

The Contract Case



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This brochure does not constitute legal advice. It is intended to be a general overview of the civil process for contract cases in California involving the collection of personal debts such as credit cards, medical debt, car or other personal loans only. It does not cover other contracts cases, such as those involving real estate, fraud, or business related debts. If you feel you need legal advice or representation for your case, you should consult an attorney.

What is a Contract?

A contract is an agreement between two or more parties who trade promises that they will do something or not do something. These promises are legal duties under the law. Contracts must include certain information to be valid (such as, who is entering into the contract, the price agreed to, the promises involved) and must be entered into by persons who are legally able to enter into contracts (for example, adults and not children). Contracts can be verbal or written, but some contracts are required by law to be in writing.

Example: You sign a contract with a company for a car loan. The company promises to give you the loan and, in exchange, you promise to pay back the money plus interest within a certain time.

How Do I Know if My Case Involves a Contract Law?

There are many types of cases that involve contract law. For example, if you entered into the contract mentioned above for a car loan and you did not pay the money back to the company within the time you agreed to, the company can sue you and this would be a contract case. Here are other common examples of contract cases:

- ❖ You are being sued for non-payment of a credit card.
- ❖ You are being sued for non-payment of a bank loan or student loan.
- ❖ You are being sued for non-payment of a medical bill.

How Does a Contract Case Start?

If you owe money on a debt that was mostly for your own personal, family or household purposes, the Creditor (the company you owe) must give you certain notices first before suing you, the Debtor (the person who owes the money).

- ❖ The Creditor must provide a notice it is trying to collect a debt and that any information obtained from the Debtor will be used for that purpose.
- ❖ The Creditor must also provide a “Debt Validation Notice” **WITHIN 5 DAYS** of first contacting the Debtor about the alleged debt. This is a notice that states:
 - The amount of money owed
 - The name of the Creditor who is owed the money
 - That the Debtor has 30 days to dispute the debt (or part of it), or it will be assumed valid
 - That if the Debtor disputes the debt within 30 days, the Creditor will provide verification (proof) of the debt or a copy of a Judgment (court order) for the debt
 - That the Debtor may request verification of the debt within 30 days
 - That if the Debtor requests verification within 30 days, the Creditor must provide the name and address of the Original Creditor (if it is not the current one)

What Options Do I Have After I Get the Collection Notice(s)?

As a Debtor, you have these options:

- ❖ Check if the information in the notice is correct.
 - Is this your account? Have you been a victim of identity theft?
 - Do you owe the debt and is the amount correct?
 - If you paid the debt, do you have any proof you did?
 - Do you know the company that is trying to collect the debt?
- ❖ Dispute, request proof, or request other information about the debt within 30 days by calling or sending a letter to the Creditor (or its attorney).
- ❖ If you want to pay all or part of the debt, you can contact the company or its attorney and try to make a deal (called a “settlement agreement”). A settlement agreement can include many conditions. For example, you can make an offer to:
 - Pay off the debt only if late fees and/or interest are removed from the total.
 - Pay off the debt only if it is removed from your credit report.
 - Pay off the debt only if the court case is dismissed and no court order (Judgment) is entered against you. (A Judgment will stay on your credit report for 7 years).
 - Make monthly payments to pay off the debt.
 - Make one big payment for less than the amount requested.
 - Have the settlement agreement be in writing and that you be given a copy of it signed by you and the Creditor and its attorney.
 - Have the settlement agreement state that it is a final and complete settlement of the debt.
 - Have the Creditor send you a receipt or other proof of any payments you make to pay off the debt.
- ❖ Consider contacting a debt consolidation company to combine and pay off all your different debts together for lower amounts per month.
- ❖ Consider filing for Bankruptcy if you have many debts you cannot afford to pay.

What if I Do Not Get Any Collection Notices?

You may receive phone calls, but the laws are specific and require that certain information be given in writing to you as a Debtor. If you did not receive the correct written notices, then you may use this to defend yourself in Court if you are sued. You may also bring your own case against the Creditor for violating the collection laws.

What is the Court Process for My Type of Contract Case?

The Creditor has to file legal papers called a “Summons & Complaint” with the Court. A Summons is a legal notice to you that you are being sued and telling you how much time you have to respond to the lawsuit. The Complaint is the actual lawsuit claiming that you owe money because you failed to pay the debt on your contract. In the legal papers, the company that is suing you claiming you owe money is listed as the “Plaintiff,” and you are named as the “Defendant.”

The Plaintiff must have the Defendant properly served with the Summons & Complaint in one of the following ways:

- ❖ **Personal Service:** The person physically hands a copy of the Summons & Complaint to the Defendant.
- ❖ **Substitute Service:** The person leaves a copy of the Summons & Complaint with an adult at the Defendant’s home/work and mails a copy.
- ❖ **Mail:** The person sends a copy of the Summons & Complaint in the mail with a form confirming receipt of the papers that the Defendant must sign and mail back.

What can I do once I receive the Summons and Complaint?

After you receive the Summons & Complaint, you have these options:

- 1) File an Answer-The purpose of an Answer is to dispute some or all of Plaintiffs’ claims and to raise defenses which could reduce or cancel the debt. In contract cases, you normally has 30 days to file an Answer with the Court and have it served on the Plaintiff or its attorney, if there is one. The Summons explains the number of days to Answer and how to count the days. The first day begins the day after you receive the Summons and Complaint. The Answer must be filed with the clerk at the same courthouse listed in the Plaintiff’s Summons & Complaint.
- 2) Do not respond
- 3) File a motion
- 4) Try to settle the case

How do I know if I should Answer?

See the flyer called “Debt Collection Cases: Deciding Whether to File An Answer.”

I’ve Decided to Answer, what Information do I Need to Prepare My Answer?

- 1) Create a timeline of events about the debt in the lawsuit.
 - ❖ For example, when did you enter into the contract?
 - ❖ When did you stop making payments?
 - ❖ Did you receive written notices about your debt?
 - ❖ When did you receive them?
 - ❖ Who were they from?
 - ❖ After you stopped paying, did you contact the company to try to work out a payment plan? If so, when?
- 2) Collect any documents you have about the debt including: canceled checks showing payments, statements, letters, notices, and agreements to pay or to reduce debts.

3) Think about what **DEFENSES** you might have. Below are some, BUT NOT ALL, common defenses that may apply to your situation. Please note, even if one of the defenses below applies, the defense may not eliminate the debt.

- ❖ **Failure to Mitigate Damages:** Someone trying to collect a debt has a legal duty to try to reduce the amount they are owed. If you have tried to negotiate a settlement or made your best offer to the other party (for example, offering to pay in smaller installments) and the other party has refused to accept your **reasonable** offer, then you may argue that the other party has failed to mitigate damages.
- ❖ **Statute of Limitations:** The law requires cases to be filed within a certain amount of time. If the law suit is not filed during the time limits listed below, the Plaintiff cannot sue for money owed anymore. In order to use this defense, you must be able to **prove** that the money owed is too old to reclaim. The time limit varies as follows:
 - For most agreements in writing (in California), the time limit is within **4** years of the last item. The last item is your last statement stating how much you owe or the date of the last payment that posted to your account. (see CCP §337 subd. 2 (1), (2), (3))
 - For most verbal agreements in California, a lawsuit must be filed within **2** years of when the cause of action accrued (when the amount became due). (see CCP §339).
- ❖ **Failure to State a Cause of Action:** A plaintiff suing you to collect a debt must explain in its Complaint why the court should give the plaintiff a judgment against you. If the plaintiff does not explain the following facts with enough information for you to understand the basis of the lawsuit, then it cannot bring the lawsuit:
 - The type of contract between you and the original creditor (i.e., to buy a car, a credit card contract, etc.);
 - Who the plaintiff is (i.e., the original creditor, a debt collector, someone who bought your debt from the original creditor, etc.);
 - What the plaintiff/creditor promised to do in the contract;
 - What you promised to do in the contract;
 - What the plaintiff/creditor actually did as part of the contract;
 - What you actually did as part of the contract; and
 - What the plaintiff did to resolve the dispute with you before filing the lawsuit.
- ❖ **Illegal Contract/Invalid Contract/Nonexistent Contract:** A plaintiff cannot sue you for a contract that is not enforceable under the law.
 - **Illegal Contract:** An illegal contract is a contract where either you or the creditor promised to do something that is not allowed under the law. Illegal contracts are very rare. If you think the contract between you and the creditor includes promises that are so unfair as to be illegal, you should speak with an attorney and get the attorney's opinion on your contract.
 - **Invalid Contract:** An invalid contract is a contract that looks legal but is not enforceable because of someone did. The most common reasons for a contract to be invalid are:

- **Fraud by Misrepresentation:** If someone lied to you or hid information from you in order to trick you into making the contract, then the contract is invalid.
 - **Superseded by New Contract:** If you and the creditor make a new agreement about what you owe and what you are supposed to pay, then the original contract is no longer enforceable.
- **Nonexistent Contract:** The plaintiff seeks to enforce a contract that looks valid even though you never entered that contract. The most common reasons for why a contract may look valid even nonexistent are:
 - **Fraud by Deception / Forgery:** If someone else signed the contract in your name or someone tricked you into signing something that you did not know was a contract, then there is no contract under the law.
 - **Satisfaction:** If you have done everything you were supposed to do under the contract, then you have no further obligations and the contract is done.
 - **Lack of Consideration:** Sometimes people talk about entering a contract (i.e., getting a quote, shopping around, etc.) but never actually form a contract. If you never signed any contract, never received anything from the creditor, and the creditor never provided some service for you, then you never entered into a contract.
- ❖ **Standing:** Often a second company (like collection agencies) will buy your debt from the original creditor. The second company may then file a law suit against you. If the second company sues you, but fails to state they are the legal owner of your debt, have the legal right to bring a suit against you, or fails to provide proof that they are the legal owner of the debt, then you may want to use the defense that the plaintiff **lacks standing** (the ability to bring this suit) and that it is the original creditor who has to sue you.
- ❖ **Laches:** A plaintiff should not be able to bring a lawsuit against you if the plaintiff has failed to bring suit against you for a long time, which made you believe they were not going to sue you.
- ❖ **Mistaken Identity/Stolen Identity:** If you believe this is NOT *your* debt, then you can use mistaken identity or stolen identity as a defense.
 - **Mistaken Identity:** With mistaken identity, your identity has not been stolen, but the plaintiff is bringing a suit against you for someone else's debt by mistake.
 - **Stolen Identity:** Stolen identity concerns another party who has illegally stolen your identity through using your credit card, opening up a fake account using your information, any form of your identification, and/or your social security number.
- ❖ **Offset (Reduce) Debt for Violation of Debt Collection Activities:** The law requires that debt collectors behave according to rules to ensure they act fairly and ethically. If the plaintiff is attempting to collect a debt from you, the plaintiff must follow the Rosenthal Fair Debt Collection Act (Civil Code §1788 et. seq.) and/or the Fair Debt Collection Practices Act (15 U.S.C. §1692 et. seq.) and/or the California Business and Professions Code (§6077.5 et. seq.). Creditors, collection agencies, **AND attorneys** are bound by these acts/codes, which require professional and fair practices in

collection of debt. If the debt collector violates these rules, the law allows for your debt to be reduced as a punishment to the debt collector for not collecting on the debt fairly. Here are some examples of what may be a violation of fair debt collection practices as required by these acts/codes.

- The plaintiff has failed to give you a debt validation notice or has failed to include a complete debt validation notice (see Step 1 above).
- The plaintiff has used false/misleading statements to collect the debt.
- The plaintiff has used harassment as a means of collecting the debt.
- The plaintiff has used abusive language to collect the debt.
- The plaintiff has contacted you by phone before 8:00 a.m. or after 9:00 p.m.
- The plaintiff has failed to stop contacting you after you have contacted them in writing, asking the plaintiff to quit doing so.

If I lose, how does the Plaintiff collect the money that I owe?

If you lose and the Plaintiff wins, then the Plaintiff's next step is to collect the Judgment (money that you owe). These are the common ways the Plaintiff may try to collect:

- ❖ **Wage Garnishment** – The Plaintiff will be able to take money (up to a certain percentage – usually up to 25%) from each of your paychecks until the debt is paid.
- ❖ **Bank Account Levy** – The Plaintiff will be able to take money from your bank account(s).
- ❖ **Abstract of Judgment** – If you own property, the Plaintiff will be able to put a lien on it. You cannot sell or refinance your property without paying the amount owed.
- ❖ **Order for Appearance & Examination** – Plaintiff can get an order requiring you to appear in court to answer questions about your finances, property owned, including any information the Plaintiff wants to get in order to help collect on the Judgment. If you do not go to court, the Judge can issue a Bench Warrant to have you arrested.

I have no money to give the Plaintiff, what are my options?

If you are unable to pay the judgment through a wage garnishment or bank account levy, for example, then you may file a **Claim of Exemption** with the Sheriff who issued the levy. The Plaintiff can contest the Claim of Exemption and both parties may have to go to court (see below). The outcome in court may reduce or eliminate the amount that you pay to the Plaintiff.

I have filed a Claim of Exemption. Is there anything the Plaintiff Can do to oppose this?

The Plaintiff can file an **Opposition to Claim of Exemption** and request a hearing on the Claim of Exemption. If a hearing is granted, then the court will decide on the judgment and amount that you owe the Plaintiff.