

Want to Sue? Know the Formula for Success!

Dear Friends:

Although economic indicators are beginning to tick upwards, we are not as yet in a full recovery. Until that happens, it is important to stay focused on moving receivables out as quickly as possible.

Because economic downturns are a time for greater debtor difficulties, this is a time when collection lawsuits become more frequent. In this issue's feature article, we take a comprehensive look at litigation with a focus on what clients can do to ensure the most positive outcome possible.

The coming months hold a busy travel schedule for Szabo Associates. We will be on both coasts, in San Francisco and New York City. Please check out this newsletter's Calendar of Events for specifics.

Best wishes for a terrific fall season,



Pete Szabo, President
Szabo Associates, Inc.

We would like to thank Sandi Garris, Litigation Manager, Szabo Associates, Inc., for her assistance with this article.

The time comes when most media firms are faced with the serious decision about whether they should sue an account for unpaid services. While the lawsuit may be the best recourse – or only recourse – when a creditor claim cannot be resolved otherwise, it is also true that prevailing in the lawsuit requires much more than simply having a valid claim.

The key to successful litigation is to be fully prepared. There are numerous steps in the litigation process, each one of which can have different outcomes and which may influence subsequent steps. Being fully prepared enables the client and attorney to most effectively manage this process, and in doing so, have a more predictable outcome and better cost control. Full preparation consists of understanding the litigation process, knowing the customer, providing complete and accurate documentation, and ensuring that personnel be responsive and available as needed.

Understand the Litigation Process

By understanding the litigation process, the creditor can ensure that all necessary information and human resources are provided, the creditor can effectively collaborate with the attorney in making decisions, and the creditor can potentially avoid costly delays that might also reduce the likelihood of winning the case.

This process begins with developing and submitting the claim. The creditor provides supporting documentation, which is forwarded to counsel in the debtor's jurisdiction. The attorney then reviews the documentation and makes both a verbal and written demand for payment from the debtor. Where possible, the attorney then seeks a mutually agreeable schedule for payment. If the matter cannot be resolved in this way, the attorney provides a recommendation to sue along with a request for estimated court costs.

In the second stage of the litigation process, the attorney drafts a complaint and files it with the court, after which a Summons is issued

—continued on page 2

Want to Sue? —

—continued from page 1

and served on the debtor. This step may take as many as 60 days. Why may it take this long? If the debtor is an individual, then “personal service” is required, meaning that an officer of the court, such as the sheriff, must personally serve the debtor in hand with the Summons. This may take several attempts, particularly if the debtor is trying to avoid the Summons. If the debtor is a corporation, the Summons must be served on the registered agent or an officer of the company. Frequently, official records do not have the most current corporate addresses, which results in additional attempts having to be made. Additionally, many sheriffs’ offices have a substantial backlog, which can delay the process further.

Once served, the debtor (now defendant) typically has 30 days to file a response with the court. If not done, the attorney will petition the court for a Default Judgment, an uncontested decision in favor of the creditor (plaintiff). If a response is filed but the attorney considers it to be without merit, with the facts stated in the suit not being at issue, the attorney will make a Motion for Summary Judgment; that is, he will request that the court make a decision based solely on the documentation provided, without a trial.

If a judgment cannot be obtained, the suit proceeds to the trial stage. The first step is Discovery, where

counsel on both sides request documentation and information to use in support of their position. This can include a Bill of Particulars (substantiation of debt amount and terms), Interrogatories (written questions), Admissions (statements which must be explicitly admitted to or denied), or Depositions (statements of involved individuals taken under oath). Discovery can take from 90 days to more than a year. Following Discovery, the litigation is scheduled on the court’s calendar; the court occasionally reschedules this date. Time to trial may be as few as 30 days or as much as two years. At trial, each party presents evidence and witnesses for substantiation, which may be challenged by opposing counsel. Upon completion of the trial, the judge renders a decision or may take the matter under advisement; that is, she may choose to review the case further and reach a decision as many as 90 days later. Note that in some states, the matter may be referred to arbitration before trial; if arbitration does not resolve the claim, then the trial stage proceeds as before.

Usually, upon receipt of the court’s judgment, assuming it is in favor of the plaintiff, the collection process can move forward. However, there are instances where the Defendant may choose to file an Appeal asking that a higher court overturn the decision. Or, the defendant may also cross-sue the plaintiff, making a counterclaim that can include an effort to recover litigation costs from the plaintiff. While rare, both counterclaims and

Appeals are serious because of the substantial time and cost they add to the litigation.

Know the Customer

Given the complexity of the litigation process, it is imperative that the best possible information be provided to the attorney. This starts with the creditor making a best effort to know the customer. It may be that the customer wants to avoid the negative publicity associated with a lawsuit. Or, if the reason for non-payment is a cash shortfall in the customer’s business, receiving payment may be problematic even with a successful Summary Judgment or trial. The customer’s perspective and past behaviors may be a guide to anticipating his response, including the likelihood of a counterclaim. And the customer may even be amenable to creative solutions, such as making incremental or reduced payments in lieu of litigation. In view of these and other possibilities, it is in the creditor’s best interest that the attorney be provided at the start with as much information about the debtor as possible. For example: Is the debtor still in business? What is the size of the company? Has the debtor been sued before? If so, what was the outcome? Does the debtor currently have other lawsuits against it pending? Szabo Associates frequently will have most of this information already and can work together with the creditor to obtain more. In this way, the attorney will be equipped with both facts and insights

while evaluating the claim and initially engaging the debtor. If the litigation then moves forward, this information, along with additional information that is gathered during the process (for example, in Discovery), can enable the attorney to effectively tailor the legal strategy. The result is a much higher probability for either early resolution or a successful trial.

Provide Complete and Accurate Documentation

As important as information specific to the customer is, providing complete and accurate documentation is even more important. Providing complete documentation is the single most effective step that the creditor can take to ensure the desired litigation outcome. Conversely, not doing so can undermine the strength of the claim or invite later unpleasant surprises.

Documentation is the primary source for substantiating the claim. This material may substantially reduce time and cost as well. It strengthens the attorney's ability to reach an up-front mutually agreed upon resolution rather than proceeding with litigation. It also forms the basis for a Motion for Summary Judgment. The quality of the documentation will determine whether or not the court will consider a Summary Judgment, as well as the judgment itself.

Additionally, having complete documentation enables the attorney to assess all court costs, fees, interest charges, etc. that should be included for recovery in the claim.

Each and every document that pertains to the transaction being litigated should be provided to the attorney at the very beginning of the process, when the claim is being developed. This should include the

Calendar of Events

October 18-22

Advertising Media Credit Executives Association
San Francisco, California

November 10-11

Media Credit Association, Publishers Advertising Credit Group, New York Media Credit Association
New York, New York

November 13-16

Commercial Law League of America
New York, New York

December 6

Szabo Holiday Party
Atlanta, Georgia

contract, invoices, statements, affidavits of performance, tear sheets, all correspondence with the customer, the sales representative's notes, and collection notes. In this way, the documentation not only details the transaction but also shows the nature of the business relationship and pattern of business dealings.

Be Responsive and Available

Being fully prepared does not end with the up-front work of obtaining information about the customer and providing complete documentation to the attorney. Throughout the claim and litigation process, the attorney may need to communicate with the party bringing the suit to obtain supplemental

—continued on page 4



"ABOUT THAT 'FEASIBILITY STUDY ON COUNTERCLAIMS'... I'M GOING TO THE DRESS COUNTER AT THE DEPARTMENT STORE, CLAIMING I NEVER WORE THIS, TO SEE WHAT I CAN COLLECT."

Want to Sue? —

—continued from page 3

documentation or information, for time-sensitive decisions, and for personal participation in required activities. This means that the creditor must ensure that the appropriate personnel be responsive and available as needed. For example, as the attorney reviews the documentation, there will quite possibly be the need for explanation and clarification. Additional documentation may need to be developed. As part of Discovery, documents may be demanded and personnel may be deposed by opposing counsel. At trial, the court will not permit documenta-

tion to be presented by a third party, so this presentation must be done by the plaintiff, and the plaintiff's representative must be a knowledgeable and credible source. If the resources are not available when needed, the strength of the documentation or testimony may be compromised.

A lawsuit can be both complex and demanding. However, having a solid understanding of the litigation process can enable the creditor to be adequately prepared throughout. By knowing the customer well, the creditor assists the attorney to develop the most effective strategy and approach with the debtor. By providing complete and accurate documentation, the

creditor makes the strongest possible claim and case, and possibly accelerates a resolution. And by being available and responsive as needed, the creditor keeps the process moving forward. ♦

The Litigation Department of Szabo Associates, Inc. assists our clients with all aspects of the litigation process. We know that suing a debtor is never pleasant; however, we do all that we can to make the process as painless as possible. Timely response by our clients to requests for documentation contributes to a more positive experience and increases the prospects of success!



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