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TAB 04

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Debtor-Creditor: Tips for Helping Your Clients Get Paid In a Challenged Economy

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HOW MUCH WILL THIS COST

The most common question I hear from creditor clients - who are looking for help in getting their debts paid - is: '*How much will this cost*?'. As most of you are aware, litigation is getting more and more expensive all the time. In this paper, I intend to suggest several options for you to consider, and to recommend to your clients, as alternatives to the standard 'off the shelf' demand letter and ensuing 'generic' statement of claim. And then, I'll mention a few new developments in debt collection that may be useful to add to the arsenal of (debt collection) weaponry available when your clients ask for your debt collection assistance.

GET ALL THE FACTS

Of course, no two debt collection retainers are identical. Perhaps the first thing a lawyer can do for his or her client looking for debt collection advice is to get all the facts from the client. Creating a basic checklist to ensure that you are getting the full story from your creditor client is always a good way to start any debt collection retainer; for instance, you may want to ask questions such as

- is there more than one debtor? Ask for full names and full contact information of all debtors
- is the debt based on a contract? Ask for a copy of the contract
- or is the debt based on invoices or purchase orders? Ask for copies of those documents
- or is the debt based on or resulting from a larger transaction? If so, prudence dictates that that transaction be reviewed and fully understood
- is the debt guaranteed? Ask for a copy of the guarantee

- does your client hold security for this debt? If so, what kind of security does your client hold – real estate or personalty or intangibles? Ask for details of the security and a copy of each security agreement
- or, is the debtor a residential or commercial tenant of your client?
- or, is the debtor an owner, or a contractor or subcontractor – and are there construction lien rights?
- is the debtor a client or customer of your business client? Is there a business or professional relationship that your client wants to preserve while collecting this debt?
- lastly, what is known of the debtor's side of the dispute? Why won't the debtor pay? Ask for copies of all letters and all emails and all other communications and correspondence

FRONT LOAD YOUR INVESTIGATIVE WORK

Pre-demand preparation is in my view one of the keys to any successful debt collection. I do not believe that there is much value in a generic 'off the shelf' demand letter. Debtors today are as sophisticated as are creditors. And more likely than not, your client will be one of any number of creditors; each of whom is vying for debt payment from the same debtor. Therefore, an extra hour or two of preparation up front - to get all of the facts – and to get those facts backed up by the documents – and to review those documents - goes a long way to differentiate your collection activities from the rest.

It is a tried and true idiom that the squeaky wheel gets the grease. And *you* want *your client* to be perceived to be that squeaky wheel. A generic demand letter – or generic statement of claim for that matter – is more likely to be ignored; or merely tossed onto a growing pile of demands that the debtor is receiving. To be noticed, and for your client's demand to be taken seriously (if the debtor intends on taking any collection matter seriously) your demand ought to be tailored to the unique facts of the debtor-creditor relationship. Let the debtor know that you understand the whole story. And that you have thought out and analyzed the legal issues involved. This extra effort at the onset – front loading the legal work before your initial contact with the debtor – can be very cost-effective.

Cost-effective, because both the debtor and any counsel acting for the debtor, will immediately see from your well thought out and well drafted demand that your creditor client is taking this debt collection very seriously – seriously enough to spend some money by having you prepare and investigate. First impressions are as important in the debt collection genre as they are in general. And a detailed and factually accurate demand that identifies the legal theories of your collection, gives the debtor the immediate (and accurate) impression that your client is prepared to spend money to collect this debt (which, by the way, debtors hate to hear). The purpose being that you want the debtor to realize sooner, rather than later, that it may very well be more costly for the debtor to ignore you and your collection efforts - than to deal with you right now.

WHY SHOULD THIS DEBTOR PAY YOUR CLIENT

And this takes me to my second point, that fundamentally any dispute, including debt collection, will only be resolved out of court when the parties involved believe that the cost of not settling the dispute will be greater than the cost of settling. Or put more positively, a dispute will only be settled by agreement between the parties when the debtor accepts (or realizes) the fact that the cost of settling will likely be less that the ongoing costs of litigation (that is, the ongoing cost of not settling). So it becomes incumbent on the solicitor acting for the creditor to give the impression that the cost of not settling – that is, the cost of not paying the debt now, will ultimately prove to be greater that the cost of settling and making payment or payments at this time.

CAN THIS DEBTOR PAY

But there is one overriding question that every client deserves to hear from you – and that I encourage you to discuss with your client from the onset. And that question is: '*What is the likelihood of collection assuming that you sue and obtain judgment?*'. It is trite to say that actual cash collection has to be the prime directive in any debt collection retainer. You are not doing your job effectively, if you do not continually ensure that your creditor client understands that we lawyers cannot guarantee that the debtor will have sufficient assets available to pay the debt.

INITIAL STEPS - DEMAND - PHONE CALL - STATEMENT OF CLAIM

After investigating the facts and creating the legal theories, I usually follow up my initial demand letter with a phone call. Speaking to the debtor before the debtor retains counsel can be invaluable. You will likely get a sense at this early stage of the file, of the kind of debtor you are dealing with; whether the debtor is truly insolvent or merely struggling through hard times. Or whether the debtor appears to want to pay, or has no moral compass guiding him or her towards payment.

But whatever you learn through a phone call, a detailed and compelling statement of claim is my next step. And I always tell the debtor on the phone that that is what I have been retained to do – to take him or her to Court if prompt payment cannot be arranged. That way, there are no surprises. The debtor cannot pretend that he or she wasn't warned of the pending litigation. And the debtor understands that not paying will be expensive.

STATEMENT OF CLAIM

Like the demand letter, I believe that a generic statement of claim is less effective than front loading the factual and legal research and drafting a detailed, factually accurate, and legally compelling story. The statement of claim will likely be the first document that a judge will read – if the matter gets to Court – and so it should tell your clients' story in an interesting and persuasive manner. Dry technical pleadings just don't hold the mustard. Whether the debtor is reading your claim, or the debtor's counsel or a judge, it should state your case not only clearly and succinctly, but passionately as well. This extra effort early on will highlight for you the weaknesses that inevitably exists in your client's case – and will allow you to better understanding those weaknesses. Reviewing these issues repeatedly with your client will help your client to understand the risks and possible rewards going forward.

SELF-HELP

Of course, before you issue and serve a claim, a thorough assessment of self-help remedies ought to be undertaken. Creditors' counsel must ask whether there is security to seize; and if so, whether there is any equity in those assets and if there is equity, creditors' counsel must assess the costs of seizing and liquidating such equity. Does the debtor own real or personal property and if so, does the creditor have security? Is the debtor the lessee under a lease of

real or personal property and if so, is the creditor the lessor? Does the creditor have lien rights under the construction lien act? The answers to these questions leads one to consider enforcing security under the Mortgages Act, the Personal Property Security Act, the Repair and Storage Lien Act, or the Construction Lien Act; to name a few. A consideration of Rule 44 (Interim Recovery of Personal Property) and Rule 45 (Interim Preservation of Property) may be of assistance. There are various self-help remedies available (eviction, taking actual or constructive possession of property, and distraint to name a few). Care must always be taken to ensure that the peace is not breached and that the technical rules associated with the self-help remedy being undertaken are followed to the letter.

FRAUD

If fraud is involved, counsel must consider and determine whether the facts support a mareva injunction. The general rule in Ontario is that there can be no seizure before judgment. But mareva injunctions are an exception to that general rule. Mareva injunctions are available when the plaintiff can show the Court that the defendant is liquidating assets and removing them or is about to remove them from this province (clearly this is a non-technical general statement). And where a strong prima facie fraud claim is alleged, Mareva injunctions are becoming more easily attainable as judges have taken note that fraudsters are likely to be dissipating assets. There is case law permitting discovery in aide of mareva injunction – which can be an effective tool to flush out unknown details of the fraud. Rule 40 is the starting point for injunctions of this nature. The Fraudulent Conveyances Act and the Assignment and Preferences Act can create causes of action. As does the Bulk Sales Act, when, for instance, a tenant breaches a commercial lease by vacating the premises before maturity and opens up virtually the same business (usually under a new corporate entity) at a new location 'across the street' (so to speak).

ENFORCING JUDGMENTS

Most of you know by now that the Court of Appeal has emasculated a judgment creditor's ability to enforce a Writ of Seizure and Sale against realty by deciding that a mortgage lender need not provide a mortgage statement to an execution creditor. And, of course, without a mortgage statement, the Sheriff will not enforce the execution creditor's writ and will not sell

the execution debtor's equity of redemption. But the recent decision in the Canaccede case (*Canaccede International Acquisitions v Abdullah* 2015 ONSC 5553) has reminded us that the Court has jurisdiction to conduct a judicial sale. And that judicial sale now seems to be the go-to route for enforcing writs of seizure and sale of encumbered land. Additionally, Courts have confirmed the usefulness of a Mareva Injunctions in Aide of Execution to assist a judgment creditor in freezing a judgment debtor's assets and to prevent those assets from being dissipated. Equitable Receivers including a Receiver in Aide of Execution can also be a useful remedy where judgment creditors have been thwarted in their collection efforts.

BANKRUPTCY AND INSOLVENCY ACT

Although this legislation is not a debt collection tool for any specific creditor, there are times when it may be advantageous for a creditor to petition a debtor into bankruptcy for the benefit of all creditors – particularly when the collection and liquidation of all assets and the distribution of such funds to all creditors is enhanced by the BIA provisions. This often is the situation when there has been an obvious fraudulent preference or fraudulent conveyance – and the provisions of section 95 or 96 of the BIA will assist the trustee in retaking the asset(s) fraudulently transferred.

SEEKING JUDICIAL ASSISTANCE

In Toronto, the Civil List and the Commercial List have set up informal, quick and cost-effective procedures to help plaintiffs schedule motions and deal with undue delays by defendants and responding parties, among other things. Counsel involved in Commercial List matters know the benefits of scheduling a 9:30am Chamber's Appointment. What appears to not yet have caught on widely, is the Civil List's two processes that are the equivalent of a Commercial Court 9:30am Chamber's Appointment. Counsel are encouraged to use Civil Practice Court appointments to schedule motions – within 100 days of the Civil Practice Court attendance – and to deal with timetabling issues and issues in which there is undue delay or non-co-operation by opposing counsel. In addition, for matters perhaps less clearly referable to scheduling, but where counsel are of the view that a quick and informal discussion with an experienced judge would help break a logjam, encourage civility, or bring better discipline to a proceeding, a Chambers Appointment may be scheduled with one of the

Civil Team Leaders or their delegates. CPC and in Chambers Appointments exist to assist the parties to proceed with maximum efficiency. They can be of great assistance to a plaintiff in prosecuting debt collection litigation who seeks to overcome inappropriate resistance.