

## Kentucky Debt Collection Laws

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### **Firm Profile**

*Lloyd & McDaniel is successor to the commercial collection law firm opened by Jeremiah A. Lloyd in 1952. The firm practices throughout Kentucky, Indiana and Ohio. Practice areas include commercial collection, retail collection, litigation, and bankruptcy representation. The firm enjoys an AV rating from Martindale Hubbell which is the highest possible peer review rating. James M. Lloyd and Michael V. Brodarick are Board Certified by the American Board of Certification in the areas of Creditors' Rights and Business Bankruptcy, respectively. The firm has been designated as one of the Top Places to Work in the City of Louisville for two consecutive years. The firm is active in the CLLA, NARCA, DBA, and ABI. The firm is a founding member of the Kentucky Creditors' Rights Bar Association and has been active in pursuing legislation favorable to creditors as well as defending against adverse legislative efforts.*

### **Specific Kentucky Collection Law Issues**

**Statute Of Limitations:** [Kentucky law](#) provides for a five-year (5) statute of limitation for open account matters. See [KRS 413.120](#). Written contracts are subject to a fifteen- year (15) statute of limitation. See [KRS 413.090](#). However, special note should be made that Kentucky has adopted the four- year (4) statute of limitations promulgated by the Uniform Commercial Code (UCC), with regard to contracts for the sale of goods and lease contracts. See [KRS 355.2-725](#) and [KRS 355.2A-506](#). For both open account and written contracts, the statute begins to run from the date of default. Kentucky Judgments (both domestic and foreign judgments domesticated in Kentucky) are valid for fifteen (15) years and can be renewed. See [KRS 413.090](#). The statute begins to run from the date execution was last issued.

**NSF Checks:** Kentucky law does not provide any special civil remedies for NSF checks. Kentucky criminal statutes include a provision for theft by deception, which is defined as obtaining property or services from another by deception. Theft by deception does not include instances of a postdated checks nor payments on existing account indebtedness. Theft by Deception is a Class A Misdemeanor where the instrument is for less than \$500.00, a Class D Felony for instruments over \$500.00 but less than \$10,000.00, and a Class C Felony for instruments over \$10,000.00. See [KRS 514.040](#).

**Execution:** Kentucky allows execution against personal property. Execution may be issued ten (10) days after the entry of Judgment. Execution is issued by the clerk of the court to the Sheriff who makes a return of service on the execution within ninety (90) days. See [KRS 426.010](#).

**Garnishment (Wage and Non-Wage):** Kentucky law provides for garnishment of a judgment defendant's wages. See [KRS 425.506](#). Wage garnishment is permanent once in place and is honored in the priority in which the Order of Garnishment is served upon an employer. Kentucky law exempts from wage garnishment the lesser of 25% of the individual's disposable earnings and the amount for the week that the disposable earnings exceeds thirty (30) times the federal minimum wage. Non-wage garnishment may be sought from any person owing money to the judgment debtor. See [KRS 425.50](#). For bank account attachment and execution purposes, Kentucky courts have held that a party to a joint account may be presumed to own the entire joint account. Upon notice and objection, the debtor or third-party account tenant may rebut that presumption by proof of separate net contributions to the account, and a showing of an intention that the non-contributor's use of the other's contributions be limited. See *Brown v Commonwealth of Kentucky*, 40 S.W.3d 873 (KY App. 1999).

**Judgment Liens:** A judgment acts as a lien on real property in which the judgment defendant has an interest once recorded in the county clerk's office of any county in which such real property is located. See [KRS 426.720](#).

**Exemptions:** Kentucky exempts the following pursuant to [KRS Chapter 427](#):

- (a) one (1) motor vehicle up to \$2,500.00
- (b) household furnishings, jewelry, clothing and ornaments up to \$3,000.00
- (c) tools up to \$300.00
- (d) homestead up to \$5,000.00
- (e) retirement plans, pensions and insurance proceeds totally exempt
- (f) Kentucky has adopted the federal bankruptcy exemptions. See [KRS 427.170](#)

### **Licensing, Bonding and Regulations**

Kentucky has been a fairly creditor-friendly state, and does not require collection agencies to be licensed or bonded. Attorneys who wish to practice law before the courts in the Commonwealth are required to be admitted to practice by the Kentucky Supreme Court pursuant to [SCR 2](#). There are no current Attorney General opinions dealing specifically with debt collection practices, nor recent Kentucky Supreme Court ethic's opinions.

### **Commercial Collections/Special Remedies:**

While the vast majority of commercial collection referrals involve the collection of a debt on an open account for goods sold and delivered, the specific facts of any given case may entitle the creditor to special remedies that may enable greater leverage.

### **Right of Repossession Pursuant to a Security Agreement**

Assuming the creditor possesses a valid and enforceable security agreement against specific collateral pursuant to [KRS 355.9-203](#) and has properly perfected that interest, the creditor is entitled to the various remedies provided to a Uniform Commercial Code Article 9 secured party, including, but not limited to, the right to take possession after default, as provided in [KRS 355.9-609](#).

### **Reclamation**

There is a potentially effective, and often overlooked, remedy available to the seller/creditor who has recently shipped goods to a buyer who is soon thereafter discovered to be insolvent. [KRS 355.2-702](#) provides in pertinent part:

(2) Where the seller discovers that the buyer has received goods on credit while insolvent, he may reclaim the goods upon demand made within ten (10) days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three (3) months before delivery, the ten (10) day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this article (KRS 355.2-403). Successful reclamation of goods excludes all other remedies with respect to them.

However, this remedy is limited in a number of ways. First, there is the issue of whether the buyer is truly insolvent. [KRS 355.1-201](#)(23) provides that the person is insolvent when he "either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law."

Furthermore, the seller must make a demand for return of the goods *within* ten days after the buyer receives them. The ten-day limitation does not apply if misrepresentations of solvency have been made to the particular seller *in writing* within three months before delivery. In the event the debtor should file bankruptcy within ten days of receipt of goods, *written* notice is required when making the demand, and additionally, the creditor's time for making the written demand for reclamation is extended an additional ten days, in this instance.

Finally, it should be understood that the rights of the reclaiming seller are *subject to* the rights of buyers in the ordinary course of business or other good faith purchasers. In particular, the reclaiming seller may find itself competing with the debtor's lending institution, which commonly holds a previously perfected security interest in all goods of the debtor, including inventory. While the case law is mixed on this issue, most courts seem to favor the rights of the *secured lender*. A detailed analysis of the rights and limitations

of the reclaiming seller can be found in the reference book titled *The Uniform Commercial Code of Kentucky*. David J. Leibson & Richard H. Nowka, *The Uniform Commercial Code of Kentucky*, § 2.6(F)(5) (2d ed. 1992).

### **Mechanic's Liens**

If available, mechanic's liens and possible payment bond rights can offer an excellent source of leverage in instances where the creditor has provided labor or furnished materials for erection, alteration or repair, and other improvements upon real estate.

Mechanic's liens, while effective, are subject to very specific and stringent limitation. Careful analysis should be made to determine whether pre-lien notice is required. In addition to the possibility of required pre-lien notice, careful effort should be made not to miss the appropriate lien deadlines pursuant to [KRS 376.010](#) and [KRS 376.080](#).

There is a completely different set of statutes relating to liens for labor and/or materials provided on public property that represent public improvements. Rather than acquiring a lien against the real estate, the claimant acquires a lien against funds due the contractor. Pertinent statutes include [KRS 376.210](#), which defines the creation of the lien, and [KRS 376.230](#), which details the necessary steps and extremely stringent time deadlines to properly perfect and enforce a public improvement lien. Should the property on which the improvement occurred be "public work" for the use and benefit of the United States Government, counsel will need to review "The Miller Act," found at [40 U.S.C. §§ 3131 – 3134](#) (formerly §§ 270a-270d-1). The Miller Act provides bond rights for the protection of persons furnishing labor and materials.

### **Attorney Fees**

Attorney fees and collection costs are recoverable pursuant to [KRS 411.195](#), which provides as follows:

Any provisions in writing, which create a debt, or create a lien on real property, requiring the debtor, obligor, lienor or mortgagor to pay reasonable attorney fees incurred by the creditor, obligee or lienholder in the event of default, shall be enforceable, provided, however, such fees shall only be allowed to the extent actually paid or agreed to be paid, and shall not be allowed to a salaried employee of such creditor, obligor or lienholder.

In addition to providing additional leverage during pre-suit collection, agreements that provide for the payment of attorney fees can be helpful in conjunction with settlement negotiations after the suit has been filed and during post-judgment collection. Terms incorporating payment of attorney collection fees can

sometimes be incorporated into pre-suit workout agreements, in the event the client does not have the benefit of a credit agreement or other contract providing for payment of these expenses.

However, the collection of attorney fees and collection costs are not without limitation. Kentucky courts limit attorney fees and base the award on “the time involved, the task assigned, and the degree of difficulty of work under the circumstances” in obtaining judgment against the defendants.

Trial courts retain the authority to determine whether a claim for attorney’s fee is reasonable, and courts are scrutinizing fees more and more. Recent opinions have stated that trial courts should require parties seeking attorney’s fees to demonstrate the amount sought accurately reflects the reasonable value of bona fide legal expenses incurred. See [Commonwealth Bank & Trust Co. v Tax Ease Lien Investments 1, LLC](#), 2010-CA-000595-MR, 2011 WL 1434697 (Ky. Ct. App. Apr. 15, 2011), review granted (Dec. 15, 2011), *aff’d sub nom.* [Tax Ease Lien Investments 1, LLC v. Commonwealth Bank & Trust](#), 2011-SC-000277-DG, 2012 WL 4243649 (Ky. Sept. 20, 2012).

### **Interest**

The legal rate of interest in Kentucky is eight percent, in the absence of a specific agreement for a higher rate. Without a provision in writing, pre-judgment interest is discretionary with the courts of Kentucky and may be allowed from the date the account is liquidated by demand, or by rendering an account to the debtor, thereby converting an open account transaction to an account stated transaction. The default rate of interest on judgments is 12 percent, in the absence of a contract for a higher or lesser amount.

### **Consumer Collections/Special Remedies**

Kentucky law provides for the pre-judgment seizure of specific personal property pursuant to [KRS Chapter 425](#). A creditor must have an immediate right of possession pursuant to contract and be able to establish that the defendant is in default. A Writ of Possession is sought by filing a motion in circuit court, supported by affidavit and documentary evidence establishing the creditor’s right of immediate possession. Upon issuance of the Writ, the creditor is required to post a bond with sufficient surety, for not less than twice the amount of the value of the property being seized.

### **Kentucky Courts**

**District court:** Actions may be brought in the district courts of the Commonwealth of Kentucky for claims of less than \$5,000.00 (exclusive of interest, attorney's fees, and court costs). Anticipated court costs for the typical collection case through post-judgment stage range from \$250.00 to \$350.00.

<http://courts.ky.gov/districtcourt/>

**Circuit court:** Actions for amounts in excess of \$5,000.00 (exclusive of interest, attorney's fees, and court costs) must be brought in the circuit courts of the Commonwealth. Anticipated court costs through post-judgment stage are generally \$400.00 to \$500.00. <http://courts.ky.gov/circuitcourt/>

\* Kentucky courts tax costs as steps are taken. Variables include the number of attempts to have the summons served and the number of specific post judgment remedies pursued.

**Venue:** Proper venue in Kentucky for commercial matters is the county in which the defendant may be served with summons and complaint. This generally means the county of residence of the defendant. Individuals are residents of the county in which they reside. See [KRS 452.480](#). Corporations and Limited Liability entities can be sued in the county where the principal office address is located, in the county where the resident agent resides, or in the county where the contract is to be performed. See [KRS 452.450](#).

### **Court Costs and Other Various Costs**

Filing fees for circuit court are about \$175.00, whereas district court filing fees are \$83.50. Sheriff Service is the preferred method, so most courts require the initial summons to go out by sheriff. Sherriff service usually costs about \$40.00 to \$50.00. If the sheriff is unable to serve the defendant, an alias summons may be issued to be served via special bailiff or certified mail. Special Bailiff's rates vary, however most rates remain competitive with sheriff's rates at about \$50.00. Certified mail is about \$14.00. For collecting on judgments, Lien fees are \$13.00, garnishment fees are \$20.00, and execution fees are about \$60.00 to \$70.00.

*Please be advised that this is not intended as legal advice. Changes to laws, statutes, regulations and costs can and do occur. We recommend that you contact an attorney for advice specific to your legal matters and your state.*

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