

RIEMER REPORTING SERVICES

I WANT MY MONEY!!! - CASHING IN RECEIVABLES THROUGH COLLECTIONS AND LITIGATION

PRESENTED BY

WILLIAM B. CREIM

Courtyard Philadelphia Downtown
21 North Juniper Street
Philadelphia, PA 19107

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William B. Creim
CREIM, MACIAS, KOENIG & FREY LLP
24722 Avignon Drive
Valencia, California 91355
Telephone: (818) 416-8915
wcreim@cmkllp.com

INFORMATION ABOUT THE SPEAKERS

Bill Creim is a partner in the law firm of Creim Macias Koenig & Frey LLP. He practices in the areas of secured transactions, creditor-debtor workouts, negotiations, bankruptcy and antitrust. Bill specializes in representing suppliers, distributors, manufacturers, and credit associations throughout the country. A frequent speaker to several credit industry groups, he has presented over 500 seminars emphasizing practical legal and business issues to trade groups and individual companies, and has had several articles published on UCC law, secured transactions, and bankruptcy. Bill received his undergraduate degree summa cum laude with highest departmental honors from U.C.L.A. where he was elected to Phi Beta Kappa membership, and his legal degree from the University of Southern California where he served on the editorial board of the Law Review and received Order of the Coif honors. He was named one of the “50 Most Influential People in Credit” by Credit Today.

WHY DO THE COSTS GET OUT OF CONTROL?

1. Failure to analyze cost effectiveness
2. Inadequate records and missing personnel
3. Poor asset search or analysis
4. Ignoring counter-claim problems
5. Failure to do preference analysis

CHECKLIST FOR GETTING THE MOST BANG FOR YOUR BUCK---

THINGS TO DO BEFORE YOU CALL YOUR ATTORNEY



INTERNAL REVIEW

- Review your company's credit files, sales files, correspondence and reports
- Review other facts; if appropriate, interview the sales people responsible for the account
- Identify unusual problems, e.g., disputes, accounting or credit issues, counterclaims
- Make a broad analysis of the likelihood of collection

ASSEMBLE THE FACTS AND DOCUMENTS

- Names and addresses of all debtors and guarantors
- Identify any collateral in which your company has a security interest, deed of trust, etc., and possible locations
- Identify debtor's and guarantor's other assets. Are any of these assets free and clear of other liens, security interests, etc.?
- Approximate value of collateral and other assets
- How much is owed?
- Collect all relevant original documents
- Run a statement of account
- Review all payments made by the debtor to your company and to other companies within the preference period if debtor were to file or be placed immediately in a bankruptcy
- Are any goods in transit, or were any goods shipped within the last ten days; the last three months?
- Prepare a brief summary of the situation

CALL THE ATTORNEY AND COVER THE ABOVE ITEMS:

- Identify your short and long term goals and problems (e.g., is a replevin action appropriate, should a reclamation letter be sent?)
- Be sure to mention any possible counterclaims, setoffs, defenses, etc.
- Your analysis of the account and any suggestions (e.g., prejudgment attachment or replevin).
- Ask for an estimate of time, costs and fees.
- Discuss who else should be kept “in the loop” and copied on correspondence, pleadings, etc.
- Will you require monthly status reports or other progress reports?

HANDLING COLLECTION LITIGATION
STARTS WITH UNDERSTANDING WHO MAY
BE LIABLE



IDENTIFY POTENTIAL SOURCES OF COLLECTION

Corporations

- Shareholders – individual or corporate (alter ego)
 - Allows creditor to sue where no contractual relationship with the target defendant
 - Elements
 - Domination or control (unity of interest), or
 - Wholly inadequate capitalization, and
 - Fraud or injustice unless corporate form disregarded
- Successor Corporations
 - Same shareholders and directors
 - Transfer of assets
 - Nonpayment of prior corporation's debts
 - Same business

PARTNERSHIPS

- Must name individual partners to reach all assets
- Partner by estoppel
 - Consent to representation as a partner
 - Credit given in reliance on representation

RELATED PARTIES

- Guarantors
- Co-borrowers
- Joint Venturers
- Successor business (bulk sales)
- Other creditors who exercise control



ANALYZE CHANCES OF SUCCESSFUL COLLECTION

- Collectability
 - Availability and sufficiency of security
 - Asset and UCC search
 - Review of debtor's current financial status
 - Effect of other creditors' legal actions
 - Analyze possible defenses to creditor's claim (credits, guaranty, antitrust, tort claims, harassment, threats of criminal prosecution)
- Likelihood and Effects of Bankruptcy
 - Automatic Stay
 - Preferences

REVIEW WORKOUT POSSIBILITY

- Final demand by creditor with attorney
- Workout to improve creditor's legal position
 - Secured (cure any defects in documents, UCC filings, or recordation, increase the amount of security, add additional guarantees, self-help)
 - Unsecured (obtain security and guarantees, judgment pursuant to stipulation, confession of judgment [beware state law procedures and due process problems], self help)
 - Secured and unsecured debt (reduce indebtedness to written agreement to minimize offsets, defenses, but beware of loss of purchase money priority due to the transformation rule when open account obligations are transferred to a promissory note)

BEGINNING LITIGATION

- Appropriate lawsuit
 - Breach of contract/common counts vs. Conversation, fraud, fraudulent conveyance
- Name all parties, list all trade names, bank accounts, business license in trade name
- Proper court
 - State
 - Federal
 - Jurisdiction
 - Venue



PRE-JUDGMENT REMEDIES

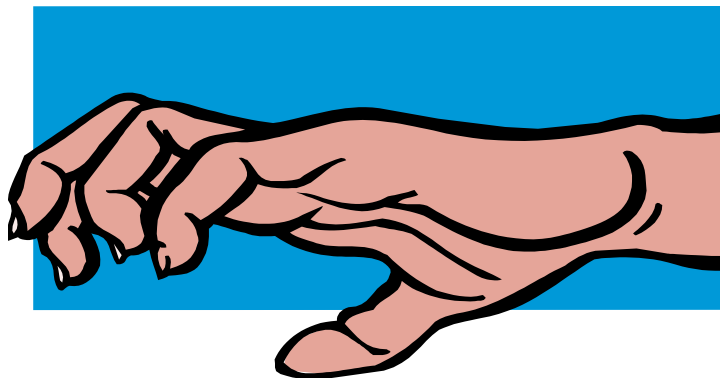
- Theory – secure the ultimate Judgment today
 - Preserve collateral
 - Obtain a lien not voidable after 90 days
- Practical uses
 - Settlement
 - Prevents protracted litigation and additional expense



ATTACHMENT

- Elements
 - Commercial Contract
 - Readily ascertainable amount
 - Probable validity of claim
 - Unsecured
- Elements
 - Fraud
 - Conversion
 - Hiding assets
 - Fleeing debtor
 - Debtor avoiding service
 - Non-Resident debtor
- Location/types of assets
 - Deposit accounts
 - Inventory
 - Equipment and motor vehicles
 - Accounts receivable
 - Real property
 - Other tangible personal property

- Proof by affidavits or declarations;
 - Mini trial on paper
 - Important role of well kept business documents
- Levy
 - Possession
 - Keeper – expense
 - Resulting storage by authorities pending judgment
 - Financial institutions
 - Third parties
 - Timing
 - Noticed hearing (5-30 days)
 - Ex parte application – “Great or irreparable injury”
 - Bulk sales notice recorded
 - Assets being concealed, impaired in value, or otherwise made unavailable to levy
 - Temporary protective order pending noticed hearing issued as an alternative – binds only debtor after personal service



REPLEVIN (CLAIM AND DELIVERY)

- Elements
 - Right to immediate possession – UCC – 1
 - Lists of specific personal property
- Need to know specific location of the collateral
- Proof by affidavits or declarations
- Documentary evidence necessary
- Necessity of demand
- Bond requirements
- Turnover Orders (directed to defendant)
 - Used for property that cannot be located
 - Can reach property in other states
 - Avoids expense of levy
 - Enforced by contempt
- Timing
 - Noticed hearing (5-30 days)
 - Ex Parte Applications
 - Collateral in immediate danger of being transferred, concealed, or impaired in value
 - Temporary Restraining Order pending noticed hearing issues as an alternative – binds only debtor after personal service
 - May be issued without notice in extreme circumstances
- Levy (Expense)

KEEP LITIGATION COST-EFFECTIVE

- Discovery
 - Purpose
 - Preparation for trial
 - Settlement
 - Types and timing
 - Depositions
 - Interrogatories
 - Requests for admission
 - Production of documents
 - Effect of discovery of creditor's files

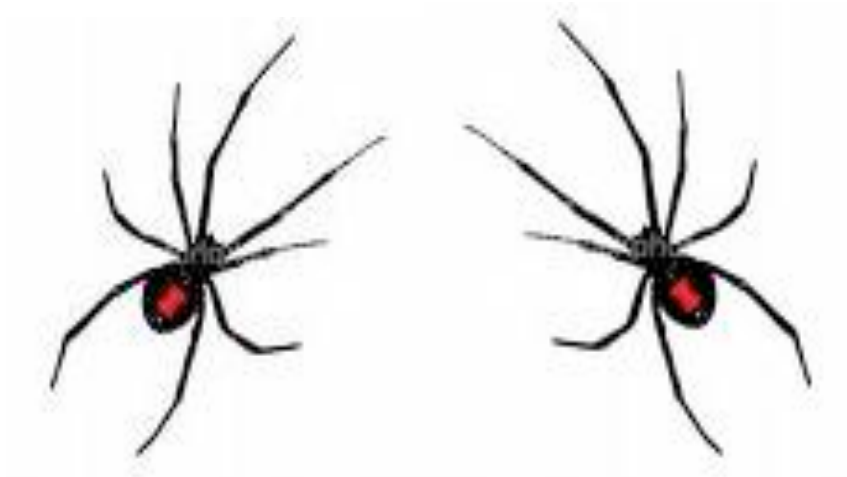


WARNING!!!

The EMAIL of the Species Is Deadlier than the MAIL

Most experts estimate that more than 90% of all legal evidence now resides in computer systems, rather than on paper.

Most than 14% of workplace e-mail is subpoenaed in lawsuits (according to Nancy Flynn, executive director at the ePolicy Institute in Columbus, Ohio.)



SETTLEMENT BEFORE TRIAL

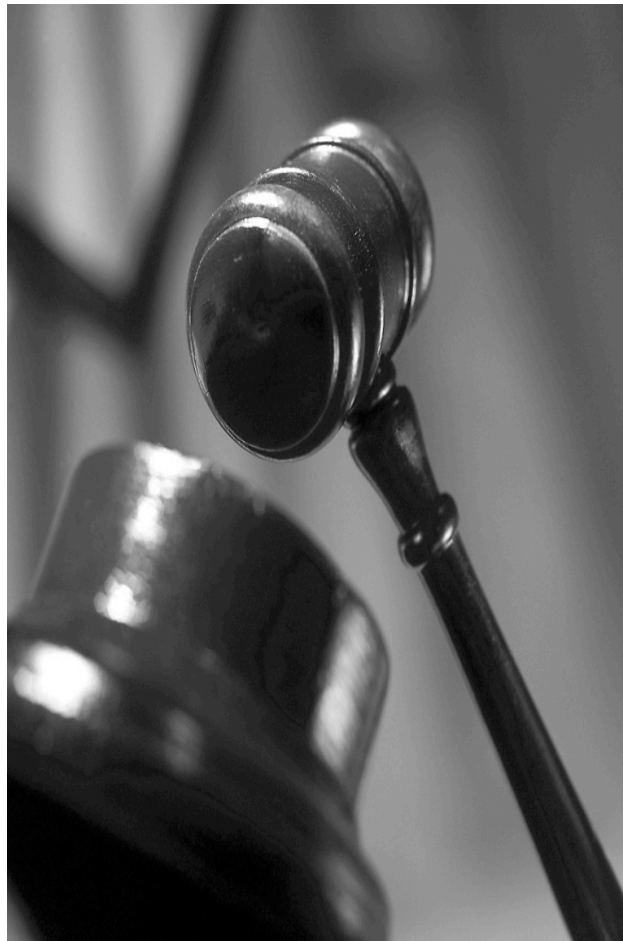
- Settlement agreements
 - Make compromise contingent upon settlement being paid in full
 - Security, attorney's fees, and interest
- Benefits and dangers of accepting an conditional settlements. promissory notes
 - Requires future litigation to collect on a promissory note or notes
 - Retain court jurisdiction over settlement
- ADR & Settlement conferences pursuant to court order
 - Timing (eve of trial)
 - What to expect from Mediation
 - Role of creditor

JUDGMENTS

- Default judgment
 - Timing (may apply to court after time to answer has elapsed)
 - Relief only as prayed in complaint
- Summary judgment
 - Timing (hold at beginning and end of case)
 - Limitations
 - Relief only as prayed in complaint (generally)
 - No issue as to a “material” fact

TRIAL

- Preparation
- Court calendars
- Witnesses
- Original documents



ALL OUT LITIGATION: WHEN TO DO IT?

- Mark a statement to your dealer or customer network
- Large dollars to collect
- Solvent parties

