Consumer Debt 101 and the Intersection with Family Law

By: Randall Ryder

Consumer debt is everywhere, from record-levels of student loan debt, to credit card lawsuits that are increasingly filling court dockets. Nearly every household has some form of consumer debt, but, "How much debt do you have?" is rarely a topic of conversation at dinner.

Because of the taboo nature of consumer debt, many consumers (and attorneys) are unaware of the wide variety of consumer protections when it comes to consumer debt. With that in mind, this article is intended to discuss some of the broader consumer protection statutes, along with how consumer debt within the context of family law can be complicated, to put it mildly.

Get the Basics on the Debt and Beware of Scam Collectors

One of the biggest issues that I encounter is scam debt collectors, i.e., individuals that present themselves as legitimate collectors, "investigators," or even attorneys. In reality, the individual may be operating from a garage in southern California or making internet calls from a room overseas. With that in mind, any consumer that is contacted about alleged debt needs to get some basic information before doing anything.

For example, find out the name of the company, their address, what they are calling about, and what they are offering. Scam debt collectors will never admit they are scammers, but they tend to have a hard time providing a physical address. When they do, a quick Google search indicates that the address is actually a UPS store in Montana.

Illegitimate collectors are becoming more and more savvy, to the point where some of them create websites that present an aura of legitimacy. Of course, some of those websites do not actually provide any real information on the business, and if they do, the address may once again lead back to a UPS store in another state.

Another good source of information on debts is a consumer's credit report. Most, but not all, debts will be reported. Although there is no guarantee that the reported information is accurate, it is a good reference point when a consumer is trying to deal with a debt.

Understand Consumer Rights Against Debt Collectors and Debt Collection Lawsuits

Consumer Rights Against Debt Collectors

The Fair Debt Collection Practices Act (FDCPA) provides consumers with broad protection against unfair, abusive, and illegal debt collection practices. The FDPCA applies to any third-party debt collector (and that includes debt collection law firms), but it does not apply to original creditors.

The FDCPA emphasizes protecting consumer's privacy. For example, debt collectors are prohibited from revealing a consumer's debt to a third-party, like a co-worker or family member. Debt collectors are also prohibited from contacting a consumer at work once the consumer requests that the collector stop calling them. A consumer can even request a complete cessation of collection activities if the request is put in writing.

Consumers are also protected against a debt collector misrepresenting the legal status of a debt or threatening to take an action that they cannot, or do not intend to, take. For example, a debt collector cannot falsely claim they have obtained a judgment when one does not exist. Also, if a debt is past the statute of limitations, they cannot make any threat to pursue legal action in regard to the debt.

In my experience, if a consumer calls an attorney about a debt collector, that is a red flag that something is potentially amiss. Or, if the debt collector's actions cause a consumer to go on the internet to research their rights, something is potentially amiss. In other words, you do not have to be an expert on debt collection laws to understand that your rights have been violated. If something causes a consumer to seek more information on their legal rights, that is a good indication that something has gone wrong.

The FDCPA has a fee-shifting provision, which means that a consumer that successfully proves their claim is entitled to statutory damages, actual damages, and attorney fees and costs. On top of that, if the violation is truly egregious and caused emotional distress, the consumer may be entitled to actual damages in the form of emotional distress. Other forms of actual damages can relate to incorrect credit reporting and/or increased (or inaccurate) amounts of interest and/or the balance.

The bottom line is that these violations and claims can have significant impact on consumers, and they are absolutely worth investigating (at a minimum).

Debt Collection Lawsuits

In terms of debt collection lawsuits, there is lots of information on the internet. Most of it, however, is not accurate. Many consumers make incorrect assumptions when they are served with a lawsuit. Those assumptions generally lead to bad results.

One, because the complaint does not have a file number, it's not a “real” lawsuit. Minnesota has pocket service, which means that lawsuits can be initiated without filing it with the court (although, the case must be filed within 1 year of service). Despite the express language on the summons that states “you are being sued” and “you must reply within 20 days to protect your rights,” many consumers believe the lawsuit is fake. If a consumer fails to respond, the creditor can obtain a default judgment, and then pursue garnishment.

Two, many consumers believe that the law firm representing the creditor is the real party in interest and that every consumer debt is sold for pennies on the dollar. In terms of the real party in interest, law firms do not purchase debt, and original creditors like Capital One, Citibank, etc., do not sell their own debt to themselves. In other words, if Capital One is the creditor, they still own the debt (and likely possess all the relevant evidence), and they will have far less wiggle room in negotiations. There are plenty of debt buyers that sue consumers, but their names are wholly distinct from the original creditor. It is an absolute must to understand the distinction in order to help a consumer maintain realistic expectations for resolving an original creditor lawsuit.

Three, other consumers automatically believe that the amount in the complaint is correct and that they are guaranteed to lose their case. At a minimum, there are usually questions about the alleged balance (interest, collection costs, attorney fees, etc.). There may also be issues with ownership and standing, since some debts are sold 3-4 times before being sued on. There are also less common defenses like identity theft and the statute of limitations. With that in mind, it is always worth investigating the debt and the potential defenses before making any decisions on a course of action.

Consumer Debt and Family Law

Given the sheer amount of consumer debt, there is significant overlap between debt and family law issues. In my practice, it usually comes up in two situations. One, a spouse (wrongfully) thinks they are liable for their spouse's debt. Two, a spouse is contacted by a debt collector about a debt that their ex-spouse was supposed to pay pursuant to the divorce decree.

Is a Spouse Liable for Another Spouse's Debt?

In general, a spouse is not liable for another spouse's debt. Marriage may be until death do you part, but that does not extend to debts. There is a lot of bad information on the internet about spousal liability for consumer debt. Here are a few examples where consumers are confused about potential liability.

Did the Spouse Co-Sign on a Credit Card or Student Loan?

Under Minnesota law, a spouse is not liable to a creditor for any debts of the other spouse (see Minn. Stat. § 519.05). The one exception is medical debt, which is discussed at length below. I regularly meet with consumers who are being pursued by a debt collector for a credit card debt or student loan. In many of those cases, a spouse is being collected on for their ex-spouse's debt.

The problem is that the spouse never co-signed on the debt and is not liable for the debt. For example, husband opens a credit card. Husband and wife get divorced. Wife starts receiving collection calls about the debt. That's problematic. If the wife never co-signed for the credit card, she may not have any liability for the alleged debt. Perhaps the wife was added as an authorized user, but that is generally not enough to attach liability. Identity theft can also come into play if a spouse opened an account without permission and added a co-signer without consent or permission.

Debt collectors do not always have (or keep) very accurate records. In many situations, the debt collector does not know whether a spouse was a co-signer or simply an authorized user.

The debt collector may have records or even account statements that list both husband and wife on the credit card statements, but that does not always mean that both parties are co-signers. One spouse may only be an authorized user.

If a consumer is being contacted about a debt that their spouse incurred, be sure to do your research and ask the right questions. Find out if the consumer was a co-signer or simply an authorized user. Ask for the original credit card application or loan application. If liability is unclear, a consumer should absolutely think twice before making any payment arrangements.

There is Joint Liability for Some Medical Debts

One exception to the general rule is medical debts. In general, a spouse can be liable for the other spouse's "necessary medical services." (Minn. Stat. § 519.05). For many consumers, the first time they learn of the alleged debt is when they are contacted by a debt collector about their spouse's debt. Or, they first learn of the debt when they are sued for their spouses's debt.

As a starting point, it's a good idea to verify whether the alleged charges were submitted to the insurance carrier and whether they were properly processed. In some situations, medical providers either neglect to submit the bill to insurance or improperly do so.

It's also a good idea to make sure the medical service was actually provided to the spouse. Lastly, if it can be determined that the debt is valid, spouses need to coordinate any payments. The last thing you want to do is pay more than the alleged balance and then try and recoup the money after making payments.

Debts from a Previous Marriage are Complicated

Ex-spouse does not always mean ex-debt. If a consumer co-signed on a debt with their ex-spouse, they may still be liable for the alleged debt, regardless of what the divorce decree says.

A credit card contract is a contract between a consumer (and a spouse if they co-sign) and a creditor. A divorce decree is a contract between an ex-spouse and an ex-spouse. Creditors are not a party to a divorce decree. In other words, a divorce decree may not protect a consumer from an ex-spouse's debt.

However, there are other factors to consider. One, sometimes spouses will fraudulently add another spouse as a co-signer. If a spouse never agreed to be a co-signer, identity theft is a potential defense. Two, if an ex-spouse agreed to pay and close an account and they racked up a bunch of debt after paying it off (but not closing it), the other spouse may have a number of defenses.

A consumer may, however, be able to use a divorce decree against their ex-spouse. For example, if a consumer is sued on a debt that their ex-spouse said they would pay, the consumer could seek relief in family court pursuant to the divorce decree.

The bottom line is that if a consumer is listed as a co-signer on a debt, the creditor can pursue either one or both parties for the debt, regardless of what a divorce decree says.

Dealing with Debts as Part of Divorce Decree

I regularly meet with consumers that are facing collection activity on debts they thought were resolved or included in the divorce decree. This information is intended to help family law attorneys explain the liability of debts to their clients and to hopefully help prevent issues on the backend of the divorce.

Step 1: Figure Out What You are Dealing With

As a starting point, pull the consumer's credit report and assess the damage (or lack thereof). You can request free copies of credit reports at www.annualcreditreport.com.

A credit report may or may not list all accounts. On top of that, the information listed may or may not be accurate, but it is a good starting point. Relying on information from two parties involved in a contentious divorce is not necessarily reliable.

One key piece of information is the heading of "responsibility." That should say something like "individual; joint; authorized user." The first two are obvious, and "authorized user" is generally going to be murky. From a consumer attorney perspective, "authorized user" is usually not sufficient to attach liability, but that also depends on a variety of other factors.

Again, a credit report is not guaranteed to list every debt or list it accurately, but it is a good place to start for considering potential debts.

Step 2: Consider Closing Accounts

Under Minnesota law, either spouse can close a joint credit account for which both spouses are liable (see Minn. Stat. § 519.05(b)). The statute only requires that either spouse provide written notice to the creditor to fulfill the request. There are a couple of things to keep in mind about closing accounts.

One, closing an account could not only impact a divorce proceeding, it could impact a credit score. If a spouse is going to have problems getting credit approval post-divorce, closing an account could be a bad idea.

Two, it's rarely as simple as sending one letter, so document all communications and follow-up. For example, send a copy of the request via certified mail (keep the original). Be sure to follow up and get confirmation that the account has been closed. The issue of who pays the balance is likely a question for a family law attorney.

Step 3: Put Additional Language in the Divorce Decree

Divorce decrees typically list all of the debt in a table or matrix. The table will typically contain the name of the creditor, the amount of the debt, and the party responsible for the debt. There is usually some form of indemnity language as well. The biggest problem is that the responsible party never actually closes the account and/or pays the balance.

With that in mind, consider including one of the following provisions (or something similar):

The party responsible for paying the creditor agrees to close the account and pay the account in full within thirty (30) days of the execution of this agreement. The party also agrees to provide written proof of account closing and payment to the other party within that time period.

The party responsible for paying the creditor agrees to remove the other party from the account within thirty (30) days of the execution of this agreement. The party also agrees to provide written proof to the other party within that time period.

Step 4: Follow Up and Confirm the Terms

If the decree includes one of those provisions, then the responsible party should provide confirmation of the debt being paid/account being closed within 30 days of the execution of the decree. If that has not occurred, follow up with the responsible party's attorney. As an added precaution, confirm with the actual creditor that the decree has been followed.

Generally speaking, it should be much easier to try and enforce the terms when both parties still have attorneys and the agreement is freshly executed. The more time that passes, the harder it can be to enforce the terms. On top of that, as an account sits unresolved, the chances of a default and potential collection activity increase.

Remember, a divorce decree is generally not a defense to a debt collection lawsuit. If a consumer gets sued on a debt, they cannot use the decree to defend the action.

Bonus Coverage: Understanding and Dealing with Student loans

Student loan debt is absolutely booming – currently at $1.2 trillion dollars and rising, with frankly no end in sight. In many ways, student loans are just like any other form of consumer debt. In other ways, they are dramatically different.

Like any other consumer debt situation, the first step in determining options is to determine what type(s) of loans a consumer is dealing: federal, private, or both.

There are vast differences between federal and private loans, as noted in the table below.

	Federal	**Private**
Statute of Limitations	No	Yes

Administrative Wage Garnishment	Yes	No
Tax Refund Capture	Yes	No
Social Security Garnishment	Yes	Potentially exempt (state law)
Guaranteed Repayment Options	Yes	Highly unlikely
Guaranteed Right to Cure Default	Yes	Highly unlikely
Lawsuit Option	Yes	Yes
Discharge on Death	Yes	Highly unlikely (co-signer)
Guaranteed Discharge Options (disability, etc.)	Yes	Highly unlikely (co-signer)

With both types of loans, when they go into default, a debt collector will get involved. For federal loans, the government contracts with private collection agencies to collect. For private loans, many loans are placed with debt collectors before proceeding to the lawsuit stage.

In the family law context, the most common scenario is when a spouse co-signs on a private student loan, and the parties get divorced. As noted above, a divorce decree may provide some potential relief if one spouse agrees to pay the debt. If the responsible party stops paying on the debt, the creditor will likely pursue one or both spouses for payment.

It is important to understand that generally speaking, removing a co-signer from a student loan (or removing liability) is not easy. Frankly, in many cases it is simply not an option.

As a starting point, get a copy of original loan and terms and conditions. You will first want to confirm that both spouses actually co-signed the loan. Some debt collectors may not outright claim joint responsibility, but they will hint that both spouses need to pay the debt. If both spouses did not sign the loan, however, that is simply a threat and not a true option. In some situations, simply being listed as a "reference" on a loan may confuse a spouse or a debt collector into thinking there is liability.

Assuming both spouses are listed, then move on to the terms and conditions of the loan. Some loans have a co-signer buyout clause (or something similar). They usually require twenty-four on-time payments in order to request a co-signer release. Even if the loan is not current, that provision can be a good starting point for a negotiation.

The next step is to contact the lender (or debt collector if the loan is defaulted) and ask what the options are. Sometimes collectors will offer a settlement to release one party from the loan. Other times they will only offer a settlement to completely resolve the debt. From what I have seen, consumers should make more than one call, because they will typically get different information and different offers from the various phone operators.

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He is an attorney instructor at the University of Minnesota Law School. He is also an author and blogger, frequent CLE presenter and an advocate for consumer rights. He graduated magna cum laude from the University of Minnesota Law School, where he also obtained his undergraduate degree.

Prior to law school, he wrote screenplays, and worked on commercials and music videos. He was also retained by a Beverly Hills law firm as an expert on Marvel Comics as part of a federal copyright lawsuit.