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IN THIS ISSUE

ARTICLES

OCTOBER/NOVEMBER/DECEMBER 2024 | VOL 38 / ISSUE 4

LEAGUE VIEWS

INDUSTRY INFORMATION

BOARD OF ASSOCIATE EDITORS

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FROM THE 2024-2025 PRESIDENT

DEAR LAW LEAGUE FAMILY

It is a great honor to be the president of the Law League this year. Being the League President brings with it a great responsibility along with many benefits.

First, I have been honored to be in this position. I have attended both the National Conference of Bankruptcy Judges (NCBJ) conference and the Western Region conference so far and both have been amazing. At the time of writing this, I am looking forward to attending the Eastern Region conference. At each of the conferences, the League is viewed with admiration and respect. I had never attended the NCBJ conference as a League member. I can tell you that our luncheon program is outstanding. The speakers were inspiring. The program was well coordinated. I had the honor of sitting next to three Federal 9th circuit court of appeals judges. The Western Region conference in Palm Springs was also well done. What a fun and interesting event.

As League president, I have realized the importance of keeping up the legacy of the Law League. This organization has been around for over 100 years. It is an important group to our industry and needs to stay around for at least 100 more years. Some of the accomplishments so far this year include the launch of a list serve to benefit League members. In addition, we are adding some additional bills to present at hill day this year. You will also not want to miss the Southern Region conference which is to be held in New Orleans on February 14-16th, 2025.

Finally, I have to say, the camaraderie of the League has been one of the best benefits to being President. I have gotten to know so many League members that I did not know well before. As many of you know, my town, Tampa got hit hard with both hurricane Helene and Milton this year. The number of League members that reached out to me to ask how we were doing was so nice. Members from all over the country offered to help in any way they could. It is that kind of friendship and closeness that makes the League different. We made it through both storms but the piles of debris still line our streets. In no time the debris will be gone and we will move forward stronger than ever. And we will likely have a new baseball stadium sooner rather than later. As with everything, resilience and persistence is the key to success.

With all that is happening every day around us, I hope this finds you well. I also hope you enjoy this edition of the CLW. If you want to be more active in the League, feel free to contact me directly any time. It is only through your activity that the League will thrive and you will see the all the benefits the League can provide. ■

Theodore J. Hamilton
2024-2025 CLLA President
Wetherington Hamilton, P.A.

The CLLA Political Action Committee (PAC) Fund is important to our participation in the political process. The PAC allows us to pool our resources and influence public policy. Political visibility and Congress's support for our profession will continue to be crucial as consumer groups and other special interest express their desires to reform aspects of the law that could be detrimental to your individual practices.

Only CLLA members are allowed to contribute to the CLLA PAC. The donation form has been password protected to follow Federal guidelines. Contact the League office for the password upon member verification.

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"I AM ALTERING THE DEAL. PRAY I DON'T ALTER IT ANY FURTHER"

We represent a commercial leasing company, Trident Leasing, here in Gotham, that leases machine equipment to manufacturers. We have an Engagement Agreement, which sets forth a very simple one-third contingent fee agreement. If we collected $30.00, we would keep $10.00, and remit $20.00 to the client. If we forward the matter to counsel outside of Gotham, that outside counsel typically receives a portion of our contingent fee, for example, twenty percent. But there would be no change to the overall fee, Trident would still pay the one-third. My firm's relationship with James Gordon, the Chief Operating Officer of Trident, was strong. For many years, we collected for Trident, with some matters being settled, some requiring suit, some going through judgment enforcement. But over the years, the relationship was consistent.

Along came one of their customers, the Cloud City Mining Company ("CCMC"), which was located in a galaxy far far away, in Bespin. CCMC was liable for a past due invoice of about $90,000.00. As I am not admitted in Bespin, I needed to bring in an old buddy, old pal, who practices law in there, namely, Lando Calrissian, to file a lawsuit.

After suit, at first, CCMC was reluctant to engage with us, but with Lando's sweet talking, (it works, every time), Lando gained the ear of CCMC's executives. There was really no defense to the action. But their defense was some sales tactics by Trident's local representative. Lando was very effective in negotiating a payment arrangement with the CCMC, after all, Lando was a native to the galaxy. But one thing that CCMC kept insisting on, was negotiating with Lando only, copying my office, but did not want to deal with Trident's representative in Cloud City. It was almost as if this unnamed representative caused fear throughout the galaxy.

Lando worked out all the paperwork, to settle the matter for a lump sum of $78,000.00, and I reached out to Trident to get approval for that amount. James Gordon responded that they approved of the settlement, the same way that Gordon has done for years.

But, as the settlement documents were being finalized, I received an email from Trident's local representative, none other than Darth Vader. Vader first requested that the funds be sent to him for processing. I responded bluntly, that we have never done that before, and that the terms of the Engagement Letter did not provide for that. Vader apparently, wanted to alter the deal.

Then, after the paperwork was signed and sealed, and CCMC remitted the funds to Lando, Vader reached out

again, asking for a letter of apology, that he wanted executed by CCMC. I explained that we already closed the deal, and that a letter of apology was not part of the settlement. Vader wished to alter the deal further.

Lando received the $78,000.00, took his twenty percent, and remit the balance to my office. We confirmed with Gordon that we received the funds, and was about to remit the $52,260.00. Vader struck again. He said that Gordon's approval of $78,000.00 was how much Trident wanted to net. I, of course, explained that first, this was not what Gordon said, and more importantly, that would mean we would have had to collect $103,974, in order for client to net $78K, and that amount was higher than the debt.

Vader then explained, and I quote, "I did not think that your fee was set in stone, and we could negotiate each matter, to get them settled." ■

Timothy Wan, Esq.
Contributing Editor

FROM THE CO-CHAIR

"Are these the shadows of the things that Will be, or are they shadows of things that May be, only?" asked Scrooge.

In recent months, after an almost twenty-year hiatus, I started playing golf again. Playing alone, as I often do (since my siblings have all moved far away and none of my friends are golfers), and spending a fair amount of time in the woods (since I have no idea where the swing I used to have went), I find lots of lost golf balls. I kept finding one brand of ball far more often than all of the others, a brand I had never heard of (the major names of golf balls having changed very little over the two decades I wasn't wandering into the trees in search of mine): Kirkland. I mentioned this to a couple of guys recently. "They're okay balls," was the consensus.

Kirkland golf balls have all the same characteristics as other golf balls – they are the same size, are round and dimpled and fly through the air pretty much in the (mis) direction they are hit. However, there is a reason that you'll not see them on the tee at a professional tournament, or even in the bag of a good amateur. They are "okay" - which is not a standard that golfers who play for money or for pride strive for. What they also are is inexpensive. Which is how they became the most-found ball in the woods – the ball of choice for people who are going to lose a lot of balls.

Costco is not competing with Titleist to be the golf ball used by the very best. They are competing with a handful of other sellers of golf balls that cost less per dozen than the buffalo wings at Pizza Hut. They are providing an adequate product at a discount price to people who are not interested in paying more for better. Which brings us to the daily practice of commercial collections.

Even through the recent decades of low inflation, the price of almost everything has been creeping up. And recently, most prices have done more than creep. Yet during this entire time the rates for commercial collections have been pushed ever downward. The first victim was the trial fee – which had disappeared by the time I started in collections in the late 80's – which was premised on the idea that the agreed 20 or so percent did not adequately compensate attorneys for the time needed to prepare and try a case. The next victim was the non-contingent suit fee, which allowed attorneys to file suit on cases where either liability or collection was uncertain by providing a small fee to take the risk that a couple of years and stacks of paperwork might lead to nothing. After that came the demise of the contingent suit fee itself. The pressure continues, as we are often asked to take a smaller fixed percentage on claims, particularly those with high balances.

The perceived logic of this, that the larger balance will net a large enough recovery to justify the discount in overall fee, is simply incorrect. Experience demonstrates that there is an inverse correlation between the size of the claim and the likelihood of collection and where it might be collected, usually entails significantly more litigation. Also, the fees earned on the larger balances are what pays for all the uncollected cases. (Our colleagues practicing tort law have operated with this model for a century.)

The other downward pressure making the practice that much harder is the drive to hold down the costs – both advanced and approved - as though we were buying yachts with the advanced costs. "What is the minimum cost needed to file the suit?" is far too common a refrain. The filing fee itself may be a relatively fixed cost, but the filing fee is often the least of the expenses in the file once we factor in multiple attempts to serve the debtor or court appearances. Additionally, there is increased push-back against paying costs which the client considers part of our overhead. With the federal mileage reimbursement up to 65.5 cents a mile, any trip beyond the local courthouse will run at least $30. And hiring appearance counsel is often not an option a client will agree to fund either.

My references to "clients" are intentional. The demands that we discount fees or eat genuine costs come from the agencies which place the files, but blaming the agency is simply shooting the messenger. Our agency partners are getting the same squeeze on fees and are being told to find a way to hold down costs. And the message is also "physician heal thyself," because as attorneys we are complicit in our own predicament. Whether the client demanded a reduction or an agency or attorney offered a discount in order to get the business, the driver is the same - clients will choose to pay Kirkland prices. And because there are some attorneys who will provide a minimal service at a minimal cost, we have allowed price to drive the market, letting the clients think that they can play Titleist golf balls while paying Kirkland prices.

The result has been evident for a couple of decades. There has been a significant consolidation among agencies in the drive to find a way to overcome decreasing returns through economies of scale. And there has been a dramatic decrease in the number of attorneys working commercial collections and difficulty in bringing associates into the practice with an eye to continuing the firm. (The attorneys, at least, can try to pursue other areas of law; the agencies don't really have that option.)

The cost of everything in the practice has increased but the fees have not. Many years ago, the industry leaders came together to collectively determine fair compensation – enshrined at that time as the "CLLA rate," with trial fees and suit fees including non-contingent fees. There is no going back to those happy times (if only because basically no one now working can recall when it was the norm), but another summit meeting of that sort is warranted because a change is needed. Continuing this trend is the popular definition of insanity – continuing to do the same thing repeatedly in the belief that the outcome will be different – or practicing the curious

economic theory that we can lose money on every file but make it up in volume.

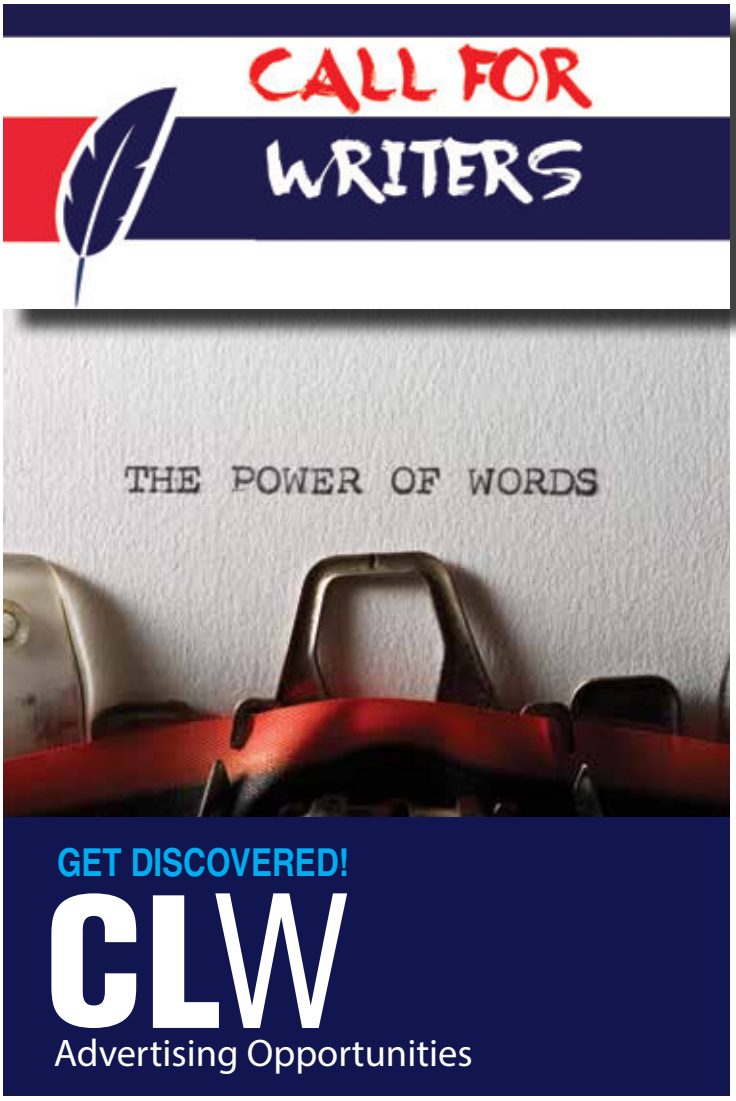
My proposal is two-fold. Proposal one is that clients using the triadic system for collection (often the same companies with general counsel and Big Law outside counsel) should acknowledge and agree that expenses are not overhead and are to be reimbursed fully. In trade for which, collection attorneys agree that expenses charged are the actual expenses, rather than being profit centers (thus distinguishing us from Big Law; have you read the elaborate guidelines created to avoid paying Big Law's markup?). Every expense reduces the margin, which was not that large to begin with. We must remind the clients that the costs are theirs to bear.

The second proposal is to revise the contingency fee structure so that the fees to reflect the amount of work performed to recover the money – a sliding percentage based on how much lawyer time and effort is expended: a low initial percentage on matters collected before suit, an increased fee once suit is filed (bumped up again if a trial is held) and another bump for post-judgment collection. The numbers are clearly negotiable (and cannot be fixed without running afoul of anti-trust law anyway) but we must return to fair compensation for our work. A similar slide-up to agencies for having to hold hands with the attorneys longer on each file is also fair.

As I am now much closer to the end of my time in this industry than the start, this suggestion is not simply to allow me to make my mortgage payment for a few more years, but to help the next generation of attorneys preserve the health of the practice which has allowed me to buy that house (and has brought me the wife who shares it with me). All three legs of the Triad take pride in the fact that we are the pre-eminent practitioners in the field. It is time for clients to again pay for the Titleists we are rather than the Kirklands we have priced ourselves into. ■

Beau Hays
Co-Chair of the Board of Associate Editors

Bean



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CLW

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The Commercial Law League of America and CLW magazine are looking for articles from our membership. We know many of you are subject matter experts in one field or another and we are hoping you will be willing to share your knowledge with your fellow members. ***Our next issue, January/February/March is focused on Technology. Submission deadline: February 14, 2025.*** If you are interested in being a contributing author for CLW, please contact Beau Hays at **beau@hayspotter.com** or Wanda Borges at **wborges@borgeslawllc.com**.

For more information contact us at info@clla.org

VIEWPOINT

As a valued member of the Commercial Law League of America, we are thrilled to announce the launch of a dynamic online community in Q1 2025. This platform will be more than just a digital space; it will serve as a vital resource designed to enhance your professional journey within the legal network. In a time when connection and collaboration are crucial, this online community will be an added benefit to your membership.

Among the most significant benefits that our online community will offer is the opportunity for collaboration and sharing ideas. You'll find a diverse group of professionals who are enthusiastic about sharing their experiences, seeking advice, and exchanging best practices. Imagine facing a unique challenge, with access to a network of peers who will have encountered similar situations and can provide insights and solutions. This collective wisdom will enhance individual success while enriching the entire CLLA membership.

While the value of in-person gatherings for networking cannot be overstated, these events typically occur only a few times a year. The online community allows for a continuation of conversations, ensuring that connections with peers will be maintained year-round. This engagement will foster deeper relationships and cultivate a sense of belonging. Discussions will be participated in, posts will be commented on, and follow-ups with fellow members will be conducted, making it easier to sustain those important connections.

Within the online community, you will have easy access to a wealth of resources. You'll find valuable materials and industry insights tailored to your specific needs at your fingertips. Whether you're looking to enhance your skills, stay updated on current trends, or tackle complex challenges, you can count on the community for support.

We encourage active participation in the online community through a variety of engagement opportunities. From discussion forums to polls and video conferencing, there will be plenty of ways for you to get involved. This flexibility will cater to different styles of engagement, ensuring that everyone has a chance to share their voice. By sharing your experiences and insights, you'll not only contribute to the community but also inspire others to participate.

An engaged online community will serve to amplify the association's voice. When members convene to discuss pressing issues and mobilize around common goals, advocacy for interests will be strengthened. Participation will help shape the narrative of the industry, positioning the CLLA as a leader in driving positive change.

The landscape of the legal and collections industry is in a constant state of evolution, as are the needs of its professionals. By monitoring discussions and gathering feedback, emerging trends and challenges will be identified, with educational offerings adapted to meet the demands of our members.

In summary, the online community will be regarded as more than just a platform; it will be viewed as a vital resource that empowers connection, collaboration, and growth. ■

Phil Lattanzio
Executive Vice President

Well – the elections are over – thank goodness. I, for one, am so glad not to be receiving a million texts each day from each political party candidate. Now, that the elections are behind us, life can proceed normally, right? In this world of commercial litigation and collections, is there really any such thing as "normal"?

The year 2024 has been unusual, exciting, worrisome, devastating to some, exhilarating to others and most people will have their own adjective to describe the year. Some CLLA colleagues have told me this was their best year ever. Others have said they had a financial downturn. We have seen mergers, buyouts, retirements and spin-offs from existing firms to independent ones. Best of luck to Richard Payne who opened his own law firm and David Gamache who sold his law practice.

The Eastern Region Conference took place on November 7th, again at the Manhattan Penthouse in New York City. Despite the fact that there was competition for the meeting date with another collection conference, the attendance at the Eastern Region Conference was on a par with last year which exemplifies how important the education obtained at the CLLA meetings is to its members. When surveyed, the CLLA members placed networking right up there with the education. That was evident as many small groups enjoyed dinner together on Wednesday evening. At the dinner which I joined, some members were meeting others for the first time. The conversation was non-stop as colleagues got to know each other, shared war stories and personal tidbits. This is a huge part of what the CLLA is all about.

The meeting was preceded by a cocktail reception on Wednesday evening and on Thursday, CLLA members experienced and enjoyed a full day of education. The focus of the conference was on Ethics and Etiquette. The morning began with our guest speaker – Richard Grayson, who served on the Ninth Judicial District Grievance Committee and shared with us his insights into Ethical and Etiquette Considerations in the Modern Age. The afternoon culminated with Bankruptcy Judge Lisa Beckerman sharing some of her cases where attorneys and/or expert witnesses were neither ethical nor displaying proper courtroom etiquette. She ended her session with some of her "Pet Peeves" such as attorneys not being prepared or not complying with her Chambers' rules.

And, of course, I would be remiss if I did not mention Tim Wan receiving the Warren Pinchuck Volunteer Service Award. Walter Lockhart gave a humorous and memorable introduction; and Tim's acceptance speech was – well – it was Tim. His speech is included in this issue, and everyone will enjoy reading it as we, who were there, enjoyed listening to it.

Legislators are still attempting to treat small businesses as though they were consumers. California's newest statute presents challenges for commercial collectors and trade creditors alike. The lead article in this issue, "Ask Not for Whom the Bell Tolls", written by Regina Slowey and Manny Newburger, will be an eye-opener for those who are not yet familiar with this newest law. This article makes one realize how important it is for each CLLA member to be on the alert for potential new laws which can have a negative impact on our industry. We congratulate Regina on her transition to the Newburger firm and are thrilled to see Manny as one of our contributors again.

If any of you hears of a proposed statute in your state or city that is trying to merge consumer issues with commercial issues, please bring it to our attention. In fact, please bring any proposed law that will negatively impact our industry to the attention Beau or me, or to Daniel Kerrick, Chair of the Legislative Committee. The CLLA will oppose such legislation, but we must know about it to do so in a timely manner.

As the year end approaches, Merry Christmas, Happy Hannukah, Happy Kwanzaa and a Safe and Happy New Year to All! ■

Wanda Borges, Esq.
Co-Chair of the Board of Associate Editors

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Beau is a 1986 graduate of the University of North Carolina School of Law, after receiving a B.A. in Political Science from UNC in 1983. He was admitted to the Georgia Bar in 1986, and has been admitted in the federal courts in all three districts in Georgia. He has acted as lead counsel in litigation matters for over twenty years, specializing in commercial disputes and bankruptcy law. Mr. Hays is a Past President of the Commercial Law League of America, having served as Recording Secretary of the League and Chair of the Creditor's Rights Section and chaired numerous committees. In addition to being active in the Bankruptcy Section of CLLA, he is an Associate Member of the National Association of Bankruptcy Trustees, and has been a presenter to that organization on issues involving hiring outside counsel. He has also served as Legislative Liaison for the Georgia Bar's Creditor's Rights Section. Mr. Hays is an editor for the National Association of Credit Management's Handbook of Credit and Commercial Laws, chapters related to materialman's liens and construction bonds.

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Salene is the founding principal of MAZURKRAEMER, an entrepreneurial business law and consulting firm. Your go-to business confidantes, the firm offers attentive legal and business consulting services, without compromising technical skill or experience. With offices in New York, NY, Weirton, West Virginia, and Pittsburgh, PA, MAZURKRAEMER counsels entrepreneurs and small to middle market companies at every stage of the business cycle in a broad range of business transactions, particularly reorganization and general business litigation. Salene concentrates her personal practice on Chapter 11 commercial bankruptcy law, along with general business transaction work. She represents businesses and individuals in courts all over the country. Salene is a member of West Virginia, New Jersey, New York, and Pennsylvania State Bars.

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The Commercial Law League of America and CLW magazine are looking for articles from our membership. If you are interested in being a contributing author for CLW, please contact Beau Hays at beau@hayspotter.com or Wanda Borges at wborges@borgeslawllc.com.

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ACCEPTANCE SPEECH: Warren Pinchuck Award 2024 Eastern Region Conference

This is super cool. I guess I'm a has been now, right? I'm done? Okay. First of all, Walt did talk about all the things that I've done, so I guess I'll skip over that and not bore you with those details. I do want to say that I am very honored, and I, believe it or not, (probably not), that I am humbled by this. To be in the same breath as Wanda Borges and Joe Marino, and to honor Warren Pinchuck, who went back to Florida late last night or early this morning, is really an honor. Not something I expected now. I did obviously think, "Hey, I'm going to get that someday." I just didn't think it would be now. So, I am very honored by that. But if you know me, I don't do humility well, so I'm going to go back to me, being me. I'm going to talk about my favorite topic: "Me!"

So, I got started in the League in 2002. My first meeting was Gary Tier's first meeting. And at that very first meeting, we were awake until 5:30 a.m. each night of the conference in New York. I was brought to the League by my late senior partner, Bob Levy. I know many of you spent a lot of time with Bob. May he rest in peace. Bob told me, "Come to these meetings. I want you to do three things. Show up, drink, and have fun." All right? Check, check, check. No problem. But shortly thereafter, a good friend of mine, and many of you know Beau Hays. Beau said, "Do you notice that Bob always goes to dinner with the same three guys every single meal at every single convention?" I went, "Yeah," now that he mentioned it, "I do notice that that's exactly what he does." Beau said, "You shouldn't do that. Take advantage of the opportunity to meet. There's all these other people that are opportunities." So, I said, "Alright, maybe that's right." And I did take advantage and take that opportunity.

Opportunities like writing a newsletter for the Young Members' Section, which then turned into Tales From The Front and Commercial Law World, which then turned into a phone call from West Publishing and Wolters Kluwer saying, "We want you to write the New York chapter on judgment enforcement for the textbook." And I said, "I'm not a textbook writer. I write funny, stupid stories based on pop culture and things that have happened to me." And they said, "Yeah, we want you to put that spin into the textbook." Okay, be careful what you wish for. But apparently, now I've been a published author, and apparently it still sells. But that's all because I started with just taking the opportunity to write for a newsletter that was only distributed by print copies when someone showed up to a meeting. It wasn't mailed out. It wasn't! Pdfs weren't really a thing at that time.

Obviously, I got very involved with the Education Committee. I took those opportunities to speak. Now,

there's some people that I've always heard from, people saying that they don't want to appear and "train their competitors". And I always thought that was dumb. I always thought that "Hey, if we are all together, and we're all rowing in the same direction, the entire industry is going to get better. So, let's do that." So, I've always encouraged people, let's educate together. I don't care if I'm "teaching my competitors tips and tricks." We're all going to do better, and let's brainwash the judges to find on our side. Not a giggle? "Let's brainwash the judges to find on our side." Thank you.

Obviously, the Meetings Committee, that was just super fun doing game shows and networking events and things to make people get together. And we took the opportunity to have fun. And like Walt was talking about, I like to bring the fun. By having fun, we met each other. We became friendly with each other. I'm looking at Michelle right now in the audience, and I don't know that we've ever crossed paths on a professional level, but at these game show events and these networking events, we've had a lot of fun. And that's what I hope that I brought.

And so now I look at the amount of time that I've spent doing Commercial Law League activities, whether it's the Board of Governors or these other things. And I think back, that's a lot of money in hourly bills that I've spent devoting to the League and not getting paid... And then I looked at it and went, wait a second, it's not about that! I've made so many friends. I've made so much money. I've made so much of my career because of what I gave to the League.

When Bob Levy died in 2017, we had 11 full-time employees, 11. We now are 28. We bought a building in Smithtown, a standalone building that we are filling to the rafters right now. Some of you know that we've now expanded beyond New York. We're now in Connecticut as well. And I owe all of these successes to the path from the people in this room and the Commercial Law League, because I wouldn't have gotten there. I wouldn't have had that opportunity, if it wasn't for the opportunities from the Commercial Law League.

So, I'm going to ask you all this: All right, I know there's many of you first-time attendees. First-time attendees, raise your hand. This is your opportunity to take this opportunity to get involved. All right, raise your hand if you've never been on a section executive board at all. And I see other people. I see people that have been in the League for a long time. Raise your hand if you've never volunteered for a National Committee like the Meetings Committee, Education Committee, Marketing Committee. Raise your hand. There's many of you. Don't make me call you out. If you raised your hand at all, or if you felt like I don't want to raise your hand because you didn't shower this morning, but you know that's you, I want you all to think about the opportunities you're missing by not volunteering and by not getting involved, because that's what got me to where I am in this very wonderful career and wonderful life that I have. It's because I took advantage of the opportunities that the Commercial Law League presented to me.

And I'm happy to continue serving, and I'm going to continue serving. Thank you. ■

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ASK NOT FOR WHOM THE BELL TOLLS, COMMERCIAL COLLECTORS AND LENDERS - CALIFORNIA'S SB 1 286

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California's SB 1286 significantly expands the scope of the Rosenthal Fair Debt Collection Practices Act (RFDCPA) to include individuals obligated on business debts of under $500,000, giving rise to new regulatory and litigation risks for those who collect commercial accounts for themselves or others. The amendments, effective July 1, 2025,[1] impose compliance requirements not only on law firms and collection agencies but also on commercial lenders, factors, merchant cash advance funders, and debt buyers. Key changes include:

- **Broadened Scope:** Commercial debts enforceable against a natural person, entered into, renewed, sold, or assigned on or after July 1, 2025, fall under the amended RFDCPA.
- **Restrictive Practices:** Collectors must adopt new policies limiting call frequency, third-party disclosures, and the use of aliases by employees unless they are part of a licensed collection agency.
- **Mandatory Disclosures:** Debt collectors must provide specific, detailed information to debtors upon request, and special disclosures apply for collecting time-barred debts.
- **Venue Limitations:** Forum selection clauses may no longer be enforceable for covered commercial debts, significantly impacting litigation strategies.
- **Litigation and Regulatory Risks:** Failure to comply can result in increased exposure to individual and class action lawsuits, along with enforcement actions by the California Attorney General or local district attorneys.

Creditors and commercial collectors should act now to implement compliance strategies, leveraging the lead-in time to adapt their policies and procedures to meet these new requirements. Ignoring these changes will pose significant legal and financial risks.

BACKGROUND

On September 24, 2024, Governor Gavin Newsom signed into law SB 1286, amending the Rosenthal Fair Debt Collection Practices Act (RFDCPA) to extend its protections to individuals who are obligated of business debts of under $500,000. Starting July 1, 2025, lenders, servicers, collection agencies, debt buyers, and law firms will be subject to strict requirements, from call frequency limits to specific disclosures, and creates significant litigation and regulatory risks. Commercial debt collectors will have to align their policies and practices with these new rules, or they risk costly enforcement actions and lawsuits. The amendment introduces significant litigation and regulatory risks for creditors previously unconcerned with consumer compliance—not just law firms and collection agencies handling commercial debts, but also commercial lenders, factors, and merchant cash advance funders, all of whom are treated as "debt collectors" under the Act.

THE CHANGES

The amendments extend the protections of the RFDCPA to covered commercial credit or covered commercial debt entered into, renewed, sold, or assigned on or after July 1, 2025.[2] The word "assigned" is not defined, raising the question of whether it means a transfer of title (as to a debt buyer) or if it could include a mere assignment to a collection agency or law firm for collection. The latter interpretation is supported by other portions of the Act. For example, Section 1788.13 forbids:

> (k) The false representation that a consumer debt has been, is about to be, or will be sold, assigned, or referred to a debt collector for collection; or
>
> (l) Any communication by a licensed collection agency to a debtor demanding money unless the claim is actually assigned to the collection agency.

In the context of these sections, assignment appears to include a mere assignment for collection purposes. If the courts interpret the text of the amendment in such a manner, collection agencies and law firms that collect covered commercial debts will be subject to the RFDCPA assigned to them on or after July 1, 2025, regardless of when the debts were created.

One small ray of light is that the amendments to the RFDCPA does not expand California's licensing requirements for debt collectors:

> (c) Nothing in this title is intended to create or impose an additional licensing requirement under Division 25 (commencing with Section 100000) of the Financial Code on a debt collector with respect to the collection of covered commercial debt or covered commercial credit.[3]

To that extent the bill did not increase licensing overhead, however, it did increase the risk of individual and class action lawsuits. It also increased regulatory risk for commercial collectors, as the RFDCPA may be enforced by the Attorney General and by a county or district attorney as to matters occurring within such official's jurisdiction.

Section 2 of S.B. 1286 added new terminology to the RFDCPA:

1 The changes to Section 1788.14 of the RFDCPA become effective as of January 1, 2025, but the amendment to Section 1788.1(d) still ties covered commercial debt to July 1, 2025.

2 S.B. 1286, § 1, adding Cal. Civ. Code § 1788.1(d).

3 S.B. 1286, § 1, adding Cal. Civ. Code § 1788.1(c).

> The term "covered debt" means a consumer debt or a covered commercial debt.[4]
>
> The term "covered credit" means consumer credit or covered commercial credit.[5]
>
> The terms "covered commercial debt" and "covered commercial credit" mean money due or owing or alleged to be due or owing from a natural person to a lender, a commercial financing provider, as defined in Section 22800 of the Financial Code, or a debt buyer, as defined in Section 1788.50, by reason of one or more covered commercial credit transactions, provided the total amount of all covered commercial credit transactions and all other noncovered commercial credit transactions due and owing by the debtor or other person obligated under the transactions to the same lender, commercial financing provider, or debt buyer is no more than five hundred thousand dollars ($500,000).[6]
>
> The term "covered commercial credit transaction" means a transaction between a person and another person in which a total value of no more than five hundred thousand dollars ($500,000), is acquired on credit by that person from the other person for use primarily for other than personal, family, or household purposes.[7]

Cal Fin. Code § 22800 defines "commercial financing" as "an accounts receivable purchase transaction, including factoring, asset-based lending transaction, commercial loan, commercial open-end credit plan, or lease financing transaction intended by the recipient for use primarily for other than personal, family, or household purposes." A "provider" of commercial financing is a person who extends a specific offer of commercial financing to a recipient as well as:

> a nondepository institution, which enters into a written agreement with a depository institution to arrange for the extension of commercial financing by the depository institution to a recipient via an online lending platform administered by the nondepository institution. The fact that a provider extends a specific offer of commercial financing or lending on behalf of a depository institution shall not be construed to mean that the provider engaged in lending or originated that loan or financing.[8]

Thus, the change to the RFDCPA brings not only direct commercial loans within the scope of the act but also factoring companies, merchant cash advance businesses, and "fintech" commercial loans that are arranged with banks via online platforms. However, the "debtors" who are protected by the amendments are natural persons and not business entities.[9]

A relevant question is whether the $500,000 limit applies to commercial lines of credit and business credit cards. S.B. 1286 states that "for credit owed to a lender or commercial financing provider, the total value of credit per transaction is determined as of when the transaction is first entered into and is the maximum amount that the creditor is contractually required to provide or make available to the debtor over the life of the transaction or is the maximum amount that is enumerated in an open-end credit agreement."[10]

Furthermore, for a debt buyer, the "value of credit" for each transaction is "the amount owing or alleged to be owing to the debt buyer when the debt buyer acquires the rights of the lender or commercial financing provider in the commercial credit."[11]

To summarize, the amendments make commercial debts of $500,000 or less that are owed by individuals subject to the FDCPA, regardless of whether the debts are owed to banks, fintech partners whose platforms arranged the loans, factoring companies, and merchant cash advance businesses. As is discussed below, this will require treating such persons as if they were "consumers" obligated on personal, family, or household debts. Under the RFDCPA, the term "debt collector" means any person who, in the ordinary course of business, regularly, on behalf of that person or others, engages in debt collection.[12] This definition has always encompassed creditors that were collecting their own debts. However, S.B. 1286 expands the definition of "debt collection" to encompass any act or practice in connection with the collection of "covered debts."[13] This means that the Act will now apply to commercial collectors, servicers, and lenders who have never been historically subject to FDCPA-like regulation.

REQUIRED DISCLOSURES

S.B. 1286 subjects collectors to Section 1788.14.5 of the RFDCPA. Under that section a debt collector to which delinquent debt has been assigned must provide to the debtor, upon the debtor's written request, a statement that includes the following information:

(1) That the debt collector has authority to assert the rights of the creditor to collect the debt.

(2)

(A) The debt balance and an explanation of the amount, nature, and reason for all interest and fees, if any, imposed by the

4 S.B. 1286, § 2, adding Cal. Civ. Code § 1788.2(l).
5 S.B. 1286, § 2, adding Cal. Civ. Code § 1788.2(m).
6 S.B. 1286, § 2, adding Cal. Civ. Code § 1788.2(n).
7 S.B. 1286, § 2, adding Cal. Civ. Code § 1788.2(o).
8 Cal Fin Code § 22800(m).
9 See Cal. Civ. Code § 1788.2(h) as amended by S.B. 1286.
10 S.B. 1286, § 2, adding Cal. Civ. Code § 1788.2(n)(1).
11 S.B. 1286, § 2, adding Cal. Civ. Code § 1788.2(n)(2).
12 Cal. Civ. Code § 1788.2(c).
13 S.B. 1286, § 2, adding Cal. Civ. Code § 1788.2(b).

creditor or any subsequent entities to which the debt was assigned.

(B) The explanation required by subparagraph (A) shall identify separately the balance, the total of any interest, and the total of any fees.

(3) The date the debt became delinquent or the date of the last payment.

(4) The name and an address of the creditor and the creditor's account number associated with the debt. The creditor's name and address shall be in sufficient form so as to reasonably identify the creditor.

(5) The name and last known address of the debtor as they appeared in the creditor's records before the assignment of the debt to the debt collector.

(6) The names and addresses of all persons or entities other than the debt collector to which the debt was assigned. The names and addresses shall be in sufficient form so as to reasonably identify each assignee.

(7) The California license number of the debt collector, if applicable.[14]

Section 1788.14.5 refers to "delinquent debt" rather than "consumer debt" or "covered commercial debt." However, S.B. 1286 provides that "for the purposes of this section, the term delinquent debt means a covered debt, other than a mortgage debt that is past due at least 90 days and has not been charged off."[15]

The wording of this section appears to exclude both issuers and persons who receive assignment of a debt at a time when the debt is not in default. The documents must be provided to the debtor without charge within thirty calendar days of receipt of a debtor's written request for information regarding the debt or proof of the debt.[16] If the debt collector cannot provide the information or documents within thirty calendar days, the debt collector must cease all collection of the debt until it provides the debtor the required information or documents.[17]

A debt collector must provide a debtor with whom it has contact an active postal address to which a debtor may send a request for the information described in this section.[18] The debt collector may also provide an active email address to which the requests can be sent and through which information and documents can be delivered if the parties agree.[19]

A debt collector to which delinquent debt has been assigned must include in its first written communication with the debtor in no smaller than 12-point type, a separate prominent notice that contains the following statement:

"You may request records showing the following: (1) that [insert name of debt collector] has the right to seek collection of the debt; (2) the debt balance, including an explanation of any interest charges and additional fees; (3) the date the debt became delinquent or the date of the last payment; (4) the name of the creditor and the account number associated with the debt; (5) the name and last known address of the debtor as it appeared in the creditor's records prior to assignment of the debt; and (6) the names of all persons or entities other than the debt collector to which the debt has been assigned, if applicable. You may also request from us a copy of the contract or other document evidencing your agreement to the debt.

A request for these records may be addressed to: [insert debt collector's active mailing address and email address, if applicable]."[20]

If a language other than English is principally used by the debt collector in the initial oral contact with the debtor, the foregoing notice must be provided to the debtor in that language within five business days.[21]

PROHIBITED PRACTICES

A debt collector to which delinquent debt has been assigned may not make a written statement to a debtor in an attempt to collect a delinquent debt unless the debt collector has access to a copy of a contract or other document evidencing the debtor's agreement to the debt, except in the following circumstances:

(1) If the claim is based on debt for which no signed contract or agreement exists, the debt collector shall have access to a copy of a document provided to the debtor while the account was active, demonstrating that the debt was incurred by the debtor.

(2) For a revolving credit account, the most recent monthly statement recording a purchase transaction, last payment, or balance transfer shall be deemed sufficient to satisfy the requirements of this subparagraph.[22]

The documents must be provided to the debtor without charge within thirty calendar days of receipt of a debtor's written request for information regarding the debt or proof of the debt.[23] If the debt collector cannot

14 S.B. 1286, § 2, adding Cal. Civ. Code § 1788.14.5(a).
15 Cal. Civ. Code § 1788.14.5(g).
16 S.B. 1286, § 2, adding Cal. Civ. Code § 1788.14.5(c)(1).
17 S.B. 1286, § 2, adding Cal. Civ. Code § 1788.14.5(c)(2).
18 Cal. Civ. Code § 1788.14.5(d)(1).
19 Cal. Civ. Code § 1788.14.5(d)(2).
20 Cal. Civ. Code § 1788.14.5(e)(1).
21 Cal. Civ. Code § 1788.14.5(e)(2).
22 Cal. Civ. Code § 1788.14.5(b).
23 S.B. 1286, § 2, adding Cal. Civ. Code § 1788.14.5(c)(1).

provide the information or documents within thirty calendar days, the debt collector must cease all collection of the debt until it provides the debtor the required information or documents.[24]

The RFDCPA contains multiple laundry lists of prohibited practices, many of which will now apply to the collection of covered commercial debts. Section 3 of S.B. 1286 makes those who collect covered commercial debts for themselves or others subject to the following restrictions:

> No debt collector shall collect or attempt to collect a covered debt by means of the following conduct:
>
> (a) The use, or threat of use, of physical force or violence or any criminal means to cause harm to the person, or the reputation, or the property of any person.
>
> (b) The threat that the failure to pay a covered debt will result in an accusation that the debtor has committed a crime where the accusation, if made, would be false.
>
> (c) The communication of, or threat to communicate to any person the fact that a debtor has engaged in conduct, other than the failure to pay a covered debt, which the debt collector knows or has reason to believe will defame the debtor.
>
> (d) The threat to the debtor to sell or assign to another person the obligation of the debtor to pay a covered debt, with an accompanying false representation that the result of the sale or assignment would be that the debtor would lose any defense to the covered debt.
>
> (e) The threat to any person that nonpayment of the covered debt may result in the arrest of the debtor or the seizure, garnishment, attachment, or sale of any property or the garnishment or attachment of wages of the debtor, unless the action is in fact contemplated by the debt collector and permitted by the law.
>
> (f) The threat to take any action against the debtor, which is prohibited by this title.[25]

The inclusion of commercial accounts within the scope of these prohibitions is not a significant burden. This set of prohibited activities are acts and practices in which most commercial collectors would not engage. However, Section 5 of S.B. 1286 also makes those who collect covered commercial debts for themselves or others subject to the following restrictions:

> No debt collector shall collect or attempt to collect a covered debt by means of the following practices:
>
> (a) Using obscene or profane language.
>
> (b) Placing a telephone call without disclosing the caller's identity, provided that an employee of a licensed collection agency may identify oneself by using their registered alias name if they correctly identify the agency that they represent. A debt collector shall provide its California debt collector license number, if applicable, upon the consumer's request.
>
> (c) Causing expense to any person for long distance telephone calls, telegram fees, or charges for other similar communications, by misrepresenting to the person the purpose of the telephone call, telegram, or similar communication.
>
> (d) Causing a telephone to ring repeatedly or continuously to annoy the person called.
>
> (e) Communicating, by telephone or in person, with the debtor with such frequency as to be unreasonable, and to constitute harassment of the debtor under the circumstances.
>
> (f) Sending written or digital communication to the person that does not display the California license number of the collector, if applicable, in at least 12-point type.[26]

This section will require changes to the policies of commercial collectors in terms of how often they mall call a business debtor. Of far greater concern, when calling to collect covered debts, employees of commercial lenders, factors, servicers, and collection agencies and merchant cash advance funders that are not licensed collection agencies appear to be barred by § 1788.11(b) from using aliases and must accurately identify themselves in such calls.

S.B. 1286 also brings the collection of commercial debts within the following restrictions:

> No debt collector shall collect or attempt to collect a covered debt or consumer debt, as specified, by means of the following practices:
>
> * * *
>
> (c) Communicating to any person any list of debtors that discloses the nature or existence of a covered debt, commonly known as "deadbeat lists," or advertising any covered debt for sale, by naming the debtor.
>
> (d) Communicating with the debtor by means of a written communication that displays or conveys any information about the covered debt or the debtor other than the name, address, and telephone number of the debtor and the debt collector and that is intended both to be seen by any other person and also to embarrass the debtor.

24 S.B. 1286, § 2, adding Cal. Civ. Code § 1788.14.5(c)(2).

25 Cal. Civ. Code § 1788.10, as amended by S.B. 1286.

26 Cal. Civ. Code § 1788.11, as amended by S.B. 1286.

(e) Notwithstanding the foregoing provisions of this section, the disclosure, publication, or communication by a debt collector of information relating to a covered debt or the debtor to a consumer reporting agency or to any other person reasonably believed to have a legitimate business need for that information shall not be deemed to violate this title.[27]

Under this section those who collect covered commercial debts for themselves or others will need to implement policies restricting what can be on the outside of an envelope or visible through an envelope's glassine window. They will also need to tighten (or implement) policies restricting third-party communications.

Persons collecting covered commercial accounts will be prohibited from a list of misleading conduct. No debt collector shall collect or attempt to collect a covered debt by means of the following practices:

(a) Any communication with the debtor other than in the name either of the debt collector or the person on whose behalf the debt collector is acting.

(b) Any false representation that any person is an attorney or counselor at law.

(c) Any communication with a debtor in the name of an attorney or counselor at law or upon stationery or like written instruments bearing the name of the attorney or counselor at law, unless that communication is by an attorney or counselor at law or shall have been approved or authorized by that attorney or counselor at law.

(d) The representation that any debt collector is vouched for, bonded by, affiliated with, or is an instrumentality, agent or official of any federal, state or local government or any agency of federal, state or local government, unless the collector is actually employed by the particular governmental agency in question and is acting on behalf of that agency in the debt collection matter.

(e) The false representation that the covered debt may be increased by the addition of attorney's fees, investigation fees, service fees, finance charges, or other charges if, in fact, those fees or charges may not legally be added to the existing obligation.

(f) The false representation that information concerning a debtor's failure or alleged failure to pay a covered debt has been or is about to be referred to a consumer reporting agency.

(g) The false representation that a debt collector is a consumer reporting agency.

(h) The false representation that collection letters, notices or other printed forms are being sent by or on behalf of a claim, credit, audit, or legal department.

(i) The false representation of the true nature of the business or services being rendered by the debt collector.

(j) The false representation that a legal proceeding has been, is about to be, or will be instituted unless payment of a covered debt is made.

(k) The false representation that a covered debt has been, is about to be, or will be sold, assigned, or referred to a debt collector for collection.

(l) Any communication by a collection agency to a debtor demanding money unless the claim is actually assigned to the collection agency.[28]

S.B. 1286 also brings commercial debts within the scope of Section 1788.14 of the RFDCPA. No debt collector shall collect or attempt to collect a covered debt by means of the following practices:

(a) Obtaining an affirmation from a debtor of a covered debt that has been discharged in bankruptcy, without clearly and conspicuously disclosing to the debtor, in writing, at the time the affirmation is sought, the fact that the debtor is not legally obligated to make an affirmation.

(b) Collecting or attempting to collect from the debtor the whole or any part of the debt collector's fee or charge for services rendered, or other expense incurred by the debt collector in the collection of the covered debt, except as permitted by law.

(c) Initiating communications, other than statements of account, with the debtor with regard to the covered debt, when the debt collector has been previously notified in writing by the debtor's attorney that the debtor is represented by the attorney with respect to the covered debt and the notice includes the attorney's name and address and a request by the attorney that all communications regarding the covered debt be addressed to the attorney, unless the attorney fails to answer correspondence, return telephone calls, or discuss the obligation in question. This subdivision shall not apply if prior approval has been obtained from the debtor's attorney, or if the communication is a response in the ordinary course of business to a debtor's inquiry.

(d) Sending a written communication to a debtor in an attempt to collect a time-barred debt without providing the debtor with one of the following written notices:

27 Cal. Civ. Code § 1788.12, as amended by S.B. 1286.

28 Cal. Civ. Code § 1788.13, as amended by S.B. 1286.

(1) If the debt is not past the date for obsolescence set forth in Section 605(a) of the federal Fair Credit Reporting Act (15 U.S.C. Sec. 1681c), the following notice shall be included in the first written communication provided to the debtor after the debt has become time-barred:

"The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it. If you do not pay the debt, [insert name of debt collector] may [continue to] report it to the credit reporting agencies as unpaid for as long as the law permits this reporting."

(2) If the debt is past the date for obsolescence set forth in Section 605(a) of the federal Fair Credit Reporting Act (15 U.S.C. Sec. 1681c), the following notice shall be included in the first written communication provided to the debtor after the date for obsolescence:

"The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it, and we will not report it to any credit reporting agency."[29]

Collectors of covered time-barred commercial accounts will have to implement policies to comply with this section of the RFDCPPA. Those that are data furnishers will have to update their forms to include the required disclosures. For the purposes of this section of the RFDCPA, "first written communication" means the first communication sent to the debtor in writing or by facsimile, email, or other similar means.[30]

For all delinquent covered commercial debt that is sold or assigned on or after July 1, 2025, S.B. 1286 also affects the litigation of covered commercial accounts: No debt collector is permitted to collect or attempt to collect a covered debt by means of judicial proceedings when the debt collector knows that service of process, where essential to jurisdiction over the debtor or their property, has not been legally effected.[31] Furthermore, the Act prohibits collecting or attempting to collect a covered debt, other than one reduced to judgment, by means of judicial proceedings in a county other than the county in which the debtor has incurred the covered debt or the county in which the debtor resides at the time those proceedings are instituted, or resided at the time the debt was incurred.[32] This restriction could have a serious impact of commercial creditors and collectors that have historically relied on forum selection clauses. Suit may also be filed instead in the county in which the business entity whose debt was guaranteed is located.[33]

For covered commercial debts incurred prior to the debtor residing in California, the authors question the enforceability of section 1788.15's undermining of forum selection clauses. Nevertheless, creditors and attorneys will have to decide their risk tolerance in taking on that fight, as the issue carries both regulatory and reputational risk in addition to the class action risk inherent in the RFDCPA.

S.B. 1286 brings covered commercial debts within the scope of the RFDCAP's prohibition on the use of communications that simulate legal or judicial process or that give the appearance of being authorized, issued, or approved by a governmental agency or attorney when it is not.[34] Any such conduct is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding $2,500 or both.

IDENTITY THEFT PROCEDURES

A debt collector shall cease collection activities upon receipt from a debtor of all of the following:

(1) A copy of a Federal Trade Commission identity theft report, completed and signed by the debtor.[35]

(2) The debtor's written statement that the debtor claims to be the victim of identity theft with respect to the specific debt being collected by the debt collector.[36]

The written statement must consist of either of the following:

(1) A written statement that contains the content of the Identity Theft Victim's Fraudulent Account Information Request offered to the public by the California Office of Privacy Protection.

(2) A written statement that certifies that the representations are true, correct, and contain no material omissions of fact to the best knowledge and belief of the person submitting the certification.[37]

The statement shall contain or be accompanied by the following, to the extent that an item listed below is relevant to the debtor's allegation of identity theft with respect to the debt in question:

(A) A statement that the debtor is a victim of identity theft.

29 Cal. Civ. Code § 1788.14, as amended by S.B. 1286.
30 *Id.*
31 Cal. Civ. Code § 1788.15(a), as amended by S.B. 1286.
32 Cal. Civ. Code § 1788.15(b), as amended by S.B. 1286.
33 Cal. Civ. Code § 1788.15(c), as amended by S.B. 1286.
34 Cal. Civ. Code § 1788.16, as amended by S.B. 1286.
35 The debtor may choose, instead, to send a copy of a police report filed by the debtor alleging that the debtor is the victim of an identity theft crime, including, but not limited to, a violation of Section 530.5 of the California Penal Code, for the specific debt being collected by the debt collector; however, the debt collector may not require a police report if the debtor submits an FTC identity theft report.
36 Cal. Civ. Code § 1788.18(a), as amended by S.B. 1286.
37 Cal. Civ. Code § 1788.18(b), as amended by S.B. 1286.

(B) A copy of the debtor's driver's license or identification card, as issued by the state.

(C) Any other identification document that supports the statement of identity theft.

(D) Specific facts supporting the claim of identity theft, if available.

(E) Any explanation showing that the debtor did not incur the debt.

(F) Any available correspondence disputing the debt after transaction information has been provided to the debtor.

(G) Documentation of the residence of the debtor at the time of the alleged debt. This may include copies of bills and statements, such as utility bills, tax statements, or other statements from businesses sent to the debtor, showing that the debtor lived at another residence at the time the debt was incurred.

(H) A telephone number for contacting the debtor concerning any additional information or questions, or direction that further communications to the debtor be in writing only, with the mailing address specified in the statement.

(I) To the extent the debtor has information concerning who may have incurred the debt, the identification of any person whom the debtor believes is responsible.

(J) An express statement that the debtor did not authorize the use of the debtor's name or personal information for incurring the debt.

(K) The certification required pursuant to this paragraph shall be sufficient if it is in substantially the following form:

"I certify the representations made are true, correct, and contain no material omissions of fact.
_____ (Date and Place) _____ _____
(Signature) _____ "

A person submitting the certification who declares as true any material matter that they know to be false is guilty of a misdemeanor.[38]

If a debtor notifies a debt collector orally that they are a victim of identity theft, the debt collector shall notify the debtor, orally or in writing, that the debtor's claim must be in writing.[39] If a debtor notifies a debt collector in writing that they are a victim of identity theft, but omits information required pursuant to Section 1788.18(a) or, if applicable, the certification required pursuant to paragraph (2) of subdivision (b), if the debt collector does not cease collection activities, the debt collector must provide written notice to the debtor of the additional information that is required, or the certification required pursuant to paragraph (2) of subdivision (b), as applicable, or send the debtor a copy of the Federal Trade Commission's identity theft form.[40]

Within 10 business days of receiving the complete statement and information described in Section 1788.18(a), the debt collector must, if it furnished adverse information about the debtor to a consumer credit reporting agency, notify the consumer credit reporting agency that the account is disputed, and initiate a review considering all of the information provided by the debtor and other information available to the debt collector in its file or from the creditor. The debt collector must send notice of its determination to the debtor no later than 10 business days after concluding the review. The debt collector may recommence debt collection activities only upon making a good faith determination that the information does not establish that the debtor is not responsible for the specific debt in question. The debt collector's determination shall be made in a manner consistent with the provisions of subsection (1) of Section 1692f of Title 15 of the United States Code, as incorporated by

Section 1788.17 of this code. The debt collector must notify the debtor in writing of that determination and the basis for that determination before proceeding with any further collection activities. The debt collector's determination must be based on all of the information provided by the debtor and other information available to the debt collector in its file or from the creditor.[41]

A debt collector that ceases collection activities under Section 1788.18 and does not recommence those collection activities must:

(1) if the debt collector has furnished adverse information to a consumer credit reporting agency, notify the agency to delete that information no later than 10 business days after making its determination; and

(2) notify the creditor no later than 10 business days after making its determination that debt collection activities have been terminated based upon the debtor's claim of identity theft.[42]

DEBTOR RESPONSIBILITIES

One unusual feature of the RFDCPA is that it imposes certain obligations upon debtors. A debtor on a covered debt must notify the creditor or prospective credit within a reasonable time or of any change in that person's name, address, or employment (but only if the creditor clearly and conspicuously in writing discloses that responsibility to the debtor);[43]

38 *Id.*
39 Cal. Civ. Code § 1788.18(c), as amended by S.B. 1286.
40 *Id.*
41 Cal. Civ. Code § 1788.18(d), as amended by S.B. 1286.
42 Cal. Civ. Code § 1788.18(g), as amended by S.B. 1286.
43 Cal. Civ. Code § 1788.21, as amended by S.B. 1286.

In connection with any request or application for covered credit, no person shall:

(a) request or apply for that credit at a time when that person knows there is no reasonable probability of that person's being able, or that person then lacks the intention, to pay the obligation created thereby in accordance with the terms and conditions of the credit extension; or

(b) knowingly submit false or inaccurate information or willfully conceal adverse information bearing upon that person's credit worthiness, credit standing, or credit capacity.[44]

In connection with any covered credit extended to a person under an account:

(1) No such person shall attempt to consummate any covered credit transaction thereunder knowing that credit privileges under the account have been terminated or suspended.

(2) Each such person shall notify the creditor by telephone, telegraph, letter, or any other reasonable means that an unauthorized use of the account has occurred or may occur as the result of loss or theft of a credit card, or other instrument identifying the account, within a reasonable time after that person's discovery thereof, and shall reasonably assist the creditor in determining the facts and circumstances relating to any unauthorized use of the account.[45]

However, those obligations apply only if and after the creditor clearly and conspicuously in writing discloses that responsibility to the debtor.

LIABILITY FOR VIOLATIONS

Any debt collector who violates the RFDCPA with respect to any debtor is liable to that debtor in an amount equal to the sum of any actual damages sustained by the debtor as a result of the violation.[46] If the violation was willful and knowing, the debt collector is also liable for a penalty of not be less than $100 or, more than $1,000.[47] A prevailing party is entitled to costs, and a prevailing debtor is entitled to recover reasonable attorney's fees as is a prevailing creditor upon a finding by the court that the debtor's prosecution or defense of the action was not in good faith.[48]

Section 1788.30 limits suits under the RFDCPA to individual actions. Nevertheless, courts have allowed class actions under the Act based on Section 1788.17, which mandates compliance with the federal FDCPA, courts have interpreted that section to incorporate the FDCPA's class action remedies. S.B. 1286 did not change Section 1788.17, which explicitly applies to consumer debts. It remains to be seen whether courts will apply those cases to allow class actions over covered commercial debts. The authors would argue that such an interpretation is improper. However, if the California courts do allow such class actions, the potential class liability is the lesser of $500,000 or one percent of the debt collector's net worth.

CONCLUSION

S.B. 1286 will significantly impact the collection of commercial debts in California. Creditors, debt buyers, and other affected parties must invest considerable time and effort to develop and maintain compliance. Furthermore, the bill creates ambiguities that will ultimately need to be resolved by the courts. Businesses that already collect consumer debts in California should be able to pivot and bring their commercial debt collection practices in line with their existing consumer debt collection policies. Businesses that have not historically been subject to consumer debt collection regulation have a lot of work ahead of them to ensure compliance with the Act. They need to use the lead-in period to develop, evaluate, and implement robust policies well before the July 2025 deadline. ■

44 Cal. Civ. Code § 1788.20, as amended by S.B. 1286.
45 Cal. Civ. Code § 1788.22, as amended by S.B. 1286.
46 Cal. Civ. Code § 1788.30(a).
47 Cal. Civ. Code § 1788.30(n).
48 Cal. Civ. Code § 1788.30(c).

RELAX

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Howard Foster

Owner

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USE OF RICO AS A COMMERCIAL COLLECTION TOOL

Here are a few scenarios collection lawyers face again and again: 1) a business shuts it doors with a mountain of debt and restarts as a new entity with a similar name, 2) a business is insolvent but tells creditors it can pay its bills on time, and 3) a business files for bankruptcy protection after many instances of defrauding creditors. In all three scenarios a lawyer representing a creditor with a claim against the business may well advise his or her client not to pursue the claim, believing the prospects for recovery are too remote. A simple breach of contract action, the typical creditor remedy, will not yield anything. A fraud action is not much better because the debtor is insolvent. And an adversary proceeding in bankruptcy court is not worth the effort. So more often than not the collection lawyer closes the matter and moves on to something more productive. He or she leaves behind an unhappy client and the sinking feeling that a fraudster has escaped justice.

It does not have to be this way. RICO, the Racketeer Influenced and Corrupt Organizations Act, a federal law enacted by Congress 54 years ago for the express purpose of combating "organized crime" can be used effectively in all three of these scenarios. RICO is very complex and off-putting to any lawyer who has never looked at it. Basically, it punishes people who commit lots of related crimes through businesses or informal organizations known as "enterprises." The crimes run the gamut from mail and wire fraud to murder to hiring illegal immigrants and many others enumerated in the statute. So a business owner who lies to creditors about his company's solvency over and over again for a period of years, even if this is sporadic, would be a candidate for a RICO case. Why? How is lying to creditors "racketeering activity?" And what is the enterprise?

The answer is fraud. When a business falsely represents itself as creditworthy, and does so through a phone call, email, text message or fax (if that obsolete device is still in use), that crosses state lines, it is actually violating the federal wire fraud statute which makes any "scheme to defraud" or "for obtaining money or property" using interstate wires a federal crime. 18 U.S.C. §1343. And the use of the U.S. mail to carry out such a scheme violates the similarly worded mail fraud statute. 18 U.S.C. §1341. Virtually all modern businesses use interstate wires and/or mail. So a debtor that

commits fraud is likely committing one or both of these crimes, which are types of "racketeering activity."

RICO also requires that the "racketeer" commit a pattern of racketeering through an enterprise. A pattern is a series of related crimes. But most seasoned creditors' lawyers know that debtors who commit fraud typically do not do so just once. Scratch the surface, and you are likely to find a wake of victims. If a claim is large enough, it is worth the scratching effort. If you find these victims, you can talk to them, gather the relevant details of the scheme to defraud them, and you might well have the requisite pattern of mail or wire fraud. And if the debtor is in bankruptcy and files knowingly false claim forms, for example omitting to disclose all debts, that is "bankruptcy fraud," a separate RICO violation. As for enterprise, the business, a legal entity, usually a corporation, will suffice. So the result is the creditor has a good RICO claim against the owner of the debtor, typically the person or persons who committed the scheme to defraud your client.

Why bother with RICO? Three good reasons: first a successful plaintiff gets triple damages and attorney's fees. Second, the case can be heard in federal court where debtors have a harder time with unfamiliar procedural rules and the need to have a more skilled lawyer than they might be accustomed to. This dramatically raises the costs and stakes on the debtor making it more likely you will achieve a quick settlement. Third, the RICO case is brought against the business owner or owners personally, and they typically have more assets than an insolvent business. Finally, the optics of RICO are terrible for defendants. No business owner wants to be known as a racketeer. Some federal judges have gone so far to call civil RICO a "thermonuclear device." I disagree with this characterization. Treble damages and attorneys' fees are a feature of the antitrust laws too, and nobody that I know of has referred to them that way. But RICO is a powerful weapon if used skillfully in appropriate cases, and there is a huge number of large fraud cases. Too few creditors lawyers are thinking about RICO. ■

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PRIMER FOR COLLECTION ATTORNEYS: WHAT TO TELL YOUR CLIENTS WHEN BANKRUPTCY HAPPENS

Are you a collection attorney who has hit a wall in your efforts because the defendant debtor has filed a bankruptcy to foil your client's collection efforts? For a small business owner, collecting on outstanding accounts can be a very distressing situation, an emotional, make-or-break financial issue. A collection matter can invoke a sense of injustice and betrayal. The client had been doing business in good faith with a customer. Very quickly a client can turn from a loyal customer to a reputation-damaging trash-talker. The dispute could possibly threaten the security of a business's continued existence.

As collection attorneys, we are hired to right the wrong. Then BAM! If a debtor customer files for bankruptcy, the filing triggers the automatic stay. This ties a collection attorney's hands unless he or she has cause to seek relief from the stay to resume state court collection remedies. It then becomes important for the collection attorney to educate its clientele on the various steps in the bankruptcy process and what can be done to protect a creditors' rights.

Here is summary of what collection attorneys need to know if a debtor files for bankruptcy:

A. DIFFERENT TYPES OF BANKRUPTCY CASE AND CASE TIMELINE:

Generally, a business will file a Chapter 11 bankruptcy case (reorganization[1]) or a Chapter 7 bankruptcy case (liquidation) under Title 11 of the United States Code (the "Bankruptcy Code"). If the debtor is an individual, he or she can file a Chapter 13, 11, or 7. Each type of case has unique mandates. In Chapter 11's and 13's, a debtor will aim to confirm a plan of reorganization. In Chapter 7's, the goal is to orderly liquidate assets. In every case, the goal of your creditor client is to maximize any possible recovery from the bankruptcy estate.

1 There are liquidating Chapter 11s also.

In a typical bankruptcy case, these are the major trigger events:

PART ONE: A. PRE-PETITION: TEACH YOUR CLIENT TO BE PROACTIVE, NOT REACTIVE.

When a business owner suspects a customer is slipping into financial distress, he or she may turn to you, its collection counsel, seeking ways to protect its claim and protect itself from possible preference attack. Here is how:

1. **Tools Available to Your Creditor Client.** Warn your client to never let its accounts receivable mount beyond its business's comfort level. Run asset searches and credit checks. Urge your client to talk to other vendors to determine the extent to which the customer may be distressed. There are many trade credit groups that can assist with that.

2. **Recommend** that your client change its payment terms from credit to cash in advance or C.O.D. Warn your client, however, that if a creditor is unsecured and insists on substantially changing the terms of the business agreement within 90 days prior to the bankruptcy filing, the creditor may run the risk of being sued post-petition for the avoidance of preferential pre-petition transfers.[2]

3. **Assist Your Client to Secure its Claim by Properly Perfecting Its Secured Position; Add A Guarantor.** If creditor wants to become secured, be certain that it has taken all steps necessary to properly perfect and record a security interest in any collateral and that such perfection has been continuous. Double check any lien and title searches and related documentation on collateral such as mortgages, deeds of trust, UCCs, and assignments of rents or deposits. Have all of your clients' documents been properly executed? Does your client have a signed security agreement that properly describes the right debtor and specifically identifies the collateral? Remind your client that if it obtains a security interest in the debtor's assets for an already existing debt 90 days prior to the filing of the case, the security interest may be avoided as a preference.

   One of the best things a creditor can do is get a personal guaranty from the business owner and his or her spouse. Advise your client to always obtain a guaranty of payment and NOT of collection. You should begin to monitor the debtor on behalf of your client for mismanagement of any collateral.

4. **Obtain a Judgment.** Ideally, an unsecured creditor should obtain a judgment against a delinquent customer pre-petition to secure a higher position in the pecking order of a liquidation of a business (hypothetical or otherwise). Your client will rely on you to advise it of the Bankruptcy Code priorities which dictate which class of creditors gets paid first in a liquidation of a bankruptcy estate. Obtaining a judgment on behalf of your client can elevate an unsecured creditor into a secured creditor, potentially securing a lien on the debtor's property. This lien can possibly survive the bankruptcy discharge, allowing the creditor to enforce it against the debtor's property even after the bankruptcy case concludes.[3] While many jurisdictions do allow a judgment lien to automatically attach to real property upon entry of judgment, others require specific actions such as recording the judgment or an abstract of judgment in the appropriate county office. Your client must be cautioned, however, that even if a creditor has a judgment lien, it can sometimes be avoided or set aside in bankruptcy, but this requires specific actions and filings.

   Although not available in every state, and state-by-states laws differ, suggest to your client that it speak with its customers and attempt to get the customer to consent to a confession of judgment which will enable the creditor to go straight to court to get a judgment against the customer upon default and without the need for a trial. These clauses are generally upheld if the debtor has knowingly and voluntarily waived their rights to notice and a hearing, and if the contract was negotiated between parties of equal bargaining power.[4]

5. **Advise your Client About Unique Steps to Take if the Circumstances Are Right.** As a debtor swirls deeper into debt, the business owner may take desperate measures. In addition to breach of contract, a creditor may be able to sue a creditor, *inter alia*, for piercing of the corporate veil, tortious interference of business relations, and alter ego allegations, to name a few.

   A creditor should also scrutinize director and officer actions for possible breach of fiduciary duties, fraud, or misrepresentation.

2 See 11 U.S.C. § 547

3 See e.g., In re Barnes, 326 B.R. 832 (Bankr. M.D. Ala. 2005).

4 Capital v. TNG Contrs., LLC, 622 S.W.3d 227 (Tex. 2021); Goshen Run Homeowners Ass'n v. Cisneros, 223 A.3d 917 (Md. 2020); D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972).

An aggressive creditor can sue to unwind actual or constructively fraudulent transfers both in and outside of a bankruptcy case under both state and federal statutes. Generally, a fraudulent transfer is a transfer made within two (2) years before the petition date, with the intent to hinder, delay, or defraud any creditor, or without receiving reasonably equivalent value.[5] Most state statutes provide a four (4)-year statute of limitations from the date the transfer was made or, if later, within one year after the transfer was or could reasonably have been discovered by the claimant.

6. **Consider Filing an Involuntary Bankruptcy Petition.** If a company is not generally paying debts as they become due, another option may be for a creditor to team up with two other creditors to force an involuntary bankruptcy petition upon the borrower. Each of these creditors must hold a claim that is not contingent as to liability or amount or the subject of a bona fide dispute, and the aggregate amount of these claims must exceed $18,600 more than the value of any liens on the debtor's property.[6] If the company has fewer than 12 creditors, a creditor alone could file the involuntary petition so long as the same criteria have been met. The criteria ensures that the debtor is in actual financial distress, which justifies the need for involuntary bankruptcy relief.

PART TWO: DON'T CLOSE THAT FILE

B. HOW CAN THE COLLECTION ATTORNEY PROTECT ITS CLIENT AFTER RECEIVING NOTICE OF FILING OF A BANKRUPTCY CASE.

1. **Review Schedules.** Immediately upon the filing of a case, you should review the bankruptcy schedules to see if and how the debtor has listed your client's claim. Is the amount owed accurate? Is the claim marked contingent, unliquidated, or disputed? Secured or unsecured? Is the lien priority correct?

2. **File a Proof of Claim**. If the creditor does not agree with the claim as set forth by the debtor, the creditor must file its own proof of claim along with supporting documentation by the Bar Date set forth in the case. Your client may want you to file that claim on its behalf. If the debtor and creditor dispute the claim, there will be a claims adjudication proceeding. If the debtor disputes the validity, priority or secured status of a claim, the debtor must initiate an adversary proceeding within the case to challenge the status.

3. **Obtain Relief from the Automatic Stay.** Once a case has been filed, a stay is automatically imposed against any adverse action taken against the debtor, including judicial, administrative, or other actions or proceedings, such as all collection efforts, harassment, and foreclosure actions. You must advise your client not to take any action that will run afoul of this automatic stay and let your client know that all collection action on your part must cease. If you know that your client has a basis to continue its state court proceeding to collect insurance proceeds or protect its collateral, you must file a motion to lift the stay in order to proceed This type of proceeding is tantamount to a lawsuit and a collection attorney may see fit to request a separate fee to file this motion as it may not be covered by the typical contingency fee arrangement.

4. **Challenge Use of Cash Collateral.** If the creditor has a security interest in the debtor's cash collateral, the debtor must file a motion to approve the use of the same. This is usually one of the first day motions filed in every Chapter 11 case if the debtor is still operating.

5. **Attend the 341 Meeting of Creditors.** A creditor is permitted to attend the first meeting of creditors (the "341" meeting). Since the pandemic, these meetings are often by video conference/Zoom. At that meeting, the debtor's principal will testify under oath as to the content of the bankruptcy petition and schedules. Your client may want you to attend this meeting on its behalf or with it. At this meeting, you can learn about the slide into bankruptcy and whether there will be any assets left to be liquidated for distribution creditors. You or your client will also have the opportunity to ask the debtor's representative questions related to the administration of the bankruptcy case, including the debtor's assets, liabilities, transactions, eligibility for bankruptcy relief, and right to a discharge. However, this 341 Meeting of Creditors does NOT take the place of an in-depth examination of the debtor, which can only be done pursuant to Bankruptcy Rule 2004.

6. **Objection to Dischargeability; Dismissal for Bad Faith; Conversion.** If fraud has been involved, an aggressive creditor can object to the discharge of the creditor's particular claim or to the discharge of the case as a whole. You can also file a motion to dismiss a bankruptcy case for bad faith filing or to convert a case from a Chapter 11 reorganization to a Chapter 7 liquidation. At the outset of the case, the collection attorney should

5 See 11 U.S.C. § 548.
6 See 11 U.S.C. § 303.

work with its client to start to gather evidence to prosecute these motions. At this point, you may wish to partner with an experienced bankruptcy attorney as these matters can become complicated and knowledge of the Bankruptcy Code and Rules becomes imperative.

A court shall convert a Chapter 11 case to a Chapter 7 case or dismiss it, whichever is in the best interests of creditors and the estate, for cause.[7] Cause for dismissal or conversion includes, but is not limited to, substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation, gross mismanagement of the estate, unauthorized use of cash collateral, failure to maintain appropriate insurance, failure to comply with a court order, and failure to file or confirm a plan within the time fixed by the court.[8]

PART THREE:

C. ISSUES THAT CAN ARISE DURING A BANKRUPTCY CASE – PARTNERING WITH YOUR CLLA BANKRUPTCY COLLEAGUE WILL BECOME IMPORTANT.

1. **Non-Debtor Guarantors.** During the pendency of a bankruptcy case, non-debtor guarantors can still be pursued zealously. In response, a guarantor may file an adversary proceeding to extend the business debtor's automatic stay to him or her under extraordinary circumstances where there is a significant identity between the debtor and the guarantor, and the debtor would suffer irreparable harm if the stay is not extended.[9] This is **not** routinely granted.

2. **Receiver or Examiner.** A creditor can seek the appointment of a receiver or an examiner in a bankruptcy case. A receiver appointed before the commencement of a bankruptcy case may sometimes remain in place temporarily while the bankruptcy court decides whether to abstain from the receivership proceeding or require the receiver to turn over the property to the trustee or debtor in possession.[10] An examiner in a bankruptcy case primarily serves an investigative role. The examiner is tasked with investigating the debtor's business, including acts, conduct, assets, liabilities, and financial condition, as well as the operation of the debtor's business and the desirability of its continuance. The examiner must file a report detailing any findings related to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the debtor's affairs.[11]

3. **Ch. 11 Trustee Appointment.** An assertive creditor can file a motion for the appointment of a Chapter 11 Trustee in a Chapter 11 case. Under 11 U.S.C. § 1104(a)(1), the court shall order the appointment of a trustee for cause, which includes fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case.[12] This provision ensures that the interests of creditors and the estate are protected when the current management is not capable of fulfilling its fiduciary duties. The appointment of a Chapter 11 trustee is considered an extraordinary remedy and is not granted lightly.

4. **Administrative Claim Status for Goods which Your Client Delivered to the Debtor Within the 20 Days Immediately Preceding the Bankruptcy Filing.** In the pecking order of claims that are paid out of a bankruptcy estate, generally, there are secured claims, administrative claims, priority claims, unsecured claims and equity, paid in that order. As soon as possible after knowledge of the bankruptcy proceeding, you should determine if your client has delivered any goods to the debtor with the 20 days immediately preceding the bankruptcy filing. This may elevate your client's general unsecured claim to an administrative expense priority claim, which generally must be paid in full as a condition of confirming a Chapter 11 plan, unless parties otherwise consent.[13] Likewise, goods or service provided to a debtor after the filing of the bankruptcy proceeding will be granted administrative expense status.

   Section 503(b)(1)(A) Post-Petition Claims. To qualify for administrative claim status under 11 U.S.C. § 503(b)(1)(A), the claim must arise from a post-petition transaction with the debtor-in-possession or trustee and must provide a direct and substantial benefit to the bankruptcy estate. This is often referred to as the "Administrative

7 See 11 U.S.C. § 1112(b).

8 Carolin Corp. v. Miller, 886 F.2d 693 (4th Cir. 1989); In re E. End Dev., 491 B.R. 633 (Bankr. E.D.N.Y. 2013); In re Miell, 419 B.R. 357 (Bankr. N.D. Iowa 2009).

9 Graziani v. Randolph, 887 A.2d 1244 (Pa. Super. Ct. 2005).

10 Kosmala v. Baek (In re Halvorson), 607 B.R. 680 (Bankr. C.D. Cal. 2019); In re Stratesec, Inc., 324 B.R. 156 (Bankr. D.D.C. 2004); In re Roxwell Performance Drilling, LLC, No. 12-50301, 2013 Bankr. LEXIS 5345 (Bankr. W.D. Tex. Dec. 23, 2013).

11 In re FTX Trading Ltd., 91 F.4th 148 (3d Cir. 2024); Ky. Bar Ass'n v. Schilling, 361 S.W.3d 304 (Ky. 2012); In re Erickson Ret. Cmtys., LLC, 425 B.R. 309 (Bankr. N.D. Tex. 2010).

12 See 11 U.S.C. § 1104. See also Zions Bancorporation, N.A. v. Kane, 616 F. Supp. 3d 960 (N.D. Cal. 2022); In re Klaynberg, 643 B.R. 309 (Bankr. S.D.N.Y. 2022); In re Royal Alice Props., LLC, No. 18-12337, 2020 Bankr. LEXIS 2354 (Bankr. E.D. La. Aug. 28, 2020).

13 See In re Bookbinders' Restaurant, Inc., No. 06-12302ELF, 2006 Bankr. LEXIS 3749 (Bankr. E.D. Pa. Dec. 28, 2006).

Priority Test".[14] The purpose of granting administrative priority is to encourage third parties to provide necessary goods and services to the debtor-in-possession, facilitating the debtor's ability to continue operations and potentially reorganize successfully.[15] The collection counsel should caution its creditor/client, however, that there is no guaranty that all post-petition administration claims will be paid. An estate can become "administratively insolvent" in which case; all administrative claims will be paid on a pro-rata basis.

Section 503(b)(9) Pre-Petition Claims. Importantly, a creditor can also see administrative claim status for unpaid goods sold to and received by the debtor within 20 days before the bankruptcy filing. Under 11 U.S.C. § 503(b)(9), a creditor can assert an administrative claim for the value of goods received by the debtor within 20 days before the commencement of the bankruptcy case, provided that the goods were sold to the debtor in the ordinary course of the debtor's business.[16]

5. **Compel Assumption or Rejection of Executory Contract.** If as of the petition date, a creditor has an ongoing contract with the debtor, that executory contract must be assumed or rejected by the debtor. The debtor may timely file amotion seeking such rejection or assumption, or do so via its chapter 11 plan, following certain procedures. Although your creditor/client may be anxious for this to happen, the debtor may not be in a hurry to do so. You can file a motion on behalf of the creditor to compel the debtor to make a decision. If the contract is rejected, the rejection gives rise to a rejection claim for the creditor which is an allowed general unsecured claim. If the contract is assumed, all pre-petition amounts outstanding on the contract must be cured and the debtor must provide adequate assurance for future performance, unless parties agree otherwise.

6. **Right to Proceeds of Sales.** Collection Counsel should monitor the sale of any assets to ensure fair market value is recovered and that your creditor client will get its fair share of the proceeds.

7. **Adequate Protection.** If your client has a perfected security interest, you should recommend that a motion for adequate protection of its collateral (insurance, additional cash payments, replacement liens) be filed to be sure its collateral is not diminished during the course of the bankruptcy proceeding or sold without your client's approval, to your client's detriment.

8. **Plan Voting**. Any creditor which will not receive 100% of its claim is deemed to be an impaired creditor. That creditor will have the right to vote on a plan of reorganization/liquidation. The collection attorney must be prepared to advise its client that in order to get a Chapter 11 reorganization plan approved, a debtor must satisfy all the confirmation criteria set forth in 11 U.S.C. § 1129(a). In summary, a Chapter 11 debtor must demonstrate that the reorganization plan meets all statutory requirements, is feasible, fair, and equitable, and has been proposed in good faith to gain court approval, Additionally, the plan must be feasible, meaning it should not likely be followed by liquidation or further financial reorganization unless such is proposed in the plan.[17] The plan must also meet the "best interest" test, ensuring that each holder of an impaired claim receives at least as much as they would in a Chapter 7 liquidation. The plan must be accepted by each class of claims or interests that is impaired under the plan, or it must meet the requirements for a cramdown if not accepted. The debtor must also ensure that all administrative and priority claims are treated in accordance with § 1129(a)(9) and that at least one impaired class of claims has accepted the plan.

D. CONCLUSION

In conclusion, the filing of a bankruptcy case does not necessarily mean that your creditor client's rights are cut off and no hope remains. The facts and circumstances vary from case to case, of course. A collection attorney can guide its client through much of the bankruptcy process and protect the creditor's rights. When more complicated issues than filing a claim, getting administrative status for a claim or seeking the assumption or rejection of an executory contract arise, your CLLA bankruptcy colleagues remain ready and able to assist you to navigate these waters to maximize your client's recovery. ■

14 See In re Blankenship Farms, LP, 612 B.R. 570 (Bankr. E.D. Ark. 2020); In re Globe Metallurgical, Inc., 312 B.R. 34 (Bankr. S.D.N.Y. 2004); In re Mary Holder Agency, Inc., No. 11-12345, 2012 Bankr. LEXIS 4452 (Bankr. N.D. Ga. Sept. 20, 2012).

15 See In re Krisu Hosp., LLC, No. 20-10434, 2021 Bankr. LEXIS 788 (Bankr. N.D. Tex. Mar. 31, 2021); In re WorldCom, Inc., 308 B.R. 157 (Bankr. S.D.N.Y. 2004).

16 See Brown & Cole Stores, LLC v. Associated Grocers, Inc. (In re Brown & Cole Stores, LLC), 375 B.R. 873 (B.A.P. 9th Cir. 2007). See also 11 U.S.C. § 503. Allowance of administrative expenses.

17 See In re Morgan, 659 B.R. 461 (Bankr. S.D. Fla. 2023); In re D & G Invs. of W. Fla., Inc., 342 B.R. 882 (Bankr. M.D. Fla. 2006).

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Robert Ash
Legal Dept. Manager
Radius Global Solutions

TALK TO ME FROGGY

For those of you who attended this year's CLLA National Convention, you will likely recognize this topic. In the "Good Forwarders Gone Bad" seminar, paneled by Matt Garcia, Brian Press, and myself, we focused on the relationship and communication between forwarders and receivers. There will be a part two at the 2025 Convention focusing on the relationship and communication between forwarders and creditors.

In our industry, when it comes to the forwarder and receiver relationship, our reliance upon you for your detailed, accurate, and timely information is not optional – it's a necessary requirement. Our clients expect us as legal liaisons to keep them as informed and up to date as possible when an account has been assigned to you. For us to be able to properly relay this information to our client, we must rely on your office's communication and response time; especially when we contact you for status updates.

While there can be numerous contributing factors as to why good forwarding can go bad, the "Telephone Game" is not one that we can allow to occur or affect our crucial relationships. We must be clear and concise with each other from start to finish, from the placement and acknowledgment all the way to the closing of the case, including all factors that can occur in-between. When a good forwarder and receiver relationship goes bad, far more often than not, it comes down to one simple thing – **communication**; or, as unintentional as it may be, a lack thereof. There can be many contributing factors to this, including no communication at all, a simple misunderstanding, an inattentive representative, or an overwhelming daily workload surpassing anyone's capacity to accomplish.

All of that, either alone or in any combination, contributes to what can go bad, and frankly, most are avoidable. Quite often we must set priorities, daily, hourly if not minute by minute as something is bound to come up that must immediately go to the top of our to-do list. This is especially true when we as agency liaisons have a highly demanding client to respond to, update, and inform. It's clients like this that require assistance from your office more than we would like to have to ask you for.

When agencies contact your office, there is always a reason, and that reason is not typically just because that account came up for review that day. When we contact you for an update on the status of a case, it's usually because our client is asking us the same. There are plenty of inquiries we can handle without needing to contact your office such as the times when a client

contacts us asking for an update only two weeks after you have filed suit. We can answer our clients without your assistance when they ask, "When will the debtor be served?" As well as the times when a client asks us, "Now that the judgment has been obtained when do I get my money?" Often our day-to-day contact is prompted by those they answer to, so naturally then coming to us since we are supposed to know what's going on. Whenever possible we will answer these questions without involving your office and taking up your time.

What we do require is your expertise and informative help when we are not aware of what has occurred with a case since your last communication or where we are in the legal process. Although creditors in the commercial debt world seem to be steadily losing their rights, they still have the right to know what's going on with their account and it is our responsibility as forwarders to keep our clients in the know.

Many receiving attorneys are nothing short of fabulous at reporting, often providing unsolicited, consistent updates for which I thank you, please keep them coming! Yet we still come across some firms who simply do not report at all, or rarely, perhaps due to some of the previously mentioned reasons. Again, as unintentional as that may be, this often results in an incredibly negative perception both by us as agencies and by our clients who will never understand why it can be so difficult to obtain status.

While not an issue for many firms, there are firms that do fall short with communication. The single biggest problem with many of these regarding communication is the illusion that it has taken place. Silence is not golden; it can be deadly to the relationship. I can't tell you how many times I've placed a claim for demands and must follow up for the acknowledgment, for an update asking if the debtor has responded, and/or for suit requirements for our client to review. As forwarders, this should not require multiple attempts on our part over the course of months.

I can't tell you how many times costs for suit have been sent to a receiver and the next thing we are made aware of is that judgment has been obtained because we are being asked for debtor asset information. Similarly, I can't tell you how many times I've placed a claim and a payment has arrived via your office with no explanation. Alternatively, there are times when we have remitted execution costs and we find out your file has been closed when unused costs have been returned. What happened with the execution? Why are you closing? Are there any other options?

Please let us know when costs are received, suit filed, defendant served, when you are filing for the judgment, when the judgment is obtained, how much it's for, what execution options are in your jurisdiction, the related costs, as well as any post judgment recommendations. I have a client who has spent money and entrusted us with that case. You have a forwarder and client who entrusted you with that case. Together, we need to keep that client informed.

I contend that the legal forwarder at every agency has arguably the toughest job in that agency, as we must keep so many people happy. From our clients to our attorneys to those who employ us; all while protecting a creditor's rights, especially their right to know. While many clients understand that lawsuits take longer than anyone would like, they do not understand what takes so long to get back to their inquiry. As I often tell clients, "The civil legal process is too often like watching a snail race a tortoise, through molasses in a desert, in the middle of August." Notifying us of what has or has not yet occurred should not be as complicated as the legal process can be and I don't believe there is any such thing as over-reporting.

Since clients can contribute to delays and impede the progress of a case, "Good Forwarders Gone Bad - Part II" will center on what we as agencies often deal with when clients get in the way of progress, as opposed to contributing to it. We too need to keep you as up to date and appraised of our efforts with our clients, as we are here to assist in every way we can, knowing this is not a one-way street.

When you think about it, there is only one boss and that is our mutual client. Our clients can place their business and spend their money anywhere they want, with someone else, and we never want to put our client or ourselves in that position. We want our clients to feel like they received the best possible legal representation in the industry, regardless of the outcome, by the best creditor's rights attorneys in the country.

It's getting harder and harder to make a buck these days. something none of us should ever apologize for. Earning money, making a profit, running our businesses all while protecting a creditor's rights to conduct interstate commerce, is essential to our living and economy. With "Consumer Creep" in the commercial world, it may very well soon be a lot tougher to make a difference.

What should never be difficult though is how we go about doing so, especially when it comes to communication or our communiqué. Talk to me Froggy, that's what I'm here for. ■

Lee Mendelson
Of Counsel
Gaba Law

THE ADVANTAGES OF MEDIATING THE CREDITORS' RIGHTS CASE

For twenty-seven years, I represented creditors in a high volume of business litigation and collection lawsuits. These cases ranged from small balance consumer debt to multiple party commercial claims with various security interests. Over the years, as my law firm grew, I began adding more and more insurance carriers as clients, not only handling the collection of their outstanding insurance premiums, but also their subrogation cases. The great majority of my cases during the last ten years have been insurance related involving not only contractual disputes but also personal injury, property damage, products liability and coverage issues.

Over the years, one of the major differences that I noticed between handling collection cases and subrogation matters is the way in which they were resolved. A large number of the tort claims were settled at mediation while only a very small amount of the collection cases were mediated at all. Most of the time the consumer and commercial creditors themselves were the impediment to referring the collection case to a mediator. After all, they were already "in the hole." The belief was that it just does not make sense to continue to "throw good money after bad."

While in some situations this is correct, I would argue that those are cases that should not have been sued anyway. If it is worth filing suit to begin with, hiring a mediator to resolve the case should be a non-issue. In fact, it is more cost-effective to go through alternative dispute resolution than it is to continue with protracted litigation.

Mediation is generally less expensive than going to trial and it requires less time and fewer resources. Avoiding lengthy litigation will save significant legal fees and related expenses. This is even true in many situations where the client has hired the creditors' rights attorney on a contingency, as there are often additional filing fees for motions, cost expenditures for certain types of discovery, and airplane and hotel payments to be made for the travel of witnesses. There is also always the risk of fee shifting in states where attorneys' fees clauses are reciprocal.

One reason often given for avoiding mediation in the collection context is that the balances are too small. This is usually seen with consumer collections where a client may file suit but if the case is disputed they will consider dismissing the case rather than providing a witness for trial. These cases are actually primed for

mediation. In the insurance industry, many carriers hire low-cost mediators to resolve smaller balance litigation cases in a "rapid fire" manner. The insurance carriers will schedule from five to ten mediations on the same day for low balance claims and will hire the same mediator for all of them. These "speed mediations" are held telephonically and usually last about two hours. The fees for these types of mediations usually range from $600 ($300 per party) to $900 ($450 per party). Consumer creditors that have claims where debtors have defense counsel would be served well to establish this type of program.

An additional advantage to mediating cases is that it is much less adversarial than proceeding through the full litigation process. As all attorneys specializing in creditors' rights are fully aware, today's regulatory environment will often result in frivolous allegations and cross claims against creditors, collections agencies and even attorneys. Once a case enters into alternative dispute resolution these types of issues dissipate. The informal and flexible nature of mediation can reduce emotional stress often associated with litigation leading debtors to be more willing to work with creditors to resolve issues rather than create new ones. Mediation is designed to be less intimidating and more comfortable for all of those involved. This spirit of working together to reach a resolution makes the temperature lower in a difficult situation. The case naturally becomes less adversarial resulting in fewer cross claims and debtor threats of regulatory violations.

Most disputes in the creditors' rights world are purely distributive in nature, meaning that there is a sum of money believed to be owed and the parties need to determine how much will be paid and how quickly. However, this is not always the case. Sometimes, there is the potential for future business between the creditor and the debtor. In these instances, the spirit of cooperation in mediation is especially important. The process can improve communication and potentially resolve underlying issues. It is true that there are times when we simply need to cut a cake and pass out the pieces but there are other times when a good negotiation can also add a cherry on top. Mediation allows for these types of creative solutions that might not be possible through litigation. This flexibility can lead to more satisfying outcomes tailored to meet the parties' unique needs.

An additional advantage to entering into alternative dispute resolution is that the parties themselves are able to choose the mediator. There is no risk of ending up with a judge that is naturally inclined to treat one party more favorably than the other. With mediation, the parties agree on the person that will move the process forward. This gives the parties the opportunity to work with a neutral that understands the subject matter and can assess the strengths and weaknesses of each party's position with the ability to provide feedback on how a court may view the case. A good mediator can evaluate and offer options or suggest specific solutions.

Mediation is empowering for the parties. Cases that are resolved at mediation then have compliance rates much higher than those cases decided by a judge or jury. Since the parties participate in creating the agreement, they are often more committed to adhering to the terms. Of course, the mediated settlement should always be reduced to a written agreement that can be enforced in court in the event of a broken promise from one side or the other, but, at the end the day, the likelihood of payment per the agreement is much stronger and the case will have been resolved in a more cost-effective, less adversarial manner. ■

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RESOLVING FREIGHT QUANDARIES: THE MYSTERIOUS MISSING CARRIER NAME

In the realm of freight charge dispute resolution, a recurring topic that consistently emerges during negotiations and litigation revolves around the presence or absence of the delivering carrier's name on the bill of lading.

The bill of lading is the basic transportation contract between the shipper and the carrier.[1] But what if the name of the actual delivering carrier is omitted from the bill of lading?

For professionals dealing with freight charge disputes, this matter is a recurring theme that frequently surfaces during negotiations and legal proceedings. The bill of lading is a contract, but as we all know, privity of contract is a requirement to enforce and have standing under said contract.

So, the big question here is whether a carrier actually has the standing and the legal right to pursue freight charges when the bill of lading doesn't have their name neatly listed in that Carrier box. Is that a permissible move from a legal perspective?

There are several arguments that the delivering carrier does in fact have legal standing and privity of contract. This article will address these arguments and give some practice pointers.

This article will address:

- The Carrier's Signature on the Bill of lading
- Implied Contract
- Damage Responsibilities and Rights
- Broker Regulations and Representation as Carriers
- Agency Principles

Inserting a freight broker's name or another carrier on the bill of lading is a very common occurrence in the transportation industry. It is common for shippers to insert the broker's name if the carrier is unknown at the time the load is arranged. Whether it happens intentionally or through oversight or negligence, it can cause a number of legal conundrums that the parties must sort out when the delivering carrier fails to get paid for hauling the loads.

This issue becomes even more prevalent in double brokering situations, where brokers may assert

1 *Southern Pacific Transportation Co., v. Commercial Metals Co.*, 456 U.S. 336, 342 (1982).

themselves as the actual delivering carriers. In many situations the broker listed as the Carrier on the bill of lading has no authority to haul the load and placing the broker's name on the bill of lading is a clear violation of Federal Regulations.

ARGUMENT 1: THE DELIVERING CARRIER'S SIGNATURE ON THE BILL OF LADING

Carriers almost always sign the bill of lading at pick up. This is a very strong argument that the delivering carrier's signature on the bill of lading, despite what is listed in the Carrier box creates a contract between the delivering carrier, shipper and consignees.

The truck drivers signing bills of lading are signing on behalf of the trucking companies they work for, and they presumably have authority to bind the company. Legal precedent supports the notion that drivers possess ostensible authority to bind the carrier. Several factors come into play: drivers execute contractual documents on behalf of the carrier, drivers often serve as the primary representatives of the carrier, and in some instances, the shipper and consignee may remain unaware of the identity of the hauling company until the driver arrives for transport.[2]

The carrier can argue that any name discrepancies on the bill of lading are immaterial, as it was signed by the appropriate parties, including the actual carrier, shipper or consignee. The signing carrier is responsible for the safe delivery of the freight and they should be entitled to its freight charges for time and resources spent hauling the load.

Courts "apply general principles of contract interpretation when construing a bill of lading."[3] The law's primary objective is to uphold the parties' intent, even if there are errors or mistakes in expression. The intent of the shipper and consignee is to have the goods hauled in good order. The intent of the carrier is to carry those goods and get paid for doing so. The signatures of the parties carrying out that intent confirms that they are the parties to the contract (bill of lading).

The broker's intent is to hire a carrier for the shipper or consignee and make a profit as the middleman. That intent is separate from the bill of lading, and is typically memorialized in broker-carrier agreements and contracts with arrangers of freight.

The handwritten signature of the driver should prevail over an erroneously printed name on the bill of lading:

> [The] principle that handwritten terms control over preprinted provisions "is based on the inference that the language inserted by handwriting . . . is a more recent and more reliable expression of [the parties'] intentions than is the language of a printed form." Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 Colum. L. Rev. 833, 855 (1964) (citing Restatement, Contracts § 236(e) (1932)). "Since the parties actually chose to add to or modify the printed contract, the written terms presumably better reflect their intention than those contained in a printed contract intended for general use." 11 Williston on Contracts § 32:13 (4th ed.).[4]

This makes sense as the actual carrier may not be known at the time the bill of lading is drafted. Once the carrier hauling the goods shows up, the intent of the parties is to have that carrier bound to the bill of lading terms and conditions.

Further, ambiguities in the bill of lading should be construed against the *non*-drafting party. A fancy legal word would apply here: "Contra Proferentem". "If a contract is ambiguous, we will apply the doctrine of contra proferentem against the drafting party and interpret the contract in favor of the non-drafting party." *Perrigo Co. v. Int'l Vitamin Corp.*, No. 1:17-CV-1778, at *11 (D. Del. Sep. 7, 2018). However, even though a carrier legally "issues" the bill of lading, it is generally drafted by the shipper or consignee, whichever arranged the shipment. The signature of the delivering carrier should trump the erroneous Carrier box on the bill of lading.

What if the carrier doesn't sign and isn't on the Bill of Lading?

This is very bad for the carrier. In the below case, the Court determined that an unsigned bill of lading was worthless:

> A bill of lading is both a receipt for goods by a carrier, and a contract to carry. It is symbolic of the property itself. Without the signature of a carrier, it is not a bill of lading. It is not a receipt of goods by a carrier, nor a contract to transport. The bank had neither a receipt from a carrier nor any instrument showing a shipment of steel. The most essential element of a bill of lading was lacking — the same as if an instrument labeled a deed or a promissory note lacked the signature of a grantor or a maker. The papers which the defendant's teller represented to plaintiff's treasurer as being "straight bills of lading" were as a matter of fact worthless, and that fact was

2 *C.A.R. Transportation Brokerage Company, Inc. v. Darden Restaurants, Inc.*, 213 F.3d 474, 9th Cir. 2000).

3 *OneBeacon Ins. Co. v. Haas Indus., Inc.*, 634 F.3d 1092, 1098 (9th Cir. 2011).

4 *Great Lakes Excavating, Inc. v. Dollar Tree Stores, Inc.*, 2022 WI 44 (Wis. 2022).

apparent on the face of the instruments. There was a misrepresentation of a very important fact.[5]

Yikes! Carriers sign your bills of lading! This old banking case should be a warning that not signing the bill of lading can lead to complete non-payment of freight charges. In this case, a carrier would have to rely upon a quasi-contract or implied contract argument as discussed below. The best practice, in order to mitigate potential issues, would be for the delivering carrier to print or even handwrite its company name and MC number on the bill of lading if not already listed, accompanied by the carrier's signature. This practice provides clarity regarding the entity responsible for the cargo's delivery.

ARGUMENT 2: IMPLIED CONTRACTS BETWEEN DELIVERING CARRIERS AND SHIPPERS

Another valid argument carriers can invoke when confronted with this issue is alleging that they have a quasi-contract with the shipper and consignee. An implied in fact contract, often referred to as a quasi-contract, is a legal concept that arises when the parties involved do not have a formal written agreement, but their actions and circumstances imply that an agreement existed.

If the shipper argues that since the carrier is not listed on the bill of lading there is no written contract, a carrier can assert an *implied contract.* This was discussed in *Contship Containerlines, Inc. v. Howard Indus,*[6] where the bills of lading were not signed by the delivering carrier. Despite this, the Court held that there remained a quasi-contract between the shipper and carrier.

The quasi-contractual liability hinged upon the shipper's knowledge regarding the identity of the carrier, and the fact that the shipper had benefited from the services of the delivering carrier:

> *The undisputed facts viewed in the light most favorable to Howard are sufficient to establish the necessary elements of a quasi-contract. Howard Industries delivered its goods to Contship, and Contship transported those goods exactly as Howard Industries wished. In doing so, Contship conferred a benefit on Howard Industries. It is clear that Contship did not behave opportunistically and seek out Howard Industries or trick Howard Industries into using its services, but rather behaved as any carrier would if a shipper delivered goods to it. Indeed, there is no dispute from Howard Industries as to the amount of shipping charges or whether the service was performed adequately.*
>
> *In light of these facts, Howard Industries' payments to Transworld were undertaken at its own risk. Thus, even if there is an issue of fact regarding whether there was an agreement between the parties, there is no need for a finder of fact to decide that issue as we believe the undisputed facts viewed most favorably to Howard clearly establish a quasi-contract.*

Despite the fact that Transworld, the intermediary in this case, had failed to pay the delivering carrier, the shipper knew that Contship delivered its goods in good order for the benefit of the shipper. The pivotal factor in this case was that shippers typically have knowledge of the actual carrier when they entrust their freight and take the risk of paying a third party. A shipper should know who is on its property and who undertakes to deliver its freight. If any doubts arise regarding the delivering carrier's identity, these can be resolved through discovery requests and informal discovery.

I also found this oddball case too that may offer an argument: *Freight Operations v. Hunterdon Cty. Democrat.*[7] This one is interesting because the Court said that since there was no bill of lading at all, the Uniform Bill of Lading should apply. Plaintiff's contention that the terms of the Uniform Bill of Lading should be implied as the contract between the parties is correct.[8] This is a topic for another article as bills of lading are not always drafted in conformity to the Uniform Bill of Lading, or the Straight Bill of Lading, or any other precedent form.

Practical Implications and Best Practices

For shippers, consignees, brokers and carriers alike, understanding the implications of implied contracts can be beneficial. Here are a few practical considerations and best practices:

1. **Clarity in Documentation:** Shippers should strive to provide accurate and complete information on the bill of lading, including specifying the carrier's name. This clarity can help avoid potential disputes down the line.
2. **Implied Contracts Awareness:** Parties involved in shipping should be aware of the concept of implied contracts and their relevance in the industry. Knowing that implied contracts can exist even without a formal written agreement can help them navigate disputes more effectively and make it clear as to the liabilities of the parties.
3. **Discovery Requests:** In cases of uncertainty about the carrier's identity or contractual obligations, utilizing discovery requests can be a valuable tool. This legal process allows parties

5 *Wettlaufer Mfg. Corp. v. Det. Bank*, 324 Mich. 684, 689-90 (Mich. 1949).
6 309 F.3d 910 (6th Cir. 2002).
7 184 N.J. Super. 556 (App. Div. 1982).
8 *City of Nome v. Alaska Steamship Co.*, 321 F. Supp. 1063 , 1066 (D. Alaska 1971).

to gather information and evidence to support their claims. Requests can be tailored to determine the delivering carrier or prove what entity delivered the shipments.

ARGUMENT 3: THE ACTUAL CARRIER IS LIABLE FOR CARGO DAMAGE AND SHOULD BE ENTITLED TO ITS FREIGHT CHARGES.

The question arises that if the delivering carrier is liable for the care and safety of the goods being hauled, shouldn't the carrier be entitled to the freight charges due? The delivering carrier has the obligation to deliver the freight safely to its destination regardless of the named Carrier in the bill of lading. The delivering carrier will be liable for cargo damage if the goods are damaged or destroyed in transit to location. In accordance with the Carmack Amendment, the liability stipulations outlined in a bill of lading extend to "(A) the initial receiving carrier, (B) the ultimate delivering carrier, or (C) any intermediate carrier responsible for the transportation of the property," as per 49 U.S.C. § 14706. To claim the benefits of the Carmack Amendment a shipper must sue either the carrier issuing the bill of lading or the carrier delivering the goods to the final destination. Either of these carriers will be liable for damage caused by any carrier used during the trip.

The specification of the delivering carrier within the bill of lading should not be the sole determining factor of the parties' rights, responsibilities, and liabilities. A precedent was set in *Keystone Motor Freight Lines v. Brannon-Signaigo Cigar Co.,*[9] highlighting that a carrier, even if not explicitly mentioned as such in the bill of lading, may still be held accountable as the delivering carrier under the Carmack Amendment if it accepts and transports all or part of the cargo. Similarly, the designation within the bill of lading may not dictate the liability of a carrier that takes possession of the cargo in transit. As illustrated by the decision in *Galveston Wharf Co. v. Galveston H. S.A.R. Co.,*[10] whether or not a carrier is named in the bill of lading is not the primary concern when it comes to their role as a connecting carrier.

Determining whether a party functions as a broker or carrier hinges on factual considerations. As demonstrated in *Louis M. Marson Jr., Inc. v. All. Shippers, Inc.,*[11] this inquiry revolves around whether the party has legally committed itself to the transportation of goods by accepting the responsibility for ensuring their safe delivery. The decision in *Tryg Ins. v. C.H. Robinson Worldwide, Inc.*[12] further solidifies this principle.

A carrier that is not named in the bill of lading but receives possession of the cargo is liable as a connecting carrier, for the fact that it "was not named in the bill of lading is unimportant."[13]

In fact, it is not even necessary to have a bill of lading when imposing liability upon a carrier. Although the Amendment requires the "initial carrier to issue a receipt or bill of lading . . . when it receives property for transportation from a point in one state to a point in another,"[14] the "[f]ailure to issue a receipt or bill of lading does not affect the liability of a carrier."[15]

To sum up, when goods suffer damage during transit, it is possible for the delivering carrier to be held accountable, regardless of how they are designated in the bill of lading. Their clear acceptance of responsibility for the safe delivery of the goods effectively establishes them as the *Carrier* under the bill of lading. This responsibility should grant the carrier full rights to pursue claims against both shippers and consignees for freight charges.

> *Southern Pacific* teaches that: (1) a carrier has a right and a duty to collect its freight charges against any party liable for them; and (2) courts should be reluctant to imply affirmative defenses in favor of a shipper which is contractually obligated to pay the carrier's freight bill.[16]

In a similar vein, just as shippers and consignees can pursue the delivering carrier for damages, the notation on the bill of lading does not necessarily change that dynamic. Everyone involved has their respective rights and responsibilities, ensuring a fair playing field in these situations.

From my perspective, it is only fair that the delivering carrier gets compensated and is seen as a crucial part of the contract, regardless of whether they are officially listed as the *Carrier* on the bill of lading. Every contract comes with its set of rights and responsibilities. The carrier has the right to receive payment and, at the same time, carries the responsibility of ensuring the safe transportation of the freight. It is all about honoring those commitments.

ARGUMENT 4: BROKER REGULATIONS AND REPRESENTATION AS CARRIERS

I hold the perspective that if an inappropriate party is designated as the *Carrier* on the bill of lading, the

9 (C.A.5) 115 F.2d 736.
10 285 U.S. 127.
11 438 F. Supp. 3d 326 (E.D. Pa. 2020).
12 No. 17-3768 (3d Cir. 2019).
13 Galveston Wharf Co. v. Galveston H. S.A.R. Co., 285 U.S. 127, 52 S.Ct. 342, l.c. 344, 76 L.Ed. 659, l.c. 662.
14 Adams Express Co. v. Croninger, 226 U.S.491 (1913) at 504.
15 49 U.S.C. § 14706. See also CNA Ins. Co. v. Hyundai Merch. Marine Co., 747 F.3d 339, 355 (6th Cir. 2014): "an actual or tangible bill of lading is not necessary to impose liability on the initial carrier under Carmack's plain terms".
16 Flota Mercanta Gran Columbiana, S.A. v. Florida Construction Equipment Inc., 798 F.2d 143, 147 (5th Cir. 1986).

delivering carrier should be recognized as the *de facto Carrier* as per the terms of the contractual bill of lading. It is important to note that regulations pertaining to property brokers expressly forbid them from representing themselves as carriers in any capacity. Therefore, in situations where there is a misrepresentation on the bill of lading, it's only reasonable to default to the delivering carrier as the rightful *Carrier* as defined by the contract.

When a property broker disregards these regulations and inserts their name on the bill of lading as a carrier or undertakes carrier duties, they expose themselves to third-party accidents and cargo claims. Statutory definitions clearly distinguish brokers from motor carriers.[17] Courts have emphasized that a bona fide holding out as a carrier, coupled with the ability to transport cargo for hire, constitutes misrepresentation.[18]

The standard bill of lading typically defines the term *Carrier* as any person or entity in possession of the shipped goods under the contract. Therefore, to establish the subcontracting carrier's liability for cargo loss or damage, it is crucial to demonstrate that the subcontractor was in possession and control of the shipment at the time of the loss and contractually obligated to transport it.

While a load confirmation sheet executed by the carrier, coupled with evidence that the carrier who signed the bill of lading was an employee or agent of the subcontracting carrier, usually suffices to establish the subcontractor's liability and trigger cargo coverage, prevailing confusion has led to the belief that obtaining Certificates of Insurance or additional insured status is advisable before entering brokerage or subcontracting relationships.

Further, a broker placing its name on the bill of lading can result in serious legal repercussions for the broker. The regulations explicitly forbid property brokers from presenting themselves as carriers in any manner. When a property broker disregards these regulations by including its name on the bill of lading as the official carrier or by assuming carrier responsibilities, it exposes itself to potential legal action related to third-party accidents and cargo claims.

The question at hand revolves around whether we should disregard the incorrect *Carrier* notation on the bill of lading when the broker has no legal authority to place its name on the bill or represent itself as a carrier. In such cases, it is worth considering whether we should conclude that the delivering carrier is, in fact, the genuine party to the contract. This raises the issue of whether the erroneous representation should hold any weight when determining contractual obligations, particularly considering the broker's lack of legal authority in this matter.

17 49 U.S.C. §13102(2).

18 *Nevada v. Department of Energy*, 457 F. 3d 78, D.C. Cir. 2006).

ARGUMENT 5: BROKERS ACTING AS AGENTS OF THE CARRIER

Shippers and consignees often assert that the broker was acting as the agent of the carrier. This argument is often supported by language found in many broker-carrier agreements. If a broker indeed acts as an agent of the carrier and signs the bill of lading on their behalf, it is entirely possible that the carrier still retains legal standing to pursue claims under the bill of lading. In this scenario, the broker, acting as an agent, possesses the authority to bind the carrier to the terms and conditions outlined in the bill of lading.

Should this matter come before a court, it would necessitate a thorough examination of the principal-agent relationship between the broker and the carrier. Such an analysis would entail a factual inquiry to determine the extent of the broker's authority and whether it was legitimately exercised on behalf of the carrier.

When a broker signs the bill of lading on behalf of the delivering carrier, they essentially function as a representative of the carrier and sign the carrier's name on the document. This signature is legally binding for the delivering carrier, the shipper, and the consignee. It means that the broker, in their capacity as an agent, has the authority to enter into agreements on behalf of the carrier, and the terms and obligations outlined in the bill of lading apply to the delivering carrier as if they had signed it themselves.

More Practical Considerations

The Federal Motor Carrier Safety Administration ("FMCSA") mandates that all motor carriers conspicuously display their name and MC number on the sides of their trucks. This requirement is fundamental to ensure transparency and accountability in the transportation sector. It is essential to recognize that ignorance of this obligation cannot be used as a legitimate defense. When a truck enters a shipper's or consignee's property for loading or unloading, it is incumbent upon them to be aware of the entity on their premises.

It is crucial to emphasize that shippers cannot evade liability merely by omitting the carrier's details from the bill of lading. Many instances exist where the actual carrier is not explicitly listed on the bill of lading. In such cases, the responsibility falls squarely on the shipper to ensure compliance. Ignorance or apathy in this regard cannot serve as a legitimate defense.

The bill of lading holds significant importance in the transportation process and is usually prepared by the shipper or consignee. However, it is important to recognize that the carrier holds the legal responsibility for "issuing" the bill of lading. Often, carriers do not

have the opportunity to review this document until the goods are loaded onto the truck, and the driver is ready to commence the journey.

In practice, it is neither reasonable nor practical to expect carriers to undergo the arduous process of rewriting the entire bill of lading if inaccuracies regarding the carrier's name arise. In such situations, it becomes imperative for shippers and consignees to ensure that all information is accurate from the outset. This approach not only ensures compliance with FMCSA regulations but also streamlines the transportation process, reducing the likelihood of disputes.

Additionally, it is worth noting that the term *Carrier* is frequently defined within the terms and conditions specified in the bill of lading itself. It is advisable and a best practice to carefully review the terms and conditions of the disputed bill of lading and assess whether the delivering carrier aligns with the document's definition of *Carrier.* If the delivering carrier indeed meets the criteria set forth in the bill of lading's terms and conditions, many of the aforementioned arguments may become irrelevant or moot. This step is crucial in ensuring a clear and legally sound understanding of the parties' roles and obligations in the freight transaction.

Adherence to FMCSA regulations and the diligent execution of responsibilities pertaining to bill of lading accuracy are indispensable components of a transparent and accountable transportation industry. Both shippers and carriers must recognize their obligations and the consequences of failing to accurately identify the carrier involved in the transportation process. Avoiding compliance is not a viable defense, and practical considerations should guide the initial preparation of the bill of lading to prevent unnecessary revisions and maintain the efficiency of cargo transportation operations.

CONCLUSION

In the realm of freight charge dispute resolution, the presence or absence of the delivering carrier's name on the bill of lading often becomes a crucial point of contention. The bill of lading, as we know, serves as the fundamental transportation contract between shippers and carriers. However, what happens when the name of the actual delivering carrier is omitted from this critical document? This issue is a recurring theme in negotiations and litigation for those who handle freight charge disputes.

The central question revolves around whether a carrier truly possesses the legal standing and the right to pursue freight charges when their name is not neatly listed in the Carrier box on the bill of lading. It is a legitimate concern from a legal perspective, given that privity of contract is typically required to enforce and establish standing under any contract, including the bill of lading.

Throughout this article, we have explored several compelling arguments that support the delivering carrier's legal standing and privity of contract. From the carrier's signature on the bill of lading, implied contracts, broker regulations, and agency principles, each argument sheds light on the complexities surrounding this issue. The common thread among these arguments is the importance of recognizing the delivering carrier's role in the transaction, regardless of their official designation as the *Carrier* on the bill of lading.

Practical considerations and best practices also play a crucial role in navigating these freight quandaries. Clarity in documentation, awareness of implied contracts, and the use of discovery requests are essential tools to mitigate potential disputes. Furthermore, the responsibility to display the carrier's name and MC number on trucks, as mandated by the FMCSA, reinforces the need for transparency in the transportation sector.

The delivering carrier's role in freight transactions should not be diminished by the absence of their name in the *Carrier* box on the bill of lading. It is both fair and legally sound to recognize their significance in the contract, as they bear the responsibility for the safe transportation of goods. Ultimately, whether you approach this issue from a contractual, regulatory, or practical perspective, the delivering carrier's rights and responsibilities should be acknowledged and respected in the realm of freight charge disputes. ■

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Borges and Associates, LLC

UPDATE ON THE UNIFORM LAW COMMISSION'S UNIFORM ASSIGNMENT FOR THE BENEFIT OF CREDITORS ACT COMMITTEE

The Uniform Law Commission ("ULC") Committee to Create a Uniform Assignment for the Benefit of Creditor Act met on November 22nd and 23rd, 2024 to discuss the latest draft of the Assignment for the Benefit of Creditors Act which incorporates all revisions from the latest meetings held on September 9, 2024 and November 5, 2024. The CLLA observers, Wanda Borges, Marc Micelli and Austin Peiffer were present during that two-day meeting. Working with this latest draft, the Commission worked through the draft, page by page to accept any additional corrections or comments. This report will address the more salient points that were addressed during this meeting but is not a complete summary of the two day meeting. The Sections refer to the November 5, 2024 draft of the Assignment for the Benefit of Creditors Act which can be found at: https://shorturl.at/t3VPY or by contacting either Wanda Borges, Marc Micelli or Austin or Joe Peiffer.

SECTION 4 REQUIREMENTS FOR ASSIGNEE AND ASSIGNMENT

Much discussion was had as to an assignee's fees. Some states without court supervision leave creditors in the dark as to what the assignee's fees should be or on what those fees are based. In California, the contract for fees is generally attached to the assignment document so that it is readily available to creditors. It was pointed out that in the states with court supervision, the retention application must set forth the details of the fee structure which the court will provisionally approve at the beginning of the case subject to final fee application at the conclusion of the case. The consensus was that creditors should have a right to know what the fees will be and have a voice in the approval of those fees.

SECTION 5. EFFECT OF ASSIGNMENT

The topic of fiduciary duty has been discussed at length at each of the committee meetings and was still discussed at this meeting. Some committee members and observers feel there should be a broad definition of "fiduciary duty" while others feel it should be more narrowly construed. The consensus is that it must be clear as to what the assignee's duties are.

SECTION 6. FILING AND RECORDING REQUIREMENTS

Discussion was had as to whether or not the assignee should be required to file a UCC financing statement. The pros and cons were that it is unnecessary since the assignment trumps all secured parties as opposed to it being essential to protect the assets from any claims of creditors who might seek to claim a secured position with respect to the assignor's assets.

One point was made by a Florida judge that there is a requirement to file a document that reflects the assignment. If using a UCC financing statement it should indicate that it is being filed to evidence the assignment for the benefit of the creditors – there is a check box to indicate this is NOT a UCC Article 9 financing statement The statute should allow putting the reference to the ABC in the "Collateral Description"

Much discussion was had as to what type of notices need to be sent to creditors to assure those creditors are aware of the assignment and when those notices should be given. Opposing points ranged from notifying all creditors simultaneously with the signing of the assignment to the impracticality of being able to do that because all creditors' information may not be known at the time of the initial assignment. Discussion was further had that such notice had to take place before a sale of assets. Everyone agreed on that.

The question was then raised as to whether or not recordation of an assignment for the benefit of creditors as to real property would trigger a transfer tax. One suggestion was that doing this by a quitclaim deed would not trigger a transfer tax. In California, the execution of assignment creates a transfer of ALL real property regardless of when anything is recorded in any public record with the idea being that a document should be recorded as soon as possible to protect the assignee against any sub-sequent transferee.

In Florida, apparently the land title companies have a concern about this issue. So, in Florida there is a recordation of the assignment with a legal description of the property. An effective idea is that the assignee has to make sure that the filing is linked to the real property in accordance with state statute.

After discussion of whether or not this transfer of real property would be a taxable event, a suggestion was made that the statute should contain specific language that such transfer is not a taxable event. However, several people voiced the opinion that such language would impact other state statutes. Therefore, there will be a Legislative note made.

SECTION 8 – DUTIES OF THE ASSIGNOR

Much discussion was had about the practicality of mandating that a principal of the assignor or some other qualified person stay around during the length of the assignment proceeding. For example, there may be a need for someone with knowledge of the technology of the assignor or patent information. No one wants the assignee to be hamstrung in the event a principal of the assignor decides to move, take a job or leave the country. Language will be added to the proposed statute and/or the Comments that the person designated by the assignor shall have accepted the responsibility to perform those duties necessary to assist the assignee to administer the estate and its assets during the course of the assignment proceeding. Many commenters stressed that this should be ironed out prior to the signing of the assignment agreement and if the assignor is not willing to provide the necessary personnel, then the assignee should not accept the assignment.

SECTION 9 DUTIES OF THE ASSIGNEE

Discussion was had as to the duties of the assignee being limited by the list set forth in the proposed statute. Language will be used to the effect that the duties shall include but not be limited to those listed duties.

SECTION 11 PROOF OF CLAIM

There is no language as to whether or not a proof of claim requirement applies to a secured creditor or a tax claim. Language will be inserted to the effect that the assignee can accept any other or informal claim notice from a secured party or taxing authority. This created much discussion over whether or not, even never having received a proof of claim from one of the government entities, is the assignor obligated to pay that claim anyway based on federal priorities or other statute, This presented a dilemma that, in theory, could prevent the assignee from ever finalizing distributions of the estate. There will be a provision that the assignee has the ability to allow claims for distribution if they are known to the assignee or if the assignee is otherwise informed of the claim which does not meet proof of claim

requirements. All that being said, it will be necessary for the assignee to timely know of the claimant. If it is a governmental entity entitled to be paid under federal law and priority statute, the timeliness of that claim will not preclude payment.

Comment was also raised that this proposed statute grants jurisdiction over a creditor who files a proof of claim and that may not be permissible in most states to grant jurisdiction over a creditor in another state or country.

SECTION 12 CLAIM RESOLUTION

Language will be changed from the address provided in the proof of claim to any address last known to the assignee.

SECTION 13 RIGHTS OF TRANSFEREE

Comments were raised as to the use of the word "discharge". The ABC law should remain aligned with the UCC and not be misconstrued to relate to the bankruptcy discharge. The suggestion was made that there should be a comment so that all terms are to be interpreted as used in the UCC.

Comment was made as to the use of the word "subordinate" and there should be language to be clear that the reference is to a subordination to the assignee's rights and none other than the assignee's.

Discussion was had as to protection of the assignee upon disposition of the assets. Language may need to be added to clarify this issue.

SECTION 14 DISTRIBUTIONS

There is an issue regarding wage claims. Some states have no wage priority statutes and other states have wage priority statutes that are archaic. Consensus is to leave the draft as is which provides for the wage priority to follow the Bankruptcy Code or state law, whichever is greater.

SECTION 16 LIABILITY

Issues were raised as to the language exculpating a person acting on behalf of the assignee. Discussion was had as to inputting a willful misconduct standard and that was generally agreed upon.

Much discussion was had as to the liability of an assignee to a creditor which has been harmed and whether any liability runs to the individual creditor or to the estate. Discussion continued as to whether all creditors have been harmed or only a specific creditor has been harmed. Comments were made that the resolution is the removal of the assignee and then the liability claim would be pursued by the successor assignee on behalf of the estate. A question was raised as to whether the "business judgment rule" would be a defense available to the assignee. A suggestion was made that an assignee's actions should be viewed under a "commercially reasonable standard". It was agreed that an assignee is personally liable for material breach of a fiduciary duty. If harm is common to all creditors and that breach reaches gross negligence or willful misconduct, then the action must be brought by a successor assignee. Consensus was not reached on this and the Committee will look at the language once it is committed to paper.

Much discussion was had about the question of attorney-client privilege where the draft contains language that says a "court may order an attorney, accountant, or other person that has information in a record relating to the assignment estate or the financial affairs to turn over or disclose the record to the successor assignee" in the event of a removal of the original assignee. No resolution was reached but the committee will research case law to see if and how courts have ruled on this issue.

SECTION 19 INTERSTATE MATTERS

Discussion was had on how to handle cases with assets in multiple jurisdictions. The draft contains a provision for an ancillary administration in the other state. Concerns were raised that the other state may claim supremacy. Discussion was had that the original assignment should be recorded with the property records in the other state. It was conceded that recordation was logical especially with respect to real estate or intellectual property. A suggestion has been made that this section should contain language to the effect that "except as otherwise provided herein, and that trust and estate's laws of the respective states should apply.

SECTION 20 COURT INVOLVEMENT

Caution was expressed that Court Involvement will not fly in California or Illinois. This has been a continuous discussion during these meetings. However, it was stressed that this is precisely the reason why Alternative 1 and 2 was put into the proposed act so that states could opt in or out. It was commented that states such as California might pull this Section 20 out altogether.

The Committee will continue to work on this latest draft and a future meeting has been set for early in 2025. ■

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Michelle Gilbert, Esquire
Managing Partner
Gilbert Garcia Group. P.A.

DEBT COLLECTION AND ARTIFICIAL INTELLIGENCE: HELP OR HINDRANCE

STATE OF DEBT COLLECTION

Artificial intelligence (AI) continues to impact many business sectors, including debt collection. The average financial burden per U.S. household averages a little over $100,000 per household which includes mortgages, car loans, student loans and credit cards. One in four Americans have defaulted with this debt, which provides opportunity for the debt collection industry.[1]

In particular, inflation, higher interest rates and depressed wages have recently led to increased debt, but collection agencies and attorneys also have been impacted by these same factors, namely, rising costs and staffing shortages. Challenges in "traditional" debt collection include:

- Labor intensive: phone calls, letters, records, administrative tasks, human errors
- Stressful and harassing for customers
- Not targeted: does not account for underlying reasons for non-payment
- Regulatory compliance risk
- Vulnerable data management: compromise of customer privacy
- Limited customization and scalability
- Lack of impartial and fair treatment

Fortunately, there appears to be solutions and strategies to assist the industry to succeed, though not without some downsides.

USE OF AI IN FINANCIAL SERVICES AS PRECURSOR

More and more financial services customers use AI in their financial transactions. Adoption in the financial sector bodes well for further implementation in debt management. Over 98 million Americans interacted with bank chatbots, a number expected to reach 110.9 million by 2026. Companies like Wells Fargo, Bank of America, J.P. Morgan Chase, American Express and Fidelity Investments, who collectively employ over 3.3 million support center specialists, are investing in technology to reduce costs and automate most customer requests, with an anticipated cost savings of $7.3 billion globally.[2]

Specific industry uses, which allow staff to focus on complex matters, include:

- Automated notifications about payments, minimum due amounts, grace periods, payment methods, and how to set up online or recurring payments
- Automated reminders
- Personalized communications for customers

So how is the debt collection industry, including third-party collection companies, currently using AI?

1 Average American Debt : Household Debt Statistics; Market Snapshot: Third-Party Debt Collections Tradeline Reporting | Consumer Financial Protection Bureau

2 Banking Chatbots: Use Cases and Numerous Examples

According to the industry, sixty percent (60%) of collection firms say they are considering using AI tools, and they have been slow to adopt innovative technology. "When you started a collections agency, you used to need a phone and a filing cabinet. We've progressed from there, but we're slow adopters," Valerie Ingold, managing director of Commercial Collection Corp. in New York, and president of the International Association of Commercial Collectors, Inc. shared in an online Context publication.[3]

CURRENT USES OF AI IN DEBT COLLECTION INDUSTRY

As of mid-2023, eleven percent (11%) of collection companies use AI as follows:

- 58% of these companies use AI to predict payment outcomes, like ability or willingness to pay
- 56% use AI to profile customers for appropriate workflow
- 46% use AI to anticipate customer behavior
- 47% use AI to determine best communication approach[4]

But there is so much more opportunity in the industry to implement AI tools, as acknowledged by more than half of companies.[5] Specific internal applications include:

- Read, interpret analyze and handle inquiries about including invoices, payment delays, disputes, outstanding debts, payment receipts, address changes, etc.
- Validate and archive information about customers, such as account statements and credit reports
- Uses data on income, credit scores and net worth to make collection decisions
- Increase productivity while minimizing labor costs

External uses increase customer participation and satisfaction:

- Act as virtual customer assistant for simple tasks with escalation to human agents
- Detect patterns in financial behaviors
- Personalize communications based on customer preference
- Increase efficiency

Look to the increased usage of AI in the industry, such that this group will continue to provide updates on this topic.

WHAT CAN GO WRONG?

"Change is the law of life. And those who look only to the past or present are certain to miss the future."

John F. Kennedy

And with change, there always is a downside, and AI in debt collection is no exception. Debt collection is very personal, and interacting with chatbots can be detrimental to the effectiveness of the process, especially with sophisticated commercial parties who evade interaction.

AI is initially expensive and requires investment in fairly new technology and training. The old saying, data in, data out, applies because poor or inadequate data compromises the effectiveness of AI solutions. Compromise of personal information and misapplication of data resulting in bias have been identified as concerns. Because AI algorithms utilize historical data, biases or prejudices can be applied towards a certain group of people as part of the processes. Also, AI models are predictive, not definitive, and so regular auditing of systems with informed human oversighted is necessary to minimize these issues.[6]

Best practices that the debt collection industry implement when implementing AI include:

- Begin with accurate data and implement data privacy and security controls
- Use transparency in AI decisions making and solicit feedback for stakeholders, employees, customers, and regulators in understanding the system
- Account for and audit AI decision making in order to address errors and adjust
- Add human oversight and ability to override AI decisions, especially potentially biased or prejudiced algorithms
- Ensure compliance with laws and regulations
- Implement ongoing monitoring and improvement[7]

AI presents a transformative opportunity for the debt collection industry, offering efficiency, scalability, and improved customer engagement while addressing labor-intensive processes and regulatory risks. However, its adoption must be approached thoughtfully, balancing the benefit with the cost of technological advances, robust data management, and human oversight to ensure compliance and lift. It may be slow at first, but the industry can harness AI's potential to revolutionize operations while maintaining fairness and trust. ■

3 AI set to transform debt collection in US, bias worries remain | Context
4 Seizing the Opportunity in Uncertain Times: The Collections Industry in 2023 | TransUnion
5 Id.
6 Ethical Considerations and Responsible AI - Credit and collections professionals
7 Id.

HILL DAY

Gil Singer
Partner, Shareholder
Marcadis Singer PA

On March 5-6, 2024, the CLLA held its annual Hill Day in Wash. DC. The event was a great success due to the planning and presence of Dawn Federico, who kept us organized, thus maximizing our ability to meet with as many legislators and their staff as possible. Also, kudos go out to the League's lobbying firm, who worked hard planning the event. Due to some last minute member cancellations, membership attendance was smaller than usual. Those that attended were rewarded by a day of meetings with Congressmen and staffers who were hospitable, prepared for our visit and knowledgeable about our critical issues. The issues we lobbied for were Student Loan dischargeability reform, Bankruptcy Venue issues, and Subchapter 5 monetary minimums for eligibility and payment. The Student Loan issue received considerable interest and we were even asked to draft a proposed bill for Congress to consider that we believe represents a fair resolution of the issues and will survive court challenges. The bankruptcy venue issue is a bi-partisan issue that should be resolved shortly. The subchapter 5 issues seemed to be problematic due to objections from the banking industry. Hopefully, at the time of publication of this piece, some of the issues may well be resolved. The specifics of the CLLA's positions will not be discussed but I encourage everyone to read the position papers and other material currently on the League's website. Additionally, much of the material was covered in depth by the excellent July-September 2024 edition of CLW.

Looking ahead to 2025, the dates should be finalized shortly. We deem it imperative to have a great turnout from our membership to meet with each of their state's legislative delegations. Your participation is critical but this is a fun, energetic event that should be attractive to our members concerned with federal creditors' rights and bankruptcy issues that will be before Congress during the 2025 legislative session. Our "critical issues" for Hill Day 2025 are still being developed by the CLLA Legislative Affairs Committee at the time of writing this article. If you have never been on Capitol Hill, this is a truly unforgettable experience.

While most of the consumer protection laws that are rapidly expanding to our world of commercial collections are in the state legislatures and not Congress, we must all be vigilant that the consumer world as it exists in places like NYC and California does not come to our states. We have even had discussions about a "big bold proposal" in Congress to see if we can get a bill introduced and passed exempting lawyers and perhaps even CLLA Certified Agencies from the FDCPA. Whether this becomes one of our "critical issues" for 2025 or not, please consider joining us the coming year in Washington DC in our journey to protect the interests of our clients that the League has represented for over 125 years. ■

HOW I GOT HERE: A PRIMER

A long time ago, I was adrift alone in the world of law. I had left the firm I was with (that's how I choose to look at it) and was practicing out of my home. I had a few clients I had carried with me through a couple of firms and was looking for my next venture as an attorney.

My next move in practicing law started with a residential developer I represented called Homeland Communities. I was their second tier attorney, meaning I got all the messes and none of the zoning and other pricey work. [One time the owner saw me in the hallway and yelled out to me "Emory Potter, you son of a bitch!" I inquired as to why he felt the need to yell that at me and he told me. "I just lost a major zoning case and you could have lost it for me for less than half the price I paid Dewey & Cheatham!" But I digress]

I was defending a case where my client, the son of the Owner here, had freaked out and disappeared without paying Sears for the appliances installed in a small subdivision he was building. I was informed that I was to work this out by my client. I had no defenses, and called opposing counsel regarding the same. We met in Court on his summary judgment motion and worked out a payment plan. It was lunch time and he recommended a hot dog place on the courthouse square and we enjoyed a nice lunch.

But, dear reader, it gets weirder. There was an employee of Homeland that was quite a drinker. He was tolerated until something happened that I do not recall, but he was summarily dismissed. As is often the case with topes who are unable to take credit for ending a relationship, drunken calls ensued. Annoying, repetitive and just plain funny calls were made to the company. The receptionist was a redhead with short hair and all the messages left and calls recorded went through her.

The rambling calls repeatedly referenced her as "Punkin' Head", among other epithets. I was called in to stop the issue. I sent a cease and desist letter that was received, but did no good. In fact, as I was practicing out of my home and the letterhead had my home number. Now, the calls came to me, too. Over and over with long drunken rants, often late at night. The same was happening to other employees.

My roommate at the time, Jeff, was an old friend and a bit a of a drunk, also. Listening to him drunkenly scream back "Psycho! Psycho! Psycho!" repeatedly into the phone until the fellow gave up warmed my heart. Some of these were recorded.

I filed an arrest warrant and took the herd of victims with me to the hearing. After hearing a few tapes, our caller left through a different door than he entered.

The caller placed a claim with a collection agency for unpaid wages and other damages. The agency sent the claim to the attorney from the prior case. Upon receipt of the dunning letters, I called him and told him I had something to show him on the case. I went by with the arrest papers and played a "greatest hits" compilation of the calls. He agreed to close the file.

The next time I saw this attorney, we were setting up a law firm called Hays & Potter that has existed for 30 years. ■

Emory Potter, Esq.
Hays & Potter, LLP

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ABC-Amega, Inc. / American Bureau of Collections
Buffalo, NY

Alternative Collections, LLC dba: Asset Compliant Solutions (ACS)
Williamsville, NY

Altus Receivables Management
Metairie, LA

BARR Credit Services, Inc.
Tucson, AZ

Brown & Joseph, LLC
Itasca, IL

C2C Resources, LLC
Atlanta, GA

Caine & Weiner
Sherman Oaks, CA

Commercial Collection Corporation of New York, Inc.
Tonawanda, NY

Continental Recovery and Filing Solutions (CRF)
Simi Valley, CA

Enterprise Recovery, LLC
West Chester, PA

Goldman Walker, LLC
Tucson, AZ

Greenberg, Grant & Richards, Inc.
Houston, TX

Joseph, Mann & Creed
Twinsburg, OH

Kearns Brinen & Monaghan, Inc.
Greenville, SC

Lamont, Hanley & Associates, Inc.
Manchester, NH

McCarthy, Burgess & Wolff
Cleveland, OH

Millennium Collections Corporation
Vero Beach, FL

MNS Credit Management Group (P) Ltd.
New Delhi, India

NACM Southwest
Coppell, TX

Northern California Collection Service, Inc.
Sacramento, CA

Radius Global Solutions, AMS Commercial Business Division
Fair Lawn, NJ

RHK Recovery Group
Plainview, NY

Ross, Stuart & Dawson
Clawson, MI

STA International
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