DEBTOR/CREDITOR RELATIONS

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A special thanks is extended to

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I. OVERVIEW

This overview seeks to provide a pragmatic, dollars and cents perspective on simple debtor/creditor cases.

The first issue in all of these cases should be cost effectiveness. A client is not well served if s/he collects $500 while incurring a $1,000 legal fee. Similarly, if a lawyer works 40 hours on a collection case only to earn a contingent fee of $175, the light bill and the vacation trip to Florida may be put off.

The Civil Litigation section of this Manual provides an overview of pleading rules and general civil process. The Debtor/Creditor section, therefore, concentrates on those portions of New Hampshire civil practice that most directly concern collection of an outstanding balance.

II. PRELIMINARY CONSIDERATIONS:

A. LEGAL FEES

FEE STRUCTURE: There is no "standard" fee structure in collection cases. There are, however, a few basic types of fee structures.

1. Contingent Fee - This fee structure is based upon the percentage of amount collected, generally ranging from 15% to 33.3%.

   It is important to clearly establish the terms of the contingency with the client. In addition to the percentage, this should include the services to be covered. Typically, a contingency fee agreement covers basic legal services up to and including trial and "standard" post-judgment remedies of execution or periodic payment petition. It does not include defense of counterclaims, appeals or other such services of an extraordinary nature, which are usually on an hourly basis.

   Before entering into a contingency fee agreement, counsel should review RSA 508:4-e which incorporates Professional Conduct Rule 1.5, requiring a disclosure of the client's right to retain counsel on an hourly basis. In addition, Professional Conduct Rule 1.5 requires a written retainer agreement in contingency fee cases and requires that the fee be reasonable.

2. Hourly Fee - Typically for larger or more complicated cases. However, it is entirely appropriate for an attorney to handle a collection case on an hourly basis and some clients may prefer that arrangement.

3. Fixed Fee – Under this arrangement, the fee is established at a set dollar amount for a specifically-defined amount of work.

SHIFTING OF LEGAL FEES: New Hampshire follows the general rule that each party must pay his or her own legal fees. However, there are certain times when legal fees can be shifted—

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in other words a prevailing party may recover legal fees from the other side. The most common examples are:

1. By Contractual Language: Often, credit applications, guarantees, promissory notes and other such documents state that the defaulting party will pay legal fees. This is enforceable in New Hampshire. However, the court will determine the amount of the legal fee award by the time spent rather than the amount in the contingency fee agreement *Fleet Bank v. Christy's Table*, 141 NH 285 (1986). In addition, RSA 361-C:2 requires that in retail installment contracts, the language must specify that fees will also be awarded to the "buyer, borrower or debtor" if they prevail in the action.
2. By Court Rule: Supreme Court Rule 23, Superior Court Rule 11 and, Circuit Court District Division Rule 1.8 allow the Court to assess reasonable costs including legal fees against a party engaged in frivolous and unreasonable conduct. However, courts are hesitant to grant this remedy and it should only be requested in clear cases of abuse.
3. By Statute: Many statutes have fee-shifting provisions. These often involve consumer protection-related legislation.

B. INFORMATION THAT THE CLIENT SHOULD PROVIDE

In general, the more information the client provides, the better. The following is a good beginning point check list of items to request of the client:

1. Name, address and business entity of the client as well as the debtor-This will be required in any suit papers.
2. Amount of claim and breakdown of principal, interest, fees and other charges-Clients often include interest and fees in the amount they calculate. However, unless allowed by contract, neither are recoverable. Further, both federal and state unfair debt collection laws prohibit requesting interest and fees in consumer cases unless they are authorized.
3. Date claim incurred and date of breach. This is critical for statute of limitations. Under RSA 508:4 the general statute of limitations in New Hampshire is only three years. Other statutory periods include 4 years for sale of goods under RSA 382-A:2-725, 6 years for negotiable promissory notes under RSA 382-A:3-118 and 20 years for judgments and contracts under seal under RSA 508:5.
4. Copies of any credit applications or other papers signed at the beginning of the relationship.
5. Copies of supplemental documents, if any, including Promissory Notes, Security Agreements, Mortgages and Guarantees.
6. Dishonored Checks
7. All correspondence regarding the claim, including any acknowledgment of the debt or statement of defenses.
8. Location information regarding the client's attempts to find a debtor who has "skipped."

In addition, the following information may be useful: Invoices and billing statements, proofs of delivery and receipts, notices of conversations with the debtor, credit reports and information on the debtor, bank account references.

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C. INITIAL WRITTEN COMMUNICATION WITH DEBTOR

Commercial Debtors: Generally, debt collectors are not required to send a written demand letter to a commercial debtor prior to filing suit. For practical purposes, however, written demand letters can be useful in determining whether the debtor is still receiving mail and the letter may open lines of communication with the debtor.

Consumer Debtors: The federal Fair Debt Collection Practices Act (FDCPA), requires that specific information and disclosures be provided to a consumer in the debt collector's initial written communication with the consumer. The Consumer Financial Protection Bureau (CFPB) drafted a model validation notice that debt collectors can use to comply with FDCPA and CFPB notice requirements. Debt collectors are not required to use the model notice, but if they do use the model notice, or a substantially similar notice, they will receive safe harbor protection if they are sued for notice deficiencies. The CFPB Model Validation Notice is included as **Appendix A**.

General Cautions:

1. Do not communicate directly with a debtor if you know the debtor is represented by counsel.
2. Do not refer to the parties as "plaintiff" or "defendant" or use any term or document that indicates suit was filed if it was not.
3. Do not include fees, costs or interest in the amount of the claim unless there is a legally enforceable basis to do so.
4. An attorney must review documentation supporting the debt and sign letters and pleadings. If no signature is required on a notice (i.e. Validation Notice), an attorney should note the file or account that the attorney reviewed and approved the document.

D. SOURCES OF DEBTOR INFORMATION

As part of the preliminary work on any collection case, the attorney should evaluate whether the debtor has sufficient assets or income to pay the claim. The following are some suggested resources to make that evaluation:

1. Secretary of State-Corporate and UCC information - https://quickstart.sos.nh.gov/online/BusinessInquire
2. City/Town Assessors - Real estate assessment and tax ratio to determine value of real estate.
3. Registry of Deeds - Real estate ownership and liens – www.nhdeeds.com
4. Other Creditors - Client may know of others in the community with claims against the debtor.
5. The debtor (if not represented) or debtor's counsel-probably the most valuable source of information as to both why the bill is unpaid and the financial background.

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E. EVALUATION OF THE CASE

Having collected the available information, the attorney's task is to evaluate and recommend to the client an approach to the case. In doing so, the following are the three critical factors:

1. The strength or weakness on the merits of the client's claim
2. The financial ability of the debtor to pay the claim.
3. The cost-effectiveness of proceeding

If the case is going to be uneconomical, close thought needs to be given to whether the case is a hopeless cause. If the case is strong and presents a chance for recovery, the attorney should finalize his fee arrangement before commencing action.

III. COURT SUIT

If the debtor does not respond to preliminary collection efforts and the evaluation of the case so justifies, the next step in the process should be suit.

The Civil Litigation section of this manual covers the basic steps in starting a lawsuit in New Hampshire. With specific regard to collection cases, bear in mind the following:

1. Choice of forum is an important factor in the cost-effectiveness of proceeding. The Circuit Court District Division has civil jurisdiction up to $25,000 and are often more geared to handle claims of a smaller size. In addition, the small claims jurisdiction of these Courts has recently been raised to $10,000. The small claims court provides an extremely inexpensive remedy, but there is a trade-off in terms of lack of pretrial motions and discovery.

2. Use of forms is critical to the successful handling of collection claims. The exhibits to these materials provide some forms that may be of assistance.

3. Despite the fact that the matter you are handling is "only" a collection case, if the debtor responds to the suit, it is important to approach the matter like any other litigation. When possible, this should include pretrial discovery and appropriate pretrial motions. Some samples are included. Similarly, if the matter must go to trial, it is up to the attorney to prepare the witnesses and exhibits in the same manner as any other litigation.

IV. STATUTORY LIENS AND CAUSES OF ACTION

In addition to the common law causes of action, New Hampshire has certain statutory liens and causes of action which may enhance a creditor's chance for recovery.

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A. STATUTORY LIENS

New Hampshire has enacted several statutes which provide certain creditors with special status in collecting an obligation. These statutes provide a statutory lien. These statutory liens are discussed below and should be consulted when preparing the Complaint.

1. Attachment Liens-

   The procedure for prejudgment attachment is contained in the Civil Litigation section of this manual. There are, however, two special types of attachments that should be mentioned:

   Mechanics Lien Attachment RSA 447

   This statute provides a lien in favor of contractors or subcontractors who provide labor or materials in the repair or improvement of real estate. The lien must be perfected by attachment of the property within 120 days after the services are performed or the materials furnished.

   This statute has very specific time limits that must be followed. If the creditor has provided labor or materials to a project, this statute provides tremendous leverage in a collection case. The Supreme Court has determined the priority of a mechanics lien over a construction mortgage where the mortgagee failed to follow RSA 447:12-a. See *Lewis v. Shawmut Bank*, 139 N.H. 50 (1995). See also *Holden Engineering & Surveying, Inc. v. Law Offices of Raymond P. D'Amante, P.A.,* 13 SCR 181 (July 23, 1997).

   The Mechanics Lien Law is an extremely dangerous area for anyone not familiar with the peculiarities of this procedure. The requirements of RSA 447 are unforgiving. The New Hampshire Supreme Court has repeatedly ruled that the language of the statute is to be strictly construed. The time limitations are inflexible. Because of this, any new lawyer confronted with a potential mechanics lien issue is encouraged to seek the assistance of another who has practiced in this area of the law in New Hampshire.

   Trustee Process Attachments RSA 512

   A trustee attachment is a unique remedy in which the creditor can attach the goods or credits of the debtor in the hands of a third party. Common examples would include a bank account attachment or the attachment of a receivable due to the debtor from one of the debtor's customers.

2. Business-Specific Liens: These include Innkeepers Lien, Agistment (Pasturage) Lien, Stud Service Liens RSA 448, Hospital Liens against an injured person's tort case RSA 448A, Launderers Lien RSA 449, Motor Vehicle and Aircraft Repairs and Storage Lien RSA 450, Liens on Vessels and Boats RSA 450A, Jewelers' Liens RSA 451, Radio and Television Repair Lien RSA 451A, Self-Storage Storage Facility Liens RSA 451-C, Liens on

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Personal Property - RSA 451-B, Liens for Monument Work RSA 452, and Liens for Lumbering RSA 453.

3. Liens Arising under RSA 382A, Uniform Commercial Code
The UCC under both Article 2 Sales and Article 9 Secured Transactions provides several statutory liens. An example of one of these liens is the lien provided to a buyer against nonconforming goods shipped by a seller. RSA 382--A: 2-711. Article 2-A of the Uniform Commercial Code deals with leases of goods. RSA 382-A: 2-A.

4. Lien for Attorneys Fees RSA 311:13

An attorney has a "Lien on Verdict" from the commencement of any proceeding in court for the extent of the reasonable fees and expenses. The statute provides a mechanism for the Court to determine the amount of the lien.

B. STATUTORY CAUSES OF ACTION

Additionally, New Hampshire law provides certain statutory causes of action, which may provide a simple means for recovering judgment. Most notable among these statutory causes of action are:

1. Claim for a Bad Check RSA 544-B

If the creditor has been paid by a bad check, in addition to suit on the debt itself, the creditor may also sue under RSA 544B. Under this statute, a successful creditor can receive the monies owed and penalty assessment of up to $500.

2. Claim for Unfair Business Practice RSA 358-A

RSA 358-A prohibits "any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state." While RSA 358A is entitled a consumer protection statute, the statute is written so broadly as to permit use by a number of parties. See e.g., *Eastern Mountain Platform Tennis v. Sherwin-Williams*, 40 F.3d 492 (1st Cir. 1994); *Gilmore v. Bradgate Associates*, 135 N.H. 234 (1992); *In re Globe Distributors, Inc.,* 111 B.R. 377 (Bankr. D.N.H. 1990). The statute carries with it the possibility of treble damages and attorneys' fees and should be examined when dealing with a debtor who was acting in a commercial capacity when incurring the debt.

3. Fraudulent Transfers - RSA 545-A

RSA 545-A provides creditors with a vehicle to recover fraudulent transfers made by debtors to third parties. This chapter sets forth various bases upon which a claim may be asserted. The time limitation for bringing a Fraudulent Transfer varies from one to four years depending on the nature of the transfer. RSA 545-A:9; See *F.D.I.C. v. Zibolis*, 856 F. Supp. 57 (D.N.H. 1994).

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4. Uniform Enforcement of Foreign Judgment Act RSA 524-A

   RSA 524-A provides a simplified method by which the judgment of a sister state can be registered and recognized in New Hampshire courts. The old method of doing so involved bringing suit on the judgment in a plea of Debt. That method is still available and may be more desirable for two reasons. First, it appears to be the only method to acquire a prejudgment attachment in an action to enforce a foreign judgment. Second, the language of RSA 524-A may be construed as giving a defendant the opportunity to reopen the foreign judgment notwithstanding the Full Faith and Credit Clause if he/she can convince a New Hampshire court that it would be in the interest of justice to do so.

5. Replevin RSA 536-A

   RSA 536-A is a process by which a secured creditor or any other person can recover property from the possession of a defendant who is wrongfully withholding possession of it. The process is started by filing of a complaint under section 2. Following service, the Court will schedule a temporary hearing to determine whether the sheriff should acquire the property and return it to the plaintiff under section 16. If the plaintiff prevails at that hearing, a bond is required for the double the value of the property under section 7.

V. TRIAL CONSIDERATIONS

The Civil Litigation section of this manual covers the subject of trial presentation in detail. However, with specific regard to collection cases, bear in mind the following:

A. **AVOIDING THE NECESSITY OF TRIAL**: It is usually preferable to avoid the necessity of trial, if possible. Trials of relatively small collections cases can be inordinately time consuming and disruptive for both the attorney and the client. Certainly, trial of a contested collection case is sometimes unavoidable. However, where possible, effective legal representation should include consideration of the following:

   1. Pretrial Activities-Although not allowed in small claims actions, all other New Hampshire courts permit pretrial discovery. At a minimum this should include a basic set of interrogatories. (See Appendix). In addition, Admission Requests, Depositions and Document Production Demands are available to help narrow the issues and prepare for the trial.
   2. Pretrial Motions-These are also not allowed in small claims actions. However, in any other case, consider a Motion for Summary Judgment to resolve the matter without the necessity of trial.
   3. Alternate Dispute Resolution-In small claims actions, mediation is optional in cases below $5,000 and mandatory for matters above that amount. Although it is not formally required, some Circuit/District Courts make mediation available in their other civil cases. In Superior Court, the parties are generally required to take part in

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some form of alternate dispute resolution before trial. This is usually part of the initial case structuring process.

4. Settlement-Effective legal representation should always include exploring settlement at every available point as the case progresses. This can and should include at a minimum some attempt at communication with the other side before the trial date. It should also include discussions on the day of trial, prior to the case being called. Often, there is a change of chemistry when the reality of trying the case is present and even the most difficult cases can be settled at that point.

B. TRIAL OF A "SIMPLE" COLLECTION CASE:

1. The Correct Documents-It is critical that a complete set of documents be in court and introduced to prove the case. Even though the case may involve only one narrow issue, when the time comes for trial, it is not sufficient to just present documents addressing whatever issue the defendant is disputing. It is the plaintiff's responsibility to satisfy the burden of proof, which means proving all the essential elements of the case from the ground up.

2. The Correct Witness- Clients often misunderstand what is expected. Common misperceptions include the possibility the attorney presenting the evidence without a witness present at trial and the possibility of the client testifying by phone. Neither are possible under New Hampshire practice. Clients are often hesitant to send witnesses to court. This is particularly so if the client is out of state or at a distance from the Court.

3. Clients also often misunderstand the difference between a "representative" from the plaintiff (who may or may not know anything about the case) and a "witness" who can testify from first-hand knowledge or as a records custodian. It is the attorney's responsibility to advise the client who must be present. For example, it does little good to have a product salesman present at trial if the issue involves an accounting error. Someone from the bookkeeping or accounting office should be the witness. Similarly, it does little good to have a doctor's billing clerk ready to testify in a collection case involving a defense of medical misdiagnosis.

4. Suggestions-The following are a few suggestions that may help prove a simple collection case:

   A. Premark Exhibits. Most courts encourage this. Even if this opportunity is not available, make sure the other side has copies of your exhibits before the trial and request copies of those from the other side.
   B. Consider calling the defendant as a witness. This is often useful to establish facts which are not really in dispute but still make up part of the plaintiff's burden of proof.
   C. Be familiar with the New Hampshire Evidence Rules regarding introduction of business records (Rule 803) as well as those dealing with self-authenticating

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documents (Rule 902). In many collection cases, most of the evidence is introduced under these two rules.

D. Simplify, Simplify, Simplify. This is not just true in small collection cases. It should be the goal in any effective trial presentation. The most successful trial presentation is usually the one that is straightforward and easy to understand.

VI. REMEDIES

The hard work in collection cases begins once judgment has been entered. The task now becomes to turn the court's order into cash. The following paragraphs provide an overview of these options.

A. "STANDARD" POST-JUDGMENT REMEDIES

In current New Hampshire practice, there are two "standard" remedies for collection of a civil judgment: execution and petition for installment payment of the obligation.

1. EXECUTION

Execution is the oldest remedy for enforcement of a civil judgment and is a useful tool in any case where the debtor has an asset with substantial equity which could be sold in satisfaction of the obligation.

There are few procedural guidelines to follow in using an execution to levy upon an asset of the debtor/defendant. Thus, the best advice which could be offered is to "know thy sheriff." Since each county's sheriff's office operates a little differently it is best to discuss the facts of each levy with the sheriff or deputy responsible for it. In dealing with the sheriff, remember that he is an elected official and is usually a "local" person. It is never pleasant to levy upon a debtor's property and sensitivity to this fact will assist any attorney in seeking the sheriff's assistance. Also, bear in mind that each sheriff's office truly believes that the procedure followed in that county is the only correct method for effectuating levy, even if counsel can demonstrate that other counties follow procedures which are apparently more correct or effective.

The first step one must take is to have the court issue a Writ of Execution. This is done by writing a letter to the clerk of court requesting that a Writ of Execution be issued. In addition, a "taxation of costs" must be submitted which will enable the clerk to compute the appropriate amount of costs and interest to which the plaintiff is entitled. The taxation of costs simply lists for the court the amount of judgment, the interest earned on the judgment plus the court costs, which are recoverable from the defendant. The interest on judgments is simple interest (no compounding) and is set by RSA 336:1. In 1995, the Legislature amended the rate from 10% to 2 percentage points in excess of the discount rate on 52-week Treasury Bills last auctioned prior to September 30 of each year.

The following link to the court's website contains a listing of the interest rates:

http://www.**courts.state.nh.us**/sitewidelinks/interest.htm

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Upon receipt of the above, the clerk of court will issue the Writ of Execution and mail it to the plaintiff's attorney. One must always be aware of the expiration date of the Writ since it cannot be used after that date. The superior court writs are valid for six months and district court writs for ninety (90) days, although this time can be extended upon motion for good cause shown. Since the sheriff will ordinarily require at least thirty (30) days to levy with the Writ of Execution, it is a good policy to send the Writ to the sheriff immediately upon its receipt.

In the event that the Writ of Execution expires without being satisfied, then it can be sent back to the clerk of court with a request for a new Writ which is called an "Alias Writ of Execution". The same procedure is followed in obtaining an Alias Writ as in the original Writ, except a notation must be made on the back of the expired Writ indicating "satisfied in no part" or in the event of partial payment "satisfied in part in the amount of $ X, leaving a balance of $ Y."

a. Real Estate Execution and Levy-

Real estate levy is considered desirable for several reasons. First, it is usually an asset of defendant with substantial value. Second, unlike personal property, it is fairly easy to determine the defendant's real estate holdings by checking with the local real estate registry or even the town clerk. Third, there is substantial psychological impact in any "threat" to sell a person's homestead.

Despite these advantages, there are certain drawbacks which should be considered. First, the debtor has the right to redeem the property within one year by paying the purchaser the purchase money and all sums expended with reference to the property, including interest (RSA 529:26). Second, the purchaser of the real estate at sheriff's sale takes title subject to all secured liens. If there are substantial prior encumbrances upon the real estate, this may be a serious drawback. Because of this, a title search should always be done prior to proceeding with sheriff's sale. In addition to prior encumbrances, if the property is one in which the debtor lives, he/she is entitled to a homestead exemption. The homestead exemption amount is currently $120,000 per spouse and was extended to manufactured housing owned and occupied as a dwelling. Third, if a debt is against only one of the two parties who own the real estate, it may be necessary to bring a second procedure, called a Petition for Partition once the sheriff's sale has been concluded. Finally, bear in mind that a sheriff's sale is a "distress" sale and that fair market value is rarely generated.

In conducting a sheriff's sale upon real estate, the first step is to send the execution and a notice of sale to the sheriff in the county of the real estate in question. The notice contains a legal description of the real estate and the terms of sale. Under RSA 529:20, the sheriff leaves a copy of the notice with the debtor and places the notice in the two most public places in the town in which the real estate is located at least 30 days prior to sale. If there is no pre-judgment attachment, the sheriff should also be instructed to file the execution with the deed registry. This has the effect of creating a lien pursuant to RSA 529:29. Absent a prejudgment attachment, however, this lien remains in effect only as long as the Writ of Execution. *McBurney v. Shaw*, 148 NH 248 (2002). Under RSA 529:22, the sale may be

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postponed for ten days at a time, up to a maximum of sixty days, provided the sheriff gives proper notice of postponement.

If the property is the debtor's homestead, there are some additional notice requirements. In addition to the notice required under RSA 529:20, RSA 529:20-a requires a specific notice be sent by certified mail to any person who resides or appears to reside at the property to be sold. RSA 529:25-a provides further protection for the homestead by setting forth a procedure to allow a party to claim a homestead exemption.

On the sale date, the sheriff reads the notice, making reference to the execution and auctions property to the highest bidder. The highest bidder is usually required to make a predetermined down payment and pays the balance within one to two weeks. The creditor's attorney is usually required to prepare a Sheriff's Deed, enabling the sheriff to convey the property.

Subject to the homestead exemption, the proceeds are distributed first to pay the sheriff's fees, then to pay any prior liens, attachments, mortgages or encumbrances of record, then to pay the judgment creditor who is levying, then to pay any subsequent liens or encumbrances and finally any balance is turned over to the debtor.

b. Personal Property Levy-

Personal property levies are often impractical for several reasons. First, most personal property does not have substantial equity. Second, unlike real estate, there is no centralized registry in which a debtor's personal property can be recorded. Third, in order to effectuate such a levy, it is necessary for the sheriff to seize or otherwise obtain physical control of the asset in question. On the positive side, however, unlike real estate levies, there is no right of redemption in any levy upon personal property.

When executing on personal property, the Writ of Execution must be sent to the sheriff of the county in which the chattels are located with instructions to levy. Before selecting the asset(s) to be levied, it is prudent to conduct a U.C.C. ll search (see Part II. A. 2. b.) and to contact the local sheriff's office to determine whether there are prior liens. One must be careful about levying on property which is encumbered since it can result in the plaintiff becoming liable to an interest superior to plaintiff's (see RSA 528:8 and 511:26.29). As often as not, the plaintiff is the high bidder at these sales.

A notice of Sheriff's Sale must be prepared by the plaintiff's attorney and sent to the sheriff as well. This notice of Sheriff's Sale includes a description of the property and terms of the sale. The notices of sale must be posted by the sheriff at the two most public places in the town where the sale is to be held.

Ordinarily the sheriff will make a demand on the defendant for payment and will seize the property to be sold. The property to be levied upon is ordinarily held by the sheriff for at least four days at the debtor's expense. The public notices must be posted at least 48 hours

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before the expiration of the four-day holding period. The property is sold to the highest bidder, and the sheriff disburses the funds to the plaintiff's attorney after deducting his fee. In the event that the sheriff has other Executions or Attachments on the same property, the disbursement of proceeds generated by the Sheriff's Sale will be made in order of priority (see RSA 528:4).

c. Bank Account Levy-

Occasionally, and most happily, one has occasion to levy on the defendant's bank account.

The process was somewhat complicated by the ruling in *Papalardo v. Bank Boston, Essex, N.A.* 133 NH 855 (1991). That case imposed the requirement that a creditor seeking to levy on a bank account first perfect a trustee attachment against the account. The difficulty is that there is no clear procedure for perfecting a post-judgment attachment.

The situation was made even more complicated by the legislature's revision of RSA 527:12, effective January 1, 2001. That statute prescribes the language which the court is to use in issuing its execution writ and was amended to include "right[s] and credit[s]" of the debtor. Although the intent was to enable a bank levy without prior attachment, it is not at all clear that this statute did away with the requirements imposed by the *Papalardo* opinion.

There are therefore two ways to effect a bank levy. One is to simply send the execution to the sheriff with instructions to levy on the goods and credits of the debtor on deposit at a bank. Most banks are now recognizing the effectiveness of this method. Another means is to bring a new suit reciting the judgment and setting forth that the suit is brought for the specific purpose of perfecting a trustee attachment upon the funds in question.

d. Periodic Payment of Judgment-

In the event that the defendant does not own sufficient assets to make levy worthwhile, but does have the ability to pay off the judgment in installment payments, RSA 524:6a is the final option. This statute provides that the court can order the defendant to make periodic payments toward the judgment. The probation department may be used to make an investigation and recommendation as to defendant's ability to pay, and the defendant faces civil contempt for failing to make the payments as ordered. The defendant must be given notice and an opportunity to be heard, before any contempt order can be entered. District Court Rule 1.21 establishes a specific procedure for handling Weekly Payment Petitions.

Among other things, Rule 1.21 provides that if the defendant is present when judgment is awarded, the court may make an immediate determination of ability to pay. The rule also provides that if judgment is declared without the defendant being present, the defendant is entitled to due process protection by having service made. If the defendant ignores the Orders of Notice being served upon him and does not show up at the court hearing, an arrest order may be issued. Rule 1.21 is very specific and any person using the Weekly Payment Procedure should become familiar with it.

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B. "EXTRAORDINARY" POST-JUDGMENT REMEDIES

1. Post-Judgment Discovery-

Post judgment discovery is in many ways an uncharted course. Some attorneys believe that the discovery rules, only apply in a case prior to judgment. For this reason, post-judgment interrogatories or depositions are viewed as objectionable and beyond the scope of the rules. Such a position is in the writer's view overly technical and not supported by the language of the rule. Once a judgment is entered, most courts, especially district courts, will side with the creditor on collection issues. If a deposition or interrogatories would be helpful in discovering assets post-judgment, these are well worth scheduling or sending.

One means of obtaining such discovery is simply to issue a subpoena duces tecum and deposition notice. While this involves some cost, it will probably have the effect of requiring the debtor to appear with the necessary financial records.

Another of post-judgment discovery is found in the periodic payment procedures discussed above. Generally, a periodic payment hearing can be scheduled faster and for less expense than a deposition. Additionally, for subscribers to the theory that the squeaky wheel gets the grease, the periodic payment hearing is a tremendous intrusion upon the debtor, requiring him to be served by a sheriff, go to court and answer questions under oath in front of a room full of strangers and a judge. The attorney for the creditor at the periodic payment hearing can ask the court's permission to raise a series of questions concerning the debtor's assets. In most instances, the court will permit an attorney to ask enough questions to determine the whereabouts of the debtor's assets.

In special cases, where extended discovery may be required (and large dollar amounts are involved), the attorney having won his first lawsuit can bring a second lawsuit to collect the judgment won in the first lawsuit. Again, from a perspective of cost-effectiveness such a duplicative approach is hard to justify.

Finally, RSA 498:8 provides a specific procedure for post-judgment discovery in cases where execution is returned unsatisfied and it is believed that assets are being hidden.

2. Post-Judgment Real Estate Attachments and liens-

RSA 524:13 establishes real estate judgment liens in all New Hampshire courts. To create the lien, the plaintiff must record a certified copy of the judgment together with a sworn statement that notice of the recording was sent to the defendant. This process establishes a lien on all property of the defendant in the county of recording. The lien remains outstanding until the judgment is satisfied or until the judgment otherwise becomes unenforceable under RSA 508: 5 (20 years from the date of judgment).

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The statute was effective January 1, 2017. Although the law is not completely clear, the language of the statute seems to make the process available to judgments entered before its effective date.

3. Other Extraordinary Remedies-

There are a wide variety of other post-judgment remedies available to a creditor's attorney. These include Fraudulent Conveyance Petitions, Assignments for Benefit of Creditors, Involuntary Bankruptcy, Petitions for Partition, Petitions to Reach and Apply and various others, far beyond the scope of this outline.

Any attorney considering such a remedy should carefully weigh the potential benefit against the cost of the procedure. These remedies should only be employed if it makes financial sense to do so and the client is fully aware of the benefits as well as the expenses.

VII. EXEMPT PROPERTY

New Hampshire law recognizes that it would not benefit society if a creditor could dispossess a debtor of all worldly belongings. For this reason, New Hampshire law recognizes that certain property is exempt from a creditor's attack. The exempt property is therefore a "safety net" in theory. Unfortunately, for debtors and creditors this safety net is vague and a bit dated in its definition. This section describes the principal state-created exempt property classifications. Federal law may also provide debtor with exemptions, such as interests in pension plans qualified under ERISA.

A. RSA 511:2

RSA 511:2 defines exempt property including the following items:

1. The wearing apparel necessary for the use of the debtor and his family.

2. Comfortable beds, bedsteads and bedding necessary for the debtor, his wife and children.

3. Household furniture to the value of $3,500.

4. One cook stove, one heating stove and one refrigerator and necessary utensils belonging to the same.

5. One sewing machine, kept for use by the debtor or his family.

6. Provisions and fuel to the value of $400.

7. The uniform, arms and equipments of every officer and private in the militia.

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8. The Bibles, school books and library of any debtor, used by him or his family, to the value of $800.

9. Tools of the debtor's occupation to the value of $5,000.

10. One hog and one pig, and the pork of the same when slaughtered.

11. Six sheep and the fleeces of the same.

12. One cow; a yoke of oxen or a horse, when required for farming or teaming purposes or other actual use; and hay not exceeding 4 tons.

13. Domestic fowls not exceeding $300 in value.

14. The debtor's interest in one pew in any meetinghouse in which he or his family usually worship.

15. The debtor's interest in one lot or right of burial in any cemetery.

16. One automobile to the value of $10,000.

17. Jewelry owned by the debtor or his family to the value of $500.

18. The debtor's interest in any property, not to exceed $1,000 in value, plus up to $7,000 of any unused amount of the exemptions provided under paragraphs III, VI, VIII, IX, XVI, and XVII of RSA 511:2.

19. Debtor's interest in a retirement plan or arrangement qualified for tax exemption under Act of Congress.

20. One computer

B. EXEMPTIONS FROM TRUSTEE PROCESS

RSA 512:21 exempts from trustee process certain classes of money, rights and credits. Prior to seeking recovery, counsel should consult these specific exemptions. RSA 512:21 includes as property exempt from trustee process the following:

1. Wages for labor performed by the defendant after service of the writ.

2. Wages earned prior to services of a writ to the extent that such wages are in an amount less than 50 times the minimum hourly wage not by the Fair Labor Standards Act.

3. Wages for personal services and earnings of spouse and minor children of defendant.

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4. Any pension allowed by any law of the United States before it comes into possession of the defendant.

5. Funds held by employee of defendant acquired in the ordinary course of business.

6. Fees for attendance in court as a juror or witness.

7. Damages recovered for conversion of property exempt from attachment.

8. Money in the hands of an insurance company or its agents for fire damages to the extent that such property is exempt from attachment.

9. Wages of $50.00 earned prior to service of writ for any loan contract subject to RSA 399-A.

10. Wages of defendant earned before service of writ, if the defendant is a married woman, if husband is co-obligor and claim is based on a loan contract subject to RSA 399-A.

C. OTHER NEW HAMPSHIRE STATUTES

New Hampshire also provides protection to a variety of other assets through a series of statutes which are scattered throughout the RSAs. The principal protections include the following:

1. $120,000 (per spouse) homestead right in real estate under RSA 480:1.

2. Benefits received under N.H. Retirement System under RSA 100-A:26.

3. Unemployment Compensation under RSA 282-A:150 I.

4. Welfare assistance under RSA 167:25.

5. Debtor's wages are in part protected from garnishment under RSA 512:21. This statute protects wages by ten different tests and thus the statute needs to be closely examined prior to action. Most notable among these protections is RSA 512:21 II which defines as exempt the sum of 50 times the federal minimum wage on a weekly basis.

VIII. CONSUMER PROTECTION LEGISLATION AND COLLECTION LAW

A. INTRODUCTION

Developments over the past two decades in the field of debtor creditor relations have been marked by a rapid expansion of the rights available to protect the debtor's interests. In addition, public policy over that same period has changed to produce a number of "new" rights for debtors. Those changes have been especially dramatic where the debtor is a "consumer" or has acquired "consumer goods".

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The entrance of the Federal Government into the field of consumer creditor relations has been a major force. The scope and nature of federal activity make it highly risky for the creditor to proceed on the basis of state law alone. In addition to the general activities of the Federal Trade Commission in regulating unfair and deceptive practices (including debt collection and other creditor practices), the federal government has regulated applications for credit, decisions to grant credit, credit reporting, credit contracts, credit billing, consumer disputes over bills, and debt collection practices.

In many of the above areas, the state has also enacted legislation. While the state has no counterpart to the F.T.C., it has enacted a "mini F.T.C." act (RSA 358-A) prohibiting unfair and deceptive trade practices and granting civil and criminal enforcement powers and rule making authority to the attorney general. State laws can be found dealing with credit reporting (RSA 359-B), credit disclosures (RSA 361-A, RSA 399-A, RSA 399-B), debt collection (RSA 358-C), and calculation of interest charges and rebates in consumer credit transactions (RSA 358-K). Many other provisions of state law protect the rights of consumers in areas touched by federal law.

The existence of both federal and state laws may make it difficult for creditors to ascertain how to comply with both bodies of law in some cases. Conversely, consumers confronted with illegal creditor activity may have some choices to make regarding which law to apply. This situation exists because the general pattern of federal law in this area has not preempted local law; rather the approach has been to establish a minimum level of protection in the federal law and permit consistent and superior state law protection to be enacted or to continue in force. Creditors are expected to comply with both federal and state law, where that is possible, and to comply with the law which gives the consumer the greater degree of protection where compliance with both is not possible.

B. DEBT COLLECTION PRACTICES

The existence of state laws, a federal statute, and a Federal Trade Commission Trade Regulation promulgated under §5(a) of the Federal Trade Commission Act, and the F.T.C. guides reproduced in the Code of Federal Regulations make this area somewhat complex. But, it may be made simple for creditors to minimize risks by adopting the highest standards to govern all of their collection activities. For the most part, the New Hampshire statute is an adequate guide for creditor's practices. The federal statute, which is aimed primarily at debt collectors rather than creditors, imposes procedural requirements on collectors not found in the state law. And the Federal Trade Commission has reached some details not expressly set out in the state or federal statute.

1. New Hampshire's Unfair or Deceptive Collection Practices Act

   a. RSA 358-C covers virtually all consumer credit transactions covered by Truth In Lending and reaches all collectors including attorneys. See generally, RSA 358-C:1.

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b. The Act generally prohibits "unfair, deceptive or unreasonable" efforts to collect a debt. But it "limits" those otherwise vague terms to the concepts set out in the Act. The specific prohibitions are enumerated in RSA 358-C:3.

In summary:

(1) These provisions regulate communications with the debtor as to time, place, and manner of the communications.

No communications about the debt are allowed with persons other than the liable party, his/her spouse or parent residing with the debtor, debtor's attorney or representative.

No communications are allowed at the debtor's employment unless attempts at other contacts have failed. Then, only one contact per month unless agreed in writing by the debtor in advance.

(2) Threats of and use of force are prohibited.

(3) Threats of use of the legal process are also regulated.

It is prohibited to threaten any action that is not intended to be taken.

(4) Invasions of privacy and undue publication of the debtor's affairs are regulated.

(5) Continued communication with the debtor when told to stop or when the debtor is represented is prohibited.

(6) False or misleading claims as to amount and legal status of the debt are prohibited.

(7) No use of forms that simulate judicial process. This probably prohibits referring to parties as "plaintiff" and "defendant" before suit.

(8) Legal fees can not be requested unless authorized by law. Generally this requires a contract or other written agreement signed by debtor in advance. Legal fees also can not be demanded in a specific amount without some disclosure that the ultimate determination is discretionary with the court.

(9) Interest or other supplemental charges can not be demanded unless authorized by law. Typically this requires a contract or other document signed by the debtor.

c. Remedies for violations are set out in RSA 358-C:4 and include the greater of actual damages or $200 per violation plus attorney's fees. Debtors, individually or as a class, may seek injunctive relief from practices covered by the Act and may recover costs and attorney's fees if they prevail. Conversely, if the court finds the debtor's suit to be

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frivolous, the debtor can be held liable for costs and attorney's fees for the debt collector.

Significantly, the Act expressly places violations of the Act under RSA 358-A, the Consumer Protection Act which invokes the procedural and rule making provisions of that Act. Further, RSA 358-A directs the state courts to be guided by the determinations of the Federal Trade Commission and the federal courts under related areas covered by §5(a) of the F.T.C. Act. A study of those decisions will reveal a fairly strong consumer protection gloss to the concepts covered under RSA 358-C. See Goldston, Federal Regulation of Debt Collection Practices 12 U.S.F.L. Rev. 575 (1979).

2. Federal Fair Debt Collection Practices Act

a. The Fair Debt Collection Practice Act is Title VIII of the Consumer Credit Protection Act. 15 U.S.C. §1692. It covers consumer (primarily for personal, family, or household purposes) debt. Its protection is broader than in the New Hampshire act which covers only those transactions governed by Truth-In-Lending.

Significantly, the Fair Debt Collection Practice Act has been amended by redefining debt collector and deleting the specific exemption for attorneys. The term "debt collector" is defined as follows:

> ...any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of inter-state commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include:
>
> (1) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;
>
> (2) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;
>
> (3) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

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(4) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(5) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(6) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by persons; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor. 15 U.S.C. §1692a (1989).

b. The Act specifically deals with location efforts and regulates the collector's communications in trying to trace the debtor. The details require attention since the concern in this area is privacy and reputation. See 15 U.S.C. §1692b. In addition, communications with persons other than the debtor about the debt are forbidden unless authorized by the debtor, the court, or the Act. 15 U.S.C. §1692c(b).

Communications with the debtor are regulated as to time, place, and manner and must be ceased when the debtor refuses to pay or requests that communications cease. Thereafter, the collection must proceed formally at law. 15 U.S.C. §1692c(c). The Act lays down three broad prohibitions: (1) the collector may not engage in practices which harass, oppress, or abuse any person, 15 U.S.C. §1692d; (2) the collector may not use any false, deceptive, or misleading representations or means to collect a debt, 15 U.S.C. §1692e; (3) the collector may not use unfair or unconscionable means to collect a debt, 15 U.S.C. §1692f. In each of the cited sections specific prohibitions are listed without limiting the scope of the broad concept, or giving a restrictive definition of the prohibited conduct. In that respect, the federal act differs from the state act which does specifically limit the scope of prohibited conduct. See RSA 358C:2. Thus the creditor/collector covered by the federal act must measure proposed conduct by the general standards in the Act before employing them.

Section 1692(e) requires all debt collectors to disclose in the initial communication that "the debtor collector is attempting to collect a debt and that any information obtained will be used for that purpose." See 15 U.S.C. §1692(e)(11). In addition, the debt collector must disclose to the consumer in each subsequent communication that the communication is from a debt collector. *Id*. Failure to do so constitutes a violation. See *Dikeman v. National Educators, Inc.,* 81 F.3d 949 (10th Cir. 1996).

Importantly, the federal act also imposes procedural obligations. Collectors must provide a detailed written notice in writing within five (5) days of initially

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communicating with the debtor (15 U.S.C. §1692g). Similar provisions for procedure run through the Act.

c. Remedies are set out at 15 U.S.C. §1692k. Basically, the claim can be brought in any state court or in the federal district court without regard to the amount in controversy. 15 U.S.C. §1692k(d). The violator is liable for actual damages, possible punitive damages up to $1,000, costs and attorney's fees. A defendant who prevails may be awarded attorney's fees and costs where it is shown that the plaintiff brought suit in bad faith or to harass. A federal court does not, however, have the power to grant injunctive relief to an individual. See *Duran v. Credit Bureau of Yuma, Inc.,* 93 F.R.D. 607 (D.C. Ariz. 1982).

C. LIABILITY OF CREDITORS ON CONSUMER CLAIMS

From the creditor's perspective, developments in the laws dramatically affect its exposure to liability in consumer credit arrangements apart from the creditor's liability for its own conduct. As things now stand, creditors are potentially liable to some degree for claims the consumer can assert against the provider of goods and services, which give rise to the debt. And this result may occur even where the creditor does not have direct control over the provider of those goods and services. From the collector's point of view, the consequences of these laws are that the consumer's assertion that there is a dispute or a claim against the seller of those goods and services must be taken seriously.

The collector may well be inclined to perceive the consumer's complaints as a convenient invention to avoid payment; that is a business judgment and, as such, it is outside the scope of these materials. But the consumer's complaint cannot be ignored because the collector believes it has no liability for the consumer's claim without considering the provisions of state and federal law protecting consumers.

Three provisions of the law dominate this New Hampshire RSA 382A:3305 (Holder-In-Due-Course); 16 C.F.R. §433 (F.T.C. Preservation of Claims and Defense Trade Regulation Rule); 15 U.S.C. §1666i (Rights of Credit Card Customers). Each in its own way exposes creditors to liability where consumer credit is involved. The beginning point is determining whether the transaction is a consumer transaction.

1. Consumer Transactions

Each relevant scheme has its own definition.

a. RSA 358-C:1 defines a consumer as "a natural person who seeks or acquires, or is offered property, services or credit for personal, family or household purposes."

b. 16 C.F.R. §433.1(b) defines consumer as natural person who acquires goods or services for personal, family or household use.

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c. 15 U.S.C. §1666i and 12 C.F.R. §226.12 apply to all credit card transactions involving open-end consumer credit plan (see also, 15 U.S.C. §1693, 1693r and 12 C.F.R.§226.31(i) relative to extension of credit via electronic funds transfers). Consumer credit for purposes of federal truth in lending requirements, is defined at 12 C.F.R.§226.2(a)(12): credit extended to a natural person in which money, property, or service is primarily for personal, family, household or agricultural purposes.

2. New Hampshire Statutes-RSA 382-A:3-302

RSA 382-A:3-305 and RSA 382-A:3-306 set forth certain defenses available to obligors under instruments. Specifically, RSA 382-A:3-305 provides:

a. Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:

(1) a defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;

(2) a defense of the obligor stated in another section of this Article or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; and

(3) a claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.

b. The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) against a person other than the holder.

c. Except as stated in subsection (d), in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument (Section 3-306) of another person, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the person entitled to enforce the instrument. An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a

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holder in due course and the obligor proves that the instrument is a lost or stolen instrument.

d. In an action to enforce the obligation of an accommodation party to pay an instrument, the accommodation party may assert against the person entitled to enforce the instrument any defense or claim in recoupment under subsection (a) that the accommodated party could assert against the person entitled to enforce the instrument, except the defenses of discharge in insolvency proceedings, infancy, and lack of legal capacity.

RSA 382-A:3-306 provides:

Claims to an Instrument. A person taking an instrument other than a person having rights of a holder in due course is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. A person having rights of a holder in due course takes free of the claim to the instrument.

3. F.T.C. Trade Reg. Rule on Preservation of Claims and Defenses

a. Notice Requirement Terms of Contract 16 C.F.R. §433.2(a) and (b) require a notice to be included in a consumer credit contract which states that any holder of the contract is subject to claims and defenses which the debtor could assert against the seller of goods or services. The required language is set forth in the regulation. The F.T.C. Staff Guidelines on the Rule reveal that the notice is a term of the agreement to be treated in the same manner as other terms of the agreement.

b. The Rule applies to "purchase money loans" to finance a specific purchase so long as the loan applies in whole or substantial part to that purchase. In addition there must be a relationship between the lender and the seller of the goods through referrals or affiliation.

4. Rights of Credit Card Customers (Federal Reserve Board Regulations)

a. Credit card customers are protected under part of the Federal Truth-in-Lending scheme in several related respects. Consequently, reference is required to general regulation of credit card programs, especially credit computation and billing (12 C.F.R.§226.14) and special requirements for resolution of billing errors in credit card transactions (12 C.F.R. §226.13).

b. Special protection is given under 15 U.S.C. §1666i and 12 C.F.R. §266.13 to credit card customers who have disputes with the sellers of goods or providers of services.

If the customer makes a good faith effort at resolving the dispute with the merchant, and if the amount of credit exceeds $50 and if the transaction took place within the state or

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within 100 miles of the customer's designated address, then the customer may withhold payment and assert all nontort claims and defenses against the card issuer. Note, however, that the status of a mail order contract may be governed either by N.H. law or by the law of the locality from which the goods were shipped, and also that a card issuer's liability may be limited by those terms of the contract between the consumer and the merchant which are not otherwise illegal or unenforceable at law (e.g., "all sales final" or "no refunds or exchanges").

c. Where the purchase giving rise to the debt is through or by a close affiliate or results from card issuer solicitations, the $50, 100 mile limits are not applicable. Thus, the customer qualifies by attempting a good faith resolution of the dispute.

5. Limitations on Liability

A review of each of the statutory and regulatory provisions reveals that each limits the liability of a creditor for the acts or practices of the merchant. But all of those provisions provide different degrees of protections for the creditor.

a. Under RSA 382-A:3-302(g), a holder in due course is subject to any other law limiting the status of holders in due course.

b. F.T.C. Rule 16 C.F.R. §433.2 imposes by the language of the notice liability for all claims and defenses that could be asserted against the seller subject only to the limit on the amount: "Recovery hereunder by the debtor shall not exceed the amounts paid by the debtor hereunder". The F.T.C. staff believes that this language entitles the consumer to recover, in addition to rescission of the contract, an amount that would restore the consumer to the pre contract posture.

c. Credit card customers, under 15 U.S.C. §1666i and 12 C.F.R. §226.12(c), can assert all nontort claims and all defenses up to the amount outstanding on that debt plus any finance charges and late payments related to that debt.

6. Consumer Leasing

Under the "consumer leasing" amendment to the federal Truth In Lending Act, 15 U.S.C. §167, et seq, leases of consumer goods (e.g., automobiles, furniture, or appliances) are treated as consumer credit transactions and are governed by 12 C.F.R. Part 213 (Federal Reserve Board Regulation "M"). The statute and the regulation set forth specific disclosure requirements and restrictions on charges and fees payable by consumers and should be carefully consulted by the petitioner.

D. DEBTORS RIGHTS UNDER ARTICLE 9 OF RSA 382-A

The general provisions of Article 9 of RSA 382-A for the most part provide for protections of debtors without regard to whether the debtor has offered consumer goods as the security.

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However, the provisions of Article 9 do expressly recognize the special significance of the consumer debtor and require the secured party to exercise a special degree of care to avoid unnecessary losses to the consumer. The "collection" rules in Article 9 (Part 6) must be consulted for the general provisions and special restrictions. These materials will focus on some special problems. As a general matter, the practitioner should begin with a review of the contractual status between the parties. The attorney should review the written agreement and also inquire of the client regarding oral modifications, even if the contract specifically prohibits oral modifications. See *Prime Financial Group, Inc. v. Masters*, 141 N.H. 33 (1996). After this analysis is concluded, the practitioner should then consult the Uniform Commercial Code.

1. The Requirement of Default Waiver by Conduct

   Default remains an unregulated concept for the most part; therefore, the parties to the security agreement remain free to define the concept in the contract. However, like most of the concepts left to freedom of contract in the Commercial Code, default is constrained by the concepts of good faith and reasonableness in RSA 382-A:1-201 and 2-209, and by the principles of unconscionability and waiver.

   Behind these concerns is the oppression of the debtor resulting from surprising and harsh actions by the creditor. In particular, the creditor may behave in a way that encourages the consumer to believe that a particular course of performance is acceptable only to have the consumer discover that it is not. Most commonly, creditors may permit a pattern of late payments that has the effect of leading the consumer to believe that late payments are acceptable.

   In those situations, the creditor may have waived the contract definition of default and be required to serve a notice of default on the consumer prior to exercising the rights of collection in Article 9. Incidentally, this concept is not limited to secured transactions.

2. Acceleration of Debt

   While a creditor is permitted to accelerate the debtor's obligation upon default or perhaps as a result of an insecurity clause in the agreement, those rights of the creditor must be exercised with care to assure that the debtor is not unnecessarily or unfairly damaged. There is a growing tendency on the part of courts to impose obligations on the creditor to avoid the power to accelerate to create a needless default. Hypothetically, the creditor feels insecure before default because of a pattern of late payments and rumors that the debtor is moving; the creditor accelerates and repossesses after the debtor fails to pay on the next due date. A good article on accelerating of debt involving demand instruments is "Good Faith and Demand Instruments" 29 N.H.B.J. 197(1988); see also 61 ALR 3d 244.

   Recall that collection under the Commercial Code must be reasonable. It may well be that unconscionability applies here as well. Even though there is no expressed unconscionability provision in the Commercial Code for Article 9, the common law doctrines seem applicable as reserved through RSA 382-A:1-103 which supplements the code with common principles

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of both law and equity. See *United States National Bank of Oregon v. Boge*, 311 Or. 550, 15 UCC Rep. Serv. 24 (Or.1991).

3. Self-Help Repossession

Even when the creditor has a legitimate right to repossess collateral, the process must be carried out with some sensitivity to avoid the tort liability for conversion or liability under RSA 382-A:9-625-628. The Commercial Code has a prohibition against self-help repossessions where a breach of peace may result. In addition, considerations of good faith and reasonableness are involved. The variety of ways in which the peace may be breached continues to expand. Much questionable conduct has been approved in other states. But collections under the New Hampshire version of the U.C.C. might well require higher standards of treatment in light of the state's broad legislative policy of consumer protection.

Breach of the peace may be evidenced by forced entry as well as by violence or the threat of violence. See *Davenport v. Chrysler Credit Corp*., 15 UCC Rep. Serv. 2d 324 (Tenn. 1991). The United States Bankruptcy Court for the District of New Hampshire found that repossession of a vehicle by a creditor over the verbal protest of the debtor with the assistance of an off-duty state police officer was not a proper exercise of self-help. See *MacLeod v. C&G Investment Group*, 118 B.R.1 (Bankr. D.N.H. 1990).

4. Resale of Collateral

The general requirements of a creditor who has repossessed collateral are imposed by RSA 382-A:9-601 et sec.

If the creditor sells the property, several duties arise: (1) notice to the debtor (RSA 382-A:9-613, 614); (2) conduct of the sale in a commercially reasonable manner (RSA 382-A:9-610); (3) duty to account for any surplus realized from the sale (RSA 382-A:9-615, 616. The more stringent standards for foreclosure on real estate may also apply to an Article 9 sale. See *Murphy v. Financial Development Corp.*, 126 N.H. 536 (1985). See also *First NH Mortgage Corp. v. Greene*, 139 N.H. 320 (defense of commercial reasonableness cannot be waived). The United States Bankruptcy Court for the District of New Hampshire has also ruled that creditors may confront challenges to foreclosure sales as fraudulent transfers. See *In re National Environmental Systems*, 111 B.R. 4 (Bankr. D.N.H.1989).

Where consumer goods are involved, the practices related to repossession and resale of collateral have become so casual that standards are stretched, perhaps beyond their limits. The creditor must remember that the process extinguishes the equity interest of the debtor. Not only are the prospects of real damage significant but RSA 382-A:9-625 also assures the injured consumer of a substantial minimum penalty. It may well be that the creditor will be regarded as having a duty approaching that of a fiduciary toward the debtor, and, depending upon the nature of the goods, the obligation may include reasonable maintenance, repair, or upkeep of the property until the time of disposition. See e.g., *Florida First National Bank v. Martin*, 449 So. 2d 861 (Fla. App. 1984).

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The notice required to be sent to debtors should be sent to all persons who are debtors as defined in RSA 382-A:9-105(1)(d). That will include, in most cases, cosigners and guarantors. The failure to give notice to the cosigner may very well impair that person's rights in the collateral and trigger a discharge of the obligation under RSA 382-A:3-306(1)(b). Thereafter, pursuit of the cosigner for a deficiency may be barred. See *Canadian Community Bank v. Ascher Findley Co*., 280 Cal. Rep. 521, 14 UCC Rep. Serv. 958 (1991).

5. Liability for Breach Under RSA 382-A, Article 9, Part 5

Courts around the country have differed regarding the severity of the penalty to be imposed on creditors who violate any requirement in Part 6 of Article 9. At a minimum, the creditor is liable for actual damages but not less than 10% of the principal amount of the debt plus the finance charges. In addition, since the security agreement will most likely qualify as a "retail installment contract or evidence of indebtedness" under RSA 361-C:2, the consumer may recover attorney's fees.

A creditor who fails to comply with Article 9 may also be faced with claims for setoff or may lose a right to recover any deficiency. See *Bank of Chapmanville v. Workman*, 406 SE 2d 58, 15 UCC Rep. Serv. 2d 381 (W.Va. 1991), *Canadian Community Bank v. Ascher Findley Co*., 280 Cal. Rep. 521, 14 UCC Rep. Serv. 958 (1991).

E. CONSUMER RIGHTS UNDER OTHER NEW HAMPSHIRE STATUTES

This section of the materials cannot be an exhaustive treatment of all the provisions in the RSAs, which conceivably could protect a consumer. Rather, a few examples are chosen from the most commonly applicable statutes to illustrate the importance of careful reference to specialized statutes in this field. A detailed outline of the statutes appears in the October 1983 N.H. Bar Journal article cited above.

1. Motor Vehicle Installment Sales

a. RSA 361-A governs the retail installment sales of motor vehicles. Among its provisions are limitations on the terms of the contract which prohibit:

(1) The taking of a security interest in any goods other than the motor vehicle purchased. RSA 361-A:7 VIII (2).

(2) Acceleration in the absence of default. RSA 361-A:7 VIII (3).

(3) Any term authorizing unlawful entry or breach of peace in repossession. RSA 361-A:7 VIII (4).

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Such contract provisions are rendered unenforceable by the statute. But even more significant is the fact that the failure to comply with these and any other provisions of RSA 361-A:7 and 361-A:8 will bar recovery of any finance charge and delinquency or collection charges. RSA 361-A:II, 11. Willful and intentional violations are punishable as a felony in the case of a corporation. In addition, the willful inclusion of provisions in a contract which are prohibited by statute could be a violation of RSA 358-A, the State's Consumer Protection Act. RSA 361-C establishes a debtor's right to attorney's fees in an action based upon a consumer credit transaction where the loan contract, note, or other evidence of indebtedness provides for attorney's fees for the creditor in a collection or default action.

b. In 1995, the Legislature amended RSA 361-A to include regulation of sales finance companies and retail sellers. The bank commissioner may examine these businesses prior to issuing a license. Failure to obtain the appropriate license will result in the imposition of fines.

2. Small Loans

RSA 399-A governs loans under $10,000. Its requirements strictly limit charges in connection with those loans so that any overcharge not resulting from accidental or bona fide error will void the contract and bar the creditor from the collection of any "principal, charges or recompense whatsoever." RSA 399-A:3 VII.

Limitations on the collateral for loans are set out in RSA 399-A:7. Lenders may not take real estate as collateral in any loan. And in loans of $2,000 or less, no security interest can be taken in household furniture presently in use. The consequences of taking more collateral than permitted are several:

a. The contract term giving the collateral is null and void. Thus, if a repossession of that collateral occurs, it is a wrongful repossession exposing the creditor to an action for damages and penalties.

b. The disclosure of security interest given to the customer pursuant to Truth In Lending will be inaccurate and thereby expose the creditor to liability under Truth In Lending.

Once again, RSA 358-A may operate to make these violations actionable under the unfair and deceptive trade practices provisions and under RSA 361-C, the consumer may seek recovery of any attorney's fees incurred in vindicating rights protected by law in these transactions.

3. Interest Calculations and Rebate on Early Payment of Loan

RSA 358-K, first enacted in April, 1983 governs calculation of interest rebates for early payment of certain consumer credit debts contracted on or after July 1, 1984. In cases where interest charges are precomputed and then figured into the installment payment

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amount, the following rules apply to loans made on or after July 1, 1984 but prior to July 1, 1985:

a. For loans payable in more than 48 monthly installments, any rebate of the unearned portion of interest must be calculated according to the "Actuarial Method", according to the rules established by the Bank Commissioner.

b. For loans payable in 48 monthly installments or less, the rebate may be computed by the so-called "Rule of 78s" or by any other method to which the consumer is entitled under the loan agreement or the note.

For all closed-end consumer credit transactions entered into after June 30, 1985, interest may be collected by the creditor only as earned, and cannot be added on to the loan payments in advance. Accordingly, interest will be charged only on unpaid principal balances, and interest rebates will not be available on early payment of such loans. A creditor can, however, collect interest in advance at the inception for origination fees or a fractional part of the month.

Note that where collection of a debt has been accomplished by acceleration, the debtor may be entitled to a rebate of a portion of prepaid interest or finance charges. However, Federal Reserve Board Regulation Z has not been construed as yet to require separate disclosure of the method where the calculations differ for a rebate on voluntary prepayment. See *Stewart v. Ford Motor Credit Co.,* 658 F.2d 391, 394 (11th Cir. 1982).

In *Mast Road Grain & Building Material Co., Inc. v. Ray Piet, Inc.,* 126 N.H. 194 (1985), the court held that a credit agreement that stated that the creditor, upon a thirty day delinquency, could require the debtor "to pay the entire amount then due...and to pay all accrued finance charges to date, and all costs of collection" entitled the creditor to interest at the contract rate only up until the date of demand.

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APPENDIX A

North South Group
P.O. Box 123456
Pasadena, CA 91111-2222
(800) 123-4567 from 8am to 8pm EST, Monday to Saturday
www.example.com

To: Person A
2323 Park Street
Apartment 342
Bethesda, MD 20815

Reference: 584-345

North South Group is a debt collector. We are trying to collect a debt that you owe to Bank of Rockville. We will use any information you give us to help collect the debt.

Our information shows:

You had a Main Street Department Store credit card from Bank of Rockville with account number 123-456-789.

As of January 2, 2017, you owed:		$ 2,234.56
Between January 2, 2017 and today:		
You were charged this amount in interest:	+	$ 75.00
You were charged this amount in fees:	+	$ 25.00
You paid or were credited this amount toward the debt:	–	$ 50.00
Total amount of the debt now:		**$ 2,284.56**

Notice: See reverse side for important information.

How can you dispute the debt?

- **Call or write to us by August 28, 2020, to dispute all or part of the debt.** If you do not, we will assume that our information is correct.
- **If you write to us by August 28, 2020**, we must stop collection on any amount you dispute until we send you information that shows you owe the debt. You may use the form below or write to us without the form. You may also include supporting documents. We accept disputes electronically at www.example.com/dispute.

What else can you do?

- **Write to ask for the name and address of the original creditor, if different from the current creditor.** If you write by August 28, 2020, we must stop collection until we send you that information. You may use the form below or write to us without the form. We accept such requests electronically at www.example.com/request.
- **Go to www.cfpb.gov/debt-collection to learn more about your rights under federal law.** For instance, you have the right to stop or limit how we contact you.
- Contact us about your payment options.
- Póngase en contacto con nosotros para solicitar una copia de este formulario en español.

Mail this form to:
North South Group
P.O. Box 123456
Pasadena, CA 91111-2222

Person A
2323 Park Street
Apartment 342
Bethesda, MD 20815

How do you want to respond?

Check all that apply:

- ☐ **I want to dispute the debt because I think:**
  - ☐ This is not my debt.
  - ☐ The amount is wrong.
  - ☐ Other (please describe on reverse or attach additional information).
- ☐ **I want you to send me the name and address of the original creditor.**
- ☐ **I enclosed this amount:** $ _____

Make your check payable to *North South Group*. Include the reference number 584-345.

- ☐ **Quiero este formulario en español.**

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APPENDIX B

BLANK PAGE

APPENDIX C

Re: Creditor:
Debtor:
Amount of Claim:
Codebtors (if any):
Your File:
Our File:

Dear Client:

I have completed my initial investigation of this matter and am writing to report to you.

The debtor in this case is a corporation of the State of New Hampshire. It is actively involved in the business of selling used widgets and does such business from its retail facility located at Industrial Park Drive in Franklin, New Hampshire.

In addition to the corporate debtor, we have the personal guaranty of the debtor's principal, Samuel Doe. The Tax Collector of the Town of Bristol , New Hampshire advises that he owns real estate consisting of land and buildings assessed at $240,000 at 37% valuation. A subsequent search of the Deed Registry revealed that the only encumbrance on the property is a first mortgage dated June 23, 2010 in the initial principal balance of $180,000.

We contacted Mr. Doe at the place of business. He acknowledged owing the debt but advised that his business is undergoing some cash flow problems. When we asked him for a payment or a payment plan, he reused to provide anything meaningful other than a promise to pay at some undefined time in the future.

Because of the above, I recommend we proceed with suit. As previously agreed, we are handing your claim on a contingency fee of 25%, not including court costs. Before proceeding, please provide us with a check for $350 to cover the court costs. Please also complete the enclosed Affidavit of Claim as well as the Petition to Attach.

Immediately upon receipt of the above, we can proceed. Of course, do not hesitate to call if you have any questions or wish to discuss this further.

Very truly yours,

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APPENDIX D

CONTINGENCY FEE AGREEMENT

The undersigned hereby agrees as follows:

1. The undersigned has retained the law firm of ********** with regard to an outstanding collection issue described as follows:

2. The undersigned has authorized and directed that firm to take all actions reasonable and appropriate to collect the above matter. Such authorization includes the filing of suit to collect the balance.

3. The terms of representation are that the law firm shall be paid on a contingency fee for any funds collected. The amount of that contingency fee shall be Thirty Percent (30%). This fee arrangement shall become effective as of the first contact between the law firm and the debtor.

4. The contingency fee shall apply to all services in pursuit of the collection balance at the pre-litigation, pretrial, trial and post-judgment enforcement stages. It shall not apply to any services necessitated by the filing of a counterclaim or an appeal.

5. The contingency fee shall not include court costs, which shall be billed and accounted for separately.

6. The undersigned has been advised of the right to an alternate fee, whereby the attorney would be compensated on the basis of hours spent and/or other means of calculation.

DATED: _____

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APPENDIX E

For e-Filing only

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name:

Case Name:

Case Number: _____
(if known)

SMALL CLAIM COMPLAINT

Plaintiff name: _____

Residence address:
Street: _____
_____
City: _____
State: _____ Zip code: _____
Telephone: _____

Mailing address: (if different):
Street: _____
_____
City: _____
State: _____ Zip code: _____
E-mail: _____

Date of birth: *Provide on Confidential Information Sheet* ☐ Check here if there are multiple Plaintiffs

If filing on behalf of another individual or a business please see below, otherwise continue to Defendant Information.

☐ **District Division Rule 1.3D Statement Attached** (This is required when filing on behalf of an individual or business in addition to the applicable authorization below.)

Type of Business/3rd Party: (If applicable)

☐ Corporation	☐ Trust
☐ Limited Liability Company	☐ Partnership
☐ Sole Proprietorship	☐ Other

Type of Authorization if filing on behalf of individual or business:

☐ Power of Attorney	☐ Authorization signed by General Partner
☐ Corporate Resolution (corporation)	☐ Authorization signed by Trustee
☐ Authorization signed by Member with Management Authority	☐ Other

Defendant name _____

Residence address:
Street: _____
_____
City: _____
State: _____ Zip code: _____
Telephone: _____

Mailing address: (if different):
Street: _____
_____
City: _____
State: _____ Zip code: _____
☐ Check here if there are multiple Defendants

☐ **Military Statement Attached** (The court cannot issue a default judgment in the event of a default on the part of an individual defendant until the Military Statement has been filed.)

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Page 1 of 2

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Case Name: _____

Case Number: _____

SMALL CLAIM COMPLAINT

Type of Business: (if applicable) ☐ Agent for Service: _____
Name of agent

_____
Address

_____
City State Zip code

Type of Business/ 3rd Party: (If applicable)

☐ Corporation	☐ Trust
☐ Limited Liability Company	☐ Partnership
☐ Sole Proprietorship	☐ Other

The Plaintiff claims that the Defendant owes the Plaintiff $_____
Use this space to clearly state the business or other relationship between the plaintiff and defendant and how, when and where the claim arose:

Amount of Claim $_____*
Filing Fee $_____
Total $_____

☐ Check here if this debt is from the extension of consumer credit and attach a Statement of Consumer Debt.

☐ Check here if this is a debt that was purchased from or assigned by a third party.

_____
Name of third party

***The maximum amount of a Small Claim action is $10,000.00**
***Claims in excess of $5,000.00 are subject to mandatory mediation**
***Claims over $1,500 entitle the defendant to request a jury trial**

_____ _____
Name Signature Date

_____ _____
Law Firm Bar ID # of attorney Telephone

_____ _____
Address E-mail

_____
City State Zip code

Court Use Only:

Return Date: _____
This is the date by which the Defendant must file a response with the court or be defaulted. See separate Instructions to the Defendant.

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APPENDIX F

For e-Filing only

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name:

Case Name:

Case Number:
(if known)

STATEMENT OF CONSUMER DEBT

In accordance with Small Claims Rule 4.1(D)(3), the undersigned submits this Statement:

1. **Statement submitted by:**

Name: _____

Address: _____

City, State, Zip Code: _____

Relationship to the plaintiff: _____

Basis for this Statement:

2. **Basic information for cases arising from the extension of consumer credit:**

Account number or account identifier (Caution: Redact this number to show **only** the last four digits.): _____

Date of last payment, if any: _____ Amount of last payment, if any: $_____

Debt principal amount: $_____

Interest, charges and fees calculated as set forth in Rule 4. 1 (D)(3)(d):

3. **Additional information required for small claim actions arising from the extension of consumer credit in which the plaintiff is a person or entity other than the original creditor:**

By completing this section, the filer is stating that the plaintiff has a right to assert this small claim.

Original creditor's name: _____

All other prior owners of the claim:

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Case Name: _____

Case Number: _____

STATEMENT OF CONSUMER DEBT

Name	Signature Date
Law Firm Bar I D # of attorney	Telephone
Address	E-mail
City State Zip Code	

NHJB-2875-De (03/07/2014)

Page 2 of 2

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APPENDIX G

For e-Filing only

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh-us

Court Name:

Case Name:

Case Number: _____
(if known)

MILITARY SERVICE STATEMENT

I (WE) _____
[enter name(s) of plaintiff(s)]

of _____
[enter address]

state the following facts showing that, to the best of my (our) knowledge and belief:

☒ The defendant(s) _____ is (are) not in the military or other service of the United States included in the provisions of the Servicemembers Civil Relief Act (SCRA) and has (have) not been called by the governor to active duty for a period of 30 days or more as a member of the state guard or national guard or as a member of the militia within the meaning of RSA 110-C:2.

(Please state supporting facts, i.e., where respondent(s)/defendant(s) is (are) living, employed, or approximate age sufficient to show not in military service).

OR

☐ The defendant(s) _____ is (are) in the military or other service of the United States included in the provisions of the Servicemembers Civil Relief Act (SCRA) or has (have) been called by the governor to active duty for a period of 30 days or more as member of the state guard or national guard or as a member of the militia within the meaning of RSA 110-C:2.

(Please state the name of the branch service and the defendant's address).

The information contained in this pleading is true to the best of my knowledge and belief and is declared to be true under penalty of perjury. I understand that making a false statement in this pleading may subject me to criminal penalties.

Name _____ Signature _____ Date _____

Law Firm _____ Bar ID # of attorney _____ Telephone _____

Address _____ E-mail _____

City _____ State _____ Zip code _____

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APPENDIX H

For e-Filing only

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: _____

Case Name: _____

Case Number: _____
(if known)

RESPONSE TO SMALL CLAIM

Instructions:
The defendant must file a response to the small claim complaint on or before the return date indicated on the small claim complaint. Failure of the defendant to file a response on or before the return date may result in the court issuing a default judgment in favor of the plaintiff.

NOTE: The return date is not a hearing date.

Defendant name: _____

Residence address:

Street: _____

City: _____

State: _____ Zip code: _____

Telephone: _____

Date of birth: *Provide on Confidential Information Sheet*

Mailing address: (if different):

Street: _____

City: _____

State: _____ Zip code: _____

E-mail: _____

Section A is required in all cases.
Section A - Select one option below.

☐ Request for Court Hearing – The defendant disputes some or all of this claim and requests that a hearing be scheduled. The defendant understands that the Court will schedule a hearing and that the parties will be notified of the hearing date and time.

The defendant agrees s/he owes the plaintiff $ _____

Include a brief explanation for the amount in dispute:

_____

☐ Claim Not Disputed/Payment of Claim – The defendant confesses judgment, which means that the defendant admits that the plaintiff is owed the money in the small claim complaint. The defendant understands that a judgment will be entered in favor of the plaintiff and will include court costs and statutory interest. A payment hearing will be scheduled. This hearing may be cancelled upon notification by the plaintiff in writing that payment has been made in full or that the parties have reached a satisfactory payment arrangement. All payments must be made directly to the plaintiff or to the plaintiff's attorney.

☐ Request for Jury Trial in Superior Court – This option is available for claims over $1,500. The defendant requests that the small claim action be transferred to the Superior Court for a trial by jury. The defendant must include the small claim transfer fee with this response or this case will not be transferred.

☐ Bankruptcy Filed – The defendant has filed a petition with the United States Bankruptcy Court and the debt sought in this small claim has been included. Attached is the defendant's list of creditors and the bankruptcy case number.

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Case Name: _____

Case Number: _____

RESPONSE TO SMALL CLAIM

Section B and C are required in some cases but not in all cases.

Section B – For cases in which the defendant wishes to file a Counterclaim. (Filing fee required)

☐ Counterclaim - In addition to responding to the small claim complaint filed by the plaintiff, the defendant makes the following counterclaim against the plaintiff:

_____

_____

_____

_____

Amount claimed: $ _____ (Amount cannot exceed $10,000)

Section C – For cases in which the person filing is not the named defendant.

☐ Filing on Behalf of Another Person or Entity –This is required if the person filing this response is filing on behalf of another person or entity. This does not apply to attorneys licensed to practice in the State of New Hampshire.

Type of Business/ 3rd Party: (If applicable)

☐ Corporation	☐ Trust
☐ Limited Liability Company	☐ Partnership
☐ Sole Proprietorship	☐ Other

Type of Authorization if Filing on Behalf of Individual or Business:

☐ Power of Attorney	☐ Authorization signed by General Partner:
☐ Corporate Resolution (corporation)	☐ Authorization signed by Trustee
☐ Authorization signed by Member with Management Authority	☐ Other

☐ **District Division Rule 1.3D Statement Attached** (This is required when filing on behalf of an individual or business in addition to the applicable authorization above.)

I state that on this date I am ☐ e-serving through the court's electronic filing system, or ☐ mailing by U.S. mail, or ☐ hand-delivering a copy of this document to:

_____ Or _____

Other party — Other party's attorney

_____ _____

Name — Signature — Date

_____ _____

Law Firm — Bar ID # of attorney — Telephone

_____ _____

Address — E-mail

_____

City — State — Zip code

NHJB-2830-De (07/01/2015)

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APPENDIX I

For e-Filing only

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: _____

Case Name: _____

Case Number: _____

MOTION FOR PERIODIC PAYMENTS
(Pursuant to RSA 524:6-a)

_____ Filing Party	V.	_____ Other Party
_____ Address		_____ Address
_____ City State Zip code		_____ City State Zip code
☐ Check if new address		☐ Check if new address

Judgment not having been satisfied in full, the Filing Party in the above-entitled matter requests that the Court issue Orders of Notice / Hearing Date (Summons) requiring the Other Party to appear in court so that an Order for Payments may be considered.

Total Amount of Judgment	$ _____
Filing Fee	$ _____
Total Paid to Date	$ _____
Balance Due	$ _____

Instructions to Filing Party: You are required to formally serve the Other Party with the Orders of Notice which will contain the date of the hearing you requested. Select one of the options below. The court will send you the necessary paperwork based on your selection.

☐ I request that Orders of Notice / Hearing Date be issued to me for service by certified mail, restricted delivery, return receipt requested. I understand that I will responsible for completing the certified mail process and for any certified mail expenses.

☐ I request that Orders of Notice / Hearing Date be issued to me for personal service by a Sheriff. I understand I will be responsible for delivery of the Orders of Notice / Hearing Date to the Sheriff and for any personal service expenses.

In addition to the service of the Orders of Notice / Hearing Date as selected above, court rules require that copies of all motions/documents filed with the court be provided to all parties on the case.

I state that on this date I am ☐ e-serving through the court's electronic filing system, or ☐ mailing by U.S. mail, or ☐ hand-delivering a copy of this document to:

_____ Other party	or	_____ Other party's attorney
_____ Name		_____ Signature Date
_____ Law Firm Bar ID # of attorney		_____ Telephone
_____ Address		_____ E-mail
_____ City State Zip code		

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APPENDIX J

For e-Filing only

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: _____

Case Name: _____

Case Number: _____
(if known)

AGREEMENT FOR PAYMENTS

The parties agree as follows:

☐ Judgment for Plaintiff ☐ Judgment for Defendant

Judgment amount $ _____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

All parties to this Agreement must sign on the next page(s).

FOR COURT USE ONLY

NHJB-2857-De (01/01/2015) Page 1 of 3

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Case Name: _____

Case Number: _____

AGREEMENT FOR PAYMENTS

By signing below, you acknowledge that you understand that exempt income and assets may not be used in the enforcement of any judgment or agreement and that failure to comply with the terms of the agreement may result in the matter being returned to the court's docket for a hearing on the merits, payment hearing or other hearing as may be necessary.

Name _____ Signature _____ Date

Law Firm _____ Bar ID # of attorney _____ Telephone _____

Address _____ E-mail _____

City _____ State _____ Zip code _____

Name _____ Signature _____ Date

Law Firm _____ Bar ID # of attorney _____ Telephone _____

Address _____ E-mail _____

City _____ State _____ Zip code _____

Name _____ Signature _____ Date

Law Firm _____ Bar ID # of attorney _____ Telephone _____

Address _____ E-mail _____

City _____ State _____ Zip code _____

Name _____ Signature _____ Date

Law Firm _____ Bar ID # of attorney _____ Telephone _____

Address _____ E-mail _____

City _____ State _____ Zip code _____

NHJB-2857-De (01/01/2015)

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Case Name: _____

Case Number: _____

AGREEMENT FOR PAYMENTS

Notice of Protected (Exempt) Sources of Income

PERIODIC PAYMENTS CANNOT BE ORDERED FROM THE FOLLOWING SOURCES OF INCOME (subject to some exceptions):

- Social Security Old-Age, Survivors & Disability Insurance Benefits (42, U.S.C. § 407)
- Supplementary Security Income (SSI) for the Aged, Blind and Disabled (42 U.S.C. §407 and §1383(d)(1))
- Unemployment Compensation Benefits (RSA 282-A:159) (Exemption from payment orders except debts incurred for basic needs expenses for you or your family during the period of unemployment.
- Public Assistance Payments to the Blind, Aged or Disabled Persons and Dependent Children (ANB, OAA, APTD and TANF/FANF) (RSA 167:25)
- Veterans Benefits including: Retirement Benefits (10 U.S.C. §1440), Survivors' Benefits (10 U.S.C. §1450), Other Veterans Benefits (38 U.S.C. § 5301(a)), Medal of Honor Veterans Benefits (38 U.S.C. § 1562)
- Workers Compensation Benefits (RSA 281-A:52) (Exemption from payment orders except debts for medical and related care for the compensated injury and claims for legal fees approved by the Superior Court for prosecuting the workers compensation claim.
- Retirement funds including Individual Retirement Accounts, Stock Bonus, Pension, Profit-Sharing, Annuity or Similar Qualified Plan (RSA 511:2(XIX)). Exempt from periodic payments up to $362.50 per week. If income and expenses are shared with another person with whom you live and the other person also receives income from such a retirement plan or arrangement, the exemption is up to $725.00 per week.
- Civil Service Retirement Benefits (5 U.S.C. § 83466(a)
- Armed Forces Retirement Pay (10 U.S.C. § 1440)
- Railroad Retirement Act Annuities and Pensions (45 U.S.C. § 231m)
- Fireman's Retirement Pay (RSA 102:23)
- Fireman's Relief Payments (RSA 402:69)
- Foreign Services Retirement and Disability Payments (22 U.S.C. § 4060(c))
- Injury or Death Compensation Payments from War Risk Hazards (42 U.S.C. § 1717) (With exception of monies paid as reimbursement for funeral expenses or as reimbursement with respect to payments of worker's compensation or in the nature of worker's compensation benefits.)
- Lighthouse Keepers Widow's Benefits (33 U.S.C. §775)
- Wages of Fisherman, Seaman and Apprentices (46 U.S.C. § 11109) (With exception for an order of a court about the payment by a master or seaman of any part of the master's or seaman's wages for the support and maintenance of the spouse or minor children of the master or seaman, or both).
- Longshoremen's and Harbor Worker's Compensation Act Death and Disability Payments (33 U.S.C. § 916)

PLEASE NOTE: IF YOU HAVE INCOME FROM ANY OF THE SOURCES LISTED ABOVE, PLEASE BRING VERIFICATION (FOR EXAMPLE, YOUR AWARD LETTER) TO COURT WITH YOU.

NHJB-2857-De (01/01/2015) Page 3 of 3

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APPENDIX K

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

Court Name: _____
Court Address: _____
_____

TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

WRIT OF ATTACHMENT and TRUSTEE PROCESS

_____
_____
_____
_____

Case Name:
Case Number:

To the Sheriff or Deputy Sheriff of any county, the Plaintiff/Petitioner, his or her Attorney, or any other person:

WE COMMAND YOU to attach the goods or the estate of _____ to the value of _____ dollars.

WE ALSO COMMAND YOU to attach the money, goods, chattels, rights, and credits of the Defendant/Respondent in the hands of _____ located at _____ to the value of $ _____ and summon the Defendant/Respondent or Trustee _____, if found in your precinct, to appear at court, within thirty (30) days after service and show cause, if any, why the attachment should not be granted for the judgment which may be recovered by Plaintiff/Petitioner against the principal Defendant/Respondent. You shall also return this writ to the court indicating your actions on page two (2).

This attachment is to secure any judgment or decree the plaintiff/petitioner may obtain in this action.

Important Notice to Trustee: The named Trustee(s) shall complete and file the enclosed disclosure of trustee form with the court, the plaintiff/petitioner and the defendant/respondent within thirty (30) days of receipt or suffer the risk of default.

Witness Edwin W. Kelly, Administrative Judge,
New Hampshire Circuit Court

Deborah A Nichols
Clerk of Court

_____
Date

_____
Plaintiff/Petitioner or Attorney

NHJB-2307-DFPS (02/14/2013)

Page 1 of 2

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Case Name: _____

Case Number: _____

WRIT OF ATTACHMENT AND TRUSTEE PROCESS

RETURNS OF SERVICE

Real Estate Attachment

_____ County Date _____

I attached all the lands and tenements in the County of _____ of the named Defendant/Respondent, _____, to the extent ordered on page one (1) of this writ, by leaving at the Office of the Registry of Deeds of that County, a true copy of this writ, and of this return endorsed at _____ a.m./p.m.

Fees: Register $ _____
Service $ _____
Copy $ _____
Travel $ _____
Total $ _____

_____
Deputy Sheriff or person making attachment

Trustee Attachment

_____ County Date _____

I attached the money, goods, chattels, rights and credits of the named Defendant/Respondent _____, that were in the hands and possession of _____ to the extent ordered on page one (1) of this writ, and summoned the trustee to appear as commanded by ☐ giving in hand OR ☐ leaving at the abode of _____ an attested copy of this writ. Service was made at _____ a.m./p.m. at the following address:

_____

Fees: Register $ _____
Service $ _____
Copy $ _____
Travel $ _____
Total $ _____

_____
Deputy Sheriff or person making attachment

Completion of Service

_____ County Date _____

I notified the named Defendant/Respondent _____ of the above attachments by ☐ giving in hand OR ☐ leaving at the abode of _____ an attested copy of the writ together with the endorsed return. Service was made at _____ a.m./p.m. at the following address: _____

Fees: Register $ _____
Service $ _____
Copy $ _____
Travel $ _____
Total $ _____

_____
Deputy Sheriff or person making attachment

NHJB-2307-DFPS (02/14/2013)

Page 2 of 2

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APPENDIX L

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: _____

Case Name: _____

Case Number: _____
(if known)

TRUSTEE DISCLOSURE
(RSA 512:9-d)

I. On what date were the trustee writ including (attachment and summons or complaint) and trustee disclosure form served upon you? _____

II. What money, rights, goods, chattels, and/or credits belonging to or due defendant did you hold at the time of service?

_____

_____

III. Are any of the money, rights, goods, chattels, and/or credits disclosed by you in response to interrogatory II subject to reductions for account fees and/or amounts alleged or determined not to belong to the defendant? If so, please state the amount and the basis.

_____

_____

IV. At this time, are you aware whether the money, rights, goods, chattels, and/or credits disclosed by you in response to interrogatory II are subject to priority claims of other people? If so, please state the amount, the basis for the priority claims and the claimants.

_____

_____

I certify that on this date I provided this document(s) to the parties who have filed an appearance for this case or who are otherwise interested parties by: ☐ Hand-delivery OR ☐ US Mail OR ☐ Email (E-mail only by prior agreement of the parties based on Court Administrative Order).

_____
Trustee Signature

_____
Print Name of Trustee

_____
Trustee Street Address or P.O. Box

_____
Trustee Title and Name of Corporation (if applicable)

_____
City, State, Zip

State of _____, County of _____

This instrument was acknowledged before me on _____ by _____
Date Person Signing Above

My Commission Expires _____
Affix Seal, if any

_____
Signature of Notarial Officer / Title

NHJB-2593-DPS (10/07/2013)

Page 1 of 1

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APPENDIX M

THE STATE OF NEW HAMPSHIRE
Court Name

Plaintiff Name

v.

Defendant Name

) Case Number

Motion for Summary Judgment

THE PLAINTIFF in the above matter respectfully moves for Summary Judgment against defendant. The grounds for this motion are that there are no genuine material issues of fact and plaintiff is entitled to judgment as a matter of Law. In support of this motion, plaintiff relies upon the affidavit annexed hereto.

DATED:

Law Firm Name
by:

_____
Lawyer Name
Bar Number
Address
Phone

I hereby certify that a copy of the within motion has this date been sent by me to (other party)

_____
Lawyer Name

NOTICE TO DEFENDANT

THIS MOTION FOR SUMMARY JUDGMENT IS FILED IN ACCORDANCE WITH RSA 502A: 27-c AND 491:8-a. IF YOU OBJECT TO THE FACTS SET FORTH IN THIS MOTION, YOU MUST FILE YOUR WRITTEN OBJECTION WITHIN 30 DAYS. YOUR OBJECTION MUST BE ACCOMPANIED BY AN AFFIDAVIT SETTING FORTH SPECIFIC FACTS SHOWING THAT THERE IS A GENUINE ISSUE FOR TRIAL. IF YOU FAIL TO FILE AN OBJECTION AND ACCOMPANYING AFFIDAVIT WITHIN 30 DAYS, THE MOTION MAY BE ACTED UPON WITHOUT A HEARING OR TRIAL AND JUDGMENT ENTERED IN FAVOR OF THE PARTY WHO FILED THE MOTION.

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APPENDIX N

THESE INTERROGATORIES ARE PROPOUNDED IN ACCORDANCE WITH CIRCUIT COURT RULE 1.10 AND/OR SUPERIOR COURT RUL 23. YOU MUST ANSWER EACH QUESTION SEPARATELY AND FULLY IN WRITING AND UNDER OATH. YOU MUST RETURN THE ORIGINAL AND ONE COPY OF YOUR ANSWERS WITHIN THIRTY (30)DAYSOF THE DATE YOU RECEIVED THEM TO THE PARTY OR COUNSEL WHO SERVED THEM UPON YOU. IF YOU OBJECT TO ANY QUESTIONS, YOU MUST NOTE YOUR OBJECTION AND STATE THE REASON THEREFOR. IF YOU FAIL TO RETURN YOUR ANSWERS WITHIN THIRTY (30) DAYS, THE PARTY WHO SERVED THEM UPON YOU MAY INFORM THE COURT AND THE COURT SHALL MAKE SUCH ORDERS AS JUSTICE REQUIRES, INCLUDING THE ENTRY OF A CONDITIONAL DEFAULT AGAINST YOU.

THE STATE OF NEW HAMPSHIRE

Court Name

Plaintiff Name	)	
v.	)	Case Number
Defendant Name	)	
	)	

INTERROGATORIES BY PLAINTIFF TO BE ANSWERED UNDER OATH BY DEFENDANT

THE PLAINTIFF in the above matter propounds the within interrogatories. New Hampshire Court Rules require that these questions be answered within thirty (30) days and be updated by any subsequently acquired facts or documents prior to trial. Absent such answers, or appropriate legal objection, defendant may be subject to default. If space for any answer is insufficient, complete the same on the back of page.

1. State the name(s), address(es), telephone number(s) and social security number(s) of the person(s) answering these interrogatories. If defendant is a corporation, state date of incorporation, state of incorporation, and position of person(s) answering these questions.

2. Does the defendant allege that the name or address of any party to this action is incorrectly stated or spelled in plaintiff's summons or that a necessary party has been omitted from this action? If so,

A. State the corrections that defendant alleges should be made.

B. If defendant claims that an additional party should be named or that another person or business entity is responsible for the debt in question, state the name and address of that person or entity and all facts that support such liability.

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3. If the parties entered into a contract or agreement (written or oral) set forth the date and substance of it, together with all supplements, amendments and waivers.

4. If defendant claims a breach of contract or any other legal defense to payment set forth all facts upon which such defense is based.

5. If defendant acknowledges any indebtedness, set for the amount and basis of calculation. If the same has not been paid, explain the reasons.

6. Annex copies of all documents relative to this matter. This should include all documents upon which defendant intends to rely at trial or which in any way relate to the subject of this suit. The documents so produced should include: A. Any documents relating to the formation of the obligation in question, including preliminary communications, credit applications, guarantees, security agreements, purchase orders, acknowledgments, contracts and specifications. B. Any documents relating to the accounting of the balance, including, invoices, statements, credit memoranda, accounting documents. C. Any documents relative to any communications between the parties including correspondence and other written communications.

7. Annex copies of all checks or other means of payment provided by defendant to plaintiff or plaintiff's predecessor. In lieu of such copies, set forth all banks or other financial institutions upon which such checks were drawn, specifying time frame, account name and number for each.

8. If defendant alleges any telephone contacts relative to this action, state date(s), parties and context. Annex copies of any logs, notes or telephone bills evidencing such contacts.

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9. List the name(s), and address(es) of all persons having knowledge of the substance of this action. Summarize the knowledge of each. Please designate which individuals defendant intends to call as a witness at trial. If defendant intends to call any expert witnesses, please so specify, set forth the areas of expertise and annex a copy of any expert reports.

10. If defendant has been a party to any civil lawsuit within the past three years (whether as a plaintiff or defendant), set forth the name of the case, court, docket number and present status.

11. Does defendant intend to allege that financial reasons caused nonpayment or delay in payment of the obligation in question? If so, in what way has defendant's financial condition caused or contributed to the nonpayment or delay in payment.

DATED:

Lawfirm Name
by:

_____
Lawyer Name
Bar ID
Address
Phone

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DEFENDANT AND NOTARY OR JUSTICE OF THE PEACE TO SIGN HERE

WARNING

THIS DOCUMENT IS BEING SIGNED UNDER OATH. THERE CAN BE SERIOUS PENALTIES FOR WILLFULLY PROVIDING FALSE INFORMATION.

Defendant's Signature

STATE OF
COUNTY OF

On this, the _____ day of _____, before me, the undersigned officer, personally appeared the above _____, known to me (or satisfactorily proven) and acknowledged that the facts set forth herein are true to the best of his/her knowledge, information and belief.

Notary Public/Justice of the Peace

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APPENDIX O

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: _____

Case Name: _____

Case Number: _____
(if known)

TAXATION OF COSTS

Entry Fee	$
Service	$
Certified Copies	$
Service of Writ of Attachment	$
Witness Fees	$
Expense of View	$
Cost of Transcripts	$
Stenographic Cost of Original Transcript of Deposition + 1 Copy	$
Cost of Videotaped Deposition	$
Actual Cost of Expert Witness (State Expert's Name) _____	$
Other costs (specify)	
	$
	$
	$
	$
TOTAL COSTS	$ 0.00

The foregoing costs are deemed taxable in this case.

APPROVED

_____ _____
Date Clerk of Court

NHJB-2406-S (06/30/2014)

Page 1 of 1

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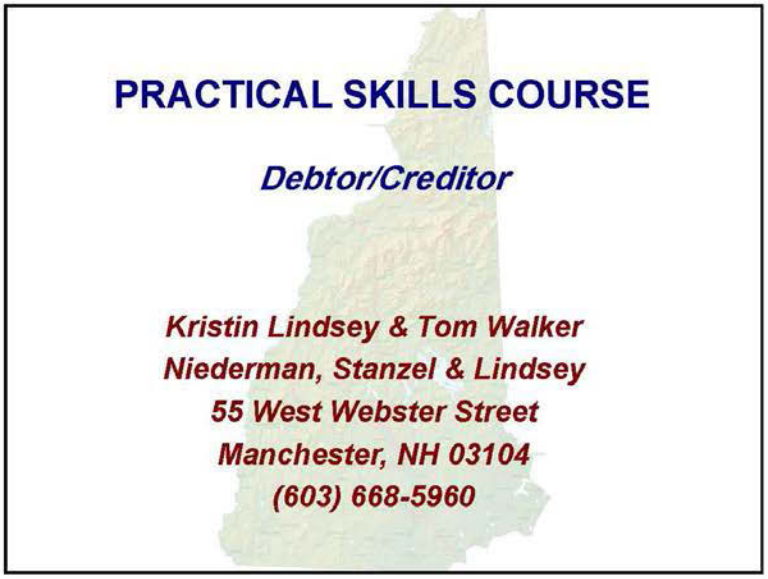
APPENDIX P
SLIDE PRESENTATION



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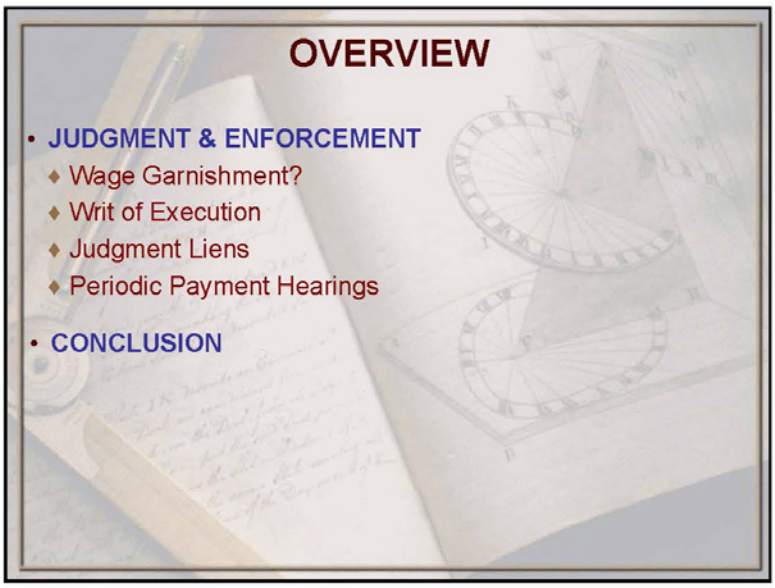

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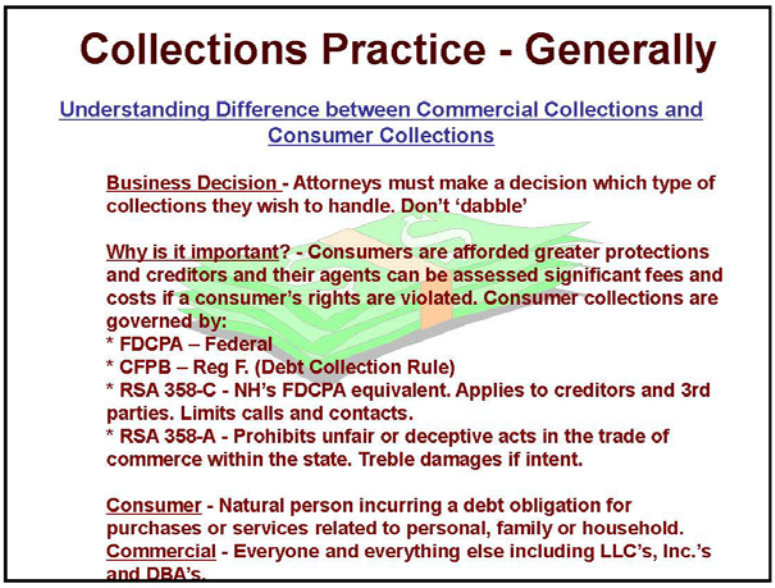

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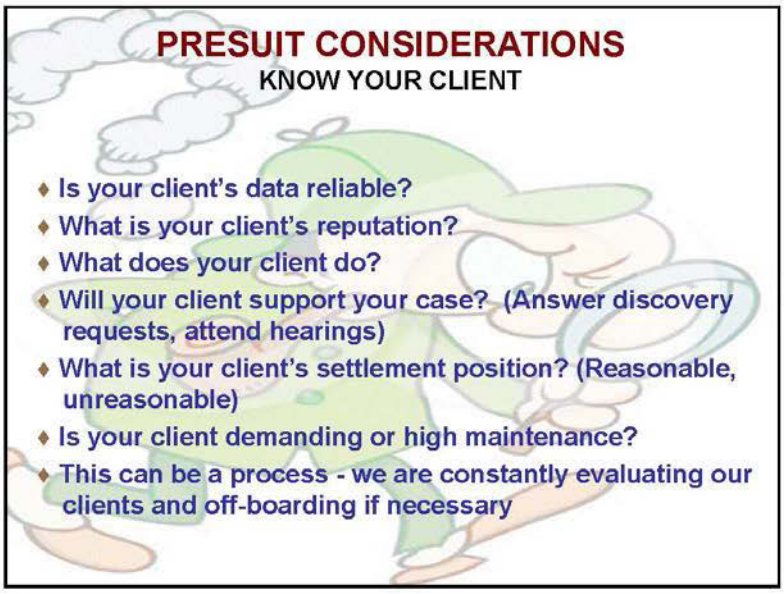

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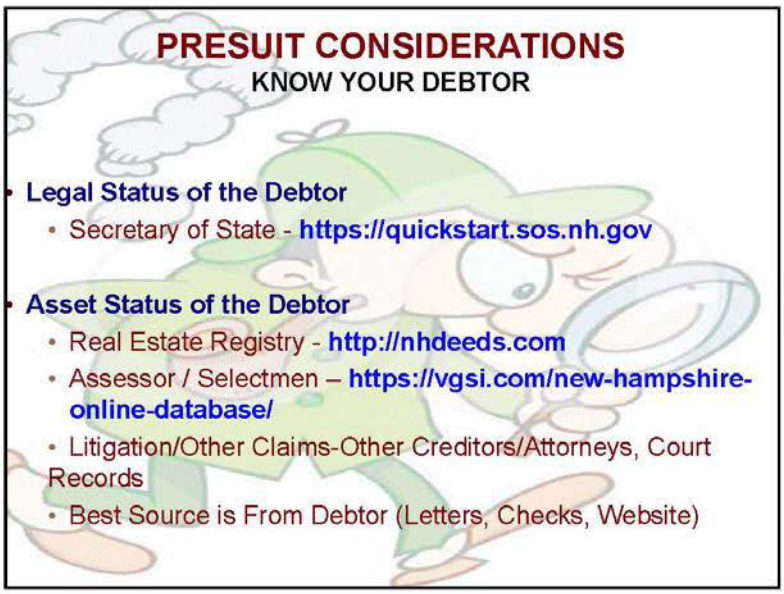

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PRESUIT CONSIDERATIONS
KNOW YOUR CASE

- **Amount of Claim – Principal, Interest, Attorney Fees**
- **Date of Default (Statute of Limitations determination)**

3 YRS-General (RSA 508:2)
4 YRS-Sales UCC (RSA 382-A:2-725)
6 YRS-Prom. Note/Negotiable Instruments (RSA 382-A:3-118)
20 YRS-Judgments, Mortgage/Sealed Contracts (RSA 508:5)
6 Months + 6 Months - Estates (RSA 556)

- **Documents**
  - Credit Application, Promissory Note, Security Agreement, Personal Guaranty, Mortgage, Charge Off Statement, Payment History etc.
- **Defenses**
  - Correspondence/Acknowledgment of Debt, Allegations of Defenses, Threat of Counterclaim.

7

PRESUIT CONSIDERATIONS
KNOW YOUR FEES

- **Costs vs. Fees**
- **Contingency Fees**
  - Typical Percentages
  - Practical & Ethical Considerations
  - Outline Parameters with client – (Counterclaims not included)
- **Hourly Fees**
  - Weighing of Benefits/Disadvantages
  - Times When Necessary
- **Flat Fixed Fees – (Replevins, Foreign Judgments)**
- **Shifting of Legal Fees**
  - General Rule: Each party bears their own costs.
  - By Contract
  - By Statute - Prevailing Party Award in Consumer Cases RSA 361-C:2
  - By Court Rule
  - Amount of Fee Award - Fleet Bank v. Christy's Table, 141 NH 285 (1986)

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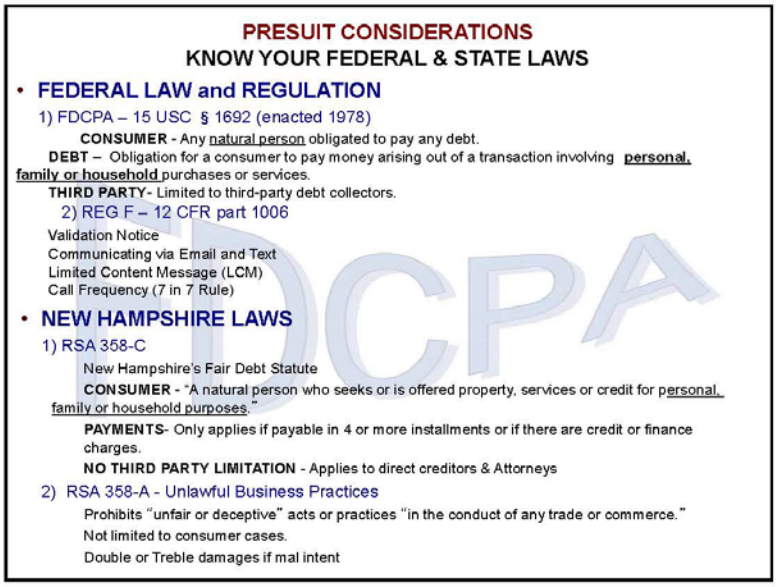

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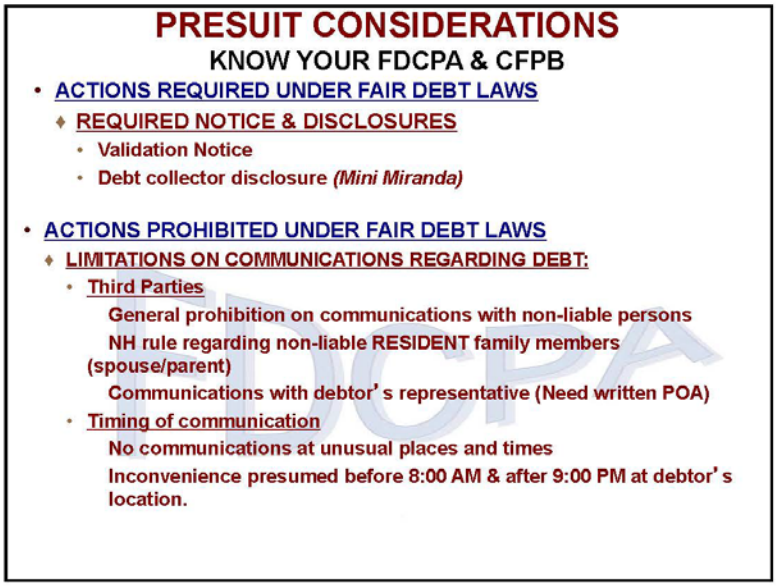

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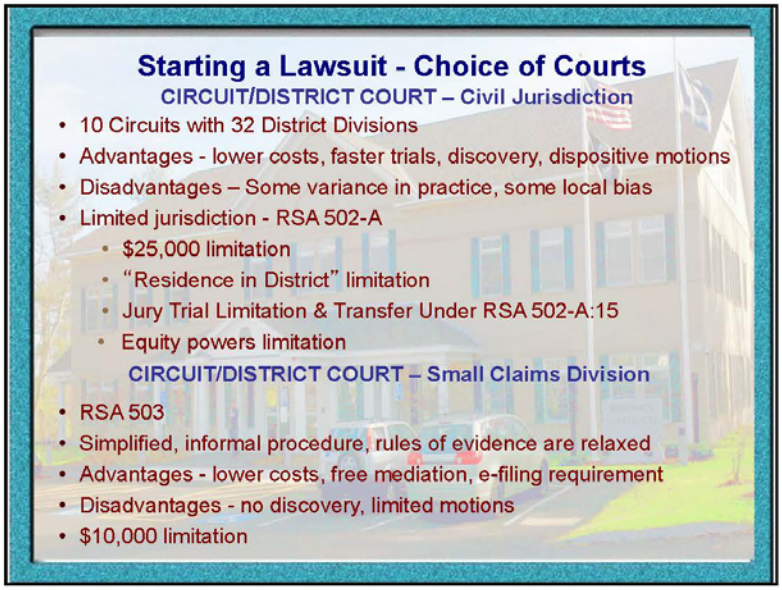

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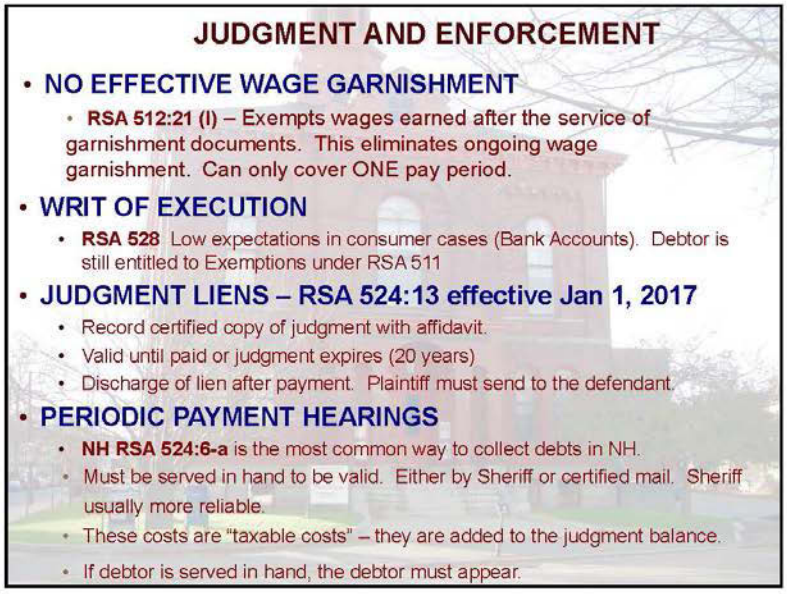

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Is it worth it?



- Stay away from the NINJAs!!
  No Income No Job No Assets
- Are they receiving Public Assistance/SSI/SSDI/other exempt income?
- Business decision – How much more time, effort and money am I or my client willing to spend?

17

JUDGMENT AND ENFORCEMENT

- **Periodic Payments – Financial Disclosure**

  1. Affidavit of Assets and Liabilities – simple form: Income on first page, expenses on the back page.

  2. Recent focus on exempt income – SSI, SSDI, Retirement etc. Don't ask the Judge for payments out of these sources. Loss of credibility.

  3. E-court rules say the Affidavit must be done by the debtor on-line. They never do!

  4. Court will give the defendant's time to fill this Affidavit out at Court.

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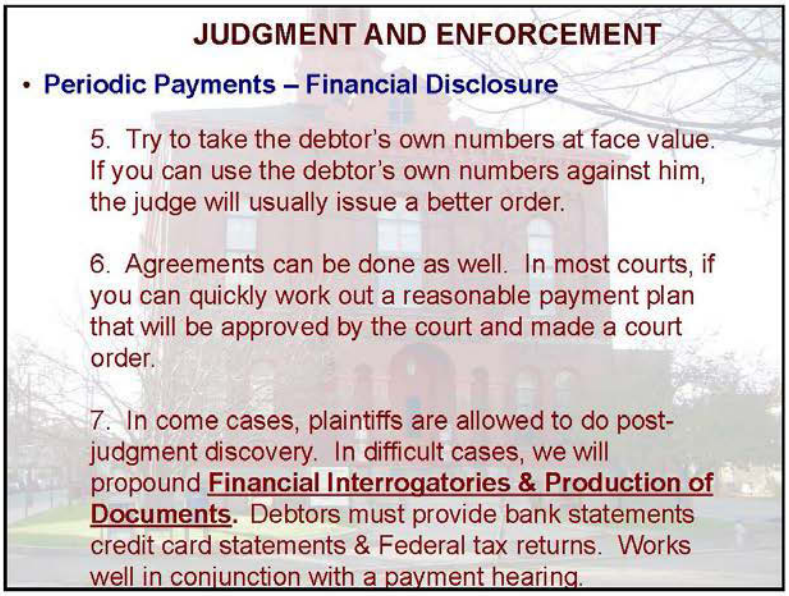

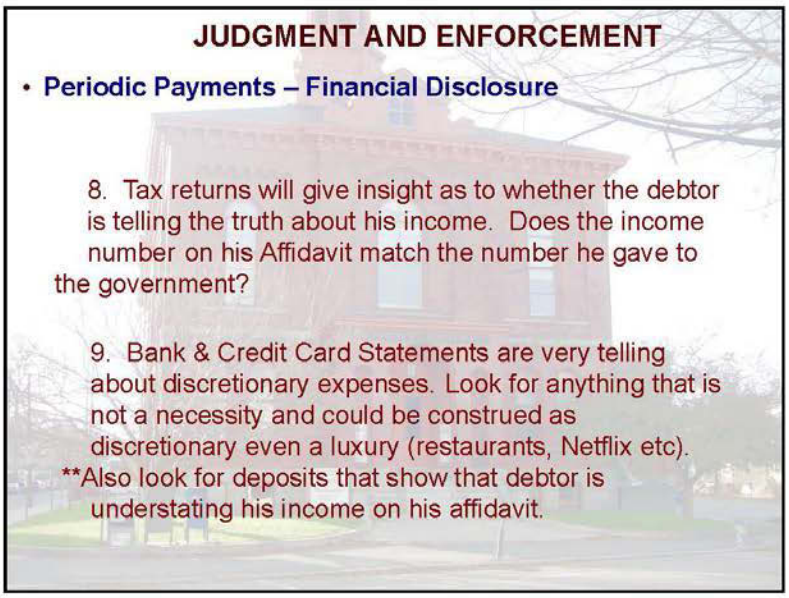

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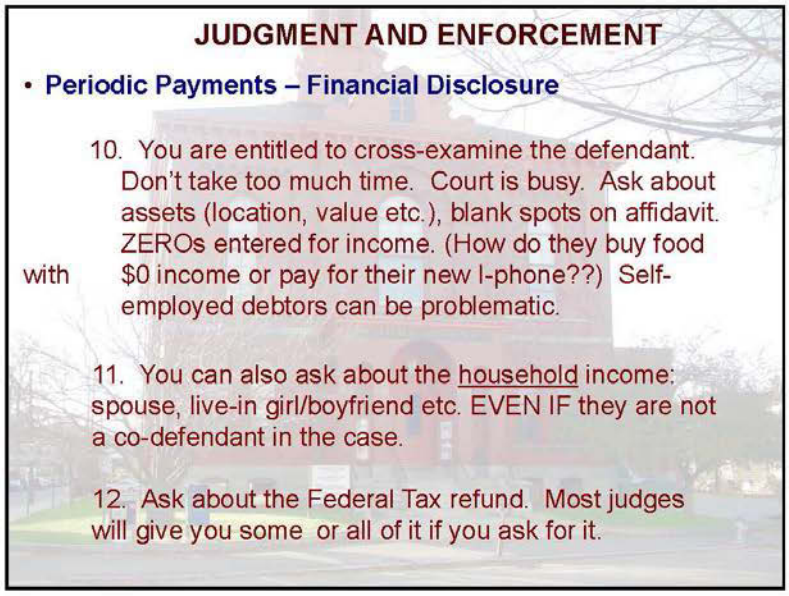

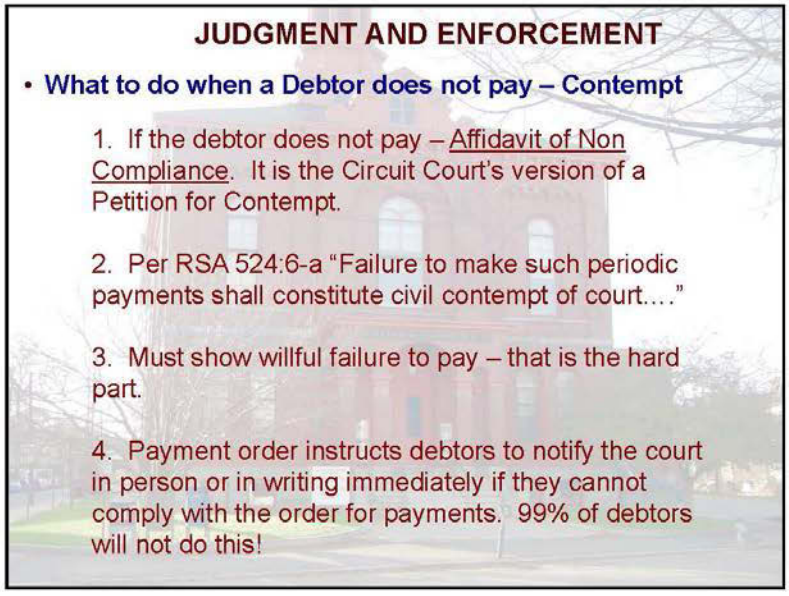

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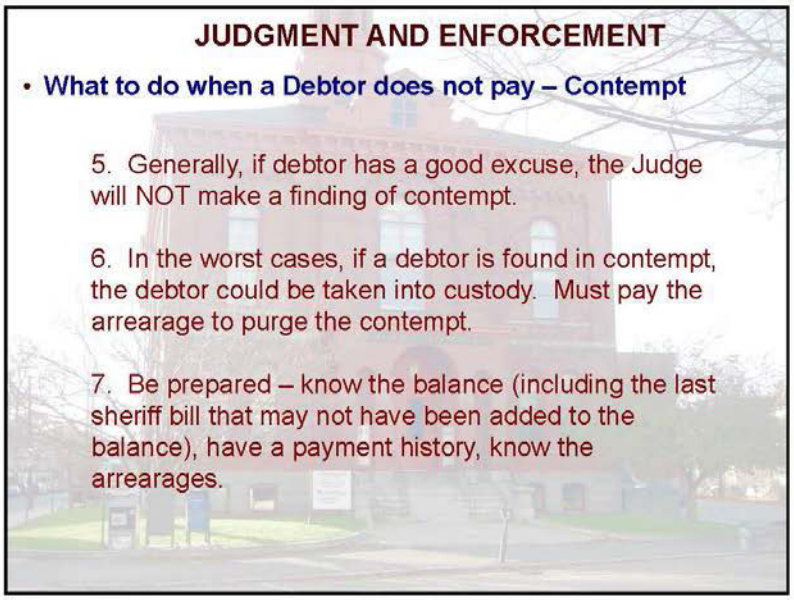

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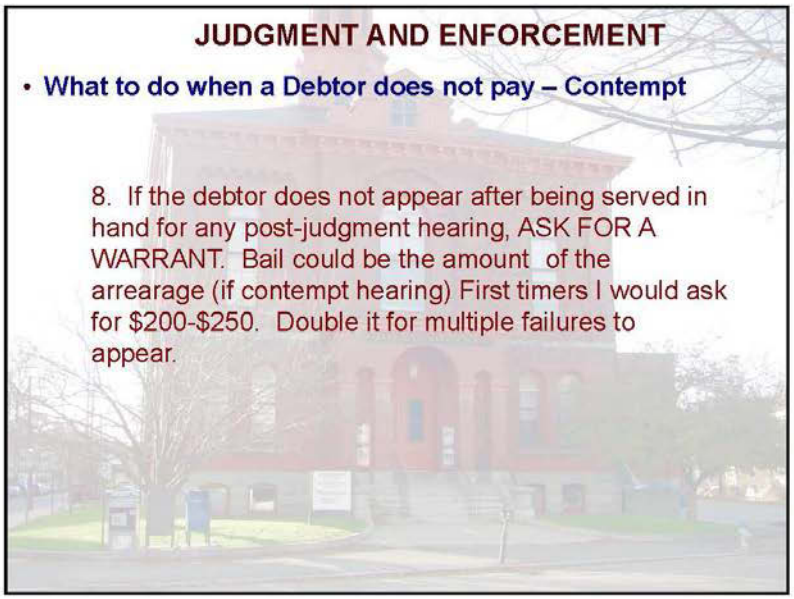

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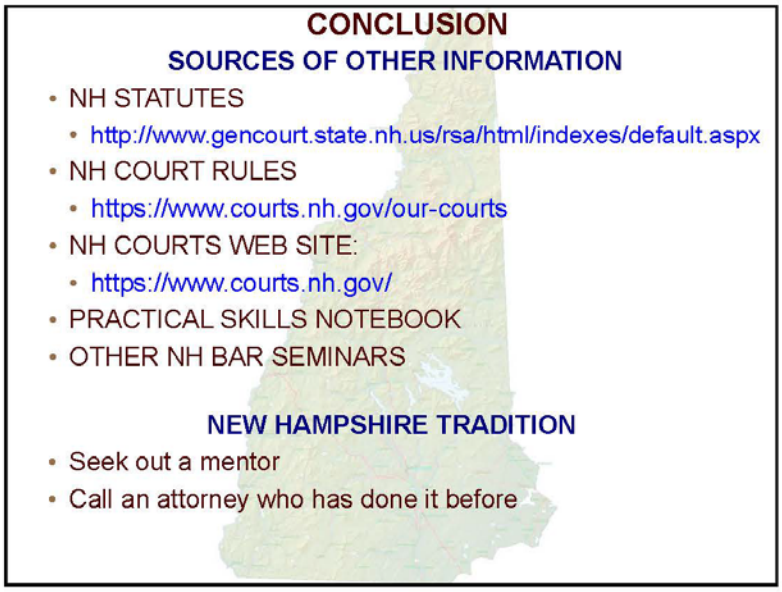

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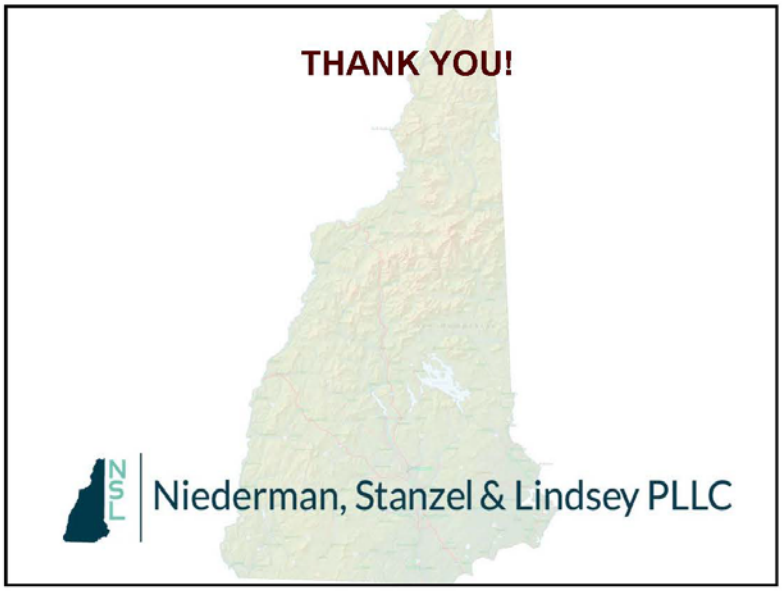

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