnership Act when a partner files for personal bankruptcy, the partnership is automatically terminated even though the business may itself be solvent. When a partner goes bankrupt, the relationship with the partnership and the other partners changes. By filing for bankruptcy protection, the filing partner is no longer liable for the partnership debts. The liability for payment of partnership debts remains with the partners who did not file bankruptcy. It is this general release of liability for the partner filing bankruptcy that gives rise to the termination of the partnership. The partners can agree not to have the partnership dissolved automatically upon the bankruptcy of a partner by a provision in the partnership agreement. Unless the partnership agreement states otherwise, the UPA will apply, and the partnership will be terminated upon the bankruptcy of a partner.

4. If a partner dies or becomes disabled.
5. If any partner withdraws from the partnership.

Without a clause in the partnership agreement stating otherwise the law is that a partnership terminates on the death of a partner or upon a partner's resignation.

Under the Uniform Partnership Act a court may order dissolution of a partnership for the following reasons regardless of specific clauses in the partnership agreement stating otherwise:

1. A partner has been found insane by a court.
2. A partner is incapable of performing his duties under the partnership agreement.
3. A partner's conduct has prejudicially affected the ability of the partnership to carry on its business.
4. A partner has repeatedly breached the partnership agreement.
5. The partnership can only do business at a loss.
6. Equitable reasons support the dissolution.

A lawsuit seeking termination on any of these grounds will be difficult and costly to prove. An alternative is for the partnership agreement to have an expulsion provision permitting expulsion of a partner for any of the above six reasons.

Termination of a partnership is accomplished in three steps:

1. The decision to terminate is made either by the partners or by law through the application of the provisions of the Uniform Partnership Act.

2. The existing business of the partnership is discharged. Under the Uniform Partnership Act each partner remains liable for the debts of the partnership incurred during discharge of the partnership affairs.
3. The final cessation of business, the payment of creditors, taxes and final division and distribution of the remaining assets to the partners takes place.

After a partnership has been dissolved and its assets liquidated, the distribution is made as follows to the extent of partnership assets:

1. All federal and state taxes are paid.
2. All employee wages and benefits are paid.
3. All secured liabilities are paid.
4. All unsecured liabilities are paid.
5. Remaining funds are divided among the partners in accordance with their percentage of ownership interest in the partnership.

The proceeds received by a partner in the dissolution of a partnership are a return of the partner's investment. Any gain or loss in the dissolution is treated as a capital gain or loss. For example, assume that a partner paid \$4,000 for stock and got back \$3,000. The partner had a \$1,000 capital loss. Likewise, if the partner received \$6,000, he would have to recognize a \$2,000 capital gain.

#### 4. TAX TREATMENT

A partnership is subject to its own peculiar tax treatment under federal tax law. Most unincorporated associations and trusts that conduct business are taxed as though they were corporations. Partnerships, however, are treated differently. In a partnership the income is attributed to the partners according to their percentage of partnership interest. The partnership pays no income tax itself on the federal level. Example: A partnership earns \$1,000,000. It will pay no taxes. Each partner will include his pro rata share of the \$1,000,000 on his personal tax returns. Assuming a 28% federal tax rate, the partners will pay a total of \$280,000, not the total \$519,200 that a C corporation and its shareholders must pay.

#### 5. LIMITED LIABILITY PARTNERSHIPS

The most important change in partnership law since the creation of the limited partnership is occurring now. A few form of partnership has been enacted by some states called the **REGISTERED LIMITED LIABILITY PARTNERSHIP** or just the **LIMITED LIABILITY PARTNERSHIP (LLP)**. The limited liability partnership is a cross between the two existing types of partnerships: the general partnership and the limited partnership. On the whole, a LLP is the treated the same as a general partnership except for the fact that the LLP provides a degree of protection to the partners for the liabilities of the partnership. A LLP must, the same as any other type of partnership, be composed of two or more persons, trusts, or

companies who have joined together to engage in a business for profit.

The driving force behind the enactment of LLP Acts is that professionals are permitted to practice their profession through the use of the LLP. Some states, most notably California, do not permit professionals to do business through the use of a limited liability company, LLC. In such states, professionals are limited to doing business in a corporate form, as either a regular corporation or subchapter S to limit their liability for the debts of the business. In order to provide professionals to get together and conduct their profession with some degree of limited liability for professionals working together, some states have enacted limited liability partnership acts. California is a state that does not permit professionals to operate through a LLC and instead adopted in October 1995, one year after the enactment of its LLC Act, a LLP Act. Other states which permit LLP's are Delaware, Minnesota, New York, New Mexico, Texas along with the District of Columbia. More states may be adopt such acts in the future. In April 1997, Hawaii, as the last holdout implemented a limited liability company act. Now, all fifty states along with the District of Columbia have enacted limited liability company acts permitting limited liability companies to be formed under their laws and also permitting foreign limited liability companies to conduct business within their borders. **A LIMITED LIABILITY COMPANY**

**OFFERS THE OWNERS (MEMBERS) THE SAME DEGREE OF FREEDOM AND OPERATION AS AN LLP ALONG WITH EVEN GREATER PROTECTION FOR LIABILITY FOR THE BUSINESS'S DEBTS.** Usually, if a person can do business in either the LLC or the LLP form, the LLC form is better. As stated above, however, not all states permit their professionals to do business in the LLC business form. Therefore, in such states, the LLP is the only alternative to a forming a corporation if it is available in the person's state

#### **A. STATUS OF THE PARTNER**

The LLP is for most purposes the same as a general partnership. All of the discussions previously, in this book, regarding a general partnership except for the personal liability of the partners applies to the LLP. A partner of a LLP is a general partner not a limited partner. One of the major differences between the LLP and a general partnership is that the LLP is governed and managed by a written partnership agreement whereas the general partnership is not required to have a written partnership agreement. **THE GENERAL PARTNERSHIP AGREEMENT IN THIS SERIES' PARTNERSHIP BOOK CAN BE USED FOR A LLP IN STATES THAT PERMIT LLPS.**

As with a general partnership or limited partnership, the partners are the owners of the partnership in accordance to the terms and conditions set forth in the partnership agreement. As with any partnership, the partners are responsible for the management of the partnership either directly or through management

which they elect or appoint. The partnership agreement will govern, when stated, those disputes that normally arise during the normal course of business. When the partnership agreement does not cover such instances, the normal business disputes or matters are handled by the majority vote of partners. When the dispute, in question, is outside the normal course of business, the dispute can only be resolved by the unanimous vote of the partners, RUPA section 401(J).

One of the common concerns that arise in the creation of a partnership, be it a general partnership, limited partnership or LLP, is how the partnership can be capitalized. Every business needs money to operate and a partnership is no different. The question is, however, how the partnership will get its money and what would happen if the company fails. Partnerships almost always have to rely on capital contributed by their partners. The issue is, then, whether the capital will be treated as a loan or the purchase of an equity interest. Loans have to be repaid but do not entitle the lender to an ownership interest in the partnership. Whereas a contribution to equity is not repaid but does purchase a percentage of the partnership. This issue is important if the partnership fails and there is not enough cash to return the capital to the partners after the payments of the partnership debts. The law is settled on this point it is in practice that difficulties arise. Any partner, even for a LLP, can lend money to the partnership and transact business with it in accordance with

state law. On dissolution of the partnership, the partners stand on the same footing as regular creditors to the extent of their loans and equity interest remain separate. The treatment of loans by partners to the partnership is the same for LLP's as with other types of partnership.

#### **B. A PARTNER'S LIMITED LIABILITY FOR THE PARTNERSHIP DEBTS**

In a general partnership, the partners are jointly and severally liable for the debts of the partnership. In a limited partnership, the general part is joint and severally liable for the debts of the partnership which the limited partners are not liable for those debts. The difference there is that the limited partners have no management and control of the limited partnership.

Since the LLP is a cross between the general partnership and limited partnership, so too is the liability of its partners for the LLP's debts. Generally, partners are jointly and severally liable for the debts of the LLP except that they are specifically held not to be liable, neither directly or indirectly, for the negligence, wrongful acts or misconduct of the other partners. This generally means that if one partner injured another person in the course of the partnership's business, that partner might be personally liable for the damages along with the assets of the partnership but not the other partners. In contrast, if an employee injures a person while in the course of the partnership business, both the partnership and the partners themselves are usually liable

for the damages. However, state law is controlling and not all states with LLP Acts treat the issue of liability the same. Some states, for example, extend a partner's limited liability to acts committed by agents and employees while both New York and Minnesota go even further and limit all partner liabilities for all obligations of the LLP. Partners of a LLP still remain liable for their own wrongful misconduct. In addition, most states having LLPs hold partners liable for the misconduct of persons under partners management, control or direction which is rather straight forward.

The rights of creditors of a LLP are determined by state law. As stated above, partners of a LLP possess some degree of limited liability for the debts of the partnership. If a creditor debt is of the type for which a partner is not liable, then a creditor cannot seek payment of the debt from the partner. If the debt is one for which limited liability does not apply, then the creditor can seek collection from the partners. Generally, a partner is not liable for the errors and omissions of the other partners, employees or agents of the partnerships. To know the extent of the limited liability, the state LLP Act must be reviewed.

### **C. SPECIAL REQUIREMENTS FOR THE LLP**

A general partnership has no formal requirements. A general partnership is usually not required to have its partnership agreement in writing or to file anything with the state. A limited liability partnership however must do both. A LLP needs the

partnership agreement in writing, the one in this book would suffice in order to form a LLP.

A LLP, unlike a general partnership, is also required to file an application with the Secretary of State or Department of Corporations to become registered as a LLP hence the second name, **REGISTERED LIMITED LIABILITY COMPANY**. The application form can be acquired upon request from the Secretary of State's office if an official one is required. Some states that have LLP Acts do not have official application forms but simply require that the application be typewritten stating information required to be produced under the state's LLP Act. The application, itself, is extremely easy to complete. The basic information to be provided is the name of the partnership, name and addresses of the partners, the business address of the LLP and the agent for service of process of the LLP. In essence, this information is the same required by a Certificate of limited partnership. Usually, only one filing is required with the Secretary of State. Delaware, however, requires an annual renewal filing of the LLP is converted into a general partnership with liability protection for the partners. Most states that have an LLP Act also require a LLP formed in another state which wishes to do business in the state to register with the Secretary of State as well. For such states, the failure of a foreign LLP to register would strip the LLP of its limited liability protection for its partners.

All LLP Acts require that the name of the company contain with the words "limited liability partnership" or the abbreviation "LLP". The name, as with any company can not be so similar to another company as to be deceptive.

#### **D. CONVERSION OF A GENERAL PARTNERSHIP TO A LLP**

The states that permit LLPs also permit general partnerships to be converted into LLPs. The conversion is simple and, in essence, the same as the formation of a new LLP. The general partnership will file with the Secretary of State and application for conversion which contains the basic information as an application from a new LLP along the name of the original general partnership which is being converted. Conversion does not alter or change the partners' liabilities for the company that were incurred prior to the conversion. Prior to the conversion, each of the partners was personally liable for the payment of all of the debts of the partnership. After the conversion, each of the partners still remain personally liable for payment of all of the debts and obligations of the partnership incurred prior to the conversion. Only the new debts and obligations incurred by the partnership following the conversion will be governed by the limited liability provisions of the state's LLP Act.

from a tax standpoint, conversion should not result in a taxable event to either the partnership or any of the partners. In contrast, when a regular corporation converts to a subchapter S

status or into a limited liability company, that is considered to be a taxable event. As such, the conversion of a corporation could result in its assets being reappraised and taxes paid on what the IRS would consider to be paper distributions. In such cases, more than the business form is being changed; the tax status is also being changed from a corporate tax status to that usually of a partnership. Conversion from a general partnership to a LLP would not be taxable event because the entity still remains a partnership for tax purposes only the precise business form changes not tax status or ownership.

#### **E. OPERATING A LLP IN OTHER STATES**

As stated above, not all states permit a limited liability company to be formed under its state law. Therefore, if an LLP wishes to do business in another state, a review of the law of that second state should be reviewed. If the second state permits LLPs to formed under its state law, then there is no problem with doing business in that state. The United States Constitution's Full Faith and Credit and Privileges and Immunities Clauses would require the second state to permit the foreign LLP to operate with limited liability for its partners. Constitutional issue arises when the second state does not permit LLP's to operate under its state law. In this situation, permitting a foreign LLP to operate with limited liability for the partners would permit non-citizens an advantage not available to its own citizens. The result could be that

citizens in the second state would form LLP's in another state just to come into the home state and operate.

The issue of foreign operations of the LLP also came up for limited liability companies. Now, all fifty states along with the District of Columbia have limited liability company acts. Prior to adopting such acts it was very unclear as to whether a limited liability company doing business across state lines would have limited liability protection for its members.

For LLP the projected future is different. Most states do not have a LLP Act even though they have a LLC Act. The reason for this is that most states do not prohibit professionals from doing business in the form of a limited liability company. The main reason for having a LLP is that the partners are not permitted to form a LLC. A Limited Liability Company is usually better than a LLP because it generally gives a greater degree of protection from the company's debts while providing the same flexibility of the LLP. Therefore states that permit professionals to form LLCs see no reason to enact LLPs. It is always important to review state law when considering to do business in the LLP form. A LLP valid in one state may not, in the end, be held to bestow limited liability protection for its partners for acts committed in another state that does not recognize LLPs. In that situation, it may be possible for the LLP to form a LLC in the second state and do in the second state as the LLC. Partnerships can be members of an LLC. All of which means that doing business in other states requires care and

compliance with the laws of each of the appropriate states.

## B. DOING BUSINESS AS A CORPORATION

### INTRODUCTION

A corporation is an artificial entity created in conformity with a particular state's law. As a distinct legal entity, a corporation is considered to be separate and apart from all of the people who own, control or operate it. A corporation holds most of the rights of a legal person. A corporation is able to execute contracts, incur debts, hold title to both real and personal property and pay taxes. The attractiveness of a corporation stems from the very fact that it is held to be a separate legal entity from its owners (the shareholders), which gives it unique advantages over both a sole proprietorship and a partnership as an entity for conducting business.

A corporation is said to have perpetual existence: a corporation will legally exist forever unless it is dissolved or terminated under state law. One of the main grounds for a corporation's existence being terminated is its non-payment of taxes. Usually, as long as a corporation pays its taxes, it will remain in effect.

A corporation's perpetual existence is an important advantage over other forms of business. A partnership terminates upon the death of a partner, and a sole proprietorship also terminates upon the death of the owner. A corporation continues regardless of the death of a shareholder. The perpetual existence of a corporation is

one of its most compelling features. The fact that a corporation continues regardless of the death of shareholders gives it stability. Most people are reluctant to invest in a business that is not a corporation and that may terminate upon the sudden death of any partner. Likewise, most lenders will not loan money to a partnership because it could suddenly terminate upon the death of a partner. The stability of a corporation derives from its continuity of existence beyond that of its shareholders.

The main advantage that a corporation has over a sole proprietorship or a partnership is that the shareholder is not personally liable for the debts of the corporation or the actions of the employees. Consider a partnership or sole proprietorship. If a partner or employee does an act in the scope of their employment that injures another person, each of the partners or the owner (of the sole-proprietorship) is personally liable to pay for the resulting damages. On the other hand, the most any shareholder can personally lose if a monetary judgment is taken against the corporation are the assets they contributed to the corporation in payment for their stock.

This limited liability for corporate shareholders is vastly different from a partnership or sole proprietorship where the owners are totally liable for all debts of the business. The creditors of the business can seek and attach every dollar and piece of property that a partner or sole proprietor owns in order to settle a judgment against the partnership or sole

proprietorship. Such personal attachment of the assets of a shareholder is not allowed to satisfy corporate debts. The reason most people incorporate is to avoid this unlimited liability for the debts of the business. Few people would ever invest in a business if they would be risking everything they had earned or would earn in the future. Incorporation acts as a one-time insurance premium.

In addition to limited liability, special tax treatment for small corporations make them as attractive as partnerships. Normally, except for S corporations, the federal government taxes corporate income twice. Corporate income is taxed when the corporation first earns it, and it is taxed again when distributed to the shareholder. The federal corporate tax rate is:

1. 15% of the first \$50,000 of taxable income.
2. 25% of the next \$25,000 of taxable income.
3. 34% of the remainder over \$75,000 of taxable income.

Corporations having income between \$100,000 and \$335,000 are taxed at a 39% rate.

When after-tax income is distributed to the shareholders as dividends, the shareholders must include it on their tax returns as income. The shareholder has to pay income tax on the income he receives that has already been taxed as corporate income.

One alternative to this double taxation is for a small corporation to pay most of the income as legitimate salaries to the shareholders for work done. A salary is deductible by the

corporation whereas a dividend payment is not deductible. Thus if the income can be paid as salaries, corporate taxes are reduced.

The taxing of a regular corporation is regulated by subchapter C of the federal tax code: it is called a "C corporation" and is subject to a different taxing structure than either a partnership or sole proprietorship. A special corporation whose taxing is regulated by subchapter S of the federal tax code is called an "S corporation" and is taxed quite differently from a C corporation.

The income tax of a C Corporation is subject to double taxation. It is taxed first when the corporation files its corporate tax return. The C corporation is taxed again when the corporation pays dividends to its shareholders: the dividends that a shareholder of a C corporation receives are includible in the shareholder's income on his Schedule B of Form 1040. Example: A C Corporation had \$1,000,000 in net profit. It will pay approximately \$340,000 in taxes. After it distributes the remaining \$640,000 to the shareholders, they will have to pay taxes on it again. Assuming the shareholders' tax rate is 28%, the shareholders will pay an additional \$179,200 in taxes. The total tax on the corporate income is \$519,200 which means that the joint tax exceeds 51%.

Partnerships provide more flexibility than S corporations in a few areas:

1. Partnerships may admit anyone as a partner and have any number of partners; whereas S corporations are limited to

35 members of special status, and

2. Partnerships can divide profits and losses in a manner not related to the partners' ownership interest. In contrast, S corporations must divide profits and losses among shareholders in proportion to their percentage of stock ownership.

Generally, these differences are not important because the S corporation usually does not want additional shareholders and does want profit and loss allocated according to stock ownership.

An individual who incorporates a business is given the opportunity to employ certain tax advantages called fringe benefits. A corporation is allowed to deduct from its pre-tax income the costs of certain fringe benefits that are not deductible by persons in a partnership or sole proprietorship. One of the main areas of tax advantage is in retirement plans. A corporate employer may contribute, tax free, significantly more to the employees' retirement plan than a self-employed person's Keogh plan. In addition, employees of corporate plans may borrow amounts to a maximum of \$50,000 of the funds contributed to a plan without penalty which is not the case with Keogh plans. Other fringe benefits that are deductible by a corporation but not by a partnership or sole proprietorship are health, life and disability insurance and a \$5,000 death benefit. These benefits are deductible by the corporation and usually are tax free to the corporate employee.

The costs for incorporating a business vary somewhat from state to state. In California the costs for filing the Articles of Incorporation and the minimum franchise tax fee is about \$915. In addition, the corporate books, which include the minute book, stock book and the corporate seal, cost between \$75 and \$125. Attorney fees are normally \$800 to \$1,000 in California. Most states are not as expensive as California and charge \$300 to \$500 for an incorporation. In like manner, attorney fees in these states vary from \$300 to \$1,000. The cost of incorporation should be viewed as a one-time insurance premium. Once the business is incorporated, the shareholders are protected from individual liability caused by the actions of the corporation or its employees. After incorporation, shareholders no longer have everything they own at risk. Peace of mind is an important consideration when deciding to incorporate. After a corporation is formed, the yearly requirements for meetings and record keeping are not much more than required for any non-corporate business.

#### 1. STEPS FOR INCORPORATION

There is no mystery to forming a corporation nor is it difficult. In its simplest sense, a corporation is merely a license to do business in a particular manner. In that sense, the Articles of Incorporation are the application for the license, and, when accepted for filing by the secretary of state, become the license. In fact, a corporation is said to be "licensed to do business" once the Articles are filed.

The act of incorporating a business is simple. All it entails is the filing of the Articles of Incorporation and the subsequent issuance of stock. The actual act of incorporating is no more than standing in line before a clerk in the secretary of state's office and having the Articles filed and stamped. It can also be accomplished by mail.

There are many companies that provide corporate kits which include basic articles, minutes and by-laws specifically designed for use in just one state. The usual cost is between \$50 and \$100. The corporate kit, however, does not address the many issues or provide the information contained in this book. This book, traveling beyond the mere corporate kit, provides guidance and advice on the considerations that arise in forming any corporation. Before filing any Articles a person should decide what additional provisions he may want in the articles. In addition, a person should read those provisions in the state's corporation code (available in most public libraries) to assure that the state law has not changed in content.

There are many choices that an incorporator faces in forming a corporation. Many of these choices can be difficult given the many options available and the particular concerns of each business. One example of a choice that must be made is whether or not to become a "CLOSE CORPORATION" which requires the shareholders to agree to operate the business pursuant to a shareholder's agreement rather than under the formalized procedures of the

state's corporate law. Another choice to be made is whether a Subchapter S tax treatment is desired. If it is, should the election be made at the first directors meeting. Nothing can replace the cold, practical consideration of the person forming the corporation. That person knows the business purpose and how it will be operated. The most any book can do is steer the incorporator to those provisions and issues of concern and practical use.

There is no set definition of a small business. The definition varies among the states and is different under federal law. Simply, it means a corporation with a limited number of shareholders. When a business qualifies as a small corporation it has the opportunity of availing itself of special advantages. Under federal tax law a small business (less than 35 shareholders) may elect subchapter S tax treatment, which allows the corporation to be treated as a partnership for tax purposes. Many states have similar subchapter S laws for small corporations. Several states also permit small corporations (in Delaware it is 30 shareholders; in Ohio it is unlimited provided there has never been a public offering) to elect to become closely held corporations.

After the Articles are prepared, they are filed with the secretary of state's office. Most states require the Articles to be filed in triplicate originals, all signed by the incorporator.

Four or more originals should be filed and a conformed, file-stamped copy requested and received from the secretary of state. Filing can be done by mail. It will take thirty 30 to 60

days to get a return. When the Articles are filed, the incorporator must pay the filing fee and the yearly franchise fee for the corporation. The fees vary from state to state. For example, in California the total fee is \$917 (\$117 filing and \$800 franchise tax). The correct amount of the fees can be obtained by calling the secretary of state's office. If an attorney service is used, they will know the fees.

After the Articles are filed, the corporation exists in a de facto mode which means that it exists on paper. It is not until stock in the corporation is actually issued that it will exist at law (de jure). Outstanding shares in the hands of shareholders is the defining characteristic of a corporation.

Once the Articles are filed, the incorporator calls a special meeting of the directors. In most states the initial directors are named in the articles. In other states the incorporator appoints the first directors at the meeting. At the meeting the bylaws are adopted by the corporation. This is an important step because it is the adoption of the bylaws that creates the officer positions of the corporation and governs daily operations. The officers of the corporation are then appointed.

The most important matter of business at the first meeting of directors is the issuance of the stock. It is this step wherein the corporation sells its stock in exchange for money, property or labor furnished or to be furnished to the corporation. When the stock is issued, the incorporation is complete.

## 2. S CORPORATIONS

### INTRODUCTION

The federal tax code calls a regular corporation a C corporation because it appears in chapter C of the Internal Revenue Code. A C corporation is subject to a different taxing structure than either a partnership or a sole proprietorship. A special corporation called a Subchapter S corporation, often referred to simply as a S corporation, is taxed quite differently from a regular corporation (a C corporation). Normally, the federal government taxes C corporate income twice. Corporate income is taxed when the C corporation first earns it and is taxed a second time when it is distributed to the shareholders.

The federal corporate tax rate is:

1. 15% of the first \$50,000 of taxable income.
2. 25% of the next \$25,000 of taxable income.
3. 34% of the remainder over \$75,000 of taxable income.

Corporations having income between \$100,000 and \$335,000 are taxed at a 39% rate. When the after-tax income is distributed to the shareholders as dividends, the shareholders must include it on their tax returns as income. The shareholder has to pay income tax on the income he receives that has already been taxed as corporate income.

One alternative to this double taxation for a small regular (C) corporation is to pay most of the income as legitimate salaries

to the shareholders for work done. A salary is deductible by the corporation whereas a dividend payment is not deductible. Thus if the income can be paid as salaries, corporate taxes are reduced.

A second alternative is for the C corporation to retain in its treasury a reasonable amount of income called "accumulated earnings." A corporation is permitted to accumulate reasonable amounts of earnings for future use of the corporation. Since the earnings are not distributed as dividends, they are not taxed to the shareholders. These retained earnings are not available for use by the shareholders.

The income tax of a C Corporation is subject to double taxation. It is taxed first when the corporation files its corporate tax return. The C corporation is taxed again when the corporation pays dividends to its shareholders. The dividends that a shareholder of a C corporation receives are includible in the shareholders income on his Schedule B of Form 1040. For example assume that a C corporation had \$1,000,000 in net profit. As such, it will pay approximately \$340,000 in taxes. After it distributes the remaining \$640,000 to the shareholders, they will have to pay taxes on it again. Assuming the shareholders' tax rate is 28%, the shareholders will pay an additional \$179,200 in taxes. The total tax on the corporate income is \$519,200 which means that the joint tax exceeds 51%

Subchapter S of Chapter 1 of the Internal Revenue Code (hence the name "S corporation") permits qualifying C corporations to

receive special tax treatment. Qualifying C corporations may elect to be taxed in a manner similar to that of a partnership at the federal level. Upon election by a C corporation, it becomes an S corporation (a pass-through entity whereby all of its income and deductions are passed through to the shareholders). The shareholders then claim their share of the corporation's income and deductions on their individual tax returns.

The S corporation is not subject to corporate income tax, accumulated earnings tax or the personal holding company tax at the federal level. The S corporation may be subjected to a special tax on its passive net income. Such tax arises where the S corporation has (1) earnings and profits and (2) gross receipts made up of passive investment income.

When an existing C corporation elects subchapter S status, there is a gains tax when any old C corporation assets are sold. The gain is attributable to the appreciation in value of any asset in the period after its conversion date to its sale date.

The requirements to become an S corporation are statutorily set. The moment that the requirements are no longer met, the S status of the corporation terminates. Only a small business corporation can elect S status. In order to be a small business corporation, the corporation must meet the following requirements:

1. It must not have more than 35 shareholders (married couples are treated as one shareholder).
2. It must be a U.S. corporation.

3. No shareholder can be a non-resident alien.
4. The corporation can have only one class of stock.
5. All shareholders must be individuals, estates or trusts.
6. The corporation cannot be part of an affiliated group of corporations.
7. The corporation cannot be a bank or insurance company.
8. The corporation has elected to be treated as a subchapter S corporation.

A corporation electing S corporation treatment will have its profits and losses passed to the shareholders. Passing through the profits and losses results in the shareholders, not the corporation, being taxed on them. S corporation income is taxed as though the corporation was a partnership or sole-proprietorship.

The S corporation must use a calendar year as its taxable year unless a legitimate business purpose is proven to the satisfaction of the IRS.

A S Corporation is a corporation given special tax treatment under federal law. The effect of the S corporation election is to have the corporation treated for general tax purposes as if it were a partnership. In an S corporation the income is attributed to shareholders in proportion to their stock ownership. The S corporation itself pays no income tax on the federal level.

Once a valid S election is made, the S corporation will no longer be subject to corporate income tax, accumulated earnings tax or the personal holding company tax at the federal level. An S

corporation may be subjected to a special tax on its passive net income. Such tax arises where the S corporation has (1) earnings and profits and (2) gross receipts for income from passive investments. For example, assume that an S corporation earns \$1,000,000. As a S corporation, it will pay no taxes. Instead, the shareholders of the S corporation will include their proportionate shares of the \$1,000,000 on their individual tax returns. Assuming a 28% federal individual tax rate, the shareholders will pay \$280,000, not the total \$519,200 that a C corporation and its shareholders must pay in combined taxes. Because of its tax advantages, successful small corporations have considered the tax effects of making an election to become an S corporation.

A federal S corporation election does not mean that the corporation will be treated as a partnership for state taxes. Not all states permit similar S corporation treatment for corporations doing business in their states. For most states the corporation will continue to be taxed as though the federal election had never been made despite a federal tax election. The reason for non-partnership treatment is obvious: states retain the double taxation on the corporate income by denying S status to the corporations.

Unless a corporation does business in a state which has no income tax on corporations (some do not tax corporations), it will have to file a state return also and pay taxes. Only a few states, such as California, permit S corporation tax treatment. In these states, the profits and losses of the corporation are passed

through to the shareholders. In California an election to be treated as a federal S corporation automatically operates as a state election as well. A federal S corporation not wishing to be taxed as an S corporation in California must specifically inform the state that it elects not to be an S corporation for state tax purposes. Unlike federal law, California continues to impose a regular C type corporate tax on S corporations, but it is at a lessor tax rate than the federal: 2½%. This is still higher than the state's minimum tax on net income. California, however, does not impose a tax on excessive passive income; the federal government does.

Most of the states which permit S corporations generally require an affirmative selection by the corporation for that tax treatment.

## C. THE LIMITED LIABILITY COMPANY

### I. DEFINITION

The most recent development in business law is the creation of the Limited Liability Company (LLC). The first LLC was created in the 1970's. For many years LLC's were not popular because the tax laws subjected them to more taxation than either a corporation or a limited partnership. In 1977, the first LLC was created in Wyoming for an oil company. The company was granted a private tax ruling stating that it would be treated as a partnership. In 1980, the U. S. Treasury issued proposed regulations that stated an LLC would be taxed as a corporation because its members did not have a

partner's liability for the company's debts. In 1988, the Internal Revenue Service finally issued Revenue Ruling 88-76, 19882 CB 360, stating that an LLC could be taxed as a partnership. This revenue ruling calmed concerns about forming LLC's. As a result, the number of states permitting LLC's has increased dramatically. In April 1997, Hawaii, as the last holdout implemented a limited liability company act. Now, all fifty states along with the District of Columbia have enacted limited liability company acts permitting limited liability companies to be formed under their laws and also permitting foreign limited liability companies to conduct business within their borders.

An LLC is a cross between a corporation and a partnership. The characteristics that are shared with a corporation or a partnership are:

1. It bestows limited liability on its members just as a corporation does on its shareholders and a limited partnership does on its limited partners.
2. It can provide for the free transferability of its membership interests the same as a corporation or partnership.
3. It can provide for continuity of life after the death, resignation, expulsion or bankruptcy of a member the same as a corporation or a partnership.

In addition, an LLC may give full management and control to just a few managing members, which is the same treatment that is available

in a partnership and similar to that of the board of directors of a corporation.

The following, however, are the major differences between LLC's and corporations or partnerships:

1. Unlike a corporation, which can have perpetual existence, some states permit an LLC to exist only for a stated period of time (30 years in such states) before it is terminated by operation of law. Many states, however, such as California treat an LLC like a corporation and permit it to have perpetual existence.
2. Unlike the partners of a general partnership, the members of the LLC are not personally liable for the debts of the company, which is the same basic treatment as that of shareholders of a corporation or limited partners of a limited partnership.
3. Unlike a corporation, the company does not have the corporate restrictions on financing. Example: The company does not need to create a special surplus account for distributions.
4. Unlike a corporation, in the majority of states, absent an agreement among the members to the contrary, profits and losses of an LLC are allocated in accordance with each member's percentage of capital contributions. A few states have adopted the per capita partnership rule: if there is no agreement on decision, profits and losses

will be allocated equally among members. Either method is different from that of a corporation. Division of corporate profits and losses must be based upon the number of shares that a shareholder owns in the corporation.

These characteristics are important. If an LLC has any three of them (as discussed below), it will be taxed as a corporation. Such taxation would be detrimental to members so care must be taken in deciding which common characteristics the company should share with a corporation.

The main advantage of an LLC is the limited liability that it provides its owners, who are called members. In an LLC, the most that its members can lose in a lawsuit against the company are the assets they contributed to the LLC. The limitation of liability would naturally not extend to any personal guarantees of company debts by a member. If a member personally guarantees a company loan of \$100,000, the member is personally liable for the repayment. The member's liability arises not because the person is a member of the company but because the member guaranteed that he personally would repay the loan. It is immaterial that the money may have gone directly to the company. The limited liability for members is quite different from that of a general partnership where the partners are totally liable for all debts of the business. The creditors of a general partnership can seek and attach every dollar and piece of property that a partner owns in order to settle a

judgement against the partnership. Such personal attachment to satisfy company debts cannot be taken against the assets of a member. People either incorporate or form an LLC to eliminate this unlimited business liability exposure.

LLC's are relatively new and has taken time for them to catch on. In April 1997, Hawaii, as the last holdout implemented a limited liability company act. Now, all fifty states along with the District of Columbia have enacted limited liability company acts permitting limited liability companies to be formed under their laws and also permit foreign limited liability companies to conduct business within their borders.

An LLC is considered to be separate and apart from all of the people who own, control and operate it. An LLC holds most of the rights of a legal person. An LLC is able to validly execute contracts, incur debts, hold title to both real and personal property and pay taxes. The attractiveness of LLC's is that they are held to be separate legal entities from owners, the members, which gives them unique advantages over both corporations and partnerships.

## II. FORMATION

### a. General

An LLC is a statutory creation. It can only be formed by strict compliance with the state law under which it is being created. An LLC just as with a corporation or a limited partnership requires a public filing of its formation documents.

The filing of the Articles of Organization is required:

1. To give public notice that the company is formed in a way that bestows limited liability on the members for the debts of the company, and
2. To give the public notice where the company is located and who can act in its behalf.

Nearly a third of the states require an LLC to have more than one owner. This is a different requirement than imposed on corporations, which are permitted to legally have only one shareholder. The states requiring the LLC to have two or more members also usually require that the organizers sign the Articles of Organization or, alternatively, a subscription agreement prior to filing the articles. If a company falls below the minimum number of members for an LLC, it will not only be dissolved but it will lose the limited liability shield for its members to the extent necessary to dissolve the company. A company will be treated harshly if it continues to do business for an undue period after ceasing to have the minimum number of members. The states imposing the two member requirement use it to insure the availability of the partnership classification for tax purposes. A partnership requires, by definition, two or more persons engaged in business.

#### b. ARTICLES OF ORGANIZATION

Articles of Organization, also called a Certificate of Organization in a few states, is an application by a group of

individuals or entities for a license to do business as an LLC. Once the Articles are accepted and filed, the LLC is thereafter formed. Each state sets its own requirements for the contents of the articles, however, they all require:

1. A name for the company which does not mislead the public but does disclose that it is an LLC.
2. The address of the company's principal place of business.
3. The name and address of the company's registered agent in the state.

The requirement for listing both the resident agent and the registered office is also imposed upon a company which is incorporating. Listing of registered agent ensures that someone is authorized to receive legal process against the company. The resident agent is the person who is served any legal notices or summons and complaint on behalf of the company.

Several states also require additional provisions to be included in the articles, such as:

1. How capital contributions will be made to the company.
2. Whether the company will be treated as a corporation or partnership for tax purposes.
3. Name and address of each organizer.
4. Whether all the members or a centralized management will manage the company.

Some states such as Colorado, Florida, Minnesota, Nevada, West Virginia and Wyoming require the Articles to state if the company will continue in effect upon the death, bankruptcy or withdrawal of a member.

Before the Articles are filed they must be approved and adopted. The person who will file the Articles calls a meeting of potential members where they decide what provisions will be contained in the articles. They also decide another important detail: whether all the members or a centralized panel of selected managers will manage the business. Once the Articles are adopted, they must be signed either by all the selected managing members, or by all of the members (if no managing members are selected. Usually, the operating agreement for the company is also created and adopted at this meeting.

#### **c. OPERATING AGREEMENTS**

Once the LLC files its articles or certificate of organization, it exists on paper; it does not exist at law (de jure) until membership certificates are actually issued. It is the fact that the company has outstanding membership certificates in the hands of members that is the defining characteristic behind the existence of an LLC. Similarly, a corporation is not deemed to be in effect until it has sold and issued stock. Following the filing of the articles, the potential members of the LLC meet to purchase their membership certificates and adopt the operating agreement for the business. Once the membership certificates have been issued, the company is fully formed.

Operating agreements are the rules for the general day-to-day management and operation of the LLC. Contained in the operating

agreement are the terms of the company concerning:

1. Capitalization of the business,
2. Distributions made from the business,
3. Admission and withdrawal of members,
4. Management of the business,
5. Fiduciary duties owed to and by the members, and
6. Dissolution of the company.

The operating agreement is adopted by the members and thereafter can be amended only by a majority vote of the members. An operating agreement is an attempt to resolve the many areas of potential conflict within an LLC and to delegate duties and assign responsibilities. Operating agreements can be general in nature or tailored to the needs and desires of the members. A few states do not require the operating agreement to be in writing. Only if the agreement is in writing can the actual intent of the members be ascertained with confidence.

Once these steps have been accomplished the LLC is formed and can commence operations. An LLC is easier and less expensive to create than a corporation or a limited partnership provided ordinary caution and care are undertaken.

#### d. MEMBERS

Members are the owners of the LLC. In nearly a third of the states, a LLC must have two or more members. In contrast, most states, Texas for example, permits a company to have only one member. The IRS, however, requires a LLC to have two or more members to have partnership tax treatment. Members own the

membership certificates of the LLC and have the right to vote in the election of managing members. The extent of a member's ownership interest is usually based either:

1. Upon a member's percentage of contribution to the total contribution of all the members,
2. Upon an equal division among all the members irrespective of contribution (per capita), or
3. Upon some other agreement between the members.

Members are not personally liable for the debts of the LLC beyond the extent of their investment in the LLC. Exception: A member is personally liable for a company debt or obligation if he personally guarantees repayment.

Members may agree for all members to manage the company or agree to elect a few members to manage, who will be called "managing members." In addition to electing any managing members, the members are required to vote on the following:

1. Amendment of the Articles of Organization,
2. Sale, option or lease of substantially all of the LLC's assets,
3. Merger or consolidation of the LLC with another LLC,
4. Amendment of the operating agreement,
5. Removal and replacement of managing members, and
6. Dissolution of the LLC.

The term "managing member" refers to all of the managing members. Managing members must be elected if the operating agreement does not reserve the management to all of the members. If managing members are elected, they alone are responsible for running the day-to-day business of the LLC. When the LLC is taxed as a

corporation, the managing members are permitted reasonable compensation for their services. In small LLC's, the managing members usually serve for free to protect their investments.

Caveat: The decision to have the LLC managed by elected managing members is an element of corporate existence. If the company also has free transferability of its shares or continuity of life, it will be taxed as a corporation and not as a partnership.

Most operating agreements for an LLC require an annual members' meeting to review business affairs and conduct. The members also will elect or re-elect the managing members for another year. Members are usually given votes proportional to their percentage of ownership in the company. A majority of those membership interests voting is needed to carry a resolution or any other matter brought to the floor.

A member cannot be sued by other members for losses incurred as a result of the member's actions or decisions provided they were reasonable and prudent. As agents of the LLC, members have the authority to bind the company by their actions. Members can execute contracts for the company and can subject the company to liability for damages arising from negligent or intentional acts they may commit on behalf of the company.

All states permit LLC's hold that an assignment of a member's interest only passes financial right unless the operating agreement states otherwise. The assignee (person who acquired a member's

interest in the company) only acquires the right to participate in the management of the company through a majority vote of the other members. Usually, a consensus is required among the members. This is important enough to repeat. The non-assigning members must agree to let the new member participate in the management unless the operating agreement states otherwise. This lack of full transferability of interest means interests do not have "free transferability." As a result, the value of the company is lessened and the company is assisted in obtaining tax treatment as a partnership.

#### e. MEMBERSHIP CERTIFICATES

Membership certificates should be thought of as the ownership interests in an LLC. The membership certificate is little more than a record that a person is a member of the company. The degree of interest that the member has in the company is determined by the terms of the operating agreement. Every LLC is authorized to sell only a certain amount of membership certificates in accordance with the security laws of the state where the company is formed. The purchasers of the membership certificates acquire an ownership interest in the common equal to their percentage of membership certificates to the total number of membership certificates outstanding. Membership certificates may be sold by an LLC for money, labor, services, canceled debts or property contributed to the LLC. Membership certificates can also be purchased with promissory notes. Although not required, membership certificates

acquired with notes are usually secured by tangible property.

Membership certificates can be voting or non-voting. Non-voting membership certificates are usually issued by an LLC to raise money without giving the certificate owner the right to participate in the business. To attract purchasers for non-voting membership certificates, an LLC may guarantee a fixed distribution payment or the right to convert the non-voting interests into voting interest based upon a fixed formula at a later date.

#### f. TAXATION

How an LLC will be taxed is the second most important concern, the first being the limited liability of members. Because an LLC has elements of both a corporation and partnership, it can, depending on the facts, be treated for tax purposes as either a corporation or a partnership. When the LLC is taxed as a partnership, its income is passed to its members and double taxation is avoided. On the other hand, when an LLC is taxed as a corporation, its income is taxed twice, first upon being earned and second when distributed to its members as dividends. It is almost always better for an LLC to be taxed as a partnership so as to avoid the double taxation.

Regardless of how a LLC is treated for tax purposes, be it as a partnership or as a corporation, the members of the LLC will not have personal liability for the debts of the company.

Federal Tax law changed dramatically in 1997. As of January 1, 1997 all newly formed LLC's with two or more members will be

treated as a partnership for tax purposes unless the LLC elects corporate tax treatment either as a C corporation or S corporation. A single member LLC will be treated as a sole-proprietorship for federal tax purposes. This is a complete reversal of prior federal tax law. Prior to 1997, an LLC was taxed as a corporation unless it could prove to the IRS that it should be a partnership. In order to prove that a pre-1997 LLC should be taxed as a partnership it had pass a special four-prong test created by the IRS.

As of January 1997, LLCs are automatically given partnership tax treatment unless they specially opt out of it. To opt for corporate tax treatment, the LLC will file a new IRS Form 8832. The election is effective on the date specified in Form 8832 or the date filed if no date is specified. An effective date can even be chosen that precedes the filing date by up to 75 days. See IRS. Regulation sec. 301.7701-3(c)(1)(i).

While LLC's no longer have to pass the IRS's four prong test for federal tax purposes, many states still apply that test in order to determine if the LLC will get state partnership tax treatment. These states had patterned their tax laws after the federal tax law and have not, as yet, changed their tax law to coincide with the new federal laws. In addition, some states have written the four-prong test into their LLC Acts so that the Articles of Organization filed in those states must address the issues raised in the four prong test.

Because some states still use the IRS four-prong test to

determine if an LLC will be treated as a partnership for state tax purposes, this chapter will discuss the four-prong test. The IRS Revenue Rulings on the four-prong test are still persuasive authority for determining whether an LLC will get partnership taxation in a state which still employs the test. If it is not known whether a particular state uses the IRS four prong test in deciding whether to give an LLC partnership treatment, the organizer can go ahead and assume that it does and meet the test, thereby assuring partnership tax treatment for both federal and state purposes. Later if it is determined that the state does not use the four prong test or if state law is changed to do away with it, the company can change the articles or operating agreement any way that it wishes without fear of losing the state partnership tax treatment.

#### **THE FORMER IRS FOUR-PRONG TEST STILL USED IN MANY STATES**

The IRS utilized until January 1, 1997, a four-prong test for determining whether an LLC will be taxed as a corporation or a partnership. If an LLC possesses any three of the four following corporate characteristics, it will be taxed as a corporation and not as a partnership:

1. Limited Liability For Its Members. All LLC's will have this characteristic. It is to obtain limited liability for the members and the members elected to conduct business as an LLC.
2. Centralized Management. The states which permit LLC's allow the members to vest the management of the business

in certain managing members. When this is done, the management of an LLC assumes the corporate characteristic of a board of directors.

3. Free Transferability of Interests. The right to sell, transfer or convey an interest in a business freely and without restrictions is a corporate characteristic. Such a right is similar to a person being able to sell his stock in a company. If the non-selling members must consent before the new member can participate in the management, then there is no free transferability, and this corporate characteristic would not be present.
4. Continuity of Life. The most important aspect of a corporation is its continuance after the death or withdrawal of one of its shareholders. A corporation, unlike a partnership, does not terminate upon the death of its shareholders. If an LLC is required under the terms of the operating agreement to remain in full effect until its termination date, and even after the death of a member, it will be considered to have the continuity-of-life characteristic of a corporation. If the remaining members must vote to continue the company life, this corporate characteristic does not exist.

When three of the four characteristics listed above were present, the LLC was taxed as though it is a corporation. It does not make good sense to do business as an LLC unless the company will be treated as a partnership for federal tax purposes. In states which still utilize the IRS test for determining whether the LLC will be treated as a partnership for state tax purposes, if an LLC has any three of the above characteristics, it will be taxed as a corporation. Such taxation would be detrimental to members so care

must be taken in deciding which common characteristics the company should share with a corporation.

Another tax concern of an LLC is how its property will be treated for tax purposes. Property which is titled in the LLC name is owned by the LLC, not the individual members. The same is true for property contributed to a corporation or a partnership. A member who contributes property to an LLC relinquishes ownership in the property, and property purchased with LLC funds is owned by the LLC. This company ownership of the property means that creditors of members cannot attach the property. They are limited to attaching the member's interest in the LLC. The property held by an LLC can be legally sold, transferred or conveyed only by the company. The LLC's basis in the contributed property is the basis that the member had before it was contributed.

g. DEBTS OF THE PRIOR BUSINESS

Many new businesses are really reformations of existing businesses. Frequently general or limited partnerships are changed to LLC's. At times a sole proprietor will contribute assets of an existing business into the LLC being formed. Question: How are debts from an existing business treated when the business assets are transferred to a new LLC? The general rule is that a newly formed LLC is not liable for the debts of a prior business whose assets were transferred into it unless all of the members (or all of the managing members) agreed to have the LLC so bound. Still, assured by the new LLC or not, the owners of the prior business

still remain personally liable for the debts of the prior business. If the transfer of assets into the LLC is intended to defraud creditors or is in violation of a state's Bulk Transfer Act (which governs the transfer of assets of a business), creditors can sue the company to the extent of the value of the property transferred.

Every state has adopted the Uniform Commercial Code, which contains the Bulk Transfer Act. Under the Bulk Transfer Act, notice must be given to creditors of a business whenever the majority of a business's assets are transferred. The Bulk Transfer Act also applies to transfers into a new LLC. The transfer is usually required to give at least 10 days notice to creditors and the local tax assessor before the transfer. The tax assessor will impose a property tax on the transaction. Notice to creditors is usually given by publishing a Notice of Bulk Transfer in the newspapers of general circulation. If no creditor objects, the transfer occurs and the creditors lose their right to seek return of the transferred assets from the LLC.

#### h. DISSOLUTION OF AN LLC

Dissolution of an LLC is the termination of the company and is, in fact, its legal death. Dissolution usually occurs under the operating agreement's terms when any of the following acts occur:

1. Members holding more than 50% of the voting rights in the LLC vote to dissolve.
2. Managing members dissolve the LLC because:
  - (a) The LLC did not issue any shares and thus was never really an LLC, or

- (b) The LLC filed a Chapter 7 bankruptcy petition, or
  - (c) The LLC has disposed of all of its assets and hasn't conducted business for some time.
3. Creditors file a legal action and win involuntary dissolution of the LLC to liquidate company assets and pay the creditors.
  4. The termination date listed in the Articles of Organization arrives.

The most common reason for the early termination of a company is the death, bankruptcy or expulsion of a member. Unless the operating agreement states otherwise, a company will automatically terminate upon the death, bankruptcy or expulsion of a member.

In the absence of a contrary provision in the operating agreement, the voluntary withdrawal of a member will automatically dissolve the company in most states. A few states (such as Delaware, Iowa, Maryland, Texas, Virginia and West Virginia) permit members to withdraw without dissolving the company unless the operating agreement states otherwise. The states of Arizona, Colorado, Illinois and Minnesota permit a member to withdraw even though forbidden in the operating agreement. In a situation where a member withdraws and the company is not dissolved, the member is entitled to the return of his capital. Specifically, Florida, Kansas, Nevada, Utah, and Wyoming each require the return of a withdrawing member's capital within six months unless an earlier date is specified in the operating agreement.

Several states (Arizona, Colorado, Illinois and Minnesota) provide for a reduction of the capital returned to a withdrawing

member when the withdrawal was in violation of the operating agreement and caused the company to incur damages. In the absence of contrary intent expressed in the operating agreement, the states of Arizona, Colorado, Delaware, Illinois, Iowa, Louisiana, Minnesota, Nevada, Oklahoma, Rhode Island, Texas and Virginia state that a withdrawing member is to receive the fair market value of his interest in the company minus any damages caused by a wrongful withdrawal from the company.

After dissolution has been approved or ordered, the LLC must stop doing business except to the extent necessary to discharge the affairs of the company. When a resolution to dissolve is adopted or ordered, the LLC must file a certificate of dissolution with the secretary of state where it was formed.

The distribution of company assets, following dissolution, will be made as follows:

1. All federal and state taxes are paid.
2. All employee wages and benefits are paid.
3. All secured liabilities are paid.
4. All unsecured liabilities are paid.
5. Any remaining funds are distributed pro rata among the members in accordance with their percentage of ownership interest in the company.

The proceeds received by a member in the dissolution of an LLC are a return of the member's investment. Any gain or loss realized by a member as a result of the dissolution is treated as a capital gain or loss. For example, assume that a member paid \$4,000 for the

membership certificates. He received \$3,000 at dissolution. He has a \$1,000 capital loss. Likewise, if the member received \$6,000, he would have a \$2,000 capital gain.

All states require that LLC's formed under their laws file a statement of dissolution either before or after the dissolution is completed. Arizona, Florida, Kansas, Louisiana, Maryland, Minnesota, Nevada, Oklahoma, Utah and Wyoming require filing a statement of intent when the dissolution begins and a statement of conclusion when the dissolution is finished. Other states such as Delaware, Illinois, Iowa, Rhode Island, Texas, Utah, Virginia and West Virginia do not require the first filing stating the intent to dissolve. All states require the final filing when the dissolution is completed.

Some states require that creditors be given specific notice of the intent to dissolve the company. For instance, Kansas requires the company to mail each creditor a notice of the dissolution within 20 days of filing the intent to dissolve.

### 3. LAWSUITS

An LLC is a legal entity, but because it is an artificial entity, it needs an individual to file any lawsuit on its behalf. When the company is managed by all the members, a suit can be brought by a member only after a majority vote of approval by the members. An exception to the majority vote approval requirement for filing a suit may exist where there is a conflict of interest among the members or members are breaching their fiduciary duties. The

non-agreeing members would be excluded from the voting, and only the votes of the disinterested members would be considered. If the suit is commenced, and it is later found that the members whose votes were ignored were not in violation of their fiduciary duties and had no conflict of interest, the persons bringing the suit might be held personally responsible for any damages caused by virtue of the suit.

When a suit is brought by virtue of a majority vote of approval by all members, no member will be personally liable for any damages that might result to the company. When the company is being managed by managing members, it is the managing members who have the authority to file suit on behalf of the company. A manager is bound by the fiduciary standard of care of a reasonable and prudent manager in making a decision to commence a lawsuit.

Liability attaches to a member who brings unauthorized or improvident suit that violates the fiduciary standard of care. Should a member act without the approval of the other members to file suit, the company would nonetheless be bound by the decision or settlement. The company may sue a member for any damages which the company suffered by virtue of the member bringing an unauthorized suit or settling one improperly.

## CHAPTER 15

## STATE LAWS

This chapter lists appropriate small claims state laws as subsequently amended. A person engaged in a small claims action should be aware of them. The application of the law is discussed throughout the text of the book. This summary of state law covers the fifty states and the District of Columbia.

It should be understood that laws do change. In the case of small claim actions, the thing that changes most is the jurisdictional amount of the court. In the last ten years California, for instance, has raised its limits for small claims cases from \$1,500 to \$2,500 and then to \$5,000. The rest of the state laws seldom change because of the nature of small claims court which is to keep it as simple as possible.

A person desiring to file a small claims action should telephone the clerk of the court to ensure the current accuracy of this information. The chances are that if the law has changed, it has changed to the benefit of the plaintiff by raising the amount on which the plaintiff can file suit.

"Equitable relief" mentioned in the summary refers to a court's jurisdiction to order a person to do or not do something beyond the payment of money. This power is normally called the power to grant injunctions (for example an order not to trespass on

property). If a court has the power to hear motions involving contract actions, it is implied it has the power to grant the basic equitable relief to the extent necessary for the reformation of the contract or the rescission of the contract along with restitution of property that each party received under the contract.

ALABAMA

GOVERNING STATUTES:

Code of Alabama 1986, Title 12, Ch. 12, Section 31, 7071 and Alabama Rules of Court.

DOLLAR LIMIT

\$3,000

SERVICE

By certified mail, sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Most Contracts six years, sale of goods four years, torts 14 years. Judgments good for 20 years.

ATTORNEYS

Permitted and required for assignees such as Collection Agencies

TRANSFER OF TRIAL TO HIGHER COURT

Not permitted.

APPEALS

Either party may appeal within 14 days of judgment.

JUDGMENT AS LIEN ON REAL PROPERTY

Recording the judgment places a lien on the debtor's real property in the county.

EQUITABLE RELIEF

Permitted.

WAGE EXEMPTION FROM GARNISHMENT

Only the lesser of 25% of the judgment creditor's gross wages or 30 times the federal minimum wages can be attached.

#### GOVERNMENT BENEFITS EXEMPTION

The following government benefits are exempt to protect the debtor receiving the benefits:

1. Aid to AFDC, aged, blind and disabled by statute 38-4-8.
2. Black lung benefits (pneumoconiosis) by statute 25-5-179.
3. Compensation to victims of crimes by statute 15-23-15.
4. Prisoner of War benefits by statute 31-7-2.
5. Unemployment compensation under statute 25-4-140.
6. Worker's Compensation benefits under statute 25-5-86.

#### HOMESTEAD EXEMPTION

Alabama Code statute 6-10-2 has a \$ 5,000 homestead exemption on real property or a mobile home. The property cannot exceed 160 acres. A homestead declaration must be recorded before any sale of the property.

#### INSURANCE EXEMPTION

There are several exemptions for different types of insurance proceeds under Alabama law:

1. Annuity proceeds up to \$250 per month are exempt under statute 27-14-32.
2. Benefits from fraternal societies are exempt under statute 27-34-27.
3. Benefits from mutual aid associations are exempt under statute 27-30-25.

4. Disability benefits up to \$250 per month are exempt under statute 27-14-31.
5. Life insurance proceeds when the debtor-beneficiary is the insured's spouse are exempt under statutes 6-10-8 and 27-14-29.
6. Life insurance proceeds when the debtor-beneficiary is the insured's exempt child under statute 6-10-8.
7. Life insurance proceeds when the insurance policy prohibits payment of the proceeds being made to the debtor-beneficiary's creditors are exempt under statute 27-15-26.

#### PERSONAL PROPERTY EXEMPTION

Alabama has exemptions for the following personal property:

1. Books under statute 6-10-6.
2. Church pew under statute 6-10-5.
3. Family pictures and portraits under statute 6-10-6.
4. Funeral plot under statute 6-10-5.
5. Needed clothing under statute 6-10-6.
6. Property of a business partnership under statute 10-8-72.

#### RETIREMENT BENEFITS EXEMPTION

The following retirement benefits are exempt to protect the debtor receiving the benefits:

1. Judges are exempt only to the extent of payments being received under statute 12-18-10.
2. Law Enforcement Officers under statute 36-21-77.

3. State Employees under statute 36-27-28.
4. Teachers under statute 16-25-23.
5. IRA'S and other retirement accounts by Statute 19-3-1

TOOLS OF THE DEBTOR'S TRADE EXEMPTION

Under Alabama law, arms, uniforms and equipment that the debtor is required to keep as a member of the National Guard are exempt by statute 31-2-78.

ALASKA

GOVERNING STATUTES:

Alaska Statutes 1988, Title 22, Ch. 15, Section 040, District Court Rules of Civil Procedure, Rules 18-22, Rules of Civil Procedure, Rule 4.

DOLLAR LIMIT

\$7,500.

SERVICE

By certified mail, registered mail, or peace officer.

STATUTE OF LIMITATIONS

Most contracts four years, torts two years, judgments last 10 years.

ATTORNEYS

Permitted along with legal interns required for collection agencies

TRANSFER OF TRIAL TO HIGHER COURT

By defendant or judge.

APPEALS

By either side but only as to questions of law within 30 days of judgment.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment does not create an automatic lien on the debtor's real property. To have a valid lien, the judgment must be recorded in each county where the debtor has real property.

EQUITABLE RELIEF

Permitted.

WAGE EXEMPTION FROM GARNISHMENT

Only the lesser of 25% of the judgment creditor's gross wages or 30 times the federal minimum wages can be attached.

GOVERNMENT BENEFITS

The following government benefits are exempt to protect the debtor receiving the benefits:

1. Under statute 9.38.015:
  - (a) Compensation to victims of crimes.
  - (b) Alaska longevity bonus.
  - (c) Federally exempt public benefits.
2. Unemployment compensation under statute 23.20.405.
3. Worker's Compensation benefits under statute 9.38.015.
4. One-half of permanent fund benefits under statute 43.23.065.
5. General relief under statute 47.25.210.
6. Aid to AFDC by statute 47.25.395.

7. Aid to aged, blind and disabled by statute 47.25.550.

#### HOMESTEAD EXEMPTION

Under Alaska Code statute 9.38.010, there is a \$54,000 homestead exemption. If joint owners file for bankruptcy, the total exemption is still \$54,000; it can not be doubled.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Alaska law:

1. Benefits from fraternal societies are exempt under statute 21.84.240.
2. Disability benefits under statutes 9.38.015 and 9.38.020.
3. Insurance proceeds for wrongful death or personal injury to the extent of exempt wages under statute 9.38.030.
4. Life insurance proceeds when the debtor-beneficiary is the insured's spouse or dependent are exempt, to the extent of exempt wages under statute 9.38.030.
5. Life insurance or annuity contract with a value of up to \$10,000 under statute 9.38.025.
6. Medical and hospital benefits under statute 9.38.015.

#### PERSONAL PROPERTY

Alaska has exemptions for the following personal property:

1. Under statute 9.38.015:
  - (a) Funeral plot.
  - (b) Medical aids.
  - (c) Child support payments.

- (d) Liquor licenses.
  - (e) Alaska fisheries permits for limited entry.
2. Under statute 9.38.020:
    - (a) Books, family pictures, portraits and heirlooms up to \$3,600.
    - (b) Jewelry up to \$1,200.
    - (c) Motor vehicles with equity up to \$3,600.
    - (d) Pets worth up to \$1,150.
  3. Recoveries for personal injuries and wrongful death to the extent of exempt wages under statute 9.38.030.
  4. Alimony to the extent of exempt wages under statute 9.38.030.
  5. Recoveries for damaged property under statute 9.38.015.
  6. Business partnership property under statute 9.38.100.
  7. Building materials under statute 34.35.105.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt to the debtor receiving the benefits:

1. ERISA, IRA and Keogh benefits deposited more than 120 days before filing the bankruptcy relief under statute 9.38.017 AND 9.38.010(e)(3)
2. Public Employees under statute 9.38.015.
3. Teachers but only for benefits building up under statute 9.38.015.
4. Other pension plans but only for payments being received

to the extent of exempt wages under statute 9.38.030.

TOOLS OF THE DEBTOR'S TRADE

Under Alaska law there is an exemption for books, tools and implements used in the debtor's trade up to \$3,360 under statute 9.38.020.

WAGES

Weekly earnings of \$420 are exempt. If the debtor is the sole wage earner for the household it is \$660 by Statutes 9.38.030 and 9.38.050.

ARIZONA

GOVERNING STATUTES

Arizona Revised Statutes 1975, Sections 22.501-523, 22.202.

DOLLAR LIMIT

\$2,500 for Small Claims Division (Justice of the Peace)

\$5,000 for Justice Court

SERVICE

By certified mail, sheriff, deputy or court-approved adult.

STATUTE OF LIMITATIONS

Most contracts six years, sale of goods four years, torts one year, judgment lasts five years.

JURY TRIALS

Not permitted in Small Claims Division

Permitted in Justice Court

ATTORNEYS

Not permitted.

TRANSFER OF TRIAL TO HIGHER COURT

From Small Claims Division to Justice Court if defendant files a counterclaim over \$2,500 or 10 days before hearing requests transfer.

For counterclaims over \$5,000 transfer is to Superior Court

APPEALS

Not permitted in Small Claims Division

Permitted in Justice Court

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment does not create an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

EQUITABLE RELIEF

Permitted.

WAGE EXEMPTION FROM GARNISHMENT

Only the lesser of 25% of the judgment creditor's gross wages or 30 times the federal minimum wages can be attached.

SPECIAL NOTE

No defamation, landlord-tenant, injunctions, or ownership of real property cases.

GOVERNMENT BENEFITS

The following government benefits are exempt to the debtor receiving the benefits:

1. Unemployment compensation under statute 23-783.
2. Welfare benefits under statute 46-208.
3. Worker's Compensation benefits under statute 23-1068.

#### HOMESTEAD EXEMPTION

Under Arizona Code statute 33-1101, there is a \$100,000 homestead exemption. A married couple may not double this exemption. Homestead declaration must be recorded.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Arizona law:

1. Benefits from fraternal societies are exempt under statute 20-881.
2. Life insurance with a cash value to \$2,000 per dependent up to a total value of \$25,000 under statute 20.1131(D).
3. Benefits from group life insurance under statute 20-1132.
4. Health, accident or disability benefits under statute 33-1126.
5. Life insurance proceeds when the beneficiary is the insured's spouse or child are exempt under Statute 33-1126.
6. Life insurance with a cash value to \$1,000 per dependent to a total value of \$25,000 under statute 33.1126(A)(6). A married couple may double this amount.

#### PERSONAL PROPERTY

Arizona has exemptions for the following personal property:

1. Household goods, appliances, family pictures, portraits and heirlooms to \$4,000 under statute 33-1123. A married couple may double this exemption.
2. Enough food and fuel to last six months under statute 33-1124. A married couple may double this exemption.
3. Bible, bicycle, sewing machine, typewriter, funeral plot, firearms to a total of \$500 under statute 33-1125. A married couple may double this exemption.
4. Books to \$250. Animals to \$500. Musical instruments to \$250. Medical aids. Clothing to \$500. All are exempt under statute 33-1125. These exemptions may be doubled by a married couple.
5. Motor vehicles with equity up to \$5,000 or \$10,000, if disabled, under statute 33-1125. A married couple may double this exemption.
6. In lieu of a homestead exemption (renters) there is an exemption for a rent or security deposit to \$1,000 or one and a half times the rent whichever is less. Also a bank deposit account with no more than to \$150 is exempt under statute 33-1126. A married couple may double the exemptions.
7. Recoveries for sold and damaged property under statute 33-1126. A married couple may double this exemption.
8. Minor's child earnings are exempt under statute 33-1126.
9. Business partnership property under statute 29-225.

## RETIREMENT BENEFITS

The following retirement benefits are exempt to protect the debtor receiving the benefits:

1. ERISA for qualified deposits made more than 120 days prior to filing for bankruptcy relief under statute 33-1126.
2. Police under statute 9-931.
3. Firefighters under statute 9-968.
4. Board of Regents under statute 15-1628.
5. Elected officials under statute 38-811.
6. Public Safety personnel under statute 38-850.
7. State Employees under statute 38-262.
8. Rangers under statute 41-955.
9. IRA's under In Re Herrscher 121 BR 29 (D.Ariz.1990)

## TOOLS OF THE DEBTOR'S TRADE

Under Arizona law the following property used in the debtor's trade and business is exempt:

1. Under statute 33-1130.
  - (a) Books, tools and implements (not including vehicle) used in the debtor's trade up to \$2,500.
  - (b) Farm equipment and animals up to \$2,500. A married couple may double this exemption.
2. Arms, uniforms and equipment that the debtor is required to keep under statute 33-1130.
3. Teaching aids for a teacher under statute 33-1127.

ARKANSAS

GOVERNING STATUTES

Arkansas Code of 1987, Title 16.17, Sections 201-210, 218, 601-614, Arkansas Constitution Amendment 64.

DOLLAR LIMIT

\$5,000

SERVICE

By certified mail, sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Most contracts five years, most torts three years, judgments last 10 years.

ATTORNEYS

Not permitted in Small Claims Division

Permitted before Justice of Peace (rural areas)

TRANSFER OF TRIAL TO HIGHER COURT

Yes, if defendant counterclaims for more than \$3,000. In Small Claims Division, a Judge must transfer if he learns that a party is represented by an attorney, no such provision for trials before a Justice of Peace

APPEALS

By either side within 30 days of judgment for new trial.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is automatic lien only for county where judgment rendered. The judgment creditor must record the judgment in every

other county where the judgment debtor has property in order to have a lien on the property in that county.

#### GOVERNMENT BENEFITS

The following government benefits are exempt to protect the debtor receiving such benefits:

1. Unemployment compensation under statute 11-10-109.
2. Worker's compensation under statute 11-9-110.
3. Victim's compensation under statute 16-90-716.
4. Assistance under AFDC or to the aged, blind, disabled under statute 20-76-430.

#### HOMESTEAD

Under Arkansas Constitution sections 9-3, 9-4 and 9-5, along with statute 16-66-210, there is a homestead exemption for a head of household. The amount of the exemption depends on the size of the homestead. For a homestead no greater than  $\frac{1}{4}$  acre in a city, town or village or 80 acres elsewhere entire homestead is exempt. If the homestead is more than  $\frac{1}{4}$  acre but less than 1 acre in a city, town or village, or between 80 to 160 acres elsewhere the exemption is up to \$2,500. Above 1 acre in a city town or village or more than 160 acres elsewhere there is no exemption. A married couple may not double a homestead exemption.

For a single person the homestead exemption is \$800 and for a married person, not a head of household, the exemption is \$1,250 under statute 16-66-218.

#### INSURANCE

There are exemptions for the following insurance benefits under Arkansas law:

1. Cash value of life, health, accident or disability policy is exempt under statute 16-66-209. Limited to \$500  
In Re Holt 97 BR 997 (W.D.ARK 1988)
2. An annuity contract and benefits are exempt under statute 23-79-134.
3. Disability benefits under statute 23-79-133.
4. Group life insurance under statute 23-79-132.
5. Life insurance benefits if the policy prohibits payment to the beneficiary's creditors under statute 23-79-131.
6. Life insurance benefits when the beneficiary is not the insured under statute 23-72-114.
7. Benefits from fraternal societies are exempt under statute 23-74-119.
8. Stipulated insurance premiums are exempt under statute 23-71-112.
9. Benefits from mutual assessment policies are exempt under statute 23-72-403.

#### PERSONAL PROPERTY

The following personal property is exempt under Arkansas law:

1. Clothing is exempt under the Arkansas Constitution sections 9-1, and 9-2.
2. Funeral plot of five acres or less is available in place of a single or married person's homestead exemption under

statutes 16-66-207 and 16-66-218.

3. A motor vehicle is exempt to a value of \$1,200 under statute 16-66-218.
4. Wedding bands and any diamond which does not exceed  $\frac{1}{2}$  carat are exempt under statute 16-66-218.
5. Business property of a partnership under statute 4-42-502.

#### RETIREMENT BENEFITS

The following retirement plans are exempt under Arkansas law:

1. ERISA qualified benefits under statute 16-66-220.
2. IRA up to \$20,000 provided the deposits were made over one year prior to the bankruptcy filing under statute 16-66-218.
3. Firefighters are exempt under statute 24-10-616.
4. Police are exempt under statute 24-10-616.
5. School employees are exempt under statute 24-7-715.
6. State police are exempt under statute 24-6-223.
7. Disabled police are exempt under statute 24-11-417.
8. Disabled firefighters are exempt under statute 24-11-814.

#### TOOLS OF TRADE

Under statute 16-66-218, Arkansas grants an exemption for the implements, books and tools of trade of a debtor up to \$750.

#### WAGES

Under statute 16-66-208, the first \$25 is exempt.

**CALIFORNIA**

GOVERNING STATUTES

California Code of Civil Procedure Sections 116-117.22.

DOLLAR LIMIT

\$5,000.

SERVICE

By certified mail, sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Written contracts four years, oral contracts two years, most intentional torts one year, negligent torts 2 years, judgments last 10 years.

JURY TRIALS

Not permitted.

ATTORNEYS

Not permitted.

TRANSFER OF TRIAL TO HIGHER COURT

By defendant if the counterclaim is more than \$5,000.

APPEALS

By defendant only or plaintiff if loses on counterclaim.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

## EQUITABLE RELIEF

Permitted.

## GOVERNMENT BENEFITS

The following government benefits are exempt to protect the debtor receiving the benefits:

1. Aid to blind, aged disabled and AFDC is exempt under C.C.P. section 704.170.
2. Student aid is exempt under C.C.P. section 704.190.
3. Relocation benefits are exempt under C.C.P. section 704.180.
4. Unemployment benefits are exempt under C.C.P. section 704.120.
5. Union benefits from labor dispute under C.C.P. section 704.120.
6. Worker's compensation under C.C.P. section 704.160.

## HOMESTEAD EXEMPTION

Under C.C.P. sections 704.710 and 704.730, there is a homestead exemption of:

1. \$50,000 if single and not disabled.
2. \$75,000 for married couple filing jointly \$37,500 each.
3. \$125,000 if the debtor is 65 or older or mentally or physically disabled.
4. \$125,000 if 55 or older, single and earning less than \$15,000 or married and earning less than \$20,000 and creditors wish to take the debtors' home. The proceeds

from a sale are exempt for 6 months after received under C.C.P. 704.720. A homestead exemption may be filed under C.C.P. 704.920.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under California law:

1. Under statute C.C.P. 704.100:
  - (a) Unmatured policies but not their loan value.
  - (b) Life insurance benefits needed for support.
  - (c) Unmatured life insurance policy to \$8000 cash value.

A married couple may double this exemption.

2. Fraternal unemployment benefits under C.C.P. 704.170.
3. Disability or health benefits under C.C.P. 704.130.
4. Homeowner's insurance proceeds for six months after receipt under C.C.P. 704.720.
5. Life insurance proceeds if the policy precludes payment to creditors under Insurance Code sections 10170 and 10171.
6. Fidelity bonds are exempt under Labor Code Section 404.

#### PERSONAL PROPERTY

California has exemptions for the following personal property:

1. Business and professional licenses are exempt under C.C.P. 695.060 except liquor licenses under C.C.P. 704.920.

2. Motor vehicles are exempt to \$1,900 under C.C.P. 704.010.
3. Appliances, household goods clothing and food as needed are exempt under C.C.P. 704.020.
4. Building materials to repair debtor's home are exempt to \$2000 under C.C.P. 704.030.
5. Jewelry and heirlooms and art are exempt to \$5,000 under C.C.P. 704.040.
6. Medical Aids are exempt under C.C.P. 704.050.
7. Social security bank deposits to \$2,000 (\$3,000 for husband and wife) are exempt under 704.080.
8. Proceeds from exempt property are exempt under C.C.P. 704.080.
9. Trust funds for inmates to \$1,000 under C.C.P. 704.090.
10. Personal injury cause of action and personal injury recoveries needed for sport are exempt under C.C.P. 704.140.
11. Funeral plots are exempt under C.C.P. 704.200.
12. Wrongful death cause of action and wrongful death recoveries needed for sport are exempt under C.C.P. 705.150.
13. Business partnership property under Corporation Code 15025.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt to protect the debtor receiving the benefits:

1. Private pension plans including IRAs and Keoghs are exempt to the extent tax-deferred under C.C.P. 704.115.
2. Public employees pensions under Government Code 21201.
3. Public retirement benefits under C.C.P. 704.110.

#### TOOLS OF THE DEBTOR'S TRADE

Under California law, tools, implements, materials, etc (except a motor vehicle) are exempt to \$5,000. If spouse in the same business, the exemption is \$10,000 under C.C.P. 704.060.

#### WAGES

The following wages are exempt under California law:

1. Public employees vacation benefits under C.C.P. 704.113.
2. 75% of the wages or 30 times the federal minimum wage (the lesser) under C.C.P. 704.070.

#### COLORADO

##### GOVERNING STATUTES

Colorado Rules for Small Claims Courts, Rules 501-521.

##### DOLLAR LIMIT

\$7,500

##### SERVICE

By certified mail, sheriff or court-approved adult.

##### STATUTE OF LIMITATIONS

Most contracts three years, most torts two years, judgments last six years.

##### JURY TRIALS

Not permitted.

ATTORNEYS

Not permitted.

TRANSFER OF TRIAL TO HIGHER COURT

Upon defendant's request or counterclaim over \$5,000.

APPEAL

None unless agreed by the parties either before or at the trial.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

EQUITABLE RELIEF

Not permitted.

SPECIAL NOTE

No defamation, landlord-tenant, injunctions, or actions to recover personal property or motor vehicle accident cases.

GOVERNMENT BENEFITS

The following government benefits are exempt to protect the debtor receiving the benefits:

1. Aid to blind, aged, disabled, AFDC under statute 26-2-131.
2. Unemployment compensation under statute 8-80-103.
3. Veteran's benefits under statute 13-54-102.

4. Victim's crime compensation under statutes 13-54-102 and 24-4.1-114.
5. Worker's compensation under statute 8-52-107.

#### HOMESTEAD EXEMPTION

There is a homestead exemption for real property occupied by the debtor of \$45,000 under statute 38-41-201. If a house trailer or coach is used as a residence it is exempt to \$3,000, mobile home is exempt to \$6,000 under statute 13-54-102. A mobile home can be used as a residence under statute 13-54-102. Sale proceeds are exempt for one year under statute 38-41-207. In bankruptcy, husband and wife may double exemption under In Re Pastrana 216 BR 948.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Colorado law:

1. Disability benefits to \$200 per month under statute 108-114. If received in a lump sum, the entire amount is exempt.
2. Fraternal society benefits are exempt under statute 10-14-122.
3. Proceeds from group insurance under statute 10-7-205.
4. Homeowners' insurance proceeds up to homestead exemption amount are exempt for one year after receipt under statute 38-41-209.
5. Life insurance worth to \$25,000 by statute 13-54-102.
6. Life insurance proceeds if the policy prohibits payment to creditors under statute 10-7-106.

## PERSONAL PROPERTY

Colorado has exemptions for the following personal property:

1. Under statute 13-54-102:
  - (a) Burial plot.
  - (b) Clothing to \$1,500.
  - (c) Food and fuel to \$600.
  - (d) Medical aids.
  - (e) Jewelry to \$1,000.
  - (f) Motor vehicle needed for work to \$3,000 increasing to \$6,000 if debtor over 65, disabled or used by dependent
  - (g) Personal injury recoveries.
  - (h) Books and pictures to \$1,500.
  - (i) Recoveries for damage to exempt property.
  - (j) Security deposits.
2. Property of a business partnership under statute 7-60-125.

## RETIREMENT BENEFITS

The following retirement benefits are exempt to protect the debtor receiving the benefits:

1. ERISA-qualified benefits, including IRAs and Keoghs under 13-54-104 and 24-51-212.
2. Firefighters under statutes 31-30-412 and 31-30-518.
3. Police officers under statute 31-30-313 and 31-30-616.
4. Public employees under statute 24-51-212.
5. Teachers under statute 22-64-120.

TOOLS OF THE DEBTOR'S TRADE

Under Colorado law the following property used in the debtor's trade and business are exempt under statute 13-54-102:

1. Horses and mules and equipment to a total of \$25,000.
2. The library of a business professional to \$3,000.
3. Livestock and poultry to a farmer to \$3,000.
4. Tools and instruments to \$10,000.

WAGES

Under statute 13-54-104, 75% or 30 times the federal minimum wage (the lesser) is exempt.

**CONNECTICUT**

GOVERNING STATUTES

Connecticut General Statutes, Title 51, Title 52, Sections 549(a)-(d).

DOLLAR LIMIT

\$3,500.

SERVICE

By certified or registered mail or sheriff.

STATUTE OF LIMITATIONS

Written contract six years, oral contracts three years, most torts three years, judgments last 15 years.

ATTORNEYS

Permitted required for corporations.

TRANSFER OF TRIAL TO HIGHER COURT

Upon defendant request or with counterclaim over \$2,500.

APPEALS

Not permitted.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

EQUITABLE RELIEF

Not permitted.

SPECIAL NOTE

No defamation cases.

GOVERNMENT BENEFITS

The following government benefits are exempt to the debtor receiving the benefits:

1. Aid to aged, blind and disabled by statute 52-352b.
2. Aid to AFDC by statute 52-352b.
3. Compensation to victims of crimes by statute 52-352b and 54 213.
4. Social Security under statute 52-352b.
5. Unemployment compensation by statute 31-272 and 52-352b.
6. Worker's Compensation benefits under statute 52-353b.
7. Veteran's benefits under statute 52-352b.
8. Wages from earnings incentive programs under statute 52-352b.

## HOMESTEAD EXEMPTION

Real property including a mobile home or manufactured home up to \$75,000 by Statute 52-552(b)(t).

## INSURANCE

There are several exemptions for different types of insurance proceeds under Connecticut law:

1. Benefits from fraternal societies are exempt under statute 38-229.
2. Health and disability benefits under statutes 52-352b.
3. Insurance proceeds when the policy forbids payment to creditors under statute 38-162.
4. Life insurance proceeds and cash value under statute 38 161.
5. No-fault insurance benefits under statute 38-336.
6. Unmatured life insurance loan value up to \$4,000 by Statute 52-352(b)(s).

## PERSONAL PROPERTY

Connecticut has exemptions for the following personal property under statute 52-352(b):

1. Appliances and household goods as needed.
2. Residential security deposits.
3. Funeral plot.
4. Food and medical aids as needed.
5. Motor vehicle to \$1,500.
6. Recoveries for damaged exempt property.

7. Wedding and engagement rings.
8. Alimony to the extent of exempt wages.
9. Child sport payments.
10. Business partnership property.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt to protect the debtor receiving the benefits:

1. ERISA benefits and IRA's only to the extent payments are being received and to the extent wages are exempt under statute 52-352b.
2. State Employees under statutes 5-171 and 5-192W.
3. Teachers under statute 10-183q.

#### TOOLS OF THE DEBTOR'S TRADE

Under Connecticut law the following property used in the debtor's trade and business are exempt under statute 52-352b:

1. Books, tools and implements used in the debtor's trade as needed.
2. Arms, military equipment, uniforms of military personnel.

#### WAGES

Under statute 52-361a, 75% or 30 times the federal minimum wage (the lesser) is exempt.

#### DELAWARE

#### GOVERNING STATUTES

Delaware Annotated Code 1974, Title 10, Sections 9301-9590.

DOLLAR LIMIT

\$15,000.

SERVICE

By certified mail, sheriff or constable.

STATUTE OF LIMITATIONS

Written contracts four years, oral contracts three years, most torts two years, judgments last 10 years.

JURY TRIALS

Permitted.

ATTORNEYS

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

Not permitted.

APPEALS

By either side within 15 days of judgment being rendered.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

GOVERNMENT BENEFITS

The following government benefits are exempt to the debtor receiving the benefits:

1. Aid to blind by statute 31-2309.

2. Aid to AFDC aged and disabled under statute 31-513.
3. General assistance benefits are exempt by statute 31-513.
4. Unemployment compensation by statute 19-3374.
5. Worker's Compensation benefits under statute 19-2355.

#### HOMESTEAD EXEMPTION

Under Delaware law, there is no homestead exemption. The courts however, (In Re Hovatter 25 B.R. 123 and Citizen's Bank Inc. vs. Astrin 44 Del 451), have permitted a married debtor to exempt his half interest in tenancy by the entirety property (joint tenancy property with the debtor's spouse) unless both spouses are liable on the debt.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Delaware law:

1. Benefits from fraternal societies are exempt under statute 18-6118.
2. Health and disability benefits under statute 18-2726.
3. Life insurance proceeds and cash value under statute 18-2725.
4. Group life insurance proceeds and policy are exempt under statute 18-2727.
5. Annuity proceeds to \$350 per month are exempt under statute 18-2728.
6. Insurance proceeds when the policy forbids payment to creditors under statute 18-2729.

## PERSONAL PROPERTY

Delaware has exemptions for the following personal property:

1. Under statute 10-4902:
  - a. Bible, books, family pictures and portraits.
  - b. Clothing and jewelry as needed.
  - c. Funeral plot.
  - d. Church pew or other seat in place of worship.
  - e. Piano or organ and sewing machine.
2. \$5,000 in personal property under statute 10-4914, doubled for a married couple.
3. Business partnership property under statute 6-1525.

## RETIREMENT BENEFITS

The following retirement benefits are exempt to protect the debtor receiving the benefits:

1. Kent County employees under statute 9-4316.
2. State employees under statutes 29-5503.
3. Volunteer firefighters under statute 16-6653.
4. Police officers under statute 11-8803.

## TOOLS OF THE DEBTOR'S TRADE

Under statute 10-4902, books, tools and implements used in the debtor's trade or business are exempt to \$75 in New Castle & Sussex counties but are exempt only to \$50 in Kent County.

## WAGES

Under statute 10-4913, 85% of the wages are exempt.

DISTRICT OF COLUMBIA

GOVERNING STATUTES

District of Columbia Code 1981, Title 11, Sections 1301-1323,  
Title 16, Sections 3901-3910.

DOLLAR LIMIT

\$5,000.

SERVICE

By certified or registered mail, U.S. Marshall or  
court-approved adult.

STATUTE OF LIMITATIONS

Written contracts 4 years, Oral Contracts 3 years, Most Torts  
1 year, Judgment lasts 12 years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Not permitted.

TRANSFER OF TRIAL TO HIGHER COURT

When either side requests jury trial or if counterclaim  
involves real estate.

APPEALS

By either side but only on questions of law.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

#### GOVERNMENT BENEFITS

The following government benefits are exempt to the debtor receiving the benefits:

1. Aid to blind, AFDC, aged and disabled under statute 3-215.1.
2. General assistance benefits are exempt by statute 3-215.1.
3. Crime victim's compensation under statute 3-407.
4. Unemployment compensation by statute 46-119.
5. Worker's Compensation benefits under statute 36-317:

#### HOMESTEAD EXEMPTION

Any property used as a residence or coop that debtor or debtor's dependent uses as a residence under statute 15-501(a)(14) The courts in Warman vs. Strawberry 587 F.Supp. 109 1983, Travis vs. Benson 1976, 300 A.2d 506, and Estate of Wall 440 F.2d.215 have held that a debtor's half-interest in a tenancy by the entireties (joint tenancy with a spouse) is exempt unless both spouses are seeking to discharge their debts.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under District of Columbia law:

1. Benefits from fraternal societies are exempt under

- statute 35-1211.
2. Disability benefits under statute 35-522.
  3. Life insurance proceeds and cash value under statute 35-521.
  4. Insurance proceeds to \$200 per month are exempt for a maximum of two months for a head of household, \$60 for everyone else under statute 15-503.
  5. Group life insurance proceeds and policy are exempt under statute 35-523.
  6. Insurance proceeds when the policy forbids payment to creditors under statute 35-525.

#### PERSONAL PROPERTY

District of Columbia has exemptions for the following personal property:

1. Under statute 15-501:
  - (a) Household furniture and appliances to \$300.
  - (b) Clothing to \$300.
  - (c) Books to \$400.
  - (d) Family pictures and portraits.
  - (e) Food and fuel for three months.
  - (f) Motor Vehicle to \$2,575.
2. Holdings in cooperative associations to \$50 under statute 29-1128.
3. Business partnership property under statute 41-124.
4. Funeral plot under statute 27-111.
5. Payment for loss of debtor or person on whom debtor depended.

6. Higher education or tuition savings account under statute 45-4510.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt to protect the debtor receiving the benefits:

1. Judges under statute 11-1570.
2. Public school teachers under statutes 31-1217 and 31-1238.
3. IRAs, ERISDs and Keoghs under Statute 15-501(a)(9).

#### TOOLS OF THE DEBTOR'S TRADE

Under District of Columbia law the following property used in the debtor's trade and business are exempt:

1. Under statute 15-501:
  - (a) Furniture, library and tools of professional person and artist to \$300 are exempt.
  - (b) Tools of trade or business to \$1,625.
  - (c) Mechanic's tools to \$200
2. Seals and documents of public notary under statute 1-806.

#### WAGES

Under statute 16-572, 75% or 30 times the federal minimum wage (the lesser) is exempt.

Under statute 15-502, non-wage earnings to \$200 per month are exempt for a head of household and \$60 per month for nonhead-of-household.

### **FLORIDA**

#### GOVERNING STATUTES

Florida Rules of Court (1989). Small Claims Rules, Rules

278

7.010-7.341.

DOLLAR LIMIT

\$5,000.

SERVICE

By registered mail, peace officer or court-approved adult.

STATUTE OF LIMITATIONS

Most contracts five years, most torts four years, judgments last seven years.

JURY TRIALS

Permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If the defendant counterclaims for more than \$2,500.

APPEALS

By either side but only as to questions of law within 10 days of verdict being rendered.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

GOVERNMENT BENEFITS

The following government benefits are exempt to the debtor receiving the benefits:

1. General assistance under statute 222.201.
2. Compensation to victims of crimes by statute 960.14.
3. Social Security under statute 222.201.
4. Unemployment compensation by statutes 222.201 and 443.051
5. Worker's compensation benefits under statute 440.22.
6. Veteran's benefits under statutes 222.201 and 744.626.

#### HOMESTEAD EXEMPTION

Under statute 222.05 and the Florida Constitution Article X Section 4 there is an unlimited homestead exemption for  $\frac{1}{2}$  acre in a municipality or 160 acres elsewhere, includes mobile or modular home. The Bankruptcy Court in the cases In Re Blum 39 B.R. 897 and In Re Hohler 19 B.R. 308 1987 have ruled that a debtor's half-interest in a tenancy by the entireties (joint tenancy with a spouse) is exempt unless both spouses are liable for the debts. Homestead declaration may be filed by Statute 222.01.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Florida law:

1. Benefits from fraternal societies are exempt if received before October 1, 1996 under statute 632.619.
2. Disability or illness benefits under statutes 222.18.
3. Proceeds from annuity contracts under statute 222.14.
4. Death benefits if paid to a specific beneficiary not an

estate under statute 222.13.

5. Life insurance proceeds cash value under statute 222.14.

#### PERSONAL PROPERTY

Florida has a \$1,000 exemption for personal property. A married couple may double this exemption under the Florida Constitution 10-4. Florida has exemptions for the following property:

1. Alimony needed for support by statute 222.201.
2. Child support payments under statute 222.201.
3. Business partnership property under statute 620.68.
4. Motor Vehicle to \$1,000 under Statute 222.5

#### RETIREMENT BENEFITS

The following retirement benefits are exempt to protect the debtor receiving the benefits:

1. IRAs, Keoghs, SEPs and private pensions needed for support under statute 222.11.
2. ERISA benefits are exempt under statute 222.21.
3. State employees under statutes 121.131.
4. Teachers under statute 238.15.
5. Police officers under statute 185.25.
6. Highway patrol officers under statute 321.22.
7. Firefighters under statute 175.241.
8. County officers and employees under statute 122.15.

#### TOOLS OF THE DEBTOR'S TRADE

Under Florida law there is no exemption for property used in the debtor's trade and business.

WAGES

Under statute 222.11, earned but unpaid and paid wages in a bank account for a head of household are exempt up to \$500 per week for six months.

GEORGIA

GOVERNING STATUTES

Georgia Code Annotated 1985, Title 15, sections 10.1, 10.20, 10.40-137.

DOLLAR LIMIT

\$5,000.

SERVICE

Constable or court-approved adult.

STATUTE OF LIMITATIONS

Written contracts five years, oral contracts four years, most torts two to five years, judgments last seven years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If the defendant counterclaims for over \$5,000.

APPEALS

By either party.

#### JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

#### GOVERNMENT BENEFITS

The following government benefits are exempt to protect the debtor receiving the benefits:

1. Under statute 44-13-100:
  - (a) Public assistance under statute 44-13-100.
  - (b) Social Security benefits under statute 44-13-100.
  - (c) Unemployment compensation under statute 44-13-100.
  - (d) Veteran's benefits under statute 44-13-100.
  - (e) Victim's crime compensation under statute 44-13-100
2. Old age assistance under statute 49-4-35.
3. Assistance to the blind under statute 49-4-58.
4. Assistance to the disabled under statute 49-4-84.
5. Worker's compensation under statute 34-9-84.

#### HOMESTEAD EXEMPTION

The homestead exemption is \$10,000, and any unused portion can be applied to any other property under statute 44-13-100. Husband and wife may double in bankruptcy.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Georgia law:

1. Disability or health benefits to \$250 per month under statute 33-29-15.
2. Benefits from annuity under statute 33-28-7.
3. Group insurance benefits under statute 33-30-10.
4. Fraternal society benefits are exempt under statute 33-15-20.
5. Industrial life insurance policy owned by someone on whom the debtor relied for support under statute 33-26-5.
6. Life insurance benefits if beneficiary isn't the insured under statute 33-25-11.
7. Life insurance benefits if policy owned by someone needed by or on whom the debtor depended for support under statute 33-26-5.
8. Unmatured life insurance dividends, interest or cash value to \$2,000 under statute 44-13-100.
9. Unmatured life insurance policy under statute 44-13-100.

#### PERSONAL PROPERTY

Georgia has exemptions for the following personal property that can be claimed by a debtor under statute 44-13-100:

1. \$300 is exempted for each of the following: animals, crops, appliances, furnishings, household goods, books, musical instruments and clothing for a total of \$5,000.
2. Funeral plots in lieu of a homestead.
3. Medical aids are exempt.
4. Jewelry is exempt to \$500.
5. Motor vehicle is exempt to \$3,500, husband and wife may

double in bankruptcy.

6. Personal injury recoveries are exempt to \$7,500.
7. Wrongful death recoveries needed for support are exempt.
8. Lost future earnings needed for support are exempt.
9. Child and spousal needs for support.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt to protect the debtor receiving the benefits:

1. ERISA benefits under statute 18-4-22.
2. Other pension benefits needed for support under statute 18-4-22.
3. IRAs under statute 18-4-22.
4. Public employees under statute 47-2-332.

#### TOOLS OF THE DEBTOR'S TRADE

Under Georgia law, tools, instruments, books of trade used in a debtor's trade or business are exempt to \$1,500.00 under statute 44-13-100.

#### WAGES

Under statutes 18-4-20 and 18-4-21, 75% or 30 times the federal minimum wage (the lesser) is exempt.

#### HAWAII

#### GOVERNING STATUTES

Hawaii Revised Statutes 1985, Title 34, Section 633.27-36.

#### DOLLAR LIMIT

\$3,500. Counterclaims up to \$20,000 no limit on landlord-tenant rent deposit cases.

#### SERVICE

By certified or registered mail, sheriff or court-approved adult.

#### STATUTE OF LIMITATIONS

Most contracts four years, most torts two years, judgments last 10 years.

#### JURY TRIALS

Permitted.

#### ATTORNEYS

Permitted.

#### EQUITABLE RELIEF

Not permitted except landlord-tenant cases

#### TRANSFER OF TRIAL TO HIGHER COURT

If either side requests a jury trial or the defendant counterclaims for more than \$5,000, otherwise with Plaintiff's consent.

#### APPEALS

Not permitted.

#### JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

## GOVERNMENT BENEFITS

The following government benefits are exempt to the debtor receiving the benefits:

1. Public assistance for work done in home or workshop under statute 20-346-33.
2. Unemployment work relief funds to \$60 per month are exempt under statute 36-653-4.
3. Unemployment compensation by statute 21-383-163.
4. Worker's Compensation benefits under statute 21-386-57.

## HOMESTEAD EXEMPTION

Under statutes 36-651-91 and 36-651-92, there is a homestead exemption of \$30,000 to a head of household or debtor over 65 years of age. For all debtors, the exemption amount is \$20,000. The proceeds from a sale are exempt for six months. In *Hinchee vs. Security Bank*, 624 P.2d 821 and *Sewada vs. Endo* 1977, P.2d 1291, the courts have ruled that a debtor's half-interest in a tenancy by the entirety (joint tenancy with a spouse) is exempt unless it is a joint debt.

## INSURANCE

There are several exemptions for different types of insurance proceeds under Hawaii law:

1. Benefits of fraternal societies are exempt under statute 24-431:10-232.
2. Health and disability benefits by statute 24-431:10-231.
3. Insurance proceeds when the policy forbids payment to

creditors under statute 24-431:10-D-112.

4. Life insurance policy on spouse or child under statute 24-431:10-234.
5. Group life insurance proceeds under statute 24:431:10 233.
6. Benefits from annuity contract if debtor is the insured's spouse, parent or child under statute 24-431:10-232.

#### PERSONAL PROPERTY

Hawaii has exemptions for the following personal property:

1. Under statute 36-651-121:
  - (a) Appliances and household goods as needed.
  - (b) Books.
  - (c) Funeral plot.
  - (d) Clothing as needed.
  - (e) Motor vehicle to \$2,575.
  - (f) Recoveries for damaged exempt property for 6 months.
  - (g) Jewelry up to \$1,000.
2. Down payments for home in a state project under statute 20-359-104.
3. Business partnership property under statute 23-425-125.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt to the debtor receiving the benefits:

1. Public employees' plans under 7-88-91 and 36-653-3.

2. ERISA benefits deposited over 3 years before the bankruptcy filing are exempt under statute 36-651-124.
3. Firefighters' plans under statute 7-88-169.
4. Police officers' plans under statute 7-88-169.

#### TOOLS OF THE DEBTOR'S TRADE

Under Hawaiian law, books, tools and implements used in the debtor's trade are exempt as needed under statute 36-651-121.

#### WAGES

The first 5% of the first \$100 of wages, 10% of the next \$100 and 20% of the remaining wages may be attached.

#### IDAHO

#### GOVERNING STATUTES

Idaho Code 1985, Title 1, Sections 2301-2315.

#### DOLLAR LIMIT

\$4,000.

#### SERVICE

By certified or registered mail, sheriff or court-approved adult.

#### STATUTE OF LIMITATIONS

Written contracts five years, oral contracts four years, most torts two years, judgments last six years.

#### JURY TRIALS

Not permitted.

#### ATTORNEYS

Not permitted.

TRANSFER OF TRIAL TO HIGHER COURT

Not permitted.

APPEALS

By either side.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Under statute 11-603:
  - (a) Social Security benefits.
  - (b) Unemployment compensation.
  - (b) Veteran's benefits.
2. Under statute 56-223.
  - (a) Old age assistance.
  - (b) Assistance to the blind.
  - (c) Assistance to the disabled.
  - (d) Assistance under AFDC.
3. Worker's compensation under statute 72-802.
4. Victim's crime compensation under statute 72-1020.

HOMESTEAD EXEMPTION

Under statute 55-1003, the homestead exemption is \$50,000.

Sale proceeds are exempt for six months. Homestead declaration must be recorded for property not occupied by Statute 55-1004.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Idaho law:

1. Medical or hospital benefits under statute 11-603.
2. Disability or death benefits are exempt by statute 11-604.
3. Benefits from annuity to \$350 per month under statute 41-1835.
4. Group insurance benefits under statute 41-1834.
5. Industrial life insurance policy if the beneficiary is a married woman is exempt under statute 41-1830.
6. Life insurance benefits if beneficiary is not the insured under statute 41-1833.
7. Life insurance benefits if policy prohibits payment to creditors under statute 41-1833.
8. Benefits from fraternal societies under statute 41-3218.
9. Insurance proceeds to \$25,000 to homeowners under statute 55-1201.

#### PERSONAL PROPERTY

Idaho has exemptions for the following personal property:

1. \$500 is exempted for each of the following: appliances, furnishings, one firearm, heirlooms, household goods, books, musical instruments and clothing for a total of

- \$5,000 under statute 11-605.
2. Funeral plot under statute 11-603.
  3. Medical Aids are exempt under statute 11-603.
  4. Jewelry is exempt to \$1,000 under statute 11-650.
  5. Motor vehicle is exempt to \$3,000 under statute 11-605.
  6. Personal injury recoveries needed for support are exempt under statute 11-604.
  7. Wrongful death recoveries needed for support are exempt under statute 11-604.
  8. Funds for damages to exempt property are exempt for 3 months under statute 11-606.
  9. Building materials under statute 45-514.
  10. Crops grown by debtor on 50 acres to \$1,000 under statute 11-605.
  11. Child and spousal support needed for debtor's support under statute 11-604.
  12. Liquor licenses are exempt under statute 23-514.
  13. Business property of partnership is exempt under statute 53-325.
  14. \$800 on any tangible property under Statute 11-605(10).

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. ERISA benefits to the extent they are tax deferred under statute 55-1611.
2. Public employees under statute 59-1317.
3. Other pension benefits including IRAs and Keoghs needed

for support under statute 11-604.

4. Firefighters under statute 72-1417.
5. Police officer under statute 50-1517.

TOOLS OF THE DEBTOR'S TRADE

Under Idaho law, tools, instruments, books of trade up to \$1,000 along with arms and uniforms that peace officer or member of military are required to keep are exempt under statute 11-605.

WAGES

Under statutes 11-207, 75% or 40 times the federal minimum wage (the lesser) are exempt.

**ILLINOIS**

GOVERNING STATUTES

Illinois Annotated Statutes 1985, Ch.110A, Sections 281289

DOLLAR LIMIT

\$5,000 in Small Claims Division

\$2,500 in "Pro Se" of Cook County

SERVICE

By registered mail, sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Written contracts 10 years, oral contracts five years, most torts two years, property damage five years, judgments last seven years.

JURY TRIALS

Permitted.

ATTORNEYS

Permitted except in COOK COUNTY "PER SE" where the defendant can still have one.

TRANSFER OF TRIAL TO HIGHER COURT

Permitted if claim or counterclaim over \$5,000.

APPEALS

By either side as to question of law only within 30 days of the verdict.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Under statute 23-11-3:
  - (a) Old age assistance.
  - (b) Assistance to the blind.
  - (c) Assistance to the disabled.
  - (d) Assistance under AFDC.
2. Worker's compensation under statute 48-138.21.
3. Occupational disease compensation under statute 48-172.56.
4. Unemployment compensation under statute 48-540.
5. Under statute 110-12-1001:

- (a) Social Security benefits.
- (b) Veteran's benefits.
- (c) Victim's crime compensation.

#### HOMESTEAD EXEMPTION

Under statute 110-12-901, the homestead exemption is \$7,500. Sale proceeds are exempt for one year. A married couple may double this exemption. A spouse or child of a deceased owner may, under statute 110-12-902, claim a homestead exemption.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Illinois law:

1. Under statute 110-12-1001:
  - (a) Disability or health benefits are exempt.
  - (b) Life insurance policy if the beneficiary is the insured's spouse or child is exempt.
  - (c) Life insurance proceeds needed for support.
2. Life insurance benefits if policy prohibits payment to creditors under statute 73-853.
3. Benefits from fraternal societies under statute 73-925.
4. Proceeds from homeowner's policy on destroyed home to \$7,500 under statute 110-12-907.
5. Life insurance proceeds if the beneficiary is the debtor's child, parent, spouse or child is exempt under statute 73-850.

#### PERSONAL PROPERTY

Illinois has exemptions for the following personal property:

1. Under statute 110-12-1001:
  - (a) Bible, family pictures, portraits, school books and medical aids are exempt.
  - (b) Motor vehicle is exempt to \$1,200.
  - (c) Personal injury recoveries to \$7,500 is exempt.
  - (d) Wrongful death recoveries needed for support are exempt.
  - (e) Funds for damages to exempt property are exempt.
  - (f) Clothing as needed.
  - (g) Child and spousal support needed for debtor's support.
2. Business property of partnership is exempt under statute 106.5-25.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. ERISA benefits including IRAs, SEPs and Keoghs to the extent payments being received under statute 110-12-1006.
2. State employees under statute 108.5-14-147.
3. State university employees under statute 108-15-185.
4. Firefighters under statute 108-5-4-135, 108.5-6-213.
5. Dependents of firefighters and disabled firefighters under statutes 108.5-135 and 108.5-22-230.
6. Assembly members under statute 108.5-2-154.
7. Correctional employees under statute 108-19-117.

8. Municipal employees under statutes 108.5-7-217,  
108.5-8-244.
9. Park employees under statute 108.5-12-190.
10. Police officers under statutes 108.5-3-144.1,  
108.5-5-218.
11. Library employees under statute 108.5-19-218.
12. Sanitation employees under statute 108.5-13-213.
13. Teachers under statutes 108.5-16-190, 105-17-151
14. County employees under statute 108.5-9-228.
15. Civil service employees under statute 108.5-11-223.
16. Judges under statute 108.5-18-161.

#### TOOLS OF THE DEBTOR'S TRADE

Under Illinois law, tools, instruments, books of trade used in a debtor's trade or business to \$750 are exempt under statute 110-12-1001.

#### WAGES

Under statutes 110-12-803, 85% or 40 times the federal minimum wage (the lesser) is exempt.

#### INDIANA

#### GOVERNING STATUTES

Indiana Annotated Code 1983, Title 33, Sections 5.1 to 5.7, 11.6-1-1 to 11.6-1-7, 11.6-4-1 to 11.6-9-5.

#### DOLLAR LIMIT

\$6,000

SERVICE

By registered mail or peace officer.

STATUTE OF LIMITATIONS

Written contract 10 years, oral contracts six years, sale of goods four years, most torts two years, judgments last 10 years.

JURY TRIALS

Not permitted except when within 10 days of trial the defendant can show that there are questions of fact requiring a jury determination then transfer is to Circuit, Superior or County Court.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Not permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If defendant requested jury trial.

APPEALS

By other side as to questions of law only.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under statute 22-3-2-17.
2. Unemployment compensation under statute 22-4-33-3.
3. Victim's crime compensation under statute 16-7-3.6-15.

#### HOMESTEAD EXEMPTION

Under statute 34-2-28-1, the homestead exemption is \$7,500. The homestead exemption plus the personal property exemption cannot exceed \$10,000. Tenancies by the entireties (a form of joint tenancy with a spouse) are exempt unless the debts are incurred by both spouses, *In re Jeffers* 1 C.B.C. 559 and *In the Matter of Haynes* 4 C.B.C. 181 (1981).

#### INSURANCE

There are several exemptions for different types of insurance under Indiana law:

1. Benefits from fraternal societies under statute 27-11-6-3.
2. Group life insurance is exempt under statute 27-1-12-29.
3. Life insurance policy if the beneficiary is the insured's spouse or dependent is exempt under statute 27-1-12-14.
4. Life insurance benefits if policy prohibits payment to creditors under statute 27-2-5-1.
5. Life insurance or accident proceeds needed under statute 27-8-3-23.

#### PERSONAL PROPERTY

Indiana has exemptions for the following personal property:

1. Under statute 34-2-28-1:

- (a) Medical aids are exempt.
  - (b) Money in a Medical Care Savings Account by Statute 34-2-28-1.
  - (c) Any intangible personal property except money owed to the debtor can be exempted to \$100.
2. Business property of partnership under statute 23-4-1-25.

RETIREMENT BENEFITS

The following retirement benefits are exempt:

- 1. Firefighters under statute 36-8-7-22 and 36-8-8-17.
- 2. Police officers for benefits increasing under statute 10-1-2-9 and 36-8-10-19.
- 3. Public employees under statute 5-10.3-8-9,
- 4. Sheriffs for benefits increasing under statute 36-8-10-19.
- 5. Teachers under statute 21-6.1-5-17.

TOOLS OF THE DEBTOR'S TRADE

Under Indiana law, uniforms, arms and equipment of military and National Guard personnel are exempt under statute 10-2-6-3.

WAGES

Under statutes 24-4.5-5-105, 75% or 30 times the federal minimum wage (the lesser) is exempt.

IOWA

GOVERNING STATUTES

Iowa Code Annotated 1964, Section 631.1-17.

DOLLAR LIMIT

\$5,000.

SERVICE

By certified or registered mail, peace officer or court-approved adult.

STATUTE OF LIMITATIONS

Written contracts 10 years, oral contracts five years, most torts two years, judgments last 10 years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Not permitted except replevin(return of specific property worth \$4,000 or less).

TRANSFER OF TRIAL TO HIGHER COURT

If Jury requested by the defendant or the counterclaim is over \$2,000.

APPEALS

By either party but only as to questions of law within 20 days of judgment.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is an automatic lien on the debtor's real property in the county where the judgment was obtained. The judgment creditor must record the judgment in every other county where the judgment

debtor has property in order to have a lien on the property in that county.

#### GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under statute 627.13.
2. Social Security benefits under statute 627.6.
3. Unemployment compensation under statute 627.6
4. Veteran's benefits under statute 627.6.
5. Child assistance under statute 627.19.
6. Assistance under AFDC under statute 627.6.

#### HOMESTEAD EXEMPTION

Under statutes 499A-18, 561.2, 561.16, the homestead exemption is unlimited for a home on one half acre in a town or city and 40 acres elsewhere. The debtor may record a homestead declaration by Statute 561.4.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Iowa law:

1. Benefits from accident, disability, health or life insurance to \$15,000 paid to the surviving spouse, child or dependent are exempt under statute 627.6.
2. Group insurance policy or benefits under statute 509.12.
3. Life insurance proceeds to \$10,000 are exempt if received within 2 years of the bankruptcy filing and paid to spouse, child or other dependent under statute 627.6.

4. Life insurance benefits if policy prohibits payment to creditors under statute 508.32.

#### PERSONAL PROPERTY

Iowa has exemptions for the following personal property:

1. Under statute 627.6:
  - (a) Bible, family pictures, portraits to \$2,000 total are exempt.
  - (b) Motor vehicle, musical instrument and tax refund to \$1,000 are exempt to a total of \$5,000 .
  - (c) Medical aids are exempt.
  - (d) Rifle or shotgun is exempt.
  - (e) Wedding and engagement rings are exempt.
  - (f) Funeral plot.
  - (g) Clothing to \$1,000.
  - (h) Appliances and household furnishings to \$2,000.
  - (i) Child and spousal support needed for debtor's support.
2. Business property of partnership is exempt under statute 544.25.
3. Liquor licenses under statute 123.38.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. Firefighters under statute 411.3.
2. Disabled firefighters or police for payments being received under statute 410.11.

3. Federal pension benefits being received under statute 627.8.
4. Public employees under statute 97B-39.
5. Police officers under statute 411.13.
6. Peace officers under statute 97A-12.
7. ERISA, IRA and KEOGHS under statute 627.6(8)(f) other plans as needed for support under 627.6(8)(e).

TOOLS OF THE DEBTOR'S TRADE

Under statute 627.6, the following property used in the debtor's trade and business is exempt:

1. Farming equipment and livestock except for a automobile are exempt to \$10,000.
2. Nonfarming equipment, except an automobile, to \$10,000.

WAGES

Under statutes 642.21, 75% of earned but unpaid wages and pensions are exempt.

**KANSAS**

GOVERNING STATUTES

Kansas Statute Annotated 1983, Sections 61-2701-2713

DOLLAR LIMIT

\$1,800.

SERVICE

Sheriff, attorney or court-approved adult.

STATUTE OF LIMITATIONS

Written contracts five years, oral contracts three years, most torts two years, judgments last five years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Not permitted except for replevin (the return of specific property worth less than \$1,800).

TRANSFER OF TRIAL TO HIGHER COURT

If the defendant counterclaims for more than \$1,800.

APPEALS

By either party within 10 days of judgment.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Under statute 39-717:
  - (a) Social Security benefits.
  - (b) General assistance.
  - (c) Assistance under AFDC.
2. Worker's compensation under statute 44-514.

3. Unemployment compensation under statute 44-718.
4. Victim's crime compensation under statute 74-7313.

#### HOMESTEAD EXEMPTION

Under statute 60-2301 and the State Constitution Article XV section 9, there is an unlimited homestead exemption for a home to 1 acre in a city or 160 acres in a farm or ranch.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Kansas law:

1. Under statute 40-414:
  - (a) Benefits from fraternal societies.
  - (b) Life insurance cash or forfeiture value if the policy was bought more than one year before the bankruptcy filing.
  - (c) Life insurance benefits if policy prohibits payment to creditors.
  - (d) Life insurance proceeds or cash value deposited into a bank account.
2. Life insurance proceeds to \$1000 paid to a deceased's estate and not a specific beneficiary is exempt under statute 40-258.

#### PERSONAL PROPERTY

Kansas has exemptions for the following personal property:

1. Under statute 60-2304:
  - (a) Appliances and furnishings.

- (b) Motor vehicle is exempt to \$20,000 but unlimited if equipped for a disabled person.
  - (c) Clothing for one year.
  - (d) Funeral plot.
  - (e) Food and fuel for one year.
  - (f) Jewelry to \$1,000.
2. Funeral plan prepayments under statute 16-320.
  3. Liquor licenses under statute 41-326.
  4. Business property of partnership under statute 56-325.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. ERISA benefits under statutes 60-2308 and 60-2313.
2. Federal pensions benefits needed for support and paid within three months of the bankruptcy filing under statute 60-2308.
3. City officials in cities with population between 120,000 and 200,000 are exempt under statute 13-14.102.
4. Firefighters and police under statute 12-5005.
5. Judges under statute 74-2618.
6. Public employees under statute 74-4923.
7. Highway patrol officers under statute 74-4989.
8. State school employees under 72-5226.

#### TOOLS OF THE DEBTOR'S TRADE

Under Kansas law, tools, instruments, books, animals, seeds used in the debtor's trade and business to a total value of \$7500

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are exempt under statute 60-2304.

WAGES

Under statute 60-2310, the lesser of 30 times the minimum wage or 75% of wage is exempt.

**KENTUCKY**

GOVERNING STATUTES

Kentucky Revised Statutes 1986, Ch. 24A.200-360.

DOLLAR LIMIT

\$1,500.

SERVICE

By certified or registered mail, sheriff or constable.

STATUTE OF LIMITATIONS

Written contracts 15 years, oral contracts five years, torts one to eight years, judgments last 15 years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If the counterclaim is over \$1,500 or the defendant requests a jury.

APPEALS

By either side but only as to questions of law.

#### JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

#### GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under statute 342.180.
2. Unemployment compensation under statute 341.470.
3. Victim's crime compensation under statute 427.150.
4. Under statute 205.220:
  - (a) Assistance to the aged.
  - (b) Assistance to the blind.
  - (c) Assistance to the disabled.
  - (d) Assistance under AFDC.

#### HOMESTEAD EXEMPTION

Under statute 427.060, the homestead exemption is \$5,000.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Kentucky law:

1. Disability or health benefits are exempt by statute 304.14 310.
2. Group insurance benefits under statute 304.14-320.
3. Benefits from annuity to \$350 per month under statute

304.14-330.

4. Life insurance policy if the beneficiary is a married woman is exempt under statute 304.14-340.
5. Life insurance benefits if beneficiary isn't the insured under statute 304.14-350.
6. Life insurance benefits if policy prohibits payment to creditors under statute 304.14-350.
7. Benefits from fraternal societies under statute 427.110.
8. Benefits from cooperative life or casualty insurance policies under statute 427.110.

#### PERSONAL PROPERTY

Kentucky has exemptions for the following personal property:

1. Furnishing, jewelry and clothing to \$3,000 total under statute 427.010.
2. Funeral plot to \$5,000 in lieu of homestead under statute 427.060.
3. Medical Aids are exempt under statute 427.010.
4. Lost earnings needed for support are exempt under statute 427.150.
5. Motor vehicle is exempt to \$2,500 under statute 427.010.
6. Personal injury recoveries not including pain and suffering or pecuniary loss to \$7,500 are exempt under statute 427.150.
7. Wrongful death recoveries needed for support are exempt under statute 427.150.

8. Payments received under the motor vehicle reparation law are exempt under statute 304.39-260.
9. Child and spousal support needed for debtor's support under statute 427.150.
10. Business property of partnership is exempt under statute 362.270.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt to:

1. State employees under statute 61.690.
2. Teachers under statute 161.700.
3. Other pension benefits, including IRAs, SEPs and Keoghs, needed for support under statute 427.150.
4. Firefighters and Police officer under statutes 67A.520, 95.878, 427.120, 427.125.
5. County government employees under statute 67A.350.

#### TOOLS OF THE DEBTOR'S TRADE

Under Kentucky law the following property used in the debtor's trade and business is exempt:

1. Tools of a nonfarmer are exempt to \$300 under statute 427.030.
2. Tools, equipment and livestock to farmer to \$3,000 in value under statute 427.010.
3. Office equipment and library of minister, attorney, doctor, veterinarian and dentist to \$1,000 under statute 427.040.

4. Motor vehicle to \$2,500 in value for attorney, doctor, veterinarian, dentist, mechanic, and mechanical or electrical servicer under statute 427.010.

WAGES

Under statute 427.010, 75% or 30 times the federal minimum wage (the lesser) is exempt.

LOUISIANA

GOVERNING STATUTES

Louisiana Statutes Annotated 1968, Sections 13.5200-13.5211.  
Code of Civil Procedure Articles 4831, 4911-4925.

DOLLAR LIMIT

Justice Court \$1,200, City Court Small Claims Division \$3,000

SERVICE

By certified mail, sheriff or constable.

STATUTE OF LIMITATIONS

Most contracts three years, most torts one year, judgment lasts 10 years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If the defendant counterclaims for more than \$2,000.

#### APPEALS

Not allowed for city court's judgments but permitted for justice of peace judgments within 15 days of judgment.

#### JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

#### SPECIAL NOTE

No cases involving the ownership of real property.

#### GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under statute 23:1205.
2. Unemployment compensation under statute 23:1693.
3. Under statute 46:111:
  - (a) Assistance to the aged.
  - (b) Assistance to the blind.
  - (c) Assistance to the disabled.
  - (d) Assistance under AFDC.
4. Victim's crime compensation under statute 46:1811.

#### HOMESTEAD EXEMPTION

Under statute 20:1 the homestead exemption is \$25,000 on up to 5 acres in town and 200 acres elsewhere . The spouse or child of a deceased owner may claim the exemption. The debtor must occupy the property when the exemption is claimed. A married couple may not

double this exemption. Exemption may be unlimited if debt was for catastrophic or terminal illness.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Louisiana law:

1. Benefits from fraternal societies under statute 22:558.
2. Disability or health benefits are exempt by statute 22:646.
3. Life insurance proceeds or cash value are exempt under statute 22:647.
4. Group insurance benefits under statute 22:649.

#### PERSONAL PROPERTY

Louisiana has exemptions for the following personal property:

1. Furnishing, appliances, clothing, family pictures, musical instruments, poultry, one cow, sewing machine, military arms and uniforms under statute 13:3881.
2. Funeral plot under statute 8:313.
3. Medical aids are exempt under statute 13:3881.
4. Lost earnings needed for support are exempt under statute 427.150.
5. Wedding and engagement rings worth to \$5,000 under statute 13:3881.
6. Spendthrift trusts under statute 9:2004

#### RETIREMENT BENEFITS

The following retirement benefits are exempt under statute 20:33:

1. ERISA benefits, to the extent tax-deferred, if the contributions were made over one year prior to the bankruptcy filing.
2. IRAs, SEPs and Keoghs.
3. Gifts by employer to the employee or the employee's heirs.
4. Assessor's pensions under Statute 11:1401.
5. Court Clerks' pensions under Statute 11:1526.
6. District Attorneys' pensions under Statute 11:1583.
7. Firemen's pensions under Statute 11:2263.
8. Judges' pensions under Statute 11:1378.
9. Louisiana University Employees' pensions under Statute 17:1613.
10. Municipal Employees' pensions under Statute 11:1735.
11. Parochial Employees' pensions under Statute 11:1905.
12. Police pensions under Statute 11:3513.
13. School Employees' pensions under Statute 11:1003.
14. Sheriffs' pensions under Statute 11:2182.
- 15.. Teachers' pensions under Statute 11:704.
- 16.. Voting Registrar's pensions under Statute 11:2033.

#### TOOLS OF THE DEBTOR'S TRADE

Under Louisiana law, tools, equipment, instruments and pick truck to three tons or a nonluxury auto and utility trailer needed for the debtor's trade or business are exempt under statute 13:3881.

WAGES

Under statute 13:3881, 75% or 30 times the federal minimum wage (the lesser) is exempt.

**MAINE**

GOVERNING STATUTES

Maine Revised Statutes Annotated 1964, Title 14, sections 1901, 7481-7485, Maine Rules of Small Claims Procedure, Rules 1-18.

DOLLAR LIMIT

\$4,500.

SERVICE

By certified or registered mail, sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Most contracts six years, most torts three years, judgments last 20 years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Not permitted except for replevin (the return of personal property) or orders to refund, repair or rescind a contract.

TRANSFER OF TRIAL TO HIGHER COURT

Permitted.

## APPEALS

Permitted within 10 days of judgment

## JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

## SPECIAL NOTE

No cases involving the ownership of real estate.

## GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Under statute 14-4422:
  - (a) Social Security benefits.
  - (b) Unemployment compensation.
  - (c) Veteran's benefits.
  - (d) Victim's crime compensation.
2. Assistance under AFDC under statutes 22-3753 and 14-1422.
3. Worker's compensation under statute 39-67.

## HOMESTEAD EXEMPTION

Under statute 14-4422, the homestead exemption is \$12,500 increasing to \$60,000 for a person over age 60 or physically or mentally disabled. A married couple may double this exemption. Exemption increased to \$25,000 if debtor has minor dependents in residence.

## INSURANCE

There are several exemptions for different types of insurance proceeds under Maine law:

1. Disability or health benefits are exempt by statute 24 A-2429.
2. Benefits from annuity to \$450 per month under statute 24-A-2431.
3. Group insurance benefits under statute 24-A-2430.
4. Unmatured life insurance policy (except credit insurance policy) is exempt under statute 14:4422.
5. Life, accident, annuity policy, proceeds or cash value under statute 24-A-2428.
6. Life insurance, policy, interest, cash value or proceeds on insured on whom debtor relied for support to \$4,000 under statute 14-4422.
7. Benefits from fraternal societies under statute 24-A 4118

#### PERSONAL PROPERTY

Maine has exemptions for the following personal property:

1. Balance due on the sale of repossessed goods providing the amount financed didn't exceed \$2,000 under statute 9 A-5-103.
2. Under statute 14-4422:
  - (a) Appliances, furnishings, household goods, books, musical instruments, clothing, tools of trade above the tools of trade exemption and personal injury recoveries above the personal injury recovery

exemption for a total of \$4,500. These items may also be claimed in lieu of the homestead exemption.

- (b) Funeral plot in lieu of a homestead exemption.
  - (c) Medical aids are exempt.
  - (d) Jewelry is exempt to \$750.
  - (e) Motor vehicle is exempt to \$5,000.
  - (f) Personal injury recoveries not including pain and suffering to \$12,500.
  - (g) Wrongful death recoveries needed for support are exempt.
  - (h) Wedding and engagement rings.
  - (I) Tools to harvest food.
  - (j) Seeds and fertilizer to raise food for 1 season.
  - (k) Lost earnings need for support.
  - (l) Animals, crops musical instruments and books are exempt to \$200 each.
  - (m) Food to last six months, fuel not to exceed 10 cords of wood, five tons of coal or 200 gallons of fuel.
  - (n) Furnaces and stoves used for heat.
  - (o) Child and spousal support payments to the extent needed for support.
3. Business property of partnership is exempt under statute 31-305.
  4. Arms and uniforms for military personnel under statute

37-B-262.

RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. ERISA benefits under statute 14-4422.
2. State employees under statute 5-17054.
3. Legislators under statute 3-703.
4. Judges under statute 4-1203.

TOOLS OF THE DEBTOR'S TRADE

Under Maine law the following property used in the debtor's trade or business are exempt under statute 14-4422:

1. Stock, materials and books used in business to a total value of \$5,000.
2. A commercial fishing boat not exceeding five tons.
3. One of each type of farm instrument used by a farmer.

WAGES

Not exempt.

**MARYLAND**

GOVERNING STATUTES

Annotated Code of Maryland 1986, Courts and Judicial Proceedings Article, Section 4-405. Maryland Rule of Civil Procedure, Rule 3-701.

DOLLAR LIMIT

\$2,500.

SERVICE

By certified mail, sheriff or disinterested adult.

STATUTE OF LIMITATIONS

Most contracts four years, most torts three years, judgments last 12 years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If either party requests a jury trial or the defendant counterclaims for more than \$2,500.

APPEALS

By either party.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under Maryland's Labor Code 9-732.
2. Unemployment compensation by Maryland's Labor Code 8-106.
3. Victim's crime compensation under Annotated Code of

Maryland section 26A-13.

4. Public assistance under Annotated Code of Maryland section 88A-73.
5. Assistance under AFDC under Annotated Code of Maryland section 88A-73.

#### HOMESTEAD EXEMPTION

None but tenancies in the entirety were held exempt in the case of *In re Ford*, 1 C.B.C. 2d 840 1980 and *Sumy vs. Schlossberg* 777 F.2d 921 1985 unless the debts of both spouses are liable on the debt.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Maryland law:

1. Disability or health benefits are exempt by Courts & Judicial Proceedings section 11-504.
2. Medical benefits paid from wage deductions under Maryland's Commercial Code 15-601.1.
3. Life insurance or annuity proceeds if beneficiary is the insured's dependent or spouse under Maryland's Estate and Trusts Code section 8-115 and Annotated Code of Maryland section 48A-325.
4. Benefits from fraternal societies under Maryland's Estate and Trusts Code section 8-115 and Annotated Code of Maryland section 48A-328.

#### PERSONAL PROPERTY

Maryland has exemptions for the following personal property:

1. Furnishings, appliances, clothing, books and pets under statute to \$500 total under Courts & Judicial Proceedings section 11-504.
2. Funeral plot under Annotated Code of Maryland section 23-164.
3. Medical aids are exempt under Courts & Judicial Proceedings section 11-504.
4. Lost earnings needed for support are exempt under Courts & Judicial Proceedings section 11-504.
5. Business property of a partnership under Corporations Code section 9-502.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. ERISA benefits, not including IRAs, under Courts and Judicial Proceedings section 11-504.
2. Benefits for deceased Baltimore police officers under the Annotated Code of Maryland section 73B-49.
3. State employees under the Annotated Code of Maryland section 73B-17 and 73B-125.
4. State police under the Annotated Code of Maryland section 88B-60.
5. Teachers under the Annotated Code of Maryland section 73B-96 and 73B-152.

#### TOOLS OF THE DEBTOR'S TRADE

Under Maryland law, tools, equipment, instruments, appliances, clothing used in the debtor's business (but not an automobile) are exempt to \$2,500 under Courts & Judicial Proceedings section 11-504.

WAGES

Under Maryland's Commercial Code section 15-601.1, lesser of 75% of wages or 30 times the federal minimum wage is exempt.

**MASSACHUSETTS**

GOVERNING STATUTES

Annotated Laws of Massachusetts 1986, Ch.218, Sections 2125.

DOLLAR LIMIT

\$2,000. No limit on damages caused by motor vehicle.

SERVICE

By certified mail, sheriff or constable.

STATUTE OF LIMITATIONS

Most contracts six years, most torts two years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

At Court's discretion.

## APPEALS

By defendant within 10 days of judgment, jury is allowed on appeal.

## JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

## SPECIAL NOTE

No defamation cases.

## GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under statute 152-47.
2. Unemployment compensation under statute 151A-36.
4. Veteran's benefits under statute 115-5.
5. Assistance to aged and disabled under statute 235-34.
6. Assistance under AFDC under statute 118-10.

## HOMESTEAD EXEMPTION

Under statutes 188-1 and 188-1A, the homestead exemption is \$300,000. A married couple may not double. In addition, under statute 209-1 a debtor's interest in tenancy by the entirety property is exempt unless it is a joint debt or for the necessities of life. The debtor must record a homestead declaration to claim the homestead exemption.

## INSURANCE

There are several exemptions for different types of insurance proceeds under Massachusetts law:

1. Disability benefits to \$35 per week are exempt by statute 175-110A.
2. Benefits from group annuity under statute 175-132C.
3. Group insurance benefits under statute 175-135.
4. Proceeds from life or endowment policies under statute 175 125.
5. Proceeds from an exempt life insurance annuity contract under statute 172-125.
6. Proceeds from a life insurance policy that prohibits payment to creditors under statute 175-119A.
7. Benefits from fraternal societies under statute 176-22.
8. Medical malpractice self-insurance under statute 175F-15.

#### PERSONAL PROPERTY

Massachusetts has exemptions for the following personal property:

1. Under statute 235-34:
  - (a) Bank accounts to \$125 .
  - (b) Food or cash to but food to \$300.
  - (c) A Bible and books to \$200 total.
  - (d) A sewing machine to \$200.
  - (e) Funeral plots and pews.
  - (f) Cash for utilities to \$75 per month.
  - (g) Cash for rent to \$200 per month in lieu of a

homestead.

- (h) Shares in a cooperative to \$100.
  - (i) Animals 2 cow, 12 sheep, 2 swine and 4 tons of hay.
  - (j) Furniture to \$3,000.
  - (k) Motor vehicle to \$700.
2. Eminent domain moving expenses under statute 79-6A.
  3. Deposits in banks, credit unions or trust companies to \$500 in value under statute 246-28A.
  4. Business property of partnership under statute 108-A-25.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. ERISA benefits including IRA's under statute 235-34A.
2. Employees of savings banks under statute 168-41.
3. Public employees under statute 32-19.
4. Private retirement benefits under statute 32-41.

#### TOOLS OF THE DEBTOR'S TRADE

Under statute 235-24, the following property used in the debtor's trade or business is exempt:

1. Arms and uniforms of military personnel.
2. Boats, fishing tackle and equipment of fishermen to \$500.
3. Products that the debtor designed to \$500.
4. Tools, instruments and equipment used in business to \$500.

#### WAGES

Massachusetts has the following exemptions regarding wages

under statute 246-28:

1. Wages are exempt to \$125.00 per week.
2. Wage and pension payments are exempt to \$100 per week.

**MICHIGAN**

GOVERNING STATUTES

Michigan Statutes Annotated 1986, Ch. 27A, Sections 8401-8427.

DOLLAR LIMIT

\$3,000.

SERVICE

By certified mail, sheriff or disinterested adult.

STATUTE OF LIMITATIONS

Most contracts six years, sale of goods four years, most torts two years.

JURY TRIALS

Not permitted.

ATTORNEYS

Not permitted.

EQUITABLE RELIEF

Not permitted.

TRANSFER OF TRIAL TO HIGHER COURT

Upon request of either party or defendant counterclaims for more than \$1,750.

APPEALS

Not permitted unless trial was before a district court

magistrate then new trial.

#### JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

#### SPECIAL NOTE

Do defamation cases, intentional torts cases or fraud cases.

#### GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under statute 418.821.
2. Veteran's benefits under statutes 35.977, 35.926 and 35.1027.
3. Unemployment compensation under statute 421.30.
4. Victim's crime compensation under statute 18.362.
5. General assistance, welfare under statute 400.63.
6. Assistance under AFDC under statute 330.1158a.

#### HOMESTEAD EXEMPTION

Under statutes 600.6023, 600.6027 and 559.214, there is an exemption to \$3,500 for a lot in a town or 40 acres elsewhere. A spouse or child of a deceased owner may claim the exemption. In Michigan National Bank vs. Chrystker 5 C.B.C. 85 the court held that a debtor's interest in tenancy by the entireties property (a special form of joint tenancy with a spouse) is exempt unless the debt is a joint debt.

## INSURANCE

There are several exemptions for different types of insurance proceeds under Michigan law:

1. Benefits from fraternal societies under statute 500.8046.
2. Life insurance proceeds or cash value under statute 500.2207.
3. Disability, health and mutual life benefits under statute 600.6023.
4. Proceeds from life or endowment policies if the beneficiary is the insured's spouse or child under statute 500.2207.
5. Life insurance benefits if policy prohibits payment to creditors under statute 500.4054.
6. Proceeds from life insurance to \$300 per year if the beneficiary is a married person under statute 500.2209.

## PERSONAL PROPERTY

Michigan has exemptions for the following personal property:

1. Business property of a partnership under statute 449.25.
2. Under statute 600.6023:
  - (a) Appliances and furnishings to a total of \$1,000.
  - (b) Shares in building and loan association to \$1000 par value in lieu of a homestead.
  - (c) Animals two cows, 100 hens, five roosters, 10 sheep, five swine, hay and grain to last six months if head of household.

- (d) Funeral plot.
- (e) Food and fuel for six months if head of household.
- (f) Church pew, clothing and family pictures.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. Legislators under statute 38.1057.
2. ERISA and IRA plans to the extent tax-deferred under statute 600.6023.
3. Firefighters under statutes 38.559.
4. Public school employees under 38.1346.
5. Judges under statute 38.826.
6. Police officers under statute 38.559.
7. State employees under statutes 38.40.
8. Probate judges under statute 38.927.

#### TOOLS OF THE DEBTOR'S TRADE

Under statute 600-6023, the following property used in the debtor's trade or business is exempt:

1. Tools, instruments, books, motor vehicle, horse and harness to \$1,000.
2. Arms and uniforms for military personnel.

#### WAGES

Under statute 600.5311, 60% of earned but unpaid wages of head-of-household and 40% for everyone else are exempt. In addition, a head-of-household may keep \$15 per week and \$2 per week for each dependent other than a spouse. All other debtors can only

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keep \$10.

## MINNESOTA

### GOVERNING STATUTES

Minnesota Statutes Annotated 1971, Section 487.30, Rules for the Conciliation Court, Rules 1.01-1.26.

### DOLLAR LIMIT

\$7,500 but \$4,000 for commercial plaintiff

### SERVICE

By certified mail, sheriff or court-approved adult.

### STATUTE OF LIMITATIONS

Most contracts six years, most torts two years, judgments last 10 years.

### JURY TRIALS

Not permitted.

### ATTORNEYS

Not permitted except for corporations or with court approval.

### EQUITABLE RELIEF

Permitted.

### TRANSFER OF TRIAL TO HIGHER COURT

If jury demanded by either party or defendant's counterclaim exceeds jurisdictional limit.

### APPEALS

By either party for new trial or jury trial before Circuit

Court.

#### JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every other county where the judgment debtor has property in order to have a lien on the property in that county.

#### SPECIAL NOTE

No case involving the ownership of real estate.

#### GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under statute 176.175.
2. Veteran's benefits under 550.38.
3. Unemployment compensation under statute 268.17.
4. Victim's crime compensation under statute 611A.60.
5. General assistance, welfare, aid under AFDC under statute 550.37.

#### HOMESTEAD EXEMPTION

Under statutes 510.01, 510.01 and 550.37, there is an unlimited exemption for a home on  $\frac{1}{2}$  acre in a city or 160 acres elsewhere. Real property with mobile home or manufactured home up to \$200,000 if primarily agricultural then \$500,000.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Minnesota law:

1. Benefits from fraternal societies under statute 64B.18.

2. Benefits from beneficiary, police or fire associations under statute 550.37.
3. Disability and accident benefits under statute 550.39.
4. Proceeds from life or endowment policies if the beneficiary is the insured's spouse or child to \$36,000 plus \$9,000 per dependent under statute 500.2207.
5. Life insurance benefits if policy prohibits payment to creditors under statute 61A.04.
6. Unmatured life insurance policy and cash value to \$7,200 if the insured is the debtor or one to whom the debtor looks for support under statute 550.37.
7. Life insurance and endowment proceeds or cash value if the beneficiary is not the insured under statute 61A.12.

#### PERSONAL PROPERTY

Minnesota has exemptions for the following personal property:

1. Under statute 500.37:
  - (a) Appliances and furnishings to a total of \$8,100.
  - (b) Books, Bible and musical instruments.
  - (c) Funeral plot.
  - (d) Church pew and motor vehicle to a total of \$3,600 up to \$36,000 if modified for disabled.
  - (e) Clothing as needed.
  - (f) Food and utensils.
  - (g) Wrongful death recoveries.
  - (h) Personal injury recoveries.

- (i) Proceeds from damage to exempt property.
- 2. For business property of a partnership under statute 323-24.
- 3. For earnings of a minor child under statute 550.37.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

- 1. ERISA benefits, including IRAs needed for support which do not exceed \$54,000 in present value under statute 550.37.
- 2. Private retirement benefits only to the extent benefits are increasing under statute 181B.16.
- 3. Public employees under 353.15.
- 4. State employees under statutes 352.96.
- 5. State troopers under statute 352B.071.

#### TOOLS OF THE DEBTOR'S TRADE

Under statute 550.37, the following property used in the debtor's trade and business are exempt:

- 1. Tools, instruments, books, machines, furniture, inventory to \$9,000.
- 2. Teaching materials of public school teacher to \$13,000.
- 3. Farm equipment, livestock, tools and equipment for farmer to \$13,000.

#### WAGES

Minnesota has the following wage exemptions:

- 1. Under statute 571.922, 75% or 40 times the federal

minimum wage (the lesser) is exempt.

2. Under statute 550.37:

(a) Wages of inmates paid within 6 months of release.

(b) Earned but unpaid wages that are paid within 6 months of returning to work if the debtor received welfare in the past.

(c) Wages deposited in bank account are exempt for 20 days.

**NOTE; SOME COURTS IN MINNESOTA DO NOT GIVE UNLIMITED EXEMPTIONS AND WILL INSTEAD ONLY AWARD REASONABLE EXEMPTION AMOUNTS. SEE IN RE TVETEN 402 N.W.2D. 551(1987) AND IN RE MEDILL 119 BR 685 (1990).**

**MISSISSIPPI**

GOVERNING STATUTES

Mississippi Code Annotated 1972, Title 11, Ch. 9, Sections 101-143.

DOLLAR LIMIT

\$2,500.

SERVICE

Sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Written contracts six years, oral contracts three years, most torts one to two years, judgments last seven years.

JURY TRIALS

Permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted for replevin (the return of specific property).

TRANSFER OF TRIAL TO HIGHER COURT

Not permitted.

APPEALS

By either party within 10 days for a new trial.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under statute 71-3-43.
2. Social Security benefits under statute 25-11-129.
3. Unemployment compensation under statute 71-5-539.
4. Old age assistance under statute 43-9-19.
5. Assistance to the blind under statute 43-3-71.
6. Assistance to the disabled under statute 43-29-15.
7. Crime victim's compensation under statute 99-41-23.

HOMESTEAD EXEMPTION

Under statute 85-3-21 the homestead exemption is \$75,000 on property that cannot exceed 160 acres. May file homestead

declaration under Statutes 85-3-27 and 85-3-31.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Mississippi law:

1. Disability benefits are exempt by statute 85-3-1.
2. Insurance proceeds to homeowners to \$30,000 under statute 85-3-23.
3. Life insurance policy or proceeds to \$50,000 under statute 85-3-11.
4. Life insurance benefits to \$5,000 if beneficiary is in the deceased's estate under statute 85-3-13.
5. Life insurance benefits if policy prohibits payment to creditors under statute 83-7-5.
6. Benefits from fraternal societies by statute 83-29-39.

#### PERSONAL PROPERTY

Mississippi has exemptions for the following personal property:

1. Any type of tangible personal property to a total of \$10,000 under statute 83-3-1.
2. Personal injury recoveries to \$10,000 under statute 85-3-17.
3. Proceeds for damages to exempt property are exempt under statute 85-3-1.
4. Business property of a partnership is exempt under statute 79-12-49.

## RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. ERISA benefits, including Keoghs, SEPs and IRAs, deposited more than 1 year before the bankruptcy filing under statute 85-3-11.
2. Private tax-deferred retirement plans by statute 71-1-43.
3. Firefighters and police under statute 21-29-257.
4. Public employees under statute 25-11-129.
5. Highway patrol officers under statute 25-13-31.
6. State employees under statute 25-14-5.
7. Teachers under statute 25-11-201-23.

## TOOLS OF THE DEBTOR'S TRADE

None beyond that of the personal property exemption.

## WAGES

Under statute 85-3-4, 75% or 30 times the federal minimum wage (the lesser) is exempt.

**MISSOURI**

## GOVERNING STATUTES

Annotated Missouri Statutes 1987, Sections 482.300-365, Rules of Practice and Procedure in Small Claims Court, Rules 140-155.

## DOLLAR LIMIT

\$3,000.

## SERVICE

By certified mail or sheriff.

STATUTE OF LIMITATIONS

Most contracts five years, sale of goods four years, most torts two years, judgments last 10 years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If defendant files a counterclaim over \$3,000.

APPEALS

By either side for a new trial within 10 days of judgment.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment cannot serve as a lien on the debtor's real property.

GENERAL EXEMPTION

Under statutes 513.430 and 513.440, the general exemption is \$1,250 for a head of household plus \$250 for each child. For other debtors, the exemption is \$400.

GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under statute 287.260.
2. Social Security benefits under statute 513.430.
3. Unemployment compensation under statute 288.430 and 513.430.

4. AFDC assistance under statute 513.430.

#### HOMESTEAD EXEMPTION

Under statutes 513.430 and 513.475 the homestead exemption is \$8,000 for real property and \$1,000 for a mobile home. A married couple may not double this exemption. Tenancies by the entireties were held exempt in the case *In re Anderson* 12 B.R. 483 (1981) unless the debt is a joint liability.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Missouri law:

1. Disability, health and medical benefits needed for support under statute 513.430.
2. Stipulated insurance premiums under statute 377.330.
3. An unmaturred life insurance policy under statute 513.430.
4. Life insurance policy, proceeds or cash value to \$5,000 bought more than 6 months prior to filing the bankruptcy petition under statute 513.430.
5. Life insurance benefits proceeds if the policy is owned by an unmarried woman and her father or brother is the beneficiary under statute 376.550.
6. Benefits from fraternal societies to \$5,000 if policy was purchased more than 6 months prior to the filing of the bankruptcy petition by statute 513.430.
7. Assessment or insurance premium proceeds under statute 377.090.

8. Fraternal benefits to \$5,000 bought more than 6 months before filing for bankruptcy relief under statute 513.430.

#### PERSONAL PROPERTY

Missouri has exemptions for the following personal property:

1. Funeral plot or \$100 under statute 214.190.
2. Business property of a partnership is exempt under statute 358.250.
3. Under statute 513.430:
  - (a) Appliances, clothing, household furnishings, animals, crops and musical instruments to \$1000 total.
  - (b) Medical aids.
  - (c) Jewelry to \$500.
  - (d) Motor vehicle to \$1,000.
  - (e) Wrongful death recoveries needed for support.
  - (f) Spousal and child support to \$500 per month.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. ERISA benefits needed for support under statute 513.430.
2. Public employees for cities over 100,000 people under statute 71.207.
3. Transportation employees under statute 104.250.
4. Firefighters under statutes 87.090, 87.365, 87.485.
5. Police employees under statutes 86.190, 86.353, 86.493,

86 780.

6. State employees under statute 104.540.
7. Public employees under statute 70.695.
8. Teachers under statute 169.090.

#### TOOLS OF THE DEBTOR'S TRADE

Under statute 513.430, tools, instruments and books used in the debtor's business are exempt to \$2,000.

#### WAGES

Under statutes 525.030 and 513.470, 75% or 30 times the federal minimum wage (the lesser) are exempt.

### MONTANA

#### GOVERNING STATUTES

Montana Code Annotated 1987, Title 25, Ch. 35, Section 501807, Ch. 34, Sections 101-404.

#### DOLLAR LIMIT

\$3,000.

#### SERVICE

Sheriff or court-approved adult.

#### STATUTE OF LIMITATIONS

Most contracts eight years, sale of goods four years, most torts two to three years, judgments last 10 years.

#### JURY TRIALS

Permitted on defendant's request unless counterclaim filed.

#### ATTORNEYS

Not permitted unless both parties have them.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

Permitted if request is made within 10 days of the service of the complaint.

APPEALS

By either side. For district court judgment, new trial, for justice court, appeal is limited to questions of law.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is an automatic lien on the debtor's real property in the county where the judgment was issued. The judgment creditor must record the judgment in every other county where the judgment debtor has property in order to have a lien on the property in that county.

SPECIAL NOTE

No personal injury or property damage cases.

GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Veteran's benefits under statute 25-13-608.
2. Social Security benefits under statute 25-13-608.
3. Worker's compensation under statute 39-71-743.
4. Unemployment compensation under statute 39-51-3105.
5. Silicosis benefits under statute 39-73-110.
6. Under statute 53-2-608:

- (a) Victim's crime compensation.
- (b) Old age assistance.
- (c) Assistance to the disabled.
- (d) Assistance under AFDC.
- (e) Assistance to the blind.
- (f) Adoptions payments if subsidized.

#### HOMESTEAD EXEMPTION

Under statute 70-32-101 and 70-32-104, the homestead exemption is \$60,000. Sale proceeds are exempt for 18 months. A homestead declaration must be recorded in order to get a homestead exemption.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Montana law:

1. Disability, health, death benefits are exempt by statute 33-15-573.
2. Benefits from annuity to \$350 per month under statute 33-15-514.
3. Group insurance benefits under statute 33-15-512.
4. Life insurance benefits or cash value if the yearly premiums do not exceed \$500 under statute 33-15-511.
5. Life insurance benefits if policy prohibits payment to creditors under statute 33-20-120.
6. Benefits from fraternal societies by statute 33-7-511.
7. Unmatured life insurance policies to \$4,000 under statute 25-13-609.

8. Hail insurance benefits under statute 80-2-245.

#### PERSONAL PROPERTY

Montana has exemptions for the following personal property:

1. Under statute 25-13-608:
  - (a) Funeral plot.
  - (b) Medical Aids are exempt.
  - (c) Child and spousal support needed for debtor's support.
2. \$600 is exempted for each of the following: appliances, furnishings, firearms, heirlooms, household goods, books, musical instruments and clothing for a total of \$4,500 total under statute 25-13-609.
3. Shares in cooperative associations to \$500 under statute 35-15-404.
4. Motor vehicle is exempt to \$2,500 under statute 25-13-609.
5. Proceeds from damages to exempt property are exempt for 6 months under statute 25-13-610.
6. Business property of partnership is exempt under statute 35-10-502.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. ERISA benefits deposited over 1 year prior to the bankruptcy filing under statute 31-02-106.
2. Public employees under statute 19-3-105.

3. Game Wardens under statute 19-8-805.
4. Firefighters under statutes 19-11-612 and 19-13-1004.
5. Police officers under statutes 19-9-1006 and 19-10-504.
6. Sheriffs under statute 19-7-705.
7. Teachers under statute 19-4-706.
8. Judges under statute 19-5-704.
9. Highway patrol officers under statute 19-6-705.
10. IRA contributions under Statute 25-13-608(1)(e)

TOOLS OF THE DEBTOR'S TRADE

Under Montana law the following property used in the debtor's trade or business, is exempt:

1. Tools, instruments, books of trade to \$3,000 under statute 25-13-609.
2. Arms, uniforms that peace officer or member of military if required to keep under statute 25-13-613.

WAGES

Under statute 25-13-614, 75% or 30 times the federal minimum wage (the lesser) is exempt.

**NEBRASKA**

GOVERNING STATUTES

Revised Statutes of Nebraska 1943, Title 24, Sections 521-527.

DOLLAR LIMIT

\$2,400.

SERVICE

By certified mail or sheriff.

STATUTE OF LIMITATIONS

Written contracts five years, oral contracts four years, most torts one to two years, judgments last five years.

JURY TRIALS

Not permitted.

ATTORNEYS

Not permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If defendant asks for jury trial or has a counterclaim that exceeds \$2,100.

APPEALS

By either side for new trial, without a jury, within 30 days of judgment.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under statute 48-149.
2. Unemployment compensation under statute 48-647.
3. Under statute 68-103:

- (a) Old age assistance.
- (b) Assistance to the blind.
- (c) Assistance to the disabled.
- (d) Aid under AFDC.

#### HOMESTEAD EXEMPTION

Under statute 40-101 the homestead exemption is \$12,500 on property that cannot exceed 2 lots in a city or 160 acres elsewhere. Sale proceeds are exempt for 6 months after a sale. May file homestead declaration under Statute 40-105.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Nebraska law:

1. Insurance or annuity proceeds or cash value to \$10,000 under statute 44-371.
2. Disability benefits to \$200 per month are exempt by statute 44-754.
3. Benefits from fraternal societies to \$10,000 under statute 44-1089.

#### PERSONAL PROPERTY

Nebraska has exemptions for the following personal property:

1. Funeral plot, crypts, vaults under statutes 12-517 and 12-605.
2. Proceeds from perpetual care contracts or savings under statute 12-511.
3. Personal injury recoveries under statute 24-1563.02.

4. Under statute 25-1556:
  - (a) Clothing as needed under statute.
  - (b) Food and fuel to last 6 months.
  - (c) Furniture and kitchen utensils to \$1,500.
  - (d) Personal possessions under statute 25-1556.
5. Business property of a partnership under statute 67-325.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. ERISA benefits needed for support under statute 25-1563.01.
2. County employees under statute 23-2322.
3. Military disability benefits to \$2,000 under statute 25-1559.
4. School employees under statutes 79-1060 and 79-1552.
5. State employees under statute 84-1324.

#### TOOLS OF THE DEBTOR'S TRADE

Under statute 25-1556, tools, equipment and instruments used in a trade or business are exempt to \$2,400. A married couple may double this amount.

#### WAGES

Under statute 25-1558, 85% for heads of household and 75% for all other debtors or 30 times the federal minimum wage (the lesser) is exempt.

#### **NEVADA**

GOVERNING STATUTES

Nevada revised Statutes Annotated 1986, Title 6, Sections 73.010-060, Justice Court Rules of Civil Procedure, Ch. XII, Rules 88-100.

DOLLAR LIMIT

\$5,000.

SERVICE

By certified or registered mail, sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Written contracts six years, oral contracts four years, most torts two years, judgments last six years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If either party requests a jury trial or the defendant files a counterclaim over \$5,000.

APPEALS

Either side as to questions of law only within 20 days of judgment.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

#### GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Under statute 422.291:
  - (a) Old age assistance.
  - (b) Assistance to the blind.
  - (c) Assistance to the disabled.
  - (d) Assistance to AFDC.
2. Unemployment compensation under statute 612.710.
3. Worker's compensation under statute 616.550.
4. Vocational training benefits under statute 615.270.

#### HOMESTEAD EXEMPTION

Under statutes 21.090 and 115.010, the homestead exemption is \$125,000 on property. A married couple may not double this exemption.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Nevada law:

1. Life insurance benefits or policy if the annual premium does not exceed \$1,000 under statute 21.090.
2. Annuity proceeds to \$350 per month under statute 687B.290.

3. Life insurance proceeds if the debtor is not the insured under statute 687B.260.
4. Group life insurance policy or proceeds under statute 687B.280.
5. Health insurance proceeds or cash value under statute 87B.270.
6. Benefits from fraternal societies by statute 695A.290.

#### PERSONAL PROPERTY

Nevada has exemptions for the following personal property:

1. Under statute 21.090:
  - (a) Appliances, household furnishings, 1 gun and yard equipment to \$3,000.
  - (b) Books are exempt to \$1,500.
  - (c) Family pictures and heirlooms.
  - (d) Motor vehicle to \$4,500 unlimited if equipped for disabled person.
2. Metal ores, geologic specimens and paleontological remains under statute 21.100.
3. Savings for funeral plot held in trust under statute 452.550.
4. Funeral Service contract under statute 689.700.
5. Business property of a partnership is exempt under statute 87.250.

#### RETIREMENT BENEFITS

The pensions of public employees are exempt under statute

353

286.670.

ERISA qualified benefits and IRAs are exempt up to \$500,000 under Statute 21.090(1)(q)

#### TOOLS OF THE DEBTOR'S TRADE

Under statute 21.090, the following items are exempt if used in the debtor's trade or business:

1. Farm truck, stock, tools, equipment, implements and seed to \$4,500.
2. Tools, materials, instruments, supplies and library to \$4,500.
3. Miner or prospector's cabin or dwelling and implements, vehicles and equipment to \$4,500.

#### WAGES

Under statute 21.090, 75% or 30 times the federal minimum wage (the lesser) is exempt.

#### NEW HAMPSHIRE

#### GOVERNING STATUTES

New Hampshire Revised Statutes Annotated 1983, Sections 503:110.

#### DOLLAR LIMIT

\$5,000.

#### SERVICE

By certified mail or sheriff.

#### STATUTE OF LIMITATIONS

Most contracts four years, most torts one to three years, judgments last 20 years. Liens on real property last six years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If either party requests a jury trial and the amount in controversy exceeds \$500 or the defendant files a counterclaim over \$5,000.

APPEALS

By either side but only on questions of law to the supreme court within 30 days of Judgment.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

SPECIAL NOTE

No cases involving the ownership of real estate.

GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Under statute 167:25:

- (a) Assistance to the disabled.
  - (b) Assistance under AFDC.
  - (c) Assistance to the blind.
  - (d) Assistance to the aged.
2. Worker's compensation under statute 281A:52.
  3. Unemployment compensation under statute 282A:159.

#### HOMESTEAD EXEMPTION

Under statute 480:1 the homestead exemption is \$30,000.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under New Hampshire law:

1. Benefits from firefighters' insurance under statute 402:69.
2. Life insurance or endowments where debtor is not the insured under statute 408.2.
3. Life insurance or endowment where the beneficiary is a married woman under statute 408:1.
4. Benefits from fraternal societies by statute 418:24.
5. Homeowner's insurance proceeds to \$5,000 under statute 512:21.

#### PERSONAL PROPERTY

New Hampshire has exemptions for the following personal property:

1. Under statute 511.2:
  - a. Bed, bedsteads, bedding and cooking utensils.

- b. Bible and books to \$800.
  - c. Funeral plot.
  - d. Clothing as needed.
  - e. Stove and refrigerator.
  - f. Food and fuel to \$400.
  - g. Furnishings to \$3,500.
  - h. Jewelry to \$500.
  - I. Sewing machine.
  - j. A hog or pig.
  - k. Cow, 6 sheep and 4 tons of hay.
  - l. Motor vehicle to \$4,000
2. Proceeds for damage to or loss of exempt property are exempt under statute 512:21.
  3. Child and spousal support needed for debtor's support under statute 161-C-11.
  4. Business property of partnership is exempt under statute 304A:25.
  5. Jury and witness fees under statute 512:21.
  6. Minor child's wages under statute 512:21.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. ERISA benefits for benefits increasing under statute 512:21.
2. Public employees under statute 100A:26.
3. Firefighters under statute 102:23.
4. Police officers under statute 103:18.

TOOLS OF THE DEBTOR'S TRADE

Under New Hampshire statute 511:2 the following property used in the debtor's trade or business is exempt:

1. Tools, instruments, books of trade to \$5,000.
2. Arms, uniforms that peace officer or member of military is required to keep is exempt.
3. Yoke for oxen or horses used by a farmer.

WAGES

Under statute 512:21, a debtor's wages are exempt to 50 times the federal minimum wage.

**NEW JERSEY**

GOVERNING STATUTES

New Jersey Statutes Annotated 1987, Title 2A, Ch.6, Sections 41-44, County District Court Civil Rules, Rule 6:11.

DOLLAR LIMIT

\$2,000 in Small Claims Division

\$10,000 in regular Special Civil Court

SERVICE

By certified mail, sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Contracts six to 16 years, sale of goods four years, most torts two to six years. Judgments last 20 years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If the defendant requests a jury trial or files a counterclaim over \$5,000.

APPEALS

By either side but only on questions of law.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is an automatic lien on the debtor's real property for the county where the judgment was issued. The judgment creditor must record the judgment in every other county where the judgment debtor has property in order to have a lien on the property in that county.

SPECIAL NOTE

The court will not hear cases involving personal property damage or personal injury unless they result from automobile accidents.

GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under statute 34:15-29.
2. Unemployment compensation under statute 43:21-53.
3. Old age assistance under statute 44:7-35.
4. Assistance to the disabled under statute 44:7-35.

5. Crime victim's compensation under statute 52:4B-30.

#### HOMESTEAD EXEMPTION

None. Tenancies in the Entireties held exempt in *Freda vs. Commercial Trust Co.* 570 A2d 409 (1990) unless the debts of both spouses are sought to be discharged or there is a joint liability.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under New Jersey law:

1. Annuity proceeds to \$500 per month under statute 17B:24-7.
2. Life insurance proceeds if the debtor is not the insured under statute 17B:24-6.
3. Group life insurance policy or proceeds under statute 17B:24-9.
4. Health or disability proceeds under statute 17:18-12, 17B:24-8.
5. Life insurance benefits if the policy forbids payment to creditors under statute 17B:24-10.
6. Benefits from fraternal societies by statute 17:44A-19.
7. Disability, health or death benefits for a military member under statute 38A:4-8.

#### PERSONAL PROPERTY

New Jersey has exemptions for the following personal property:

1. There is a total exemption of \$1,000 for personal property and shares in a corporation under statute 2A:17-19.
2. Funeral plots under statute 8A:5-10.

3. Clothing under statute 2A:17-19.
4. Furniture and household goods to \$1,000 under statute 2A:25-4.
5. Business property of a partnership is exempt under statute 42:1-25.

#### RETIREMENT BENEFITS

The following pensions are exempt under New Jersey law:

1. Alcohol control officers under statute 43:8A-20.
2. Civil defense workers under statute A:057.6.
3. County and public employees under statutes 43:10-57, 43:10-155, 43:13-9 and 43:15A-53.
4. Firefighters, police and traffic officers under statutes 43:16-7 and 43:10-105.
5. Health board employees under statute 43:18-12.
6. Judges under statute 43:6A-41.
7. Municipal employees under statute 43:13-44.
8. Prison employees under statute 43:15A-53.
9. School district employees under statute 18A:66-116.
10. State police under statute 53:5A-45.
11. Water and street department employees under statute 43:19-17.
12. Teachers under statute 18A:66-51.
13. IRA's under In Re Yukas No: 96-5146 (3rd Cir. 1/22/1997)

#### TOOLS OF THE DEBTOR'S TRADE

None.

## WAGES

Under statute 2A:17-56, 90% of wages are exempt.

Under statute 38A:4-8 wages of military personnel are exempt.

**NEW MEXICO**

## GOVERNING STATUTES

New Mexico repealed its small claims legislation and has not replaced it. As such, Small Claims Courts no longer exist in New Mexico. The old law was in New Mexico Statutes 1978, Sections 34.8A.1-9 and 35.3-36.

Although going to small claims courts is no longer a viable means of collecting small judgments the rest of New Mexico's debtor and creditor law remains the same. Which is still an important factor in deciding whether to sue and is all important in the enforcement and collection of a monetary judgment.

## STATUTE OF LIMITATIONS

Written contracts six years, oral contracts four years, most tort three years, Judgments last fourteen (14) years.

## JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

## GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under statute 52-1-52.
2. Unemployment compensation under statute 51-1-37.
3. Victim's crime compensation under statute 31-22-15.
4. Occupational disability benefits under statute 52-3-57.
5. Assistance under AFDC under statute 27-2-21.
6. General welfare assistance under statute 27-2-21.

#### HOMESTEAD EXEMPTION

Under statute 42-10-9, there is a homestead exemption of \$30,000 for a person who is married, widowed or sporting another person. Joint owners may double this exemption.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under New Mexico law:

1. Benefits from fraternal societies under statute 42-10-4.
2. Benevolent association benefits to \$5,000 under statute 59A-44-18.
3. Life, annuity, health or accident benefits or cash value where the beneficiary is a New Mexican citizen under statute 42-10-3.
4. Life insurance proceeds under statute 42-10-5.

#### PERSONAL PROPERTY

New Mexico has exemptions for the following personal property:

1. Under statutes 42-10-1 and 42-10-2:
  - (a) \$500 in personal property other than cash.
  - (b) Books, medical aid, furniture.
  - (c) Clothing as needed.
  - (d) Jewelry to \$2,500.
  - (e) Motor vehicle to \$4,000.
2. Cooperative association shares to the extent needed to maintain membership under statute 53-4-28.
3. Materials to drill or repair oil well, gas well or pipeline under statute 70-4-12.
4. Building materials as needed under statute 48-2-15.
5. Property in a business partnership under statute 54-1-25.
6. Interests in unincorporated associations by statute 53-10-2.

#### RETIREMENT BENEFITS

Under New Mexican law, retirement benefits are exempted as follows:

1. Public school employees under statute 22-11-42.
2. Pension and retirement benefits, in general, under statutes 42-10-1 and 42-10-2.

#### TOOLS OF THE DEBTOR'S TRADE

Under New Mexico law, tools, instruments, books of trade, used in the debtor's trade or business to \$1,500 are exempt under statutes 42-10-1 and 42-10-2.

WAGES

Under statute 35-12-7, 75% or 40 times the federal minimum wage (the lesser) are exempt.

NEW YORK

GOVERNING STATUTES

Consolidated Law of New York Annotated 1969, Uniform District Court Act, Sections 1801-1814, Uniform Justice Court Act, Sections 1801-1814, Uniform City Court Act Sections 1801-1814, Civil Practice Laws and Rules (C.P.L.), Section 321 (a), N.Y.C. Civil Court Rule 2900.33.

DOLLAR LIMIT

\$3,000.

SERVICE

By certified or registered mail, or court-approved adult.

STATUTE OF LIMITATIONS

Most contracts six years, sale of goods four years, most torts three years. Judgments last 10 years.

JURY TRIALS

Permitted on defendant's request.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

At discretion of court.

APPEALS

By defendant only and only on questions of law. Plaintiff can appeal only by claiming that "Substantial Justice" was not done.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Under Debtor & Creditor Code section 282:
  - (a) Worker's compensation.
  - (b) Veteran's benefits.
  - (c) Assistance under AFDC.
  - (d) Victim's crime compensation.
  - (e) Old age assistance.
  - (f) Social security.
  - (g) Assistance to the disabled.
  - (h) Home relief.
  - (i) Assistance to the blind.
2. Unemployment compensation under C.P.L. 5205.

## HOMESTEAD EXEMPTION

Under statute C.P.L. section 5206, the homestead exemption is \$10,000. A married couple may double this exemption.

## INSURANCE

There are several exemptions for different types of insurance proceeds under New York law:

1. Disability, health death benefits are exempt to \$400 per month under the Insurance Code statute 3212.
2. Benefits to \$5,000 from annuity purchased more than 6 months before the bankruptcy filing and not tax deferred under Debtor and Creditor Code, statute 282.
3. Life insurance proceeds or cash value if the beneficiary is not the insured under Insurance Code statute 3213.
4. Insurance proceeds for damage to exempt property under C.P.L. section 5205.
5. Life insurance benefits if policy prohibits payment to creditors under Estates, Powers & Trusts Code section 7-1.5.
6. Benefits from fraternal societies by statute under Insurance Code statute 3212.

## PERSONAL PROPERTY

New York has exemptions for the following personal property:

1. Under Debtor and Creditor Code, statute 282:
  - (a) Motor vehicle to \$2,400.
  - (b) Personal injury recoveries to \$7,500 up to one year

after recovery.

- (c) Recoveries for lost earnings needed for support.
  - (d) Wrongful death recoveries for a person on whom the debtor depended for support.
  - (e) Child and spousal support needed for debtor's support.
2. Bible and schoolbooks are exempt, other books to a value of \$50, stoves and fuel for 60 days, sewing machine, a pet worth to \$450, 60 days of food, furniture, refrigerator, television, radio, cooking utensils to a total of \$5,000 under statutes C.P.L. section 5205 and Debtor & Creditor Code section 283.
  3. Funeral plot under statute C.P.L. statute 5206.
  4. Money in the form of cash to \$2,500 increasing to \$5,000 if a homestead exemption is not taken under statute Debtor & Creditor Code section 283.
  5. Medical aids under statute C.P.L. section 5205.
  6. Security deposits for rent or utilities under statute C.P.L. statute 5205.
  7. Trust fund principal and 90% of the trust income under C.P.L. statute 5205.
  8. Business property of partnership is exempt under statute Partnership Code section 51.

#### RETIREMENT BENEFITS

1. Under Debtor & Creditor Code section 282 and C.P.L. Section

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5205, ERISA retirement benefits including Keoghs that are needed for sport are exempt.

2. Public Retirement Benefits under Insurance Code Section 4607.

3. State Employees; Retirement under Social Security Section 110.

4. Teachers' retirement plans under Education Section 524

5. Village Police Officers retirement plans under Unconsolidated Section 5711-0.

#### TOOLS OF THE DEBTOR'S TRADE

Under C.P.L. section 5205, tools, instruments, implements, library, furniture to \$600 and food for 60 days used in the debtor's trade or business along with arms, uniforms, equipment of military personnel are exempt.

#### WAGES

Under C.P.L. section 5205, 90% of wages are exempt.

#### NORTH CAROLINA

#### GOVERNING STATUTES

General Statutes of North Carolina 1986, Ch. 7A, Sections 210232.

#### DOLLAR LIMIT

\$4,000.

#### SERVICE

By certified or registered mail, sheriff or court-approved adult.

#### STATUTE OF LIMITATIONS

Most contracts three years, most torts one to two years. Judgments last 10 years.

#### JURY TRIALS

Not permitted.

#### ATTORNEYS

Permitted.

#### EQUITABLE RELIEF

Not permitted except for enforcement of liens.

#### TRANSFER OF TRIAL TO HIGHER COURT

No provision but the court does not permit counterclaims over \$3,000; so effectively the case is transferred to avoid having the same suit tried twice.

#### APPEALS

By either side for a new trial.

#### JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is an automatic lien on the debtor's real property for the county where the judgment is issued. The judgment creditor must record the judgment in every other county where the judgment debtor has property in order to have a lien on the property in that county.

#### GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Victim's crime compensation under statute 15B-17.
2. Unemployment compensation under statute 96-17.
3. Worker's compensation under statute 97-21.
4. Adult special assistance under statute 108A-36.
5. Assistance under AFDC under statute 108A-36.
6. Assistance to the blind under statute 111-18.

#### HOMESTEAD EXEMPTION

Under statute 1C-1601, there is a homestead exemption of \$10,000. Husband and wife may double the exemption. Up to \$3,500 of the unused exemption may be applied to any other property. The cases *In re Woodward* 13 B.R. 105 and *In re Martin* 20 B.R. 374 permitted a married debtor to exempt the debtor's interest in tenancy by the entireties property except where both spouses are liable for the debts.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under North Carolina law:

1. Benefits from fraternal societies under statute 58-340.18.
2. Group life policy or proceeds under statute 58-213.
3. Life insurance proceeds or cash value under statute 58-206.
4. Life insurance policy where the beneficiary is the insured's spouse or child under Constitution 10-5.

#### PERSONAL PROPERTY

North Carolina has exemptions for the following personal

property:

1. Under statute 1C-1601:
  - (a) Animals, appliances, books, clothing, crops, household goods, furnishings to \$3,500 plus \$750 per dependent up to another \$3,000
  - (b) Funeral plot to \$10,000 in lieu of a homestead.
  - (c) Medical aids.
  - (d) Motor vehicle to \$1,500.
  - (e) Personal injury recoveries for a person on whom the debtor relied for support.
  - (f) Wrongful death recoveries for a person on whom the debtor relied.
2. Business property of a partnership under statute 59-55.

#### RETIREMENT BENEFITS

Retirement benefits are exempted as follows to:

1. Firefighters and rescue squad workers under statute 118-49.
2. Legislators under statute 120-4.29.
3. Public employees under statute 128-31.
4. Teachers under statute 135-9.
5. State employees under statute 135-95.
6. Law enforcement officers under statute 143-166.30.

#### TOOLS OF THE DEBTOR'S TRADE

Under North Carolina law, tools, instruments, books of trade used in the debtor's trade or business to \$500 are exempt under

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statute 1C-1601.

#### WAGES

Under statute 1-362, all wages are exempt as needed for support.

#### NORTH DAKOTA

#### GOVERNING STATUTES

North Dakota Century Code Annotated 1974, Title 27, Sections 08.1-01 to 1-08.

#### DOLLAR LIMIT

\$5,000.

#### SERVICE

By certified mail or court-approved adult.

#### STATUTE OF LIMITATIONS

Most contracts six years, most torts two years, judgments last 10 years.

#### JURY TRIALS

Not permitted.

#### ATTORNEYS

Permitted.

#### EQUITABLE RELIEF

Not permitted.

#### TRANSFER OF TRIAL TO HIGHER COURT

Upon the defendant's request.

#### APPEALS

Not permitted.

#### JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

#### GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Assistance to AFDC under statute 28-22-19.
2. Crime victim's compensation under statute 28-22-19.
3. Social security under statute 28-22-03.1.
4. Viet Nam veterans assistance under statute 37-25-07.
5. Unemployment compensation under statute 52-06-30.
6. Worker's compensation under statute 65-05-29.

#### HOMESTEAD EXEMPTION

Under statutes 28-22-02 and 47-18-01, the homestead exemption is \$80,000 on real property, house trailer or mobile home used as a residence.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under North Dakota law:

1. Life insurance proceeds payable to a decedent's estate under statute 26.1-33-40.
2. Life insurance cash value to \$100,000 per policy, if the beneficiary is insured's relative and owned over 1 year

before filing for bankruptcy. There is no limit if needed for support under 28-22-03.1.

3. Benefits from fraternal societies by statutes 26.1-15.1 18 and 26.1-33-40.

#### PERSONAL PROPERTY

North Dakota has exemptions for the following personal property:

1. Under statute 28-22-02:
  - (a) A Bible is exempt along with books to \$100, family pictures and clothing as needed.
  - (b) Funeral plot and church pew.
  - (c) Crops grown on 160 acres.
  - (d) Food and fuel to last 1 year.
2. Cash to \$7,500 in lieu of a homestead under statute 28-22-03.1.
3. Personal injury recoveries to \$7,500 not to include pain and suffering under statute 28-22-03.1.
4. Wrongful death recoveries under statute 28-22-03.1.
5. Under statute 28-22-03, a head of household not claiming crops or grain (item 1(c)) has the option of exempting \$5,000 of any personal property under statute 28-22-04.
  - (a) Books and musical instruments to \$1,500.
  - (b) Furniture to \$1,000.
  - (c) Professional's library and instruments.
  - (d) Farmer's stock and equipment.

(e) Tools of mechanic and stock in trade.

6. Nonhead of household not claiming crops or grain may exempt \$2,500 of personal property under statute 28-22-05.
7. Business property of a partnership is exempt under statute 45-08-02.
8. Motor Vehicle to \$1,200 under Statute 28-22-03.1(2).

#### RETIREMENT BENEFITS

The following retirement plans and pension benefits are exempt:

1. Annuities, pensions, IRAs, Keoghs, SEPs and ERISA qualified benefits to \$100,000 per plan or as needed for support with exempt insurance not need for support the total exemption \$200,000 under statute 28-22-03.1.
2. Disabled veteran's benefits, not including military pay, under statute 28-22-03.1.
3. Public employees plans under statute 28-22-19.
4. State employees' plans under statute 54-52-12.

#### TOOLS OF THE DEBTOR'S TRADE

None.

#### WAGES

Under statute 32-09.1-03, 75% are exempt.

#### OHIO

#### GOVERNING STATUTES

Ohio Revised Code Annotated 1983, Title 19, Ch. 1925, Sections

.01-.17, Ohio Rules of Civil Procedure.

DOLLAR LIMIT

\$3,000 Municipal Small Claims

\$5,000 Small Claims County Court

\$15,000 regular County Court with Simplified Mediation  
Procedures.

SERVICE

By certified mail, sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Written contracts 15 years, oral contracts six years, sale of  
goods four years.

JURY TRIALS

Not permitted except in County Court.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Not permitted.

TRANSFER OF TRIAL TO HIGHER COURT

Upon request of either side or the defendant files a  
counterclaim over \$3,000.

APPEALS

By either side but only as to questions of law.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real  
property. The judgment creditor must record the judgment in every

county where the judgment debtor has property in order to have a lien on the property in that county.

#### SPECIAL NOTE

No defamation cases.

#### GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under statutes 2329.66 and 4123.67.
2. Vocational benefits under statute 3304.19.
3. Unemployment compensation under statutes 2329.66 and 4141.32.
4. Crime victim's compensation under statute 2743.66.
5. AFDC assistance under statutes 2329.66 and 5107.12.

#### HOMESTEAD EXEMPTION

Under statute 2329.66, the homestead exemption is \$5,000 for real property, mobile home, house trailer or house boat used as a residence. In the cases *In re Thomas* 14 B.R. 423 and *In re Hicks* 1 C.B.C. 963 1980, the court held that a debtor could exempt property held in tenancy by the entireties unless the debt is for both spouses.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Ohio law:

1. Disability benefits to \$600 per month under statutes 2329.66 and 3923.19.
2. Benefits from fraternal benefit societies under statutes

2329.66 and 3923.18.

3. Benefits from benevolent societies to \$5,000 under statutes 2329.66 and 2329.63.
4. Group life policy or proceeds under statutes 2329.66 and 3917.05.
5. Life insurance proceeds for a spouse under statute 3911.12.
6. Life insurance proceeds if the policy forbids payment to creditors under statute 3911.14.
7. Life insurance, endowment or cash value proceeds for a policy on a spouse, child or dependent by statute 3911.10.

#### PERSONAL PROPERTY

Ohio has exemptions for the following personal property:

1. Under statute 2329.66:
  - (a) \$200 per item in animals, appliances, books, crops, furnishings, household goods, hunting and fishing equipment, firearms, jewelry ( to \$400) and musical instruments for a total of \$1,500 that increases to \$2,000 if no homestead exemption is claimed.
  - (b) Beds and clothing to \$200 per item.
  - (c) Funeral plot.
  - (d) Cash, money due within 90 days and tax refund (provided the debtor has income) to \$400.
  - (e) Medical aids.

- (f) Personal injury recoveries to \$5,000 not including pain or suffering.
  - (g) Wrongful death recoveries for a person on whom the debtor relied for support.
  - (h) Motor vehicle to \$1,000.
  - (i) Stove and refrigerator to \$300 each.
  - (j) Spousal and child support needed for support.
2. Business property of a partnership under statute 1775.24.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. Under statute 2329.66:
  - (a) ERISA benefits, including Keoghs and IRAs, needed for support.
  - (b) Death benefits for firefighters and police.
  - (c) Firefighters and police.
2. Public employees under statute 145.56.
3. Highway patrol employees under statute 5505.22.
4. Volunteer firefighters' dependents under statute 146.13.

#### TOOLS OF THE DEBTOR'S TRADE

Under Ohio law, the following property used in the trade or business of the debtor are exempt:

1. Implements, instruments, books, tools of trade are exempt to \$750 under statute 2329.66.
2. The seal and register of a notary public under statute 147.04.

WAGES

Under statute 2329.66, 75% or 30 times federal minimum wage of wages are exempt.

OKLAHOMA

GOVERNING STATUTES

Oklahoma Statutes Annotated 1980, Title 12, Sections 1751-1771.

DOLLAR LIMIT

\$4,500.

SERVICE

By certified mail, sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Written contracts five years, oral contracts three years, most torts one to two years.

JURY TRIALS

Permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Not permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If the defendant files a counterclaim over \$4,500.

APPEALS

By either party but only as to questions of law within 30 days

of judgment.

#### JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

#### SPECIAL NOTE

Only case to recover money or personal property can be brought.

#### GOVERNMENT BENEFITS

The following government benefits are exempt:

1. Worker's compensation under statute 85-48.
2. Social Security benefits under statute 56-173.
3. Unemployment compensation under statute 40-2-203.
4. Victim's crime compensation under statute 21-142.13.
5. Assistance under AFDC under statute 56-173.

#### HOMESTEAD EXEMPTION

Under statute 31-2, the homestead exemption is unlimited on real property or manufactured home provided the property does not exceed  $\frac{1}{4}$  acre. If the property exceeds  $\frac{1}{4}$  acre, the exemption is \$5,000 on one acre in a city, town or village and 160 acres elsewhere.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Oklahoma law:

1. Benefits from fraternal societies under statute 36-2720.
2. Mutual benefits or assessment under statute 36-2410.
3. Group life policy or proceeds if the debtor is not the insured under statute 36-3632.
4. Life insurance proceeds if the debtor is not the insured under statute 36-3631.
5. Limited stock insurance proceeds under statute 36-2510.
6. Pre-paid funeral benefits if held in trust under statute 36-6125.

#### PERSONAL PROPERTY

Oklahoma has exemptions for the following personal property:

1. Under statute 31-1:
  - (a) Books, family portraits, pictures and a gun.
  - (b) Two bridles and saddles.
  - (c) Clothing to \$4,000.
  - (d) Furniture.
  - (e) Medical aids.
  - (f) Food to last 1 year.
  - (g) \$50,000 total recovery for personal injury, wrongful death and worker's compensation. This exemption does not include a recovery for punitive damages.
  - (h) Animals as follows: 100 chickens, 10 hogs, 2 horses, 5 cows, 20 sheep and feed for 1 year.
  - (i) Child and spousal support needed for debtor's

support.

(k) Motor Vehicle to \$3,000

2. Business property of partnership is exempt under statute 54-225.
3. Funeral plots under statute 8-7.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. ERISA benefits including IRAs, SEPs, and Keoghs needed for support to the extent tax-deferred under statute 31-1.
2. Public employees under statute 74-923.
3. Firefighters under statute 11-49-126.
4. Police officers under statute 11-50-124.
5. Tax exempt bonds under statute 60-328.
6. Law enforcement employees under statute 47-2-303.3.
7. Teachers under statute 70-17-109.
8. County employees under statute 19-959.
9. Disabled veterans under statute 31-7.

#### TOOLS OF THE DEBTOR'S TRADE

Under Oklahoma law, tools, instruments, books and farming implements are exempt to a total of \$5,000 under statute 31-1.

#### WAGES

Under statutes 12-1171.1 and 31-1, 75% of wages are exempt.

OREGON

GOVERNING STATUTES

Oregon Revised Statutes 1988, Sections 46.010-760, Sections 55.011-140.

DOLLAR LIMIT

\$5,000.

SERVICE

By certified mail, sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Most contracts six years, sale of goods four years, most torts two years. Judgments last 10 years.

JURY TRIALS

Not permitted.

ATTORNEYS

Not permitted without the Court's consent.

EQUITABLE RELIEF

Not permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If either party requests a jury trial or the defendant files a counterclaim over \$3,500, or the defendant requests one and the complaint is over \$200.

APPEALS

No appeals of judgments from District Court. An appeal on questions of law only is permitted of justice court judgments by

defendant within 10 days of judgment.

#### JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

#### GOVERNMENT BENEFITS

The following government benefits are exempt to the debtor under state law:

1. Crime victim's compensation under statutes 23.160 and 147.325.
2. Vocational benefits under statute 344.580.
3. Welfare and general assistance under statute 411.760.
4. Assistance for old age under statute 413.130.
5. Assistance to the blind under statute 412.115.
6. Assistance to the disabled under statute 412.610.
7. Assistance under AFDC under statute 418.040.
8. Disaster relief under statute 401.405.
9. Medical assistance under statute 414.095.
10. Inmates benefits under statute 655.530.
11. Worker's compensation under statute 656.234.
12. Unemployment compensation under statute 657.855.

#### HOMESTEAD EXEMPTION

Under statutes 23.164 and 23.240, the homestead exemption for real property, mobile home or houseboat to \$25,000 increasing to

\$33,000 for a married couple. If the debtor does not own the land on which a mobile home is located, the exemption is \$23,000 increasing to \$30,000 for a married couple. The property cannot exceed 1 block in a city, town or village or 160 acres elsewhere.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Oregon law:

1. Life insurance benefits if the policy prohibits payments to creditors under statute 743.240.
2. Life insurance benefits or cash value if the debtor is not the insured under statute 743.099.
3. Annuity benefits to \$250 per month under statute 743.105.
4. Disability benefits are exempt by statute 743.108.
5. Group life benefits or cash value under statute 743.102.
6. Benefits from fraternal societies by statute 749.207.

#### PERSONAL PROPERTY

Oregon has exemptions for the following personal property:

1. Under statute 23.160:
  - (a) Books, pictures and musical instruments to a total of \$600. A married couple may double this exemption.
  - (b) Clothing and jewelry to a total of \$1,800. A married couple may double this exemption.
  - (c) Pets and food to last 60 days to \$1,000.
  - (d) Motor vehicle to \$1,700. A married couple may

double this exemption.

(e) Personal injury recoveries to \$10,000, not including pain and suffering. This exemption may be doubled by a married couple.

(f) Furniture and appliances to \$3,000.

(g) Spousal and child support as needed for support.

2. Under statute 23.166:

(a) Bank account to \$7,500.

(b) Proceeds from the sale of exempt property.

3. Firearm under statute 23.200.

4. Funeral plot under statute 61.770.

5. Business property of a partnership is exempt under statute 68.420.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt:

1. ERISA benefits, including IRAs and SEPs deposited more than a year before filing for bankruptcy relief under statute 23.170.

2. Government and public employees (state, federal and local) under statute 237.201.

3. Employees of school districts under statute 239.261.

#### TOOLS OF THE DEBTOR'S TRADE

Under statute 23.160, there is an exemption for tools, library, implements, instruments and a team of animals used in a debtor's trade or business to \$3,000. A married couple may double

this amount.

#### WAGES

Under Oregon law, there are the following wage exemptions available to debtors:

1. 75% of wages or 40 times the federal minimum wage is exempt under statute 23.185.
2. Wages that have been placed in an employee's bond savings account under statute 292.070.

#### PENNSYLVANIA

##### GOVERNING STATUTES

Pennsylvania Statutes Annotated 1981, Title 42, Sections 1511-1516, Rules of Civil Procedure Governing District Justices, Rules 201-325.

##### DOLLAR LIMIT

\$5,000 in the Municipal Courts, \$8,000 in the District Justice courts.

##### SERVICE

By certified or registered mail, sheriff or court-approved adult.

##### STATUTE OF LIMITATIONS

Most contracts four years, most torts one to two years, judgments last four years.

##### JURY TRIALS

Not permitted. Either party can request a jury trial and the

case will be transferred.

#### ATTORNEYS

Permitted.

#### TRANSFER OF TRIAL TO HIGHER COURT

If the defendant counterclaims over limit in Municipal Court, the case can be transferred to the Court of Common Pleas. No provision for District or Justice courts.

#### APPEALS

By either party for a new trial.

#### JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is an automatic lien on the debtor's real property in the county where the judgment was issued. The judgment creditor must record the judgment in every other county where the judgment debtor has property in order to have a lien on the property in that county.

#### SPECIAL NOTE

No actions for ownership of real estate.

#### GOVERNMENT BENEFITS

The following government benefits are exempt to a debtor under state law:

1. Unemployment compensation under statute 43-863.
2. Korean veteran benefits under statute 51-20098.
3. Veteran's benefits under statute 51-20012.
4. Crime victim's compensation under statute 71-180-7.10.
5. Worker's compensation under statute 42-8124.

## HOMESTEAD EXEMPTION

There is no homestead exemption, but court decisions, In re Thacker 5 B.R. 592 and In re Barsotti 3 C.B.C.2d 306 1980, permit a debtor to exempt tenancy by the entireties property unless both spouses are jointly liable for the debts.

## INSURANCE

There are several exemptions for different types of insurance proceeds under statute 42-8124:

1. Accident or disability benefits.
2. Annuity contract payments and cash value to \$100 per month.
3. Annuity policy, cash value or proceeds if the beneficiary is the insured's dependent, spouse, or child.
4. Benefits from fraternal benefit societies.
5. Group life policy or proceeds.
6. Life insurance proceeds if the policy prohibits payment to creditors.
7. Insurance proceeds from no-fault auto insurance.

## PERSONAL PROPERTY

Pennsylvania has exemptions for the following personal property:

1. Business property of a partnership is exempt under statute 15-8341.
2. Under statute 42-1824:
  - (a) Bibles and school books.

- (b) Sewing machine.
  - (c) Clothing as needed under statute.
  - (d) Uniforms.
3. Personal property at a U.S. sponsored international exhibit under statute 42-8125.

RETIREMENT BENEFITS

The following retirement plans and pension benefits are exempt to protect debtors:

- 1. Employees of cities under statutes 53-13445, 53-23572 and 53- 39383.
- 2. Employees of counties under statute 16-4716.
- 3. Employees of a municipality under statute 53-881.115.
- 4. Employees of the state under statute 71-5953.
- 5. Private retirement plans that forbid payment to creditors under statute 42-8124.
- 6. Police officers under statutes 53-764, 53-776 and 53-23666.
- 7. Public school employees under statute 24-8533.
- 8. Self-employment benefits under statute 42-8124.

TOOLS OF THE DEBTOR'S TRADE

None.

WAGES

Under statute 42-8127, wages are exempt.

**RHODE ISLAND**

GOVERNING STATUTES

General Laws of Rhode Island 1985, Title 10, Ch. 16, Section 116.

DOLLAR LIMIT

\$1,500.

SERVICE

By certified or registered mail, sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Most contracts 10 years, most torts five years, judgments last 20 years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Not permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If the defendant counterclaims for more than \$1,500.

APPEALS

By defendant for a new trial except where default was taken against a manufacturer or seller by a consumer.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every

county where the judgment debtor has property in order to have a lien on the property in that county.

#### SPECIAL NOTE

No personal liability or property damages actions permitted.

#### GOVERNMENT BENEFITS

The following government benefits are exempt to a debtor under state law:

1. Unemployment compensation under statute 28-44-58.
2. Veteran and survivor's benefits under statute 30-7-9.
3. Disability benefits under statute 28-41-32.
4. Welfare and general assistance under statute 40-6-14.
5. Worker's compensation under statute 28-33-27.
6. Assistance to aged, blind, disabled and AFDC under statute 40-6-14.

#### HOMESTEAD EXEMPTION

\$150,000 in land and buildings used as primary residence under Statute 9-26-4. Tenancy by the Entireties property may be exempt if it is not liable for a joint debt of the spouses, Cull vs. Vadnais 1979, A.2d 1241.

#### INSURANCE

There are several exemptions for different types of insurance proceeds for a debtor:

1. Accident or health benefits under statute 27-18-24.
2. Benefits from fraternal benefit societies under statute 27-25-18.

3. Life insurance proceeds if the policy prohibits payment to creditors under statute 27-4-12.
4. Life insurance proceeds or cash value if the beneficiary is not the insured under statute 27-4-11.
5. Proceeds from temporary disability insurance under statute 28-41-32.

#### PERSONAL PROPERTY

Rhode Island has exemptions for the following personal property:

1. Cooperative association holdings to \$50 under statute 7-8-25.
2. Business property of a partnership is exempt under statute 7-12-36.
3. Body of a deceased person under statute 9-26-3.
4. Under statute 9-26-4
  - (a) Bibles and books to \$300.
  - (b) Clothing as needed.
  - (c) Debt secured by a promissory note or bill of exchange.
  - (d) Funeral plot under statute 9-26-4.
  - (e) Furniture including bedroom set to a total of \$1,000.
  - (f) Earnings of a minor child.
  - (g) Jewelry to \$1,000
  - (h) Motor vehicle to \$10,000
  - (i) Prepaid tuition program or tuition savings account

#### RETIREMENT BENEFITS

The following retirement plans and pension benefits are exempt to protect debtors under state law:

1. ERISA qualified benefits and IRA's by statute 9-26-4.
2. Employees of a municipality under statute 36-10-34.
3. Employees of the state under statute 36-10-34.
4. Private retirement plans under 28-17-4.
5. Police officers and firefighters under statute 9-26-5.

#### TOOLS OF THE DEBTOR'S TRADE

Under statute 9-26-4, Rhode Island has the following exemptions for a debtor's tools of trade:

1. The library of a professional person in active practice.
2. Tools, instruments, implements used in the trade or business to \$500.

#### WAGES

Rhode Island has the following exemptions for wages of a debtor:

1. Earned but unpaid wages to \$50 under statute 9-26-4.
2. Under statutes 7-7-25 and 30-7-9:
  - (a) Earned but unpaid wages due military members on active duty.
  - (b) Earned but unpaid wages to seamen.
  - (c) Earned but unpaid wages if the debtor received welfare during the year prior to the filing of bankruptcy relief.
  - (d) Wages of a spouse.
  - (e) Wages paid by charity to the debtor.

SOUTH CAROLINA

GOVERNING STATUTES

Code of the Laws of South Carolina 1976, Title 22, Ch. 3, Sections 10-320, Administrative and Procedural Rules for Magistrate's Court, Rule 1-19.

DOLLAR LIMIT

\$7,500: no limit for landlord-tenant cases.

SERVICE

By certified or registered mail, sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Most contracts three years, most torts two to three years, judgments last 10 years.

JURY TRIALS

Permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If the defendant counterclaims for more than \$5,000.

APPEALS

By either party but only on questions of law within 5 days of judgment for new trial and if denied then within 25 days appeal of

that motion.

#### JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

#### GOVERNMENT BENEFITS

The following government benefits are exempt to protect the debtor under state law:

1. Under statute 15-41-30.
  - (a) Unemployment compensation.
  - (b) Crime victim's compensation.
  - (c) Veteran benefits.
  - (d) Social Security.
2. Under statute 43-5-190:
  - (a) Old age assistance.
  - (b) Assistance to the blind.
  - (c) Assistance to the disabled.
  - (d) Assistance under AFDC.
3. Worker's compensation under statute 42-9-360.

#### HOMESTEAD EXEMPTION

Under statute 15-41-30, the homestead exemption for real property, mobile home or houseboat used as a residence is to \$5,000. Joint owners may double this exemption.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under South Carolina law:

1. Disability and health benefits are exempt by statute 15-41-30.
2. Life insurance cash value on policy on which debtor relied on to \$4,000 under statute 15-41-30.
3. Life insurance policy or proceeds to \$25,000 on a spouse or child under statute 38-63-40.
4. Life insurance benefits on a person on whom the debtor relied for support under statute 15-41-30.
5. Life insurance benefits if policy prohibits payment to creditors under statute 38-63-50.
6. Benefits from fraternal societies by statute 38-37-870.
7. Unmatured life insurance contract under statute 15-41-30.
8. Group Life Insurance cash value to \$50,000 under statute 38-65-70.
9. Proceeds from Group Life Insurance under statute 38-63040(c)
10. Proceeds from life insurance annuity contract under statute 38-63040(b).
11. Unmatured life insurance contract except credit insurance policy under statute 15-41-(30)(7).
12. Accident and disability benefits under statute 38-63040(d).

South Carolina has exemptions for the following personal property:

1. Under statute 15-41-30:
  - (a) Animals, appliances, books, clothing, crops, household goods, furniture, and musical instruments to a total of \$2,500.
  - (b) Funeral plot to \$5,000 in lieu of a homestead exemption. A married couple may double this exemption.
  - (c) Cash, stocks and bonds to \$1,000 in lieu of a homestead exemption.
  - (d) Medical aids.
  - (e) Jewelry to \$500.
  - (f) Motor vehicle to \$1,200.
  - (g) Personal injury recoveries.
  - (h) Wrongful death recoveries.
  - (i) Alimony.
  - (j) Child support.
2. Business property of a partnership is exempt under statute 3-41-720.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt to debtors:

1. ERISA benefits under statute 15-41-30.
2. Public employees' plans under statute 9-1-1680.
3. Firefighters' plans under statute 9-13-230.
4. Police officers' plans under statute 9-11-270.

5. Judges' plans under statute 9-8-190.
6. Legislators' plans under statute 9-9-180.
7. IRAs under statute 15-41(30)12).

TOOLS OF THE DEBTOR'S TRADE

Under statute 15-41-30, there is an exemption for tools, library, implements, instruments and a team of animals used in a debtor's trade or business to \$750.

WAGES

No exemptions.

SOUTH DAKOTA

GOVERNING STATUTES

South Dakota Compiled laws Annotated 1984, Title 15, Ch. 39, Sections 45-78.

DOLLAR LIMIT

\$4,000.

SERVICE

By certified mail, sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Written contracts six years, oral contracts four years, sale of goods four years, most torts two to three years. Judgments last 20 years. Liens on real property last 10 years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

With court discretion, if the defendant requests a jury trial with an affidavit stating that the issues are complex.

APPEALS

Not permitted.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is an automatic lien on the debtor's real property in the county where issued. The judgment creditor must record the judgment in every other county where the judgment debtor has property in order to have a lien on the property in that county.

SPECIAL NOTE

No defamation cases.

GOVERNMENT BENEFITS

The following government benefits are exempt to a debtor under state law:

1. Unemployment compensation under statute 61-6-28.
2. Worker's compensation under statute 62-4-42.
3. Assistance under AFDC under statute 28-7-16.

HOMESTEAD EXEMPTION

Under statutes 43-31-1 through 43-31-4, there is an unlimited homestead exemption on real property not exceeding 1 acre in town or 160 acres elsewhere. The exemption also applies to a mobile home larger than 240 square feet. Sale proceeds are exempt to \$30,000

or unlimited for a debtor over age 70 or widowed for 1 year after a sale. A spouse or child of a deceased owner can claim the homestead exemption. May file a homestead declaration under statute 43-31-6.

#### INSURANCE

There are several exemptions for different types of insurance proceeds available to a debtor:

1. Benefits from life insurance, endowments and cash value to \$20,000 under statute 58-12-4.
2. Annuity contract payments and cash value to \$250 per month under statute 58-12-8.
3. Life insurance proceeds to \$10,000 if the beneficiary is surviving spouse or child under statute 43-45-6.
4. Benefits from fraternal benefit societies under statute 58-37A-18.
5. Benefits from health policies to \$20,000 under statute 58-12-4.
6. Life insurance proceeds if the policy prohibits payment to creditors under statute 58-15-70.
7. Endowment, life insurance policy, proceeds or cash value to \$20,000, can not double. In Re James 31 BR 67 (1983) statute 58-12-4.

#### PERSONAL PROPERTY

South Dakota has exemptions for the following personal property:

1. A Bible is exempt along with books to \$200, burial plots, church pews, family pictures, clothing and food for one year and fuel for one year under statute 43-45-2.
2. Under statute 43-45-5, a head of family may claim \$6,000 of any personal property
3. Under 43-45-2 the following are exempt:
  - (a) Books and musical instruments to \$200.
  - (b) Animals: 2 cows, 5 swine, 25 sheep and food enough to last 1 year.
  - (c) Farming machinery, utensils, tackle for teams, wagon to a total of \$1,250.
  - (d) Furniture including bedroom set and bedding to \$200.
  - (e) Library and tools and instruments of a professional to \$300.
  - (f) Tools of mechanic and stock in trade to \$200.
  - (g) Animals: 2 oxen, horses and mules.
3. Under statute 43-45-4, a nonhead of family may claim \$4,000 of any personal property.
4. Business property of a partnership is exempt under statute 48-4-14.

#### RETIREMENT BENEFITS

The following retirement plans and pension benefits are exempt to debtors:

1. Employees of cities plans under statutes 9-16-47.
2. Public employees' plans under statute 3-12-115.

3. ERISA benefits limited to \$250,000 under 43-45-16.

TOOLS OF THE DEBTOR'S TRADE

None.

WAGES

Under state law, the following exemptions exist for the wages of the debtor:

1. 80% of wages or 40 times the federal minimum wage (the lesser) is exempt.
2. Wages of prisoners employed in work programs under statute 24-8-10.

**TENNESSEE**

GOVERNING STATUTES

Tennessee Code Annotated 1980, Title 16, Ch. 15, Sections 501-713.

DOLLAR LIMIT

\$15,000 for counties with population less than 700,000; otherwise \$25,000. No limit on eviction or recovery of personal property cases (limited to \$25,000 in counties of less than 700,000).

SERVICE

By certified mail or sheriff.

STATUTE OF LIMITATIONS

Most contracts six years, sale of goods four years, most torts one year. Judgments last 10 years.

JURY TRIALS

Not permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Limited to restraining orders.

TRANSFER OF TRIAL TO HIGHER COURT

No provision.

APPEALS

Either party for new trial.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

GOVERNMENT BENEFITS

The following government benefits are exempt to the debtor under state law:

1. Worker's compensation under statute 50-6-223.
2. Unemployment compensation under statute 26-2-111.
3. Public assistance under statute 26-2-111.
4. Old age assistance under statute 71-2-216.
5. Assistance to the blind under statute 71-4-117.
6. Assistance to the disabled under statute 71-4-111.
7. Assistance under AFDC under statute 71-3-121.

8. Crime victim's compensation to \$5,000 under statutes 29-13-111 and 26-2-111. A maximum total exemption of \$15,000 exists for victim's compensation, personal injury and wrongful death.
9. Veteran benefits under statute 26-2-111.
10. Social security under statute 26-2-111.

#### HOMESTEAD EXEMPTION

Under statute 26-2-301, the homestead exemption is \$5,000, but a married couple may claim \$7,500 includes life estate and 2-15 year leases under statutes 26-2-302, 26-2-303. Under court decision in Ray vs. Dawson 5 C.B.C. 404 1981, a debtor is permitted to exempt tenancy by the entireties property provided both spouses are not liable on the debt.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Tennessee law:

1. Disability and health benefits are exempt by statute 26-2-111.
2. Disability, accident and health benefit under statute 26-2-110.
3. Life insurance policy or proceeds on a spouse, dependent or child under statute 56-7-201.
4. Insurance proceeds under a homeowner's policy to \$5,000 under statute 26-2-304.
5. Benefits from fraternal societies by statute 56-25-1403.

#### PERSONAL PROPERTY

Tennessee has exemptions for the following personal property of a debtor:

1. Bible, school books, pictures and portraits under statute 26-2-103.
2. Clothing as needed under statute 26-2-103.
3. Medical aids under statute 26-2-111.
4. Recoveries of lost earnings under statute 26-2-111.
5. Personal injury recoveries to \$7,500, not including pain and suffering under statute 26-2-111.
6. Wrongful death recoveries to \$10,000 under statute 26-2-111. (Maximum for both personal injury and wrongful death recoveries together is \$15,000)
7. Alimony owed for more than 30 days before filing for bankruptcy relief under 26-2-111.
8. Funeral plot to one acre under statute 26-2-305.
9. Business property of a partnership is exempt under statute 61-1-124.

#### RETIREMENT BENEFITS

The following retirement plans and benefits are exempt to protect debtors:

1. ERISA benefits under statute 26-2-111.
2. Public employees' plans under statute 8-36-111.
3. State government employees' plans under statute 26-2-104.
4. Local government employees' plans under statute 26-2-104.
5. Teachers' plans under statute 49-5-909.

TOOLS OF THE DEBTOR'S TRADE

Under statute 26-2-111, there is an exemption for tools, library, implements, instruments used in a debtor's trade or business to \$1,900.

WAGES

Under statutes 26-2-106 and 26-2-107, 75% or 30 times the federal minimum wage (the lesser) is exempt plus unpaid wages plus \$250 per week per child are exempt.

TEXAS

GOVERNING STATUTES

Texas Code Annotated 1988, Government Code, Sections 28.001-.055, Texas Rules of Civil Procedure.

DOLLAR LIMIT

\$5,000 depending on the county.

SERVICE

By certified mail, sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Most contracts four years, most torts two years, judgments last 10 years.

JURY TRIALS

Permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Not permitted.

#### TRANSFER OF TRIAL TO HIGHER COURT

Defendant may file motion to transfer under Justice Court rules.

#### APPEALS

By either party within 10 days of judgment.

#### JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

#### GOVERNMENT BENEFITS

The following government benefits are exempt to protect the debtor under state law:

1. Worker's compensation under Civil Statutes 8306-3.
2. Unemployment compensation under Civil Statutes 5221b-13.
3. Medical benefits under Human Resources statute 32.036.
4. Assistance under AFDC under Human Resources statute 31.040.
5. Crime victim's compensation under Civil Statute 8309-1.

#### HOMESTEAD EXEMPTION

Under Property Statutes sections 41.001 and 41.002, there is an unlimited homestead exemption on real property that cannot exceed 1 acre in a town, city or village or 100 acres elsewhere (increasing to 200 acres for a family). Sale proceeds are exempt

for 6 months after sale.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Texas law:

1. Accident, annuity, health or life benefits under Insurance Statutes section 21-22.
2. Life insurance policy, proceeds or cash value where policy was purchased 2 years before filing for bankruptcy relief under Insurance Statutes section 10.28.
3. Life insurance benefits where the policy forbids payment to creditor under Insurance Statutes section 21.22.
4. Public school employees' plans group life insurance under Insurance Statutes section 3.50-4.
5. Benefits from fraternal societies by Insurance Statutes section 10.28.
6. Group insurance under Insurance Statute 3.50-2.
7. State college or university employee benefits under Insurance Statute section 3.50-3.

#### PERSONAL PROPERTY

Texas has a total personal property exemption, not including a funeral plot, of \$30,000 for an individual that increases to \$60,000 for a head of household. The amount of this exemption includes the value of any exemption taken under the tools of trade or insurance. Specifically, the personal property exemptions are:

1. Under Property Statutes sections 42.001 and 42.002,

animals: 5 cows, 20 hogs, 50 chickens, 30 geese, 20 goats, 20 sheep and food, clothing, food, furniture, heirlooms, jewelry not more than 25% of the total personal property exemption, motor vehicle, supporting equipment, two firearms, wagon, horse and harness.

2. Funeral plot under Property Statutes 41.001.
3. Business property of a partnership is exempt under Civil Statute section 6132b-25.
4. Alimony and child support under Property Section 42.001(b)(3).

#### RETIREMENT BENEFITS

The following retirement plans and benefits are exempt to debtors:

1. ERISA benefits, including SEPs, Keoghs and IRAs, under Property Statutes section 42.0021.
2. County employees under statute 110B-51.006.
3. Firefighters under Civil Statutes sections 6243e, 6243e.1, 6243 e.2.
4. Police officers under Civil Statutes section 6243d-1, 6243j, 6243g-1.
5. Judges under statute Civil Statutes section 110B-41.004.
6. State employees' plans under 110B-21.005.
7. Teachers' plans under 110B-31.005.
8. Municipal employees' plans under Civil Statutes 6243g, 110B- 61.006.

9. Law enforcement survivor's plans under Civil Statutes 6228f.

#### TOOLS OF THE DEBTOR'S TRADE

Under statute Property Statutes section 42.002, there is an exemption for tools, library, implements, instruments used in a debtor's trade or business.

#### WAGES

Under Property Statutes section 42.002, the debtor has exemption for all wages.

#### UTAH

#### GOVERNING STATUTES

Utah Code Annotated 1953, Sections 78.6.1-15.

#### DOLLAR LIMIT

\$5,000.

#### SERVICE

Sheriff or non-party adult.

#### STATUTE OF LIMITATIONS

Written contracts six years, oral contracts four years, most torts one to four years. Judgments last eight years.

#### JURY TRIALS

Permitted.

#### ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

No provision.

APPEALS

By either party within 10 days of Judgment.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is an automatic lien on the debtor's real property in the county where judgment is issued. The judgment creditor must record the judgment in other every county where the judgment debtor has property in order to have a lien on the property in that county.

GOVERNMENT BENEFITS

The following government benefits are exempt to protect the debtor under state law:

1. Worker's compensation under statute 35-1-80.
2. Unemployment compensation under statute 35-4-18.
3. Assistance under AFDC under statute 55-15-32.
4. Crime victim's compensation under statute 63-63-21.
5. Veteran benefits under statute 78-23-5.
6. Welfare and general assistance under statute 55-15-32.
7. Occupational disability benefits under statute 35-2-35.

HOMESTEAD EXEMPTION

Under statute 78-23-3, the homestead exemption is \$20,000, \$5,000 if not primary residence A married couple may double. A

homestead exemption must be filed before any sale of the home in order to protect the proceeds.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Utah law:

1. Disability and health benefits are exempt by statute 78-23-5.
2. Life insurance policy or proceeds where the beneficiary is the insured's spouse, child or dependent as needed for support under statute 78-23-6.
3. Cash surrender value of life insurance policies to \$1,500 under statute 78-23-7.
4. Benefits from fraternal societies by statute 31A-9-903.

#### PERSONAL PROPERTY

Utah has exemptions for the following personal property for a debtor:

1. Under statute 78-23-5:
  - (a) Funeral plot to one acre.
  - (b) Medical aids.
  - (c) Clothing as needed.
  - (d) Personal injury recoveries for the debtor or a person on whom the debtor relied for support.
  - (e) Wrongful death recoveries for a person on whom the debtor depended for support.
  - (f) Family portraits, pictures and artwork by a member

of the debtor's family.

- (g) Bedroom set, bedding, washer and dryer.
  - (h) Freezer, refrigerator, sewing machine and stove.
  - (I) Food for 12 months.
  - (j) Child support.
2. Under statute 78-23-8:
    - (a) \$500 total for animals, books and musical instruments.
    - (b) Furniture and appliances to \$500.
    - (c) Heirlooms to \$500.
    - (d) Motor Vehicle to \$2,500
  3. Alimony needed for support under statute 78-23-6.
  4. Recoveries for damages to exempt property under statute 78-23-9.
  5. Business property of a partnership is exempt under statute 48-1-22.

#### RETIREMENT BENEFITS

The following retirement plans and benefits are exempt to debtors:

1. ERISA benefits under statute 78-23-5.
2. Other pension plan benefits needed for support under statute 78-23-6.
3. Public employees' plans under statute 49-1-609.

#### TOOLS OF THE DEBTOR'S TRADE

Utah has the following exemptions for the tools of trade used

by a debtor:

1. Books, tools and implements of trade to \$3,500 under statute 78-23-8.
2. Uniforms and equipment required to be kept by a National Guard member under statute 391-47.

WAGES

Under statute 70C-7-103, 75% or 30 times the federal minimum wage (the lesser) is exempt.

VERMONT

GOVERNING STATUTES

Vermont Statutes Annotated 1973, Title 12, Sections 405, 5531-5538.

DOLLAR LIMIT

\$3,500.

SERVICE

By first class mail or sheriff.

STATUTE OF LIMITATIONS

Most contracts eight years, sale of goods four years, most torts three years. Judgments last eight years.

JURY TRIALS

Defendant may request jury trial.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Not permitted.

TRANSFER OF TRIAL TO HIGHER COURT

Not Permitted

APPEALS

By either party but limited to only review of questions of law within 30 days of judgment.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

SPECIAL NOTE

The defendant must file a written answer to the allegations in the plaintiff's complaint. No defamation cases are permitted. Defendant may file a counterclaim for more than \$3,500, but the court can only award \$3,500. The defendant could file another suit for the difference.

GOVERNMENT BENEFITS

The following government benefits are exempt to protect the debtor under state law:

1. Worker's compensation under statute 21-681.
2. Unemployment compensation under statute 21-1367.
3. Under statute 33-2575:
  - (a) Public assistance.
  - (b) Old age assistance.

- (c) Assistance to the blind.
  - (d) Assistance to the disabled.
  - (e) Assistance under AFDC.
4. Crime victim's compensation under statute 12-2740.
  5. Veteran benefits under statute 12-2740.
  6. Social Security under statute 12-2740.

#### HOMESTEAD EXEMPTION

Under statute 27-101, the homestead exemption is \$75,000 that may also apply to rents, profits and out buildings. A spouse of a deceased owner may also claim the homestead exemption. Under court decisions Lowell vs. Lowell 1980, 419 A.2d 321 and In re D'Avignon 34 B.R. 790 1982, a debtor is permitted to exempt tenancy by the entirety property provided the debt is not a joint liability of the spouses.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Vermont law:

1. Disability and health benefits are exempt by statute 12-2740.
2. Annuity benefits to \$350 per month under statute 8-3709.
3. Life insurance policy or proceeds if the beneficiary is not the insured under statute 8-3706.
4. Group life or health insurance benefits under statute 8-3708.
5. Benefits from fraternal societies by statute 8-4478.

6. Health benefits to \$200 per month under statute 8-4086.
7. Life insurance proceeds for a person that the debtor relied on for support under statute 12-2740.
8. Life insurance proceeds if the policy prohibits payment to the creditors under statute 8-3705.
9. Unmatured life insurance contract under statute 12-2740.

#### PERSONAL PROPERTY

Vermont has exemptions for the following personal property:

1. Under statute 12-2740:
  - (a) \$2,500 total for animals, appliances, books, clothing, crops, furniture, goods and musical instruments under statute 12-2740(5)
  - (b) Animals: 1 cow, 2 goats, 10 sheep, 3 swarms of bees, feed for 1 winter, 10 cords of firewood, 5 tons of coal or 500 gallons of oil, 2 horses, harnesses, growing crops to \$5,000, 2 halters, plow and ox yoke under statute 12-2740(6) (9-14).
  - (c) Wedding ring exempt, jewelry to \$500.
  - (d) Motor vehicle to \$2,500.
  - (e) Bank deposits to \$700.
  - (f) Personal injury recoveries for a person on whom the debtor relied for support.
  - (g) Wrongful death recoveries for a person on whom the debtor relied for support.
  - (h) Recoveries of lost earnings on which the debtor

relies for support.

(i) Medical aids.

(j) Appliances and sewing machine.

(k) Alimony and child support needed for support.

2. Business property of a partnership is exempt under statute 1-1282.

#### RETIREMENT BENEFITS

The following retirement plans and benefits are exempt to debtors:

1. Municipal employees' plans under statute 24-5066.
2. State government employees' plans under statute 3-476.
3. IRAs, Keoghs and SEPs to \$10,000 under statute 12-2740.
4. Teachers' plans under statute 16-1946.
5. Other pension plans under statute 12-2740.

#### TOOLS OF THE DEBTOR'S TRADE

Under statute 12-2740, there is an exemption for tools, library, implements, instruments used in a debtor's trade or business are exempt to \$5,000.

#### WAGES

Under statute 12-3170, 75% or 30 times the federal minimum wage (the lesser) is exempt.

#### VIRGINIA

#### GOVERNING STATUTES

Code of Virginia 1982, Sections 16.1.76-113 and 122.1-122.7.

DOLLAR LIMIT

Varies from \$1,000 to \$15,000 among Small Claims Courts.  
\$15,000 in regular District Court

SERVICE

Sheriff or court-approved adult.

STATUTE OF LIMITATIONS

Written five years, oral four years, sale of goods four years,  
most torts two years. Judgments last 20 years.

JURY TRIALS

Not permitted.

ATTORNEYS

Not permitted

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If requested by a defendant with a counterclaim greater than  
\$1,000.

APPEALS

By either party for a new trial with 10 days of judgment. Jury  
trial can be requested.

JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real  
property. The judgment creditor must record the judgment in every  
county where the judgment debtor has property in order to have a  
lien on the property in that county.

## GOVERNMENT BENEFITS

The following government benefits are exempt to protect the debtor under state law:

1. Unemployment compensation under statute 60.2-600.
2. Under statute 63.1-88:
  - (a) Public assistance.
  - (b) Old age assistance.
  - (c) Assistance to the blind.
  - (d) Assistance to the disabled.
  - (e) Assistance under AFDC.
3. Worker's compensation under statute 65.1-82.
4. Crime victim's compensation under statute 19.2-368.12.

## HOMESTEAD EXEMPTION

Under statutes 34-4 and 34-18, the homestead exemption is \$5,000 plus \$500 per dependent that may also apply to rents and profits and a mobile home In Re Goad 161 BR 161 (1993). A married couple may double. Under court decisions In re Costley 39 B.R. 585 1984, and Ragsdale vs. Genesco 674 F.2d 277 1982, a debtor is permitted to exempt tenancy by the entirety property provided the debt is not a joint liability of both spouses. Surviving spouse may claim \$10,000 exemption if none but minor children exist they can claim \$10,000 under statute 64-1-151-3.

## INSURANCE

There are several exemptions for different types of insurance proceeds under Virginia law:

1. Accident and health benefits are exempt by statute 38.2-3549.
2. Cooperative life insurance benefits under statute 38.2-3811.
3. Life insurance policy or proceeds if the beneficiary is not the insured under statute 38.2-3123.
4. Group life or accident proceeds for government officers under statute 51-111.67:8.
5. Group life or accident proceeds or policy under statute 38.2-3339.
6. Benefits from fraternal societies by statute 38.2-4118.
7. Funeral benefits under statute 38.2-4021.
8. Occupational medical benefits under statute 38.2-3549.
9. Life insurance cash values to \$10,000 under statute 38.2-3123. The exemption is only available for a debtor who is a householder.

#### PERSONAL PROPERTY

Virginia has exemptions for the following personal property for a debtor:

1. Under statute 34-26:
  - (a) Bible, portraits, heirlooms to \$5,000.
  - (b) Clothing to \$1,000.
  - (c) Health and medical aids.
  - (d) Furniture to \$5,000.
  - (e) Funeral plots.

- (f) Pets.
  - (g) Wedding and engagement rings.
  - (h) Family portraits and heirlooms \$5,000
  - (i) Motor Vehicle to \$2,000
2. Under statute 34-28.1:
    - (a) All personal injury causes of action.
    - (b) Recoveries for personal injuries.
  3. Business property of a partnership is exempt under statute 50-25.

#### RETIREMENT BENEFITS

The following retirement plans and benefits are exempt to protect debtors:

1. ERISA qualified benefits to \$17,500 per year under statute 34-34.
2. County employees' plans under statute 51-127-7.
3. State government employees' plans under statute 51-111-15.
4. Judges' plans under statute 51-180.

#### TOOLS OF THE DEBTOR'S TRADE

Virginia has the following exemptions for a debtor engaged in a trade or business and who is also a householder:

1. Under statute 34-26, tools, books, instruments and motor vehicle to \$10,000 if needed for the debtor's trade or education.
2. Under statute 34-27:

(a) To \$3,000 for horses, 2 mules, gear, wagon and tractor.

(b) Plows, implements, equipment to a farmer to \$1,000.

3. Uniforms and arms of military personnel under statute 44-96.

#### WAGES

Under statute 34-29, 75% or 30 times the federal minimum wage (the lesser) is exempt.

#### WASHINGTON

#### GOVERNING STATUTES

Revised Code of Washington Annotated 1962, Title 12, Sections 40.010-120.

#### DOLLAR LIMIT

\$4,000.

#### SERVICE

By certified or registered mail, sheriff or nonparty adult.

#### STATUTE OF LIMITATIONS

Most contracts six years, most torts two years, sale of goods four years, judgments last 10 years.

#### JURY TRIALS

Not permitted.

#### ATTORNEYS

Not permitted without court consent unless case was transferred from regular court.

## EQUITABLE RELIEF

Not permitted.

## TRANSFER OF TRIAL TO HIGHER COURT

Upon defendant's request when plaintiff is a corporation with an attorney.

## APPEALS

By defendant when case is more than \$100. By plaintiff when case involves more than \$1,000. For a new trial within 14 days of judgment.

## JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is an automatic lien on the debtor's real property in the county where the judgment was issued. The judgment creditor must record the judgment in every other county where the judgment debtor has property in order to have a lien on the property in that county.

## SPECIAL NOTE

Counterclaims of more than \$2,500 must be filed separately in appropriate court. No transfer of the plaintiff's claim.

## GOVERNMENT BENEFITS

The following government benefits are exempt to the debtor under state law:

1. Worker's compensation under statute 51.32.040.
2. Unemployment compensation under statute 50.40.020.
3. Public assistance under statute 74.04.280.
4. Old age assistance under statute 74.08.210.

5. Assistance under AFDC under statute 74.13.070.
6. Crime victim's compensation under statute 7.68.070.

#### HOMESTEAD EXEMPTION

Under statutes 6.13.010 and 6.13.030, the homestead exemption is \$40,000, unimproved property \$15,000. A homestead declaration must be filed prior to the judgment in order to get this exemption if the property is unimproved or unoccupied.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Washington law:

1. Disability benefits are exempt by statute 48.18.400.
2. Annuity contract proceeds to \$250 per month under statute 48.18.430.
3. Group life insurance policy or proceeds under statute 48.18.420.
4. Insurance proceeds or policy if the beneficiary is not the insured under statute 48.18.410.
5. Benefits from fraternal societies by statute 48.36A.180.
6. Fire insurance proceeds for damage to exempt property under statute 6.15.030.

#### PERSONAL PROPERTY

Washington has exemptions for the following personal property for a debtor:

1. Under statute 6.15.010:
  - (a) To \$2,700 for appliances, furniture, household

goods, home and yard tools.

(b) Books to \$1,500.

(c) Clothing as needed.

(d) Jewelry and furs to \$1,000.

(e) Food and fuel to last 3 months.

(f) Heirlooms and family pictures.

(g) Motor vehicle to \$2,500, 2 if husband and wife  
filing

2. Business property of a partnership is exempt under statute 25.04.250.
3. Funeral plot if sold by nonprofit association under statute 68.20.120.

#### RETIREMENT BENEFITS

The following retirement plans and benefits are exempt to protect debtors:

1. ERISA benefits including IRAs under statute 6.15.020.
2. Public employees' plans under statute 41.40.380.
3. State patrol employees' plans under statute 43.43.310.
4. Local government employees' plans under statute 41.28.200.
5. Volunteer firefighters' plans under statute 41.24.240.

#### TOOLS OF THE DEBTOR'S TRADE

Under statute 6.15.010, there are the following exemptions for the debtor's tools of trade:

1. To \$5,000 for the equipment of a farmer including trucks, stock, tools and supplies.

2. Library, office supplies, equipment and furniture of a professional to \$5,000.
3. Tools and materials used in the debtor's trade or business to \$5,000.

WAGES

Under statute 6.27.150, 75% or 30 times the federal minimum wage (the lesser) is exempt.

**WEST VIRGINIA**

GOVERNING STATUTES

West Virginia Code 1986, Ch. 50, Sections 1.1-6.3, Ch. 56, Sections 1.1-1.2.

DOLLAR LIMIT

\$5,000 in County Magistrate Court

SERVICE

By sheriff or disinterested, nonparty adult.

STATUTE OF LIMITATIONS

Most contracts five years, sale of goods four years, most torts two years. Judgments last 10 years.

JURY TRIALS

Permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Not permitted.

## TRANSFER OF TRIAL TO HIGHER COURT

Cases less than \$300 on the consent of both parties. Cases involving more than \$300 on the request of either party.

## APPEALS

By either party for a new trial within 20 days of judgment.

## JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

## SPECIAL NOTE

No defamation, ownership of real property, real property foreclosure, or false imprisonment cases. No cases can be filed against the state in this court.

## GOVERNMENT BENEFITS

The following government benefits are exempt to protect the debtor under state law:

1. Under statute 9-5-1:
  - (a) Old age assistance.
  - (b) Assistance to the blind.
  - (c) Assistance to the disabled.
  - (d) Assistance under AFDC.
2. Worker's compensation under statute 23-4-18.
3. Under statute 38-10-4:
  - (a) Crime victim's compensation.

- (b) Veteran benefits.
- (c) Social Security.
- (d) Unemployment compensation.

#### HOMESTEAD EXEMPTION

Under statute 38-10-4, there is a homestead exemption for real property, mobile home or houseboat used as a residence to \$25,000. Any unused portion of the homestead exemption may be used against any other property.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under West Virginia law:

1. Disability and health benefits are exempt by statute 38-10-4.
2. Life insurance cash value on policy on which debtor relied on to \$4,000 under statute 38-10-4.
3. Group life insurance policy or proceeds under statute 33-6-28.
4. Life insurance benefits if debtor is both beneficiary and policy owner under statute 33-6-27.
5. Life insurance benefits if beneficiary is a married woman under statute 48-3-23.
6. Benefits from fraternal societies by statute 33-23-21.
7. Unmatured life insurance contract to \$8,000 by 38-10-4.

#### PERSONAL PROPERTY

West Virginia has exemptions for the following personal

property:

1. Under statute 38-10-4:
  - (a) Animals, appliances, books, clothing, crops, household goods, furniture, and musical instruments to \$400 per items for a total of \$8,000.
  - (b) Funeral plot to \$15,000 in lieu of a homestead exemption.
  - (c) Lost earnings needed for support.
  - (d) Medical aids.
  - (e) Jewelry to \$1,000.
  - (f) Motor vehicle to \$2,400.
  - (g) Personal injury recoveries to \$15,000 not including pain and suffering.
  - (h) Wrongful death recoveries for a person that the debtor relied on for support.
  - (i) Spousal and child support as needed for support.
2. Business property of a partnership is exempt under statute 47-8A-25.

#### RETIREMENT BENEFITS

The following retirement benefits are exempt to protect debtors:

1. ERISA and IRAS needed for support under statute 38-10-4.
2. Public employees' plans under statute 5-10-46.
3. Teachers plans under statute 18-7A-30.

TOOLS OF THE DEBTOR'S TRADE

Under statute 38-10-4, there is an exemption for tools, library, implements, instruments and a team of animals used in a debtor's trade or business to \$1,500.

WAGES

Under statute 38-5A-3, there is an exemption for 80% or 30 times the federal minimum wages (the lesser) is exempt.

WISCONSIN

GOVERNING STATUTES

Wisconsin Codes Annotated 1981, Section 799.01-45.

DOLLAR LIMIT

\$5,000 but unlimited in eviction cases.

SERVICE

By certified or registered mail, sheriff or disinterested adult.

STATUTE OF LIMITATIONS

Most contracts six years, most torts three to four years.

JURY TRIALS

Permitted.

ATTORNEYS

Permitted.

EQUITABLE RELIEF

Permitted.

TRANSFER OF TRIAL TO HIGHER COURT

If either side requests jury trial or counterclaim more than \$5,000. Case will be tried under regular rules of court.

#### APPEALS

By either party but only on questions of law within 45 days of judgment.

#### JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is not an automatic lien on the debtor's real property. The judgment creditor must record the judgment in every county where the judgment debtor has property in order to have a lien on the property in that county.

#### SPECIAL NOTE

Attorneys fees to \$100 may be awarded on judgments exceeding \$1,000.

#### GOVERNMENT BENEFITS

The following government benefits are exempt to protect the debtor under state law:

1. Worker's compensation under statute 102.27.
2. Unemployment compensation under statute 108.13.
3. Welfare or social services benefits under statute 49.41.
4. Assistance under AFDC under statute 49.41.
5. Veteran benefits under statute 45.35.
6. Crime victim's compensation under statute 949.07.

#### HOMESTEAD EXEMPTION

Under statute 815.20, the homestead exemption is \$40,000. The debtor must have the intention to occupy the property in order to

get this exemption. Sale proceeds are exempt for 2 years if the debtor intends to "roll over" into another home.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Wisconsin law:

1. Disability, accident and health benefits to \$150 per month are exempt under statute 815.18.
2. Life insurance proceeds or cash value if the beneficiary is not the insured under statute 815.18.
3. Fire proceeds for damages to exempt property under statute 815.18.
4. Life insurance benefits if the policy forbids payment to creditors under statute 632.42.
5. Life insurance benefits if beneficiary is a married woman to \$5,000 under statute 766.09.
6. Benefits from fraternal societies by statute 614.96.
7. Benefits from Federal Disability Insurance under statute 815.18
8. Unmatured life insurance contracts, accrued dividends, interest or cash value to \$4,000 if insured is debtor or someone debtor is dependent upon under statute 815.18(3)(f).

#### PERSONAL PROPERTY

Wisconsin has exemptions for the following personal property:

1. Under statute 815.18:

- (a) Funeral plots.
  - (b) Deposit accounts to \$1,000.
  - (c) Household furnishings to \$5,000.
  - (d) Recoveries for lost future income needed for support.
  - (e) Motor vehicle to \$1,200 husband and wife may double
  - (f) Personal injury recoveries to \$25,000.
  - (g) Wrongful death recoveries needed for support.
  - (h) Alimony and child support as needed for support.
2. Business property of a partnership is exempt under statute 178.21.
  3. College Savings and Trust Accounts 14.64(7), 14.63(18)

#### RETIREMENT BENEFITS

The following retirement benefits are exempt to debtors:

1. Designated municipal employees plans under statute 66.81.
2. Public employees' plans under statute 40.08.
3. Firefighters' and police officers' plans under statute 815.18.
4. Military pension plans under statute 815.18.
5. ERISA, IRAs, Keoghs, SEPs and other private retirement plans under statute 815.18.

#### TOOLS OF THE DEBTOR'S TRADE

Under statute 815.18, there is an exemption of \$7,500 for equipment, instruments, books and tools used in the debtor's trade or business including arms and uniforms of a member of the military

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or National Guard.

#### WAGES

Under statute 815.18, 75% or 30 times the federal minimum wage (the lesser) is exempt.

#### WYOMING

#### GOVERNING STATUTES

Wyoming Statutes Annotated 1977, Sections 1.5.101-108 and 1.21.201-205, Rules for Civil Procedure for the Justice of the Peace Courts, Rules 1-8.

#### DOLLAR LIMIT

\$4,000 before Justice of Peace

\$7,000 before County Court

#### SERVICE

By certified or registered mail, sheriff or court-approved adult.

#### STATUTE OF LIMITATIONS

Written contracts 10 years, oral contracts eight years, most torts one to four years.

#### JURY TRIALS

Permitted.

#### ATTORNEYS

Permitted.

#### EQUITABLE RELIEF

Permitted.

## TRANSFER OF TRIAL TO HIGHER COURT

Permitted.

## APPEALS

By either side but only as to questions of law within 10 days of judgment.

## JUDGMENT AS LIEN ON REAL PROPERTY

Judgment is an automatic lien on the debtor's real property in the county where the judgment was issued. The judgment creditor must record the judgment in every other county where the judgment debtor has property in order to have a lien on the property in that county.

## GOVERNMENT BENEFITS

The following government benefits are exempt to protect the debtor under state law:

1. Worker's compensation under statute 27-14-702.
2. Unemployment compensation under statute 27-3-319.
3. Public assistance under statute 42-2-113.
4. Assistance under AFDC under statute 42-2-113.
5. Crime victim's compensation under statute 1-40-113.

## HOMESTEAD EXEMPTION

Under statutes 1-20-101 and 1-20-104, the homestead exemption is \$10,000 for real property and \$6,000 for a house trailer. A married couple may double this exemption. The property must be occupied by the debtor at the time of filing for the exemption in order to get this exemption. A spouse or child of a deceased owner

may claim this exemption. Under the court decision, *In re Anselmi* 52 B.R. 479 a debtor is permitted to exempt tenancy by the entirety property provided the debt is not a joint liability of both spouses.

#### INSURANCE

There are several exemptions for different types of insurance proceeds under Wyoming law:

1. Benefits from annuity contracts to \$350 per month under statute 26-15-132.
2. Disability benefits if the policy forbids the payment to creditors under statute 26-15-130.
3. Life insurance proceeds if the policy forbids the payment to creditors under statute 26-15-133.
4. Insurance proceeds if the beneficiary is not the insured under statute 26-15-129.
5. Benefits from fraternal societies by statute 26-29-116.
6. Group life or disability policy or proceeds under statute 26-15-131.

#### PERSONAL PROPERTY

Wyoming has exemptions for the following personal property for a debtor:

1. Clothing and wedding rings to \$1,000 under statute 1-20-105.
2. Under statute 1-20-106:
  - (a) Bible, school books, pictures and portraits.

(b) Funeral plot.

(c) Furniture, household articles and food to \$2,000 per person in the debtor's home (debtor and dependents).

(d) Motor vehicle to \$2,400.

3. Business property of a partnership is exempt under statute 17-13-502.
4. Liquor licenses under statute 12-4-604.
5. Prepaid funeral contracts under statute 26-32-102.

#### RETIREMENT BENEFITS

The following retirement plans and benefits are exempt to debtors:

1. Public employees' plans under statute 9-3-426.
2. Fish and game wardens under statute 9-3-620.
3. Highway patrol and criminal investigators' plans under statute 9-3-620.
4. Firefighters' and police officer's plans to the extent of payments being received under statute 15-5-209.
5. All retirement plans of a self-employed person under statute 1-20-110.
6. All retirement plans where plan states that benefits are not assignable under statute 1-20-110.

#### TOOLS OF THE DEBTOR'S TRADE

Under statute 1-20-106, there are the following exemptions for

tools of trade:

1. A professional's tools, library, implements, instruments are exempt to \$2,000.
2. Tools, motor vehicle, implements, stock in trade of the debtor's business to \$2,000.

#### WAGES

Under Wyoming law, there are the following wage exemptions available to a debtor:

1. 75% or 30 times the federal minimum wage (the lesser) is exempt.
2. National guard members' earnings under statute 19-2-501.
3. Wages of prisoners on work release under stat. 7-16-308.

## GLOSSARY OF TERMS USED IN SMALL CLAIMS CASES

The following are basic terms that tend to arise in small claims actions. Words that are in quotation marks are themselves separately defined.

**ABSTRACT OF JUDGMENT**                      An official document issued by a court clerk to the effect that a "judgment" was issued by the Court on certain date against the "judgment debtor" in the favor of the "judgment debtor" in a certain amount. The recordation of the abstract of judgment places a lien on the real property of the judgment debtor in each county where it is recorded.

**ANSWER**                                      The formal response that is required to be filed by "defendant" . In the response the defendant is expected to admit or deny the truth of the "plaintiff's" allegation in the "complaint." Not all states require an answer to a Small Claims case to be filed. In such states, it will not be known until the day of trial if the defendant will appear and defend the suit. In states that require an answer to be filed, failure of a defendant to file an answer will result in a default judgment being taken against him.

APPEAL                    The review by a higher court of the propriety of the decision rendered in the small claims court. A few states do not permit appeals. Other states permit appeals only by the "defendant." Some states permit appeals only on questions of law whereas most states which permit appeals have "trial de novo." In California for instance, small claims appeals are handled by the Superior Court on a trial de novo basis.

ASSIGNEE                    A person to whom the right to collect a debt is transferred or assigned. Many states will not permit a person to whom a debt has been assigned to sue in small claims court for collection of the debt.

ATTACHMENT                    The legal procedure in which real or personal property is seized in execution of a court's judgment. When wages of a debtor are attached the term is "garnishment." All states have limitation on the amount and type of property which can be attached. Attachment is also not permitted if the person subsequently files for debt relief under Bankruptcy law.

CLAIM                    The demand for relief against one or more other parties set forth in the complaint. A claim must be based upon a legally recognized theory such as breach of contract, negligence, fraud.

COMPENSATORY DAMAGES                    The award given to the prevailing party, thereafter referred to as the Judgment Creditor, to fully compensate the party for the damages actually suffered as a result of the other party's, thereafter referred to as the Judgment



codefendant.

DEFAULT JUDGMENT                      A judgment rendered in favor of the opposing party (usually the "plaintiff") because the losing party failed to appear for trial.

DEFENDANT                                The person who is being sued by the "plaintiff." State Law sometime places restrictions on who can be sued in small claims courts.

DEPOSITION                                The questioning under oath before a court reporter prior to a trial. Depositions are usually taken when a lawsuit has been filed in a formal court or when a small claims "judgment" has been appealed and the appeals court is having a "trial de novo."

DISCOVERY                                The legal process wherein one party can force the other party to disclose information which is relevant to the trial of the case. "Interrogatories" (written questions) and "depositions" are the most common forms of discovery.

EQUITABLE RELIEF                        Relief granted to a winner of a small claims case in addition to money. Some states deny their small claims courts the power to grant any relief other than money damages. Most states, however, permit their small claims court to grant any relief, including money damages, which the courts consider just and proper.

EXEMPTION                                 Property which, under state law, cannot be attached or taken for payment of a "judgment."



not go forward until the proof has been filed. The proof of service is evidence that the defendant has been given notice of the lawsuit and therefore is aware that action should be taken to avoid the entry of judgment against him.

**PUNITIVE DAMAGES** Are punishment damages. They are awarded by a court in addition to the actual damages suffered by the judgement creditor. Punitive damages are not awarded for breach of contract actions. Punitive damages are awarded when the actions of the judgment debtor which resulted in the injuries were done with malice or wilful disregard of the safety or rights of others.

**STATUTE OF LIMITATIONS** All causes of action, theories for recovery against a party, have a specific of time for which the law suit can be brought. Failure to sue on the cause of action within that time period will result in the right to sue being lost. In California, for example, the statute of limitations for breach of a written contract is four years whereas for an oral, unwritten, contract is only two years and for fraud it is three years.

**TORTS** A "tort" is a civil wrong as opposed to criminal wrong. All crimes are torts but not all torts are crimes. There are two basic types of torts: intentional and unintentional. The intentional torts include but are not limited to assault, battery, false imprisonment, conversion (theft of property), defamation and fraud. Unintentional torts include injuries caused by negligence (such as most auto accidents) and breach of contract.

**TRIAL** The formal hearing on the merits of the claims

filed in a small claims court case by the parties. In most states, the trials are usually by judges; in a few states, trials of small claim cases may be heard by juries.

TRANSFER           The right of a "defendant" to have a small claims case transferred to a formal court for trial.

VENUE                The court before which a trial may validly be heard. In most states, the court in the district where the "defendant" resides, where a contract was executed or where an accident occurred is the proper place to bring an action against the "defendant." A corporation may also be sued where its principal place of business is located.

WRIT OF EXECUTION.       A court order which permits a Sheriff or Marshall to seize and sell assets of a "judgment debtor" in order to payment a "judgment" held by a "judgment creditor." The execution call only take place against property that is not exempt as discussed above under attachment.

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