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Has the Flood of Debt Collection Lawsuits Swept Away Minnesotans' Due Process Rights?

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Sam Glover†

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  Act and consumers sued by debt collectors. This article was written with
  the indispensable assistance of Danielle Sollars, currently pursuing a J.D. at William
  Mitchell College of Law.
I. INTRODUCTION

In Minnesota, debt collectors and debt buyers may commence lawsuits without filing them, garnish bank accounts and wages without paying a filing fee, and obtain default judgments without producing evidence to substantiate their claims. Debt collectors in Minnesota take advantage of favorable rules and laws, rely on the fact that many defendants often do not understand their rights, and thus collect millions from consumers every year. In this process, debt collectors are sweeping away Minnesotans’ due process rights in a flood of collection lawsuits.

A. Background

All debt collection lawsuits begin with an unpaid debt owed by a consumer to a creditor. Usually, the collection process begins with friendly collection letters, or “duns.” The creditor may “charge off” the account at some point, often several months after the consumer defaults. In other words, the creditor writes off the receivable portion of the debt as a loss for tax purposes. This does not mean that the consumer no longer owes the debt. Other creditors may not charge off their debts but instead hire a third-party company or law firm to continue the stream of letters and phone calls or to bring a lawsuit to collect the debt.

The original creditor or debt buyer who does bring a lawsuit finds Minnesota a very friendly jurisdiction. In Minnesota, a plaintiff can initiate a lawsuit without incurring a filing fee (this is called “pocket filing”). Even better (for the creditor), if the debtor does not answer the lawsuit, the creditor may freeze the debtor’s funds before incurring a filing fee. In other words, Minnesota’s procedural rules make defaults more likely, and

3. Id. at 5.
4. Id.
5. Id.
6. See MINN. R. CIV. P. 3.01.
7. See MINN. STAT. § 571.71 (2008).
Minnesota’s garnishment rules mean a creditor can “peek” at a debtor’s finances without paying a filing fee.\textsuperscript{8} But Minnesota courts may be too friendly. Forty-one percent of the total default judgments filed in Hennepin County between January 1, 2008, and August 31, 2008, were filed by debt buyers who probably could not prevail on the merits in most, if not all, of those lawsuits.\textsuperscript{9} Credit card companies filed a further 28\% of the default judgments, many with defects.\textsuperscript{10} As of August 2008, debt collectors filed 700 to 800 default judgments per month in Hennepin County alone.\textsuperscript{11} In 2007, debt collectors filed around 2,400 default judgments every month, statewide.\textsuperscript{12} This raises at least one important question: Do Minnesota’s pocket filing rules and prejudgment garnishment laws violate defendants’ right to due process?

\textbf{B. Minnesota’s Defendants Do Not Receive Due Process}

The constitutions of the United States and Minnesota say that “[n]o person shall . . . be deprived of . . . property, without due process of law . . .”\textsuperscript{13} “Due process of law” means, at a minimum, meaningful notice and an opportunity to respond.\textsuperscript{14}

\textsuperscript{8} See \textit{Minn. R. Civ. P} 3.01; § 571.71. \\
\textsuperscript{9} E-mail from Anna Lamb, Senior Admin. Manager, Fourth Judicial Dist., to Danielle Sollars, Law Clerk for Samuel Glover (Oct. 27, 2008, 06:48 CST) (on file with author) [hereinafter Lamb e-mail (Oct. 27, 2008)] (reporting data on default judgments filed in Hennepin county from January 1, 2008 through September 30, 2008). This percentage represents 3,502 debt collection defaults purchased by debt buyers out of 8,547 total defaults. \textit{Id.} \\
\textsuperscript{10} \textit{Id.} Credit card companies filed 2,428 collection defaults, accounting for 28.4\% of the 8,547 total defaults filed during the same period. \textit{Id.} \\
\textsuperscript{11} \textit{Id.} This range represents an approximate monthly average of default judgments filed by debt buyers and credit card companies. Over the eight-month period from January through August 2008, debt buyers filed 3,502 default judgments and credit card companies filed 2,428 default judgments, for a monthly average of 741.25 judgments. \textit{Id.} Monthly default judgments filed by debt buyers and credit card companies in this period ranged from 552 in April 2008 to 910 in May 2008. \textit{Id.} \\
\textsuperscript{12} This number is a rough estimate based on the approximate percentage of defaults filed by plaintiffs who filed at least five default judgments in Hennepin County in January through August 2008 (80\%) and the approximate number of statewide defaults in 2007. See Randy Furst, \textit{Defaults on Loans Surge in Minnesota}, \textit{STAR TRIB.} (Minneapolis), Feb. 24, 2008, at A1. \\
\textsuperscript{13} U.S. CONST. amend. V; \textit{Minn. Const.} art. I, § 7. \\
The vast majority of defendants in debt collection matters never respond to the summons and complaint, but in the vast majority of debt buyer lawsuits, the plaintiff’s claims are defective. There are several reasons why defendants may default. Yet where so many fail to answer, especially when the claims are defective in many cases, the courts should question the sufficiency of notice of the opportunity to be heard.

Further, Minnesota’s prejudgment garnishment statute allows a plaintiff to freeze a defendant’s assets with no further notice, even though the lawsuit remains unfiled (and therefore in the plaintiff’s pocket). The result is that plaintiffs with suspect, if not meritless claims, can nevertheless obtain default judgments and collect on those judgments. Where this is the rule rather than the exception, as in Minnesota, there is no due process.

II. BACKGROUND: DEBT COLLECTION LAWSUITS IN MINNESOTA

A. Original Creditors v. Debt Buyers

An original creditor is a person who or company that owns a consumer debt before default. Typical original creditors that appear on Minnesota’s default judgment records are credit card companies and medical service providers. A debt buyer, on the other hand, is a person who or company that purchases a consumer debt after default.

The distinction between original creditors and debt buyers is meaningful because while an original creditor collects its own debts, a debt buyer collects debts it has purchased for pennies on the dollar, either from the original creditor or from the last in a line of other debt buyers. As a result, debt buyers usually have very limited documentation and cannot provide relevant, admissible evidence without the unlikely cooperation of all predecessors in interest.

15. MINN. STAT. § 571.71 (2008).
17. Id. § 1692a(6).
B. Pocket Filing: Minnesota’s Extreme Minority Rule on Commencement of Lawsuit

Minnesota is one of only three states that does not require a plaintiff to file a lawsuit. North Dakota and South Dakota have virtually the same rule as Minnesota, providing that a lawsuit is commenced on service and need never be filed with the court. In those states, a lawsuit may be served before filing, as long as it is filed within ten to ninety days after service. Colorado has a hybrid rule that allows a lawsuit to be commenced by filing or by service, so long as the summons, complaint, and proof of service are filed with the court within ten days of service. If not, the service is ineffective. The Colorado rule further provides that a defendant may waive the ten-day requirement expressly or by failing to raise it as a defense in response to the complaint.

In forty-one states and in the federal courts, a lawsuit is commenced on filing. Many of these states have adopted Rule 3

18. Some refer to Minnesota’s service rule as “hip pocket service.” See David F. Herr & Roger S. Haydock, Minnesota Practice: Civil Rules Annotated § 3.3 (4th ed. 2002) (explaining the reason behind the phrase “hip pocket service”). Since the lawsuit still must be served in the usual way, this makes little sense. “Pocket filing” comes closer to describing the lack of filing the lawsuit with the court.


20. CONN. GEN. STAT. ANN. § 52-45a (West 2005); N.H. DIST. CT. R. 3.2(A); UTAH R. CIV. P. 3(a); VT. R. CIV. P. 3; WASH. SUPER. CT. CIV. R. 3(a).

21. CONN. GEN. STAT. ANN. § 52-46 (West 2005); N.H. REV. STAT. ANN. § 514:5 (LexisNexis 2006); UTAH R. CIV. P. 3(a); VT. R. CIV. P. 3; WASH. SUPER. CT. CIV. R. 3(a).

22. COLO. R. CIV. P. 3(a).

23. Id.

24. Id.

25. GA. CODE ANN. § 9-11-3 (2006); ILL. COMP. STAT. ANN. 5/2-201 (West 2003); N.Y. C.P.L.R. § 304 (McKinney 2001 & Supp. 2008); OKLA. STAT. ANN. tit. 12, § 2003 (West 1993 & 2008); WIS. STAT. ANN. § 801.02 (West 1994 & Supp. 2008); ALA. R. CIV. P. 3(a); ALASKA R. CIV. P. 3(a); ARIZ. R. CIV. P. 3; ARK. R. CIV. P. 3(a); CAL. C. C. P. 350; DEL. SUPER. CT. R. CIV. P. 3; FLA. R. CIV. P. 1.050; HAW. R. CIV. P. 3; IDAHO R. CIV. P. 3(a)(1); IND. TRIAL P. R. 3; IOWA CT. R. 1.301(1); KAN. R. CIV. P. § 60-203(a)(1); KY. R. CIV. P. 3.01; LA. CODE CIV. P. 421; ME. R. CIV. P. 3; MD. R. 3-101(a); MASS. R. CIV. P. 3; MICH. CT. R. 2.101(B); MISS. R. CIV. P. 3(a); MO. SUP. CT. R. 53.01; MONT. R. CIV. P. 3; NEB. R. CIV. P. 25-201; NEV. R. CIV. P. 3; N.J. R. CT. 4:2-2; N.M. R. CT. 1-003; N.C. R. CIV. P. §§ 1A-1, 3(a); OHIO R. CIV. P. 3(A); OR. R. CIV. P. 3; PA. R. CIV. P. 1007; R.I. ST. CT. R. 3; S.C. R. CIV. P. 3(a); TENN. R. CIV. P. 3; TEX. R. CIV. P. 22; VA. SUP. CT. R. 3.2(a); W. VA. R. CIV. P. 3(a); WYO. R. CIV. P. 3(a).
of the Federal Rules of Civil Procedure verbatim and therefore “[a] civil action is commenced by filing a complaint with the court.” But under Rule 3.01 of the Minnesota Rules of Civil Procedure, a lawsuit commences on service of the summons and complaint, not on filing. Many civil lawsuits are therefore resolved without filing any papers with the court. Moreover, because a plaintiff can start a lawsuit in Minnesota without filing (and therefore without paying a filing fee), district court may be less expensive than conciliation court, where plaintiffs must pay a filing fee to commence a lawsuit.

Minnesota and the Dakotas are an extreme minority. In nearly every other state, a defendant has a legitimate expectation that a lawsuit not filed is not real. The Internet, where many consumers first turn for advice, is little help, yielding consistently inconsistent advice on what to do when served with a summons and complaint.

Because of Minnesota’s pocket filing rule, defendants may be more likely to default. Whether or not this is the reason, many debtor-defendants do default and Minnesota law gives creditors another important advantage—the ability to “go fish” for funds in defaulted defendants’ bank accounts before the creditor must pay a filing fee.

C. Pre-Filing Garnishment

Minnesota’s prejudgment garnishment rule actually allows for pre-filing garnishment:

[A] creditor may issue a garnishment summons as provided in this chapter against any third party...any time 40 days or more after service of the summons and complaint.

26. See, e.g., GA. CODE ANN. § 9-11-3 (2006); ALASKA R. CIV. P. 3(a); ARIZ. R. CIV. P. 3; HAW. R. CIV. P. 3; IDAHO R. CIV. P. 3(a) (1); IOWA CT. R. 1.301(1); MD. R. 3-101(a); MICH. CT. R. 2.101(B); MISS. R. CIV. P. 3(a); MO. SUP. CT. R. 53.01; MONT. R. CIV. P. 3; NEV. R. CIV. P. 3; N.J. R. CT. 4:2-2; N.M. R. CT. 1-003; N.C. R. CIV. P. §§ 1A-1, 3(a); OHIO R. CIV. P. 3(a); W. VA. R. CIV. P. 3(a); WYO. R. CIV. P. 3(a).

27. FED. R. CIV. P. 3.

28. MINN. R. CIV. P. 3.01 (“A civil action is commenced against each defendant...when the summons is served upon that defendant...”).

29. 1 HERR & HAYDOCK, supra note 18, § 3.3.

30. MINN. STAT. § 357.022 (2008) (requiring a $50 filing fee for the first paper filed in any conciliation court action).

31. For example, a Google search for “served with a summons” yields more than 2.5 million results, many with advice from laypeople or that is state-specific, and many with advice that is just plain wrong.
complaint upon the debtor in the civil action when a judgment by default could have, but has not, been entered pursuant to rule 55.01(a) of the Minnesota Rules of Civil Procedure for the District Courts. *No filing of a pleading or other documents by the creditor is required to issue a garnishment summons...*  

This means a plaintiff may commence a lawsuit, wait forty days, and serve a garnishment summons on a debtor’s bank or place of employment. The obvious benefit of this system—to a creditor, anyway—is that it allows the debt buyer to learn if the debtor has money to collect before the debt buyer spends any money filing the lawsuit. If service was defective, the debtor’s first notice of the lawsuit may be when the bank freezes his or her bank account or when the employer withholds part of a paycheck. But because of the pocket filing rule and prejudgment garnishment law, the court may not have notice of the lawsuit.

D. *Nature of Claims*

Most plaintiffs in debt collection lawsuits, whether original creditors or debt buyers, make claims for breach of contract, account stated, or both.

1. *Breach of Contract*

A plaintiff with some evidence of an agreement between the original creditor and the alleged debtor may allege breach of contract. The elements of breach of contract are: (1) a valid contract between the two parties; (2) performance by plaintiff; (3) breach by defendant; and (4) that the plaintiff was damaged as a result of the breach.

Even original creditors rarely produce a written contract in debt collection cases. In the credit card industry, for example, the usual practice is for the consumer to apply for a credit card without seeing the terms and conditions. The credit card grantor then

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33. *See id.*
36. *See, e.g.*, Posting of Sam Glover to Caveat Emptor Blog, HSBC Will Not Give You Their Credit Card Agreement Until After You Apply for the Card,
sends a card, which the consumer signs and uses, supposedly indicating assent to the credit card company’s terms and conditions. When the credit card company issues new terms and conditions, the consumer supposedly accepts them by using the card after receiving the new terms and conditions. Where the plaintiff is a debt buyer, proving the existence of a valid assignment of the contract benefits and obligations may be impossible.

2. Account Stated

Since original creditors and debt buyers rarely possess a signed contract, many allege that an account stated exists (or in the case of a debt buyer, that an account stated existed between the defendant and the original creditor). The account stated cause of action is an old claim generally used for open commercial accounts, and one that the debt collection industry has adopted for consumer accounts.

In order for an account to become stated, the creditor must provide the debtor with a statement of the account. An account does not become stated simply because the creditor demands payment of a lump sum. In 1940, the Minnesota Supreme Court decided that where the invoices and account statements sent by the creditor were not itemized and no basis for the computation was shown, no account had been stated because the debtor could not have known what went into the balance. More recently, the Minnesota Court of Appeals emphasized that the statement of account must contain a description of every charge to be included


37. Id.


39. See infra Part III (discussing how few debt buyers provide competent evidence of a valid assignment).


42. Hall-Vesole Co. v. Durkee-Atwood Co., 227 Minn. 379, 386–87, 35 N.W.2d 601, 605 (1940); Am. Druggists Ins. v. Thompson Lumber Co., 349 N.W.2d 569, 573 (Minn. Ct. App. 1984) (rejecting creditor’s claims to compound interest where compound interest is not mentioned in invoices).

43. Hall-Vesole, 227 Minn. at 386–87, 35 N.W.2d at 605.
Once the creditor has provided an account statement, the account may become stated if both parties acknowledge the amount of the debt, or the defendant has acquiesced to the plaintiff's calculation of the amount due. An account stated is essentially a new contract between the parties based on the debtor's promise to pay and the creditor's acceptance of that promise.

There must be a meeting of the minds as to each component of the balance. However, if the debtor retains an account statement without objection, a court may infer that he or she is satisfied with the statement of the account. The omission may rise to the level of an agreement to the account in some cases, but ordinarily is evidence that the defendant may rebut with evidence or argument. For example, if the alleged debtor did not receive the account statement or was otherwise unable to object, then no inference should be drawn.

Moreover, if no underlying entitlement to recovery exists, an account cannot become stated. None of the foregoing Minnesota cases on account stated suggest that a creditor can prevail if the alleged debtor never actually had an account with the creditor. Original creditors should be able to provide evidence sufficient to prevail on an account stated claim. Yet, many original creditors never do, perhaps because their document destruction policies result in partial records by the time they sue on an account.

Very few debt buyers can actually provide evidence that would support an account stated. In some cases, they may have a facsimile of an account statement from the original creditor. However, what few statements they may have usually show nothing but late and over-limit fees. Furthermore, the debt buyer's own statements of the account are insufficient as a matter of law to support an

44. Am. Druggists, 349 N.W.2d at 573 (rejecting creditor's claims to compound interest where compound interest is not mentioned in invoices).
45. Meagher, 251 Minn. at 490, 88 N.W.2d at 880–81.
46. Id. at 487, 88 N.W.2d at 879.
47. Id. at 490, 88 N.W.2d at 881 (citing Lockwood v. Thorne, 18 N.Y. 285, 288 (1858)).
48. Id.
49. Id.
50. See Lockwood, 18 N.Y. at 289.
51. Id.
account stated claim since they are based on hearsay.\textsuperscript{53}

Additionally, many alleged debtors do dispute the full balance. By the time they are sued, the account may include hundreds or thousands of dollars in late and over-limit fees and interest accumulated at the original, high-interest rate. Many are willing to admit they owed something near the original credit limit to the original creditor, but will not admit they owe the extra fees and charges. As a result, once a debtor has notice, he or she will often call the creditor and protest the balance.

E. Typical Evidence

Although the evidence available will vary by case, it is possible to make some generalizations regarding the type of proof that plaintiffs are able to produce. Original creditors usually have access to more evidence than debt buyers. For example, in a credit card case, a credit card company will usually provide a set of terms and conditions and several years of account statements showing charges and payments.\textsuperscript{54} In a medical debt case, the medical provider will usually provide some proof of the service provided together with a full account statement showing payments made. In cases involving other consumer debts, the credit grantor may even be able to provide a signed contract.

Debt buyers seem to be at the mercy of their immediate predecessor in interest. Often, they produce only a redacted, incomplete bill of sale, a “trade line” printout from a computerized collection system, and sometimes a few account statements, although these usually show only late fees and overdraft charges but no charges or payments made by the alleged debtor.\textsuperscript{55} In discovery, a motion for summary judgment, or at trial, the debt buyer may also provide an affidavit of the debt buyer’s custodian of records.\textsuperscript{56}

\textsuperscript{53} FED. R. EVID. 801(c).
\textsuperscript{54} See HOBBS ET AL., supra note 2.
\textsuperscript{55} See id. at 9–10.
F. Default Judgments Filed and Defaults Not Filed

According to the Star Tribune, more than 36,000 default judgments were filed in Minnesota courts in 2007. In Hennepin County, 9,237 default judgments were filed in 2007. In 2008, 33,899 default judgments were filed in the first eight months of the year and exceeded 50,000 by the year's end. In Hennepin County alone, 8,547 default judgments were filed through August 2008.

Some companies account for a greater percentage of filings than others. In Hennepin County, 76% of the total filings were by original creditors or debt buyers who filed twenty-five or more lawsuits as of August 2008. Twenty plaintiffs filed 63% of all default judgments filed in Hennepin County. Capital One, the “top” plaintiff, filed nearly 1,500 default judgments in Hennepin County, about 190 per month.

There are several law firms in Minnesota competing for debt collection business. One firm in particular, Messerli & Kramer, P.A., stands out. Messerli & Kramer filed 34% of Hennepin County default judgments on behalf of the debt buyers Dakota Bluff Financial, L.L.C.; Livingston Financial, L.L.C.; Midland Funding, L.L.C.; Pipestone Financial, L.L.C.; and Red Rock Lake Financial, L.L.C. Messerli & Kramer also represents Capital One Bank USA, N.A., in Minnesota. Debt collection is a major source of income for the courts. In January through August 2008, Hennepin County earned at least $1,362,816 from the “top 20” plaintiffs. It earned at least $734,328 from Messerli & Kramer’s clients alone.

57. Furst, supra note 12.
58. Id.
59. E-mail from Anna Lamb, Senior Admin. Manager, Fourth Judicial Dist., to Danielle Sollars, Law Clerk for Samuel Glover (Oct. 10, 2008, 07:52 CST) (on file with author); E-mail from Anna Lamb, Senior Admin. Manager, Fourth Judicial Dist., to Sam Glover (Mar. 6, 2009, 01:39 CST) (on file with author).
60. Lamb e-mail (Oct. 27, 2008), supra note 9.
61. Id. These original creditors or debt buyers filed 6,527 of the 8,547 total default judgments. Id.
62. Id. The twenty plaintiffs accounted for 5,408 of 8,547 default judgments from January 1, 2008 through August 30, 2008. Id.
63. Id. Capital One filed 1,465 default judgments during this eight-month period, averaging just over 183 per month. Id.
64. Id. Messerli and Kramer filed 2,914 of the 8,547 default judgments in Hennepin County. Id.
65. Id.
66. Id. The figure is based on 5,408 cases with $252 in filing fees per case.
67. Id. The figure is based on 2,914 cases with $252 in filing fees per case.
Due to Minnesota’s pocket filing rule, there are certainly more lawsuits that creditors never file. Some may be settled and in others, the debtor may consent to the release of funds garnished before filing, potentially saving on court costs. In still other cases, the creditor may have attempted to reach the debtor’s funds by prejudgment garnishment, concluded that there would be little chance of satisfying the judgment, and elected not to file.

III. Few Debt Buyers Provide Competent Evidence of a Valid Assignment

Debt buyers’ lawsuits are, by and large, lawsuits the plaintiffs should not win. Many original creditors sell charged-off debts to the hundreds of debt buyers in the United States who will pay “pennies on the dollar” for defaulted debt portfolios. Debt buyers then attempt to collect the full amount of the debt from consumers. Some debt buyers will repackage debts and resell them to another debt buyer. Securitization of credit card debt is also now common.

To prevail in a debt collection lawsuit, a debt buyer must be able to prove the existence of a valid debt as well as a valid chain of assignment from the original creditor. And to maintain an action, the debtor must have received notice of each assignment from the assignor. If the assignment was a partial assignment of the original creditor’s rights and obligations, as is usually the case, the debt buyer must join all previous assignees and the original creditor. Few debt buyers meet these requirements, yet nevertheless obtain tens of thousands of default judgments every year and commence many more lawsuits that never reach the courts.

68. See Minn. R. Civ. P. 3.01.
69. Hobbs et al., supra note 2, at 7.
70. Id.
72. Id.
73. Hobbs et al., supra note 2, at 9.
76. In the first eight months of 2008, debt buyers obtained 3,502 default judgments in Hennepin County alone. Lamb e-mail (Oct. 27, 2008), supra note 9. Information on lawsuits not filed is based on conjecture and personal
A. Assignments Must Specifically Identify the Property Being Assigned

Assignments must be specific and precisely identify what is being assigned. An assignment of property is sufficiently specific if “armed with . . . and aided by competent extraneous evidence, parol or otherwise” so that “the property covered may with certainty be identified.” Debt assignments are not like property deeds or auto titles, which are tracked by independent and impartial government agencies. Instead, only the assignor and assignee track debt assignments. Mistakes happen, and often the debt buyer does not have the complete chain.

With most assignments, specificity is not a problem. Yet, consumer credit assignments present a different problem. Debt buyers often have only a bill of sale that does not reference the debt that is the subject of the lawsuit. Most bills of sale reference a list of accounts, but few debt buyers can provide that list. Fewer still can provide the list for each assignment. When that is the case, the assignment does not identify the property as being assigned.

B. Original Creditors and Subsequent Assignees Must Give Notice of Any Assignment

Under Minnesota law, an assignment is valid only if the debtor receives notice of the assignment or if sufficient facts put the debtor “on inquiry” of the assignment. In Neilson v. City of Albert Lea, the Minnesota Supreme Court explained that “an assignment
of a chose in action is wholly ineffectual as against the debtor, in the absence of notice . . . .” 84 In other words, no notice, no lawsuit.

The reason for this rule is obvious—debtors should not have to guess whom to pay. Instead, debtors must have confidence that if they pay the assignee, they will actually be able to settle the debt. Though Nielson was decided over one hundred years ago, the requirement is even more important today, when identity thieves, phishing scammers, and confidence artists threaten every consumer’s pocketbook and credit rating. Consumers cannot trust just anyone who says the consumers owe money. Under Nielson, they do not have to.

Generally, the debtor does not receive notice when the original creditor sells the debt. Subsequent assignors will also not likely give notice of the assignment. This is the opposite of mortgages, school loans, and auto loans, which are regularly bought and sold and in which the servicer may change several times during the life of the loan. 85 When these loans change hands, however, the assignor notifies the debtor.

C. If the Assignment Was Partial, the Original Creditor Must Be a Party to the Lawsuit

Many consumer debt assignments are partial assignments. The debt buyer purchases the receivable portion of the account only, while the original creditor retains certain rights and obligations. 87 In Minnesota, an assignment of “receivables” is not a complete assignment as a matter of law. 88 Minnesota law requires joining the assignee where an assignment is only partial. 89 Debt buyers must therefore join all previous assignees, including the original creditor. 90 A creditor may make a partial assignment and the courts will protect the equitable interest created when the creditor does so. 91 But if the creditor makes a partial assignment, the assignee

84. 91 Minn. at 390, 98 N.W. at 196.
86. See id.
90. Id.
91. Id. at 506–07, 55 N.W. at 628.
may not maintain a lawsuit without joining the assignor as a plaintiff or defendant.\(^\text{92}\) “There can be but one action upon a single demand. The parties interested must join as plaintiffs, or those not joined must be made defendants, in the action, so that the whole controversy may be determined in one suit, unless the creditor agrees to a severance . . . .”\(^\text{93}\) The assignee may only bring an independent lawsuit if the debtor consents to be sued on the partial assignment alone.\(^\text{94}\) This is well-settled law in Minnesota.\(^\text{95}\)

In Dean v. St. Paul & D.R. Co., the Minnesota Supreme Court decided that “[t]he assignee of a part interest cannot be permitted to carve out of the entire demand the amount of his claim, leaving other parties to bring separate actions for their several interests.”\(^\text{96}\) This squares with Rule 19.01 of the Minnesota Rules of Civil Procedure and protects a debtor from multiple lawsuits to resolve the rights and responsibilities related to a debt.\(^\text{97}\) The alleged debtor is entitled to resolve, in one lawsuit, the question of which parties have which rights and duties.\(^\text{98}\) The solution to this defect in debt buyers’ lawsuits, at least, is simple—debt buyers need only join previous assignees, including the original creditor, as parties in the collection lawsuit.

D. Debt Buyers’ Lawsuits Are, By and Large, Defective

If debt buyers cannot prove valid assignments, if assignees are not providing notices of the assignments, and if debt buyers are failing to join necessary parties, their lawsuits should be dismissed on the merits. But since Minnesota courts enter default judgments administratively in most cases, no judge ever sees most complaints or gives the claims even cursory consideration. Instead, a debt buyer need only swear that it served the defendant and that the defendant did not respond.\(^\text{99}\) Once the debt buyer has a judgment, the bank must garnish and hold the debtor’s funds until it receives

\(^{92}\) Id. at 507, 55 N.W. at 628–29; Shilling v. Mullen, 55 Minn. 122, 122, 56 N.W. 586, 586 (1893).

\(^{93}\) Dean, 53 Minn. at 507, 55 N.W. at 629.

\(^{94}\) Cross v. Page & Hill Co., 116 Minn. 123, 124, 133 N.W. 178, 178 (1911); Dean, 53 Minn. at 507, 55 N.W. at 628; Shilling, 55 Minn. at 122, 56 N.W. at 586.

\(^{95}\) Brown-Wilbert, Inc. v. Copeland Buhl & Co., 732 N.W.2d 209, 224 (Minn. 2007) (recognizing that Dean is still good law).

\(^{96}\) Dean, 53 Minn. at 507, 56 N.W. at 629.

\(^{97}\) See MINN. R. CIV. P. 19.01.

\(^{98}\) See id.

\(^{99}\) MINN. R. CIV. P. 55.01.
a writ of execution. \textsuperscript{100} Unfortunately, the debtor has little or no hope of getting a hearing on the merits of the debt buyer’s lawsuit.

IV. IS MINNESOTA GIVING DUE PROCESS TO DEBTORS?

While in a single case it may appear that the defendant received due process, a brief look at the staggering number of unchallenged cases indicates something is amiss in Minnesota.

A. Due Process Is Meaningful Notice and an Opportunity To Be Heard

“No person shall... be deprived of life, liberty, or property, without due process of law...”\textsuperscript{101} The basic right under the Due Process Clause is the right to be heard, but that right is meaningless if the person whose life, liberty, or property may be deprived does not have notice of the opportunity to be heard.\textsuperscript{102} That notice must be reasonable and meaningful.\textsuperscript{103} In the context of a Minnesota lawsuit, a plaintiff most commonly gives notice by personally serving the defendant with the summons and complaint.\textsuperscript{104} Under Rule 4.01 of the Minnesota Rules of Civil Procedure, the summons must include, among other things, the following language: “the time within which these rules require the defendant to serve an answer, and notify the defendant that if the defendant fails to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint.”\textsuperscript{105}

The Minnesota Rules do not require any notice that the lawsuit is valid even if it is not filed with the court.\textsuperscript{106} A debt collector only need serve the summons and complaint on the

\textsuperscript{100} See MINN. STAT. § 571.74 (2008).

\textsuperscript{101} U.S. CONST. amend V; MINN. CONST. art. I, § 7.


\textsuperscript{103} Id.; see also Eisen v. State Dept. of Pub. Welfare, 352 N.W.2d 731, 736 (Minn. 1984) (stating that notice must include “statements ’reasonably calculated’ to inform the private person of the availability of a process by which he might contest the proposed government action.”); Schulte v. Transp. Unlimited, Inc., 354 N.W.2d 836, 834 (Minn. 1984) (“Where there is a statutory requirement of notice, the notice must contain such information and be presented in such a manner so as to ’enable a person of ordinary perception to understand the nature and purpose of the notice.’”).

\textsuperscript{104} See generally MINN. R. CIV. P. 4.03 (stating the requirements for personal service).

\textsuperscript{105} MINN. R. CIV. P. 4.01.

\textsuperscript{106} Cf. id.
defendant. But if the person responsible for notifying the defendant has reason to know that ordinarily employed notice will be ineffective, he must use other means. “The purpose of this requirement . . . is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . .” Nevertheless, to determine whether additional procedural protections should be used, a court must consider the three factors laid out by the United States Supreme Court in Mathews v. Eldridge: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation; and (3) the government’s interest, including the burden of the additional requirements.

B. The Notice Required in Minnesota Is Not Meaningful

Every year, tens of thousands of debtor-defendants fail to take advantage of their right to be heard in Minnesota. The general information available to defendants—including on the face of the summons, the notice itself—is confusing and misleading since the lawsuit has commenced even though only the plaintiff knows it. In fact, debt collectors know consumers are unlikely to respond, which should put debt collectors on notice that simply leaving a summons is inadequate. The Restatement (Second) of Judgments suggests they should be required to do more.

None of this would raise much concern if debt collectors were filing slam-dunk cases. But they are not. Many of the lawsuits filed by debt collectors are defective and the plaintiff should lose on the merits. Yet, they do win, and they do get default judgments.

107. See Save Our Creeks v. City of Brooklyn Park, 682 N.W.2d 639, 647 (Minn. Ct. App. 2004) (holding that “[a] summons and complaint are sufficient to commence an action . . . if they clearly inform the defendant that it was intended for him or her, require the defendant to answer the complaint, and give the defendant fair notice of the theory on which claim for relief is based.”).
110. 424 U.S. 319, 335 (1976).
111. Lamb e-mail (Oct. 27, 2008), supra note 9. For example, in the first eight months of 2008, 7,321 default judgments were entered against debtor-defendants in Hennepin County. Id.
112. Restatement (Second) of Judgments § 2(2) (2008).
In Minnesota, the court administrator enters default judgments on claims for a definite amount. No judge sees the case and the debt buyers do not have to provide any proof of their claims. A debt buyer (or more often, its attorney) who wants a default judgment simply provides the administrator with an affidavit showing: (1) the debt buyer never received an answer or other defense, and (2) the amount due on its claims.

If obtaining a default was not easy enough, Minnesota also allows debt buyers to freeze funds in debtors’ bank accounts even before applying for default. In other words, although the courts have no idea that a lawsuit is in progress, and the debt buyer has no judgment, the debt buyer may use the courts’ power to secure payment of the judgment it has yet to apply for. Debt buyers obviously have no interest in filing for a judgment unless the bank is holding money for them.

This makes the debt buyers’ business model quite lucrative, and potentially costs Minnesota significant money for cases that debt collectors never file. In most defaults, no judge ever sees the lawsuit. A defendant is sued, defaults, loses, and endures garnishment or levy without a judge asking even a single question to probe the merit of the creditor’s case. In other words, Minnesota courts do not require meaningful notice and provide zero oversight of the tens of thousands of collection lawsuits that end in default every year in Minnesota.

There is no due process when a debt collector may rely on the unlikelihood of most defendants understanding their right to be heard. Since so few defendants will challenge the defective collection lawsuits, debt collectors can usually bring them unchallenged, defects and all, and count on a handsome profit.

V. BRINGING FAIRNESS TO DEBT COLLECTION LAWSUITS IN MINNESOTA

If there is no due process, there must be change. First, Minnesota courts should eliminate pocket filing entirely, and move to the majority rule that a lawsuit commences when it is filed. Second, the Minnesota legislature should limit prejudgment

113. MINN. R. CIV. P. 55.01(a).
114. See id.
115. MINN. R. CIV. P. 55.01.
garnishment to situations where the collector can show there is a significant risk that the debtor-to-be may hide or fraudulently transfer funds.

When a plaintiff applies for a default judgment, the courts should ask a few simple questions. For example, at a bare minimum, courts should require the plaintiff to produce a valid contract between the original creditor and the debtor. In the absence of a valid contract, the courts should require statements of account, with supporting evidence, including affidavits from each assignor and the original creditor.

The courts must also require a valid chain of assignment, shown by competent evidence, giving rise to the right to collect, and attested to by competent witnesses from each assignor and assignee. This must include not just bills of sale, but also the entire agreement and evidence that the particular debt was actually assigned. The chain of assignment must include a record of the notices of assignment provided to the alleged debtor. Finally, where, as in most collection lawsuits, the assignment was merely partial, the courts should require the creditor to join any previous assignors, including the original creditor, so that the court may determine and discharge all the rights under the original account.