Settling With Contentious Debtors Who May Have Little Or No Assets (With Sample Agreed Order)

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Collection litigation can be expensive and time-consuming. In many cases, agreed judgments are attractive to both debtors and creditors.

IN REPRESENTING CREDITORS, a creative agreed judgment can be an incentive to settle a case, especially those cases in which a debtor is contentious or has little or no assets. In collection cases, courtesy to debtor (or debtor's counsel) and a steady march to the courthouse door without delay is most productive. This article deals with commercial debt collection against makers, guarantors, and co-debtors and thus will not have to address the consumer protections acts.

1. Write Attorney Letters

Normally as creditor's counsel, your client has made efforts over many months to collect a debt before turning it over to you. Most situations lend themselves to the writing of two letters. The first is the standard "attorney letter" which advises debtors that you have been retained by the creditor and to please contact your client by a date certain or you will have to take steps to "protect your client's interests" (which is recognized code for the filing of a lawsuit). A number of debtors respond to these letters, but seasoned delinquent debtors are used to receiving telephone calls or collection letters and likely will not respond by the date requested.

It is productive to follow up immediately after the deadline with a letter and a draft complaint advising the debtor that she has not responded and that you will be filing the attached complaint on a date certain unless debtor makes arrangements with the client to pay. Not surprisingly, a copy of a draft complaint receives much more attention from recalcitrant debtors because, for the first time, they feel that they are involved in litigation. If the debtors do not respond by the date certain, it is unproductive to send further letters; suit should be filed the next day with a courtesy copy sent the debtor. The debtor then knows that he or she has been sued and often there will be some response from the debtor or his or her attorney. The advantage of sending a courtesy copy is that it sometimes takes weeks to obtain service on all defendants and it also helps to let a debtor know that you are true to your word.

2. Lender Liability And Pro Se Defendants

At this point, negotiations may start and answers may be filed as well as counterclaims. Always take a counterclaim seriously because it usually takes the form of a "lender liability" counterclaim. Consider your judge, jury and case law in the jurisdiction when advising your client.

Generally, do not be concerned with defenses or counterclaims raising consumer protection acts, abuse of process, or malicious prosecution. These are often filed by attorneys who do not deal in commercial litigation. Unless there is something woefully wrong with your claim, your client is owed a debt which is unpaid and is entitled to collect that debt, subject to any valid defenses.

Often you must deal with pro se individual defendants. Treat them as advised by your local ethics rules. It is helpful to have at least one letter to a pro se defendant recommending that he/she seek counsel, but also stating that if she chooses not to do so, you may deal with her directly. If she sends you a letter which contests the complaint or explains the situation, forward a copy of the letter to the court and tell the court you will treat the letter as a responsive pleading by the pro se defendant. If there appear to be counterclaims in the letter and not merely defenses, file an appropriate response, however informally the counterclaims may have been raised.

3. Mediation Is Good

In this day and age, mediation is more and more common. Frankly, this helps the creditor when the debtor is contentious, has few assets, or both. Mediation provides an inexpensive forum for the debtor to vent — and often that it is all the debtor wants to do. A skilled mediator will allow a debtor to do so and a smart client will be as sympathetic as possible under the circumstances, in hopes that the parties can agree on a disposition.

Mediation fees are commonly split between the parties. Many debtors, especially ones who do not want to pay for counsel, would rather avoid mediation fees. The mere arrangement for mediation on a date certain often has a way of encouraging debtors to compromise.

4. Let The Debtor Save Face

In many cases, especially those in which you have a contentious debtor or a debtor with few or no assets, an agreed compromise judgment is better than one for a large amount that is unlikely to be collected and can be "bankrupted." It can be helpful to put yourself in the debtor's shoes by explaining that you know of her financial difficulties and also know that even with an agreed judgment the debtor has the ability to "bankrupt" the judgment. If the debtor is starting to talk to you about an agreed judgment, likely she prefers not to file for bankruptcy protection; otherwise the debtor would not waste her time negotiating.

5. Let Actions Do The Talking

Be courteous to the debtor. As my senior law partner told me when I started practicing law, "Courtesy doesn't cost anything." In most cases, polite behavior by collection counsel will facilitate an agreed judgment. Conversely, hardball tactics and inflammatory language can rile debtors who would otherwise prefer to settle and such tactics are not appreciated by the courts or mediators.

Some jurisdictions have efficient ways of obtaining judgments by advance confession. As of this writing, most do not. For instance, Ohio allows for confessed judgments (judgments on a cognovit note) in advance of a default, giving the creditor the power to obtain a judgment after default without any input from debtor. *See Milstein v. Northeast Ohio Harness,* 507 N.E. 459 (Ohio Ct. App.. 1986). In West Virginia and many other states, this practice is not allowed, frowned upon, or diluted by case law and legislation. Thus, confessed judgments are not an option for most creditors' counsel. However, judges are happy to clear dockets by entry of an agreed judgment order after a case is commenced.

6. Provide Creative Incentives

An agreed judgment for the full amount of the prayer for relief is rare; there is no incentive for the debtor to sign off on a judgment giving the creditor everything it seeks. Indeed, if the debtor seems very willing, this may indicate she is "judgment proof." The creditor normally will need to provide some incentive for the debtor to settle. The following are some alternatives and a sample order with a compromise solution.

For the debtor who does not want her name in the paper or the stigma of a judgment, one may provide for an agreed judgment and have a side agreement that the creditor will not cause entry of the order if the debt is paid or paid at a discount by a date certain. The downside of this approach is that intervening creditors may obtain judgments and take priority in post-judgment collection if your debtor does not pay.

A preferred method is to agree upon a judgment that can be entered and filed for lien purposes, but in which you agree, either in the order or by side agreement, that the creditor will release the judgment upon certain conditions. For instance, you may compromise a $100,000 debt by having debtor agree on a judgment of $25,000, but you will agree not take collection action, other than filing the judgment for lien purposes, if debtor pays the creditor $10,000 within 24 months. (See the Sample Order at the end of this article.) This allows the debtor time to find money to buy out a larger judgment. Also, it feels less painful for the debtor to agree upon a judgment that will not be collected immediately. Even if the debtor cannot make the payment, in most jurisdictions your lien will attach to real property in the county in which the judgment is recorded. A debtor may later find that when she wants to refinance her mortgage loan, she will need to take care of the judgment lien.

Another alternative is to agree to have the debtor pay you a small immediate payment, such as $5,000, and you will dismiss the lawsuit as being settled and compromised. This allows the debtor to save face and there are no judgments published or recorded.

Sometimes you have to be very creative when it is clear that the debtor has little money or income. In the most extreme case, one might take a judgment for a larger amount of money, but have a side agreement with the debtor that the creditor may file a copy of judgment for lien purposes but will not execute on the judgment unless there is a "material positive change" in the net worth or income of the debtor. It is of course preferable to define materiality, but sometimes you do not have that luxury. At least the creditor has a judgment. If the debtor is later back on her feet, either by inher-

ited money, new job, or success in business, then the creditor has the option of revisiting collection.

CONCLUSION • Again, the most effective way to collect is to be courteous but demonstrate that you will be taking steps to collect at trial if the matter is not resolved. The vast majority of contested collection cases end up resolved short of a court-ordered judgment.

APPENDIX

Sample Agreed Order Judgment for Settlement

[Caption]

AGREED JUDGMENT ORDER

On the 31st day of December, 2010 came the Plaintiff Jones Banking & Trust Company by counsel, John Smith, and also came Defendants John Doe and Jane Doe by counsel, George Black, whereupon counsel represented to the Court that an Agreement had been reached upon all matters pending in the above styled civil action.

Based upon the representations of counsel and the Court believing it proper to so do, it is hereby ORDERED as follows:

Plaintiff shall have judgment against the Defendants in the sum of Twenty-five Thousand and no/100ths ($25,000.00) Dollars, which said judgment shall accrue post judgment interest at the statutory rate as permitted by West Virginia law.

Plaintiff shall be entitled to record an Abstract of Judgment in the Office of the Clerk of the County Commission of Smith County, West Virginia, or in any other locality, county or state in which Plaintiff hereafter acquires or may acquire any ownership interest in real property situate therein.

A stay of execution of any and all other post judgment enforcement proceedings shall be in effect from the date of entry of this Order until and through December 31, 2012. During said period, Plaintiff shall not be entitled to execute upon said Judgment or otherwise initiate any post judgment enforcement proceedings as would otherwise be permitted by West Virginia law.

Defendants may, at any time on or before December 31, 2012, pay to Plaintiff the discounted sum of Ten Thousand and no/100ths ($10,000.00) Dollars, upon receipt of which Plaintiff agrees to release the Judgment herein granted.

In the event the Defendants have not paid the discounted amount as permitted in paragraph 4 above, then from and after January 1, 2013, Plaintiff shall be entitled to pursue any post-judgment enforcement proceedings permitted by West Virginia law or the law of any jurisdiction where the judgment is of record.

It is further ORDERED that the above styled matter be and is hereby dismissed from the docket of this Court, with prejudice.

ENTERED this 31st day of December, 2010:

_____

JUDGE

Agreed to by:

_____

Counsel for Plaintiff

_____

Counsel for Defendants