

Responding to Service of Legal Process: Subpoenas, Garnishments and Levies

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Banks play a vital role in the economy as lenders and depositories. As a result, bank records and funds on deposit are often at the center of legal disputes and governmental enforcement actions. The vast majority of legal documents served on any bank – such as subpoenas, garnishments, and tax levies – do not make any direct claim against the institution. However, a bank's failure to properly respond to any of these items could impose significant, yet avoidable, costs upon a bank. This *Update* is based on federal law and on Wisconsin law, which may not necessarily apply to financial institutions located in other states. It addresses the most common types of legal process served on banks, and explains the basic requirements for a response.

Create a System for Handling Service of Legal Papers and Follow It

Every type of legal document served on a bank, whether a summons and complaint, garnishment, tax levy or subpoena, requires action within the specific period of time identified in the document. It is critical to make sure that all legal papers served on the bank are handled properly. Consider taking the following steps:

- Identify a point person authorized to receive service in each branch office.
- Set up a chain of people who can accept service if the point person is not available.
- Create a procedure to memorialize service of legal papers to make sure that they are directed to appropriate bank officers and counsel, preferably by email distribution.

Taking these simple steps minimizes the risk that legal papers served on the bank will "fall through the cracks" with potentially harsh results. Once served, the institution's response to the legal documents is equally important.

Exercise Discretion in Responding to Subpoenas

A subpoena is a court order which requires the recipient to produce documents and, in some cases, to appear in court or at a deposition. Banks' financial records are regularly the target of subpoenas, which may be issued by a Wisconsin state court or a federal court and may relate to either a criminal or civil matter. A subpoena must be personally served on the bank or its registered agent. Personal service means handing the subpoena to an officer, director, managing agent, or person whom the process server reasonably deems to be in charge of the office. Failure to timely or adequately respond to a subpoena could result in the bank being found in contempt of court.

Sometimes the bank is not required to respond to a subpoena because it is legally defective. For example, attorneys in states outside Wisconsin often mail subpoenas purporting to require the bank to produce specified records and to sign an affidavit that the records are genuine. In many cases, a subpoena issued from another state imposes no legal duty to respond because courts in other states generally do not have jurisdiction over Wisconsin banks. This is not a simple issue, however. If there is any question as to a subpoena's validity, it should promptly be forwarded to legal counsel who can help make this determination.

Many subpoenas are overly broad in terms of the documents requested. If the volume of responsive documents is large, the attorney who issued the subpoena should be contacted about narrowing the request. Reimbursement of research and copying costs should also be arranged with the requesting party. Additionally, a motion to quash may be necessary if counsel does not agree to limit the scope. All of these are considerations that are better left to the institution's in-house or external counsel to handle.

When responding to a subpoena, customers' privacy rights must be respected. For example, personal information, such as social security numbers, should be redacted before copies are made. When such information is to be provided, courts often (upon request) enter confidentiality or protective orders providing that documents marked as "confidential" may not be made public. Such documents, when filed in court, must be filed under seal. This means that the public cannot generally access the documents. Obtaining a protective order also protects the bank if a subpoena requires production of documents which reflect the bank's lending policies, strategic planning or other proprietary information.

Bank Account Garnishment – How it Works and How to Respond

A garnishment is a three-party lawsuit in which the judgment creditor attempts to obtain money or property owned by the judgment debtor but held by a third-party. Garnishments are often filed by creditors to recover funds held in bank accounts.

The creditor commences the garnishment by filing a summons and complaint with the court. The creditor must then personally serve the garnishment summons and complaint on the bank and the judgment debtor. A garnishee (the bank) is entitled to a \$3.00 fee, which must be tendered when the summons and complaint are served. The bank is not required to answer the complaint until the fee is paid.

Upon being served with a garnishment, the bank must freeze non-exempt funds in deposit accounts of the judgment debtor identified in the garnishment complaint, and ultimately pay them into the court or to the creditor/plaintiff upon the court's order. The current exemption for personal bank accounts is \$5,000 of aggregate deposits. No exemptions exist for business bank accounts, and the entire amount of any such account may be garnished. Exemptions do not apply unless they are affirmatively claimed. Often, disputes arise over whether a particular account is "personal" or used by the judgment debtor in his or her business activities. A bank may prefer to allow the account holder/debtor to claim the exemption rather than attempt to determine what is and is not exempt.

Within 20 days after service of the summons and complaint, the bank must file with the court, and serve upon the creditor, an answer stating whether the bank is holding any money of the judgment debtor. The answer must state:

1. the amount of funds being held in any bank account of the judgment debtor;
2. whether the bank is holding title to or possession of any property belonging to the judgment debtor; and
3. any defense claimed by the bank.

The federal government recently enacted a rule requiring financial institutions to conduct an account review within two business days of being served with a garnishment. The financial institution must: (1) identify and protect exempt federal benefit payments deposited in the account in the prior two months; and (2) determine the amount of funds, if any, that are subject to garnishment. If exempt funds are identified, the account holder must be given access to those funds. The only exceptions are for state child support agencies and certain federal garnishment orders where a "Notice of Right to Garnish Federal Benefits" has been attached to the garnishment order.

If the garnishee defendant is also a borrower of the bank, the bank should consult with legal counsel as to its possible defenses to a garnishment action, which generally involve asserting a right, superior to that of the judgment creditor, to the non-exempt funds on deposit:

- The bank may assert a security interest in the deposits, if the loan documents provide this right. A prior security interest in the judgment debtor's bank account as containing proceeds of collateral may also be asserted if, for example, it contains identifiable proceeds of accounts receivable.
- A bank served with a garnishment complaint may want to assert a right of set-off against funds in a borrower's deposit account. In most instances, set-off is available only if the debt is due and accelerated, and if the account is frozen prior to when the garnishment is served on the bank. Legal ramifications in this instance can be significant, and the advice of counsel is recommended.
- Consumer debt is not subject to set-off unless: the set-off right is conspicuously disclosed in the contract; there has been a default; notice of right to cure default has been sent; and the cure period has expired before the garnishment action was commenced.

Banks should not pay non-matured obligations such as CDs and time deposits, and the answer should state that the bank's liability in connection with such accounts is contingent upon maturity.

The deadline to respond to the garnishment complaint is important. Failure to timely answer a garnishment could result in the bank being liable for the full amount of the underlying judgment, even if the bank was not holding sufficient, or even any, funds which could have been paid to the creditor.

The bank's answer is taken as true unless the judgment creditor files a reply to the answer within 20 days following service by the bank. If a reply is filed, the matter then proceeds in court like a normal lawsuit.

If your bank is served with an out-of-state garnishee summons and complaint, counsel should be consulted to determine if the issuing court has personal jurisdiction over the bank. Counsel can advise whether a response is required.

Levies – Types and Procedure

A levy is an action by a governmental agency to seize assets from delinquent taxpayers and others with unpaid obligations. Agencies such as the IRS, Wisconsin Department of Revenue (DOR) and Wisconsin Department of Workforce Development (DWD) regularly place administrative levies on bank accounts. Funds on deposit at the time of the levy are subject to the levy.

IRS and DOR Levies

For an IRS levy, the bank surrenders deposits up to the amount of the levy twenty-one (21) calendar days after the date the levy is made. Where a notice of levy is served by mail, the date that the notice is delivered to the person being served is the date that the levy is made. The bank must freeze the funds subject to the levy during the following 21-day period.

Compliance with an IRS levy discharges the bank from any liability to the taxpayer/account holder. Similarly, compliance with a DOR levy discharges the bank's liability to the delinquent taxpayer with regard to the deposits surrendered. Failure to comply with an IRS or DOR levy subjects the bank to liability for the amount that should have been paid from the levied account, plus costs and interest and a 50% penalty.

Defenses to IRS and DOR levies are limited. A bank's right of set-off defeats a levy only if the right was exercised, and the bank's interest perfected, prior to service of the notice of levy on the bank. Federal and state exemptions do not apply to deposit accounts. There are two statutory defenses to a levy: (1) the property is subject to prior judicial attachment or execution; and (2) the bank is not in possession of any property of the delinquent taxpayer.

DWD Levies – Unemployment Contributions and Overpayments

DWD may collect overdue unemployment contributions from employers and benefit overpayments to unemployed workers by levy. The levy may be served by personal service or by any type of mail service which requires signature acceptance.

The bank is required to freeze and surrender accounts. The bank must answer the levy within 45 days. If the bank claims a lien or set-off of funds in a deposit account subject to levy, the answer should state that claim. No exemption applies to a levy for unemployment compensation contributions, but an exemption of \$1,000 applies when the levy is to recover an overpayment of unemployment benefits.

The levy continues until the liability is paid in full, the levy is released, or one year from the date of service, whichever comes first. The bank's failure to honor a DWD levy could result in a lawsuit by DWD to recover from the bank up to 25% of the debt owed by the account holder.

DWD Child Support Levy

DWD and county child support agencies have authority to assert child support liens against bank accounts of delinquent child support payers.

DWD or the county child support agency sends the bank a "Notice of Administrative Levy." This notice instructs the bank to freeze the funds in the account of the delinquent child support payer, subject to certain limitations: (1) the maximum amount frozen in the account must not exceed the amount stated by the DWD or child support agency as being due; and (2) the maximum amount frozen may not exceed the payer's ownership interest.

A bank is not liable to the depositor/delinquent payer for encumbering or surrendering any assets held by the bank in response to instructions provided by a county child support agency for the purpose of enforcing a child support obligation.

Conclusion

Having a system in place to handle all legal papers served on the bank – which includes a point person and support team with specific responsibilities for coordinating the bank's response – greatly reduces the risks associated with responding to service of legal process. Consultation with counsel is also advisable when determinations need to be made about the enforceability of subpoenas or garnishments, whenever the bank desires to assert a set-off or security interest in a deposit account, and any time a summons and complaint is served on the bank.

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