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Collecting Through the Legal Process

Every story has two sides. This is an important concept to keep in mind not only in life, but also when developing a litigation strategy with a client. Steve Harms of Muller, Muller, Richmond, Harms, Myers P.C. in Birmingham, Mich. began his May 4, 2011, teleseminar on "Collecting Through the Legal Process" by explaining the importance of remembering you only have one side of the story when litigation begins. Maybe you are lucky enough to talk with someone on the debtor side, but this is not common. So, remember there are two sides to every story and keep this in mind as you make your strategy and recommendations to your client.

When talking about litigation strategy, you are really talking strategy, Harms says.

You'll need to lay out the information you have from your client and then also consider the theories the debtor has as to why they don't need to pay. From there, there are many items to review when making your decision of whether or not to go to suit.

Harms says, "In order to determine whether or not your case is strong enough to win in court you may want to review the following:"

- **Any letters or other written communications exchanged with the debtor, and your notes on any comments made orally.** (It's very important to keep written notes of all discussions with a debtor.)
- **An analysis of the debtor's likely claims and defenses.** Determine whether you have sufficient information, evidence and documentation to counter what you expect the debtor to say. Don't expect the judge or jury to simply take your word for what happened— you should be able to produce documents to support your position.
- **An objective evaluation of the data before you.** It's easy to take the position that you're right, and therefore, you should win and the debtor should lose. Instead, step back and ask yourself whether the debtor may score some points with the judge or mediator based on your knowledge or instinct about what the debtor's going to say.

The next item to analyze is: does the likely outcome justify the costs of suit?

Even if your claim is being handled on a contingency fee, there are costs to consider; the costs of suit, rarely less than $300, and the potential costs of providing documents along with any travel for hearings, trial, etc. For this item, you are basically reviewing the dollars and cents of the case. You obviously will not want to spend more to go forward with suit than you will get back, so if you know that will be the outcome perhaps litigation is not the right avenue.

Then, ask yourself, do you have the documents and witnesses needed for litigation? Harms mentioned that he finds in a lot of cases the witnesses would be sales representatives who were with the company when the contract was made, but are now no longer there. This becomes tough because the defendant

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can then say the sales representative promised me blank and he could get away with this because there is no one there to rebut what he is claiming. The credit manager may be available; however, the credit manager was most likely not involved in the discussion with the defendant and the sales representative and only became involved after the sale was made. Harms points out a sales representative unavailability is a trigger to look at the case because it may now be one notch weaker if it's a disputed case. Same thing with the documents, Harms said, if you do not have the invoices, delivery receipts, signatures on deliveries, contract, etc. you may not have a very strong case for litigation.

Another item to consider is the statute of limitations and other concerns. Harms notes that the statute of limitations is a topic the client is not frequently aware of so you may have to do some educating here.

"The sale of goods under the Uniform Commercial Code (UCC) is usually a four year statute of limitations. Keep in mind, we are talking 50 states and the law may be different in every state. The one thing that's consistent, though, is the UCC. That's a law in every state."

Harms continued to say, as the documents come in from the client and you are looking over the claims, you still have the right to collect on the account and ask for the money; however, it is when you are over the statute of limitations that you are no longer able to bring the account to suit and cannot say to the debtor that you are going to sue.

The last item Harms discussed regarding what to think about when creating your litigation strategy is that some states are more expensive than others and you may be looking at some very expensive suit costs. You will obviously want to consider whether or not it is worth the amount you may be able to collect by going to suit versus the cost it will take to go through the process.

Now that you've determined you have a good case, and you want to proceed, you can begin the suit process. You will first want to select a court to file your lawsuit. Once your court is selected, you will want to file a summons and a complaint. Harms notes, the following explanations may not be new terms to everyone but always good to review.

"The summons notifies the defendant (the debtor) that you're suing him and provides basic information such as the court location, court telephone, case number and your name and phone number. It will also state how much time the defendant has to file an answer to your complaint (usually 28 days)," Harms explained.

The complaint is the document that describes why you are suing them. Harms said this document is usually about four to five paragraphs long stating you sold goods to the debtor between such and such a date, the defendant received those goods, but has not paid for them and demand for payment has been made but nothing has been received. You can also include a paragraph that says something to the effect of, the contract calls for interest, court costs and attorney fees and then finish with your "wherefore" or wrap up paragraph that says something like, wherefore plaintiff requests judgment against defendant for… and fill in fee costs here.

You will also attach to the complaint any exhibits you have which may be contracts, invoices, delivery receipts, a statement showing the outstanding balance, the credit application or whatever documents you may have that will assist in asserting your claim(s).

You've filed suit, the defendant has been served, and now you will want to make sure you include all your legal theories of recovery. When you file a lawsuit, include as defendants all people who may be responsible for paying the debt. It's best to add all defendants at the beginning of a lawsuit, so you can get them all served with copies of the lawsuit and reduce chances for the litigation to drag out. Among those defendants that should be named are:

- Personal guarantors
- Successor companies
- Issuers of bad checks
- Individuals who are liable as a matter of law
- The principal to a contract
- Beneficiaries of fraud

Harms noted these are just suggestions, not a list of every possibility. Be sure to think creatively to make sure you include all potential defendants; Harms emphasized the importance of working with your client to get all of those defendants before filing suit so you have all that information at the outset.

After the defendant has been served, one of two things will happen. The defendant files an answer which triggers discovery or the defendant doesn't file an answer (or other acceptable response) with the court, and you ask the court to enter a default judgment in your favor. This gives you a judgment which you want as quickly as possible.

Harms concluded the teleseminar by going over what alternative dispute resolution is and how it might help you and what tools you have to collect payment after judgment.

This is only a summary of the IACC teleseminar, Collecting Through the Legal Process*, presented on May 4, 2011, by Steve Harms. To listen to this teleseminar in its full version you can purchase a recording by contacting the IACC office at* iacc@commercialcollector.com *or (952) 925-0760.*