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Off the Books and Into the Bank—Through Teamwork

Your customer has “gone bad”, having failed to pay pursuant to terms, or giving an “NSF” check or disputing the balance. The decision has been made to turn the account over for collection. What can the credit executive do to aid the attorney and assist in the collection process?

The most effective collection relationship exists when the credit executive and the attorney or collector assist each other. Most credit executives make the mistake that, when they “turn over” a delinquent account, they no longer involve themselves in the collection process. The credit executive with his or her knowledge of the sale and of the customer is the most valuable source that a collection attorney can use to resolve and collect an account.

At the time of placing the claim for collection, the *credit executive must turn over complete information*. The attorneys should be provided with all pertinent documentation and information, including: the current statement of account; the debtor’s current name, address, phone number; and current invoices. Additionally, the credit executive most likely has other documentation that would be of assistance, consisting of: general correspondence admitting the debt between the debtor and creditor; correspondence regarding any disputes of payment problems; copies of previous payment checks; and, most importantly, a credit application or personal guaranty. By having full documentation at the outset of placement, the attorney will be able to determine and conclude whether the claim falls under “consumer” collection rules; the proper defendant business entity (corporation, individual, etc.); and the full, correct balance owing (including interest and attorneys’ fees).

*“often hours
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total loss”*

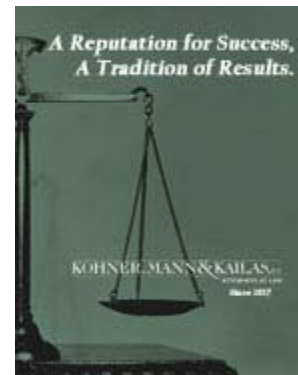
In addition, the attorney will have the current information concerning the correct location of the debtor; phone and fax numbers, etc., without having to waste valuable time tracking these down or bothering the credit executive for it later (losing more of the creditor’s valuable time) and reducing collection prospects in the interim. We have helped many creditor clients formulate excellent state-of-the-art credit applications and personal guarantees to collect this “needed” and invaluable information, and we can assure you that our experience is that this type of documentation is the best and most efficient tool to collect the claim. Creditors tell us this is the easiest way for the creditor to provide this data and information to the attorney.

What to do in case of a dispute

When a claim is ready to be placed for collection and there is a dispute, generally this dispute has already been made known to the credit executive. If this be the case, there are two further steps that should be taken prior to placement: 1) When the claim is placed, there should be an acknowledgment that there is a dispute and brief narration of the debtor's dispute; 2) The collection attorney needs creditor's response to this dispute (a brief narration of the facts and information available and necessary to refute the debtor's allegations). By having this information at the start, the attorney can save time and immediately and intelligently "zero in" on the dispute with the debtor at the onset and work out an amicable resolution. Alternatively, the attorney can quickly put the debtor on notice that debtor has no basis in law for withholding payment. If there is a problem with the product or service provided, the attorney would be provided the tools available to correct or solve the problem and be able to quickly work out payment by mutual agreement. In the event the debtor has the ability to bring a separate action or counterclaim for damages against creditor (aside from the collection claim), the attorney may be able to avoid expensive subsequent litigation as to the counterclaim by providing a resolution that considers settlement of the counterclaim to client's benefit, at the same time that the collection aspects are considered. Often, in the past, we have been able to save our clients many thousands of dollars by avoiding and settling out such expensive litigation and controversies by handling them "early" in the game.

Place claims in a timely manner

Finally, and by far the most important element: a client may have the best documentation available by way of credit application and invoices, but if a claim is not placed in a timely manner, the claim may end up as partially or completely uncollectible should the debtor be going out of business or in some fashion has dissipated its available assets. In a commercial collection matter, delays of payment by a customer (especially a customer who has never been late in the past) are usually evidence that the debtor itself is experiencing financial difficulties. Any delay often provides adequate time for a debtor company to liquidate its assets, or otherwise dissipate its assets, or go bankrupt, leaving creditor without payment. Such delay often causes the loss of very valuable reclamation rights or mechanic's lien rights of the creditor and increases the likelihood of claims for return of preferential payments under the U.S. Bankruptcy Code more prevalent. It is best to err for "earlier" placement for collection rather than "later" placement. The degree of "loss" will be much more "controlled". It is better to be paid "now" rather than "later". Usually 60 to 90 days is plenty of time to recognize and investigate the problem and place the claim for collection if the "delay and excuses" suggest debtor's inability or unwillingness to pay, or some more serious difficulty such as fraud.



To minimize potentially devastating results, the credit executive should have strict company guidelines as to "slow pays". In the commercial collection industry, days, and *often hours*, can mean the difference between full collection and a total loss. If the credit executive turns a claim over in a timely manner, the experienced commercial collection attorney can obtain payment as quickly as the law provides. If the collection is early enough (more than 90 days prior to a bankruptcy filing), the payment will be "outside" the bankruptcy preference period, and creditor may retain the funds free from preference attack. A 1992 U.S. Supreme Court case involved a creditor that had to return a payment of \$157,149.22 because it was deemed a preferential payment under the U.S. Bankruptcy Code because of a one-day delay (Barnhill v. Johnson, U.S. Supreme Court, Case No. 91-159).

Summary

For the best results, the credit executive and attorney must work as a team when working together to collect a delinquent account. To protect collection the credit executive must submit an account for collection in a timely manner and should include all pertinent documentation, correspondence and information that can aid the attorney. By providing this data and information "up front", and with timely placement, the attorney can ensure the resolution of the collection quickly and successfully, and with a minimum of delay and expense of litigation.

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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.