

www.kmkcollections.com

**Washington Building  
Barnabas Business Center  
4650 N. Port Washington Road  
Milwaukee, WI 53212  
Telephone: 414-962-5110  
Facsimile: 414-962-8725**

## **"GOING FOR THE JUGULAR"** The Use of Summary Judgment in a Contested Collection Matter

**By Jordan B. Reich and Steve Kailas of Kohner Mann & Kailas, S.C.**

Most creditors are justifiably frustrated by the delay occasioned in the litigation process. In a commercial collection suit, such delays are not only frustrating but, more importantly, otter the debtor the delay which often results, in materially reduced prospects for collection. Too much delay can result in a judgment rendered too late, and when the debtor may be out of business or the debt otherwise uncollectible.

To minimize this tragic result, the creditors attorney must move aggressively to procure the earliest judgment possible, and "go for the jugular", as the saying goes.

The answer to a quick and early judgment can be found in both state and federal civil procedure. The available vehicle is the motion for summary judgment. This article will briefly discuss: what a motion for a judgment is; when it should be used; when it will be granted; and, finally, what steps the creditor can and should take to prepare for summary judgment even prior to placement of the account for collection.

The motion for summary judgment is a written motion made to the court in an attempt to eliminate groundless issues and cut through" the debtors dilatory tactics to avoid the delay and expense of a full-scale trial. The motion simply implores the court to grant the creditor an immediate judgment based upon the creditors pleas to the judge that there is no material dispute as to the issues of fact or law involved in the controversy between the parties, and that the creditor's money claim, as asserted against the debtor, is in fact owed by the debtor to the creditor. In essence, the creditor must put before the judge (prior to the actual trial) sufficiently clear, convincing and incontrovertible facts to induce the judge to believe that immediate judgment for the creditor is in order, without the protection to the debtor of a full-scale trial.

*"[A] thoroughly prepared motion for summary judgment is the type of aggressive and pro-active activity that will result in successful collection against the most difficult of debtors."*

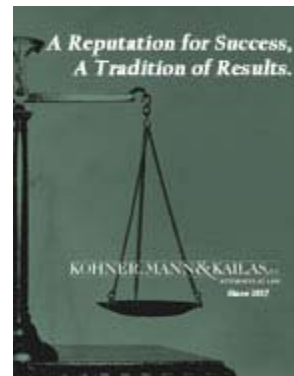
Over the years, the types of action in which summary judgment can be obtained has substantially increased. Intelligent use of both statutory law and case law interpretation can often result in the commercial or business lawsuit being resolved through the summary judgment process. The typical defense to a commercial collection action generally asserts defenses that: 1) the debtor did not order the goods; 2) the debtor did order the goods the debtor did not receive them; and 3) if the debtor did receive the goods they were sent back or were defective. Another defense is often alleged by the debtors counsel, generally disputing the amount claimed as due and owing. The debtor's attorney may claim that payments were made by the debtor that have not been properly credited by creditor, or that the debtor is entitled to certain specific credits that were not provided

to the debtor. Summary judgment is often used to expose and nullify such defenses in the event they can be disproved summarily and before actual trial.

Whether a motion for summary judgment should be made by the creditors counsel depends on the factual scenario which counsel can marshal to support such motion. It becomes critical that, prior to the placement of the claim, the creditor be prepared to provide a full and complete record of its transactions with the debtor. It is obvious that there must be an accurate statement of account provided by the creditor, showing all debits and credits in the transactions between the parties. Accurate invoices should also be provided to evidence and describe what goods were sold or what services were provided to the debtor. Both the statement of account and invoices should show precisely the amount due and owing, the basis for the amount due and owing and any credits that have in fact been given. In addition, proof of delivery of the goods sold or services provided should be chronicled and the supporting documents gathered. Any written and verbal contact with the debtor, its employees or agents should be documented, and if this establishes any admissions of the debt owing, this should be clearly set forth and provided by the creditor to its attorney for appropriate future reference. All of this evidence, proof and documentation should be provided to creditors counsel at the earliest possible date--preferably at the time of the placing of the account for collection.

In addition to the stated support for creditor's claim, it is imperative that the people in the sales, credit and collection departments of creditor who have had contact with the debtor be made accessible provided to the creditor's attorney. Also, a brief synopsis of their knowledge and the basis of their knowledge should be provided. Again, *it is extremely helpful to provide this information to creditor's counsel at the time of the placement of the delinquent account for collection.* Not only does this provide creditors counsel with the fullest support for the claim but it also provides fuel for discovery and ultimately the motion for summary judgment. The judge must be convinced of the creditor's position. This is the very type of evidence that will convince the court to award the creditor with a summary judgment.

Assuming that the suit has been commenced and the debtor has put in a responsive pleading raising a defense to the creditor's claim, the issue is then presented as to when the motion for summary judgment should be presented to the court. Given the fact that the motion for summary judgment is in a sense a "mini-trial, and the fact that the making of the motion will provide the other side with detailed knowledge of the creditor's case (thus allowing debtor to better prepare its defense in the event of the ultimate trial), it is recommended that some early discovery to define the debtor's specific claims be undertaken prior to presentation of the summary judgment motion.



Effective and diligent early discovery practice on behalf of the creditor will often expose the fact that the claims and/or defenses of the debtor can be defeated by summary judgment. At a minimum, creditor's counsel should compile a series of written interrogatories and a request for production of documents to be served upon the debtor. In a more complicated matter, in addition to these, it may be necessary to conduct a deposition of the debtor or the debtor's pertinent officers or employees. With thorough preparation by the creditor of its documents, its witnesses, and with the addition of reasonable discovery, creditor's counsel should then be in a position to consider whether to assert the motion for summary judgment before the court in an attempt to procure an early judgment.

A motion will be made asking the court to grant the creditor judgment on its complaint on the basis that there are no substantial material issues of fact or law, which must be decided at the trial. Supporting the motion will be the affidavits from creditor's sales, credit and/or collection people detailing the facts of the transaction or transactions between the parties which give rise to the creditor's claim. The documentary evidence showing the pertinent purchases, delivery and accounting, will be attached to the appropriate representative's affidavit. If there have been any admissions or other evidence of liability of the debt, whether the creditor's internal notes or written

letters received from the debtor, all of these will be presented through affidavits. Finally, in support of the motion, any and all successful discovery results and admissions against interest, which may have been procured thereby, will also be shared with and put before the court.

In response, the debtor will have to provide both the factual and documentary basis for its claims of defense and must establish before the court what material issue of fact or law it claims exists, which may require a full-scale trial. Legally, the debtor cannot simply rest on its responsive pleading and allege to the court that a material issue of fact or law exists. The debtor must affirmatively present evidence that adheres to the rules of evidence to support its position that a full-scale trial is necessary, in spite of the delay and expense thereof. Typically, once the motion has been made and all of the supporting items that have been presented by both the creditor and debtor have been assembled before the court, a decision will be made by the court with or without oral argument of the attorneys, and as may be directed by the court.



Whether or not there is a substantial material issue of fact or law that will require a full-scale trial will be decided by the court. If the creditor, prior to the placement of the claim for collection, has thoroughly prepared its file in cooperation with its attorney, the decision of the court is often favorable to the creditor. If the decision is favorable to the creditor, time, effort and money have been saved. In addition, the "debtor's day of reckoning" has been greatly accelerated, and as a result, the likelihood of collecting the monies owed the creditor on the judgment significantly increased. It can often mean the difference between collection of the judgment and complete uncollectibility of the creditor's claim.

The issue of summary judgment should be discussed at the earliest possible date with the creditor's counsel. Thorough preparation by the creditor and aggressive action by the creditor's counsel in using a well-timed and a thoroughly prepared motion for summary judgment is the type of aggressive and pro-active activity that will result in successful collection against the most difficult of debtors. "Going for the jugular" with a summary judgment motion will force the debtor to submission while the prospects of collection are still excellent, or at least very good.

### ***About KMK Collections***

KMK Collections is a division of **Kohner, Mann & Kailas, S.C.**, a law firm founded in 1937 as a result of a conviction that businesses deserved more aggressive and cost-effective advocacy for their interests and contractual rights. Over 70 years as leaders in debt liquidation and commercial law, Kohner, Mann & Kailas, S.C. and KMK Collections have earned an industry-wide reputation. Each year we handle many thousands of commercial contract and collection matters for the liquidation of commercial debt and recovery of goods and services provided, delivering the consistently exemplary results that our American and international clientele has come to rely upon and expect of us. **Kohner, Mann & Kailas, S.C.**, is a business law firm listed in Martindale-Hubbell's Bar Register of Preeminent Lawyers that provides exemplary legal service in all areas of law encountered by businesses in the normal course of their operations and growth.

[www.kmkcollections.com](http://www.kmkcollections.com)