

Debt Collection Report Recommendations

The ACLU makes the following recommendations to preserve the integrity of the courts and protect alleged debtors against the unconstitutional and abusive debt collection practices documented in this report.

Arrest Warrants – Recommended Reforms

Prohibit the issuance of arrest warrants in debt collection cases.

(Recommendation for state legislatures and state and local courts):

- Prohibit courts from issuing any “body attachment,” “*capias* warrant,” “writ of attachment,” or warrant for contempt, failure to appear or failure to comply for the arrest of a debtor in debt collection cases.

Enact federal legislation prohibiting the use of arrest warrants in debt collection cases.

(Recommendation for the United States Congress):

- Amend the Fair Debt Collection Practices Act (FDCPA) to prohibit debt collectors from using or seeking warrants for the arrest of alleged debtors.

In the absence of a complete ban on the issuance of arrest warrants in debt collection cases, strictly limit the use of arrest warrants for judgment debtors.

(Recommendations for state legislatures and state and local courts):

- Issue an order giving the judgment debtor 90 days to: 1) appear at the court or 2) provide the post-judgment discovery if the judgment debtor fails to appear for the post-judgment hearing or comply with the court-ordered discovery order.
 - Explain in the order that the court may issue a warrant if the judgment debtor does not comply.
 - Require the order to be served by certified mail or in hand.
- Issue a warrant at the end of the 90-day period only if the judgment creditor: 1) submits proof that notice was actually received by the consumer and 2) submits a proffer of evidence that the judgment debtor has non-exempt income or assets.
- Defendants should not be taken into custody pursuant to any new or pre-existing warrant. Instead, release judgment debtors on their own recognizance, with no conditions, upon service of the warrant or hold the post-judgment hearing the same day they are taken into custody.

- Clarify that the warrant is fully satisfied once the judgment debtor provides information about income and assets.
- Require that the warrant expire 180 days after it is issued.
- State and local courts should codify the aforementioned protections by issuing a judicial bench card that creates guidelines for judges to prevent the abuse of contempt of court authority in civil debt collection proceedings.

States that permit judgment debtors to be held overnight for a post-judgment hearing must adopt additional protections.

(Recommendations for state legislatures and state and local courts):

- Set bail the same day that the individual is taken into custody.
- Set bail based on an individual's ability to pay.
- Set bail at the minimum required to secure attendance at the hearing (including \$0), not the amount of the debt.
- Prohibit money bonds from being turned over to judgment creditors.
- Prohibit requirements that judgment debtors post bail in cash.
- Provide court-appointed counsel to indigent defendants in post-judgment proceedings at which a warrant may be issued that may result in their incarceration.

Decrease the likelihood that consumers need to appear in court post-judgment.

(Recommendations for state legislatures and state and local courts):

- Develop robust options for discovery of income and assets outside of court such as standardized forms that can be filled out by mail, phone, or online.
- Require any post-judgment discovery to include a list of all types of income and assets that are exempt. This form should explain how to claim these exemptions.
- Require judgment creditors to pursue all out-of-court post-judgment discovery options before requesting a post-judgment hearing.

Provide effective notice of the post-judgment hearing and alternative means of appearance.

(Recommendations for state legislatures and state and local courts):

- Require service of the notice of the post-judgment hearing by certified mail or in-hand.
- Require the notice to include a list of all types of income and assets that are exempt. This form should explain how to claim these exemptions.
- Provide alternatives such as telephonic or video appearances to allow people to attend the hearing without physically appearing in court.

Ensure due process protections at post-judgment hearings.

(Recommendations for state legislatures and state and local courts):

- Require the court to engage in a colloquy to review any settlement agreement and confirm that it does not require payment from exempt income or assets.
- Require that post-judgment proceedings be conducted entirely in the judge's presence and memorialized through court reporting and/or audio recording.
- Prohibit the court from scheduling any further post-judgment hearings unless the judgment creditor provides evidence that there may be additional income or assets.

Prohibit courts from issuing orders to pay.

(Recommendations for state legislatures and state and local courts):

- Prohibit courts from ordering a judgment debtor to pay or imprisoning an individual who fails to comply with an order to pay.¹

Take enforcement action to curb the abusive use of warrants in debt collection cases.

(Recommendations for state attorneys general, the Consumer Financial Protection Bureau, and the Federal Trade Commission):

- Bring enforcement actions against creditors and debt collectors who use warrants to frighten consumers or to coerce them into making payments from exempt income, or who falsely claim to have legal authority to jail consumers in order to coerce payments.
- Enter into consent or remediation agreements with creditors and debt collectors, to ensure they do not use warrants in collection cases.
- Investigate whether the use of post-judgment warrants has a disparate impact on particular communities.

Issue regulations or advisory opinions to curb the abusive use of warrants in debt collection cases.

(Recommendations for state attorneys general, the Consumer Financial Protection Bureau, and the United States Department of Education):

- Issue regulations or advisory opinions clarifying that using a warrant to coerce payment or frighten alleged debtors violates state and federal consumer laws.
- Publish know-your-rights information for consumers regarding their rights under federal and state law when threatened or served with a warrant in debt collection cases.
- Ensure that all contracts with attorneys collecting unpaid federal student loans stipulate that they will not seek or threaten to seek warrants for the arrest of debtors.

Bad-Check Enforcement Programs – Recommended Reforms

End bad-check enforcement programs run by private check collection companies.

(Recommendations for district attorney offices and state legislatures):

- District attorney offices should terminate contracts with private companies for the administration of bad-check enforcement programs.
- State legislatures should pass legislation prohibiting district attorney offices and other public agencies from contracting with private companies to operate check diversion programs.

In the absence of a complete ban on bad-check enforcement programs run by private companies, enhance consumer protections.

(Recommendations for state legislatures and district attorney offices)

- Prohibit district attorney offices and other public agencies from allowing private debt collectors to use their seal or letterhead.
- Prohibit referral if the balance is less than the minimum dollar threshold for prosecution under state law.
- Require individual review by the district attorney for each account that goes to the check diversion program and set up a mechanism to audit this internal review.
 - Require that for a debt to be referred, the district attorney must first confirm that: 1) the consumer received at least two notices of the unpaid check; 2) the district attorney's office would otherwise prosecute this case but for the check diversion program; 3) there is no evidence that the consumer stopped payment for a reason that is legal under federal law U.C.C. § 4-403; and 4) the consumer is not listed in any government databases as receiving government benefits.
- Require standard language in letters that can be set by regulation.
- Limit the fees that private collectors can charge to no more than the amount of the not-sufficient-funds (NSF) checks fee set by state law.
- Require any money generated by bad-check enforcement programs beyond restitution be paid to a legal services fund to represent individuals with consumer debts.
- Prohibit requirements for diversion seminars or require free online alternatives.
- Adopt transparent reporting requirements for district attorney offices, including the number and details of cases referred for private collection, the terms of its diversion program agreements, and revenue generated for the government and the company.

Take enforcement action and issue regulations to curb private companies' misuse of bad-check enforcement programs.

(Recommendations for the Consumer Financial Protection Bureau and state attorneys general):

- Issue regulations or advisory opinions to clarify which actions by bad-check enforcement programs violate federal and state consumer protection laws.
- Bring enforcement actions against debt collectors operating bad-check enforcement programs outside the limited exemption embodied in 15 U.S.C. § 1692p(a).

Other Due Process Deficiencies in Debt Collection – Recommended Reforms

Ensure due process protections for defendants in debt collection lawsuits to reduce default judgments.

(Recommendations for state and local courts):

- Amend court rules to increase judicial scrutiny over applications for default judgment by requiring debt buyers to produce documentation that the lawsuit was brought prior to expiration of the statute of limitations and to disclose if the debt is time-barred.
- Modify rules to permit entry of default judgment against a defendant only after the defendant has received timely and actual notice of the summons and subsequently fails to appear at a trial setting.
- Require plaintiffs filing petitions to collect consumer debt to provide evidence of the debt, e.g. documentation of all assignments demonstrating the plaintiff's right to collect the debt from the consumer.
- Chief justices or presiding judges of higher courts should exercise their administrative oversight authority to more closely supervise local or municipal courts, to determine whether they are complying with existing law and court rules in the adjudication of debt collection lawsuits, and to recommend best practices.
- State bar associations and legal aid offices should create projects that provide same-day legal assistance in the courthouse for consumers in civil debt collection cases. At a minimum, they should provide legal advice for pro se litigants and offer limited assistance representation at their court appearances.

¹ Some states allow courts to order a debtor to make payments on a debt and then hold the debtor in contempt for failing to do so, while other jurisdictions properly recognize that this practice amounts to unlawful imprisonment for debt. *See, e.g.*, 735 Ill. Comp. Stat. § 5/2-1402(c)(2) (allowing court to order a debtor to make installment payments out of nonexempt income); Mass. Gen. Laws ch. 224, § 16 (allowing court to order debtor to make payments if it finds that debtor is financially able and providing that noncompliance can be punished as contempt); N.J. Stat. Ann. § 2A:17-64 (West) (allowing court to order debtor to pay judgment in installments from non-exempt income); N.Y. C.P.L.R. § 5226 (allowing court to order debtor to make installment payments).