

PRE-SUIT COLLECTION STRATEGIES

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In today's information age, obtaining accurate information in a quick and economical way is the key to successful debt collection. The purpose of this paper is to suggest some ways to accomplish that goal.

A. Knowing the Debtor

1. Identifying the Debtor

Properly identifying the debtor up front can save you endless amount of hassle and frustration down the road. The debtor's status as an individual, partnership, corporation, limited liability company or sole proprietorship can have a big effect on who is ultimately liable on the debt. The precise name of the debtor is extremely useful also. Consider the situation where the client tells you that the debtor is "Bill Smith". It is not too helpful to look in the phone book and see that there are twelve Bill Smiths listed and fourteen William Smiths listed. Getting the full and complete name (including middle names or initials) is important. Even better, if you can get a social security number it will make internet searches for key information much easier.

2. Locating the Debtor

Identifying the debtor's state of incorporation or where its principal place of business is located can be very important for issues like diversity jurisdiction in federal court, service of process, and ultimate collection of assets. You may technically have jurisdiction over somebody in Oklahoma, but if they have no assets here, you may not be able to collect your ultimate judgment, without registering it in

another state. If the debtor is an individual, knowing both a home and business address are helpful to the collection process.

Probably the easiest and most effective thing that can be done to identify and locate the debtor is to have your business client require a credit application before extending any credit in the first place. Such an application should ask the debtor to identify itself. Specifically, it should ask:

1. Name (full name) (d/b/a's, a/k/a's and trade names)
2. Address (include e-mail address if it has one)
3. Business Status (corporation, LLC, sole proprietorship, partnership, including state of registration)
4. Phone number (include fax number if they have one)
5. Bank account and financial information
6. Description of any litigation or claims
7. Website information
8. Social Security Number or Employer Tax ID Number
9. References

If you cannot get all the information up front, you can get it on the "back end" through an asset hearing. 12 O.S. ' 842. The debtor in an asset hearing is usually a lot less forthcoming or cooperative. In addition to a credit application, it is always smart to obtain a deposit, down payment or retainer. If the customer pays with a check, you already know what bank it uses and account number.

In addition to the debtor itself as a source of information, there are many other outside sources of information that can be extremely helpful. These include:

- a. Credit reporting agency. There are three major credit reporting agencies. They are Experian/TRW (www.experian.com), Equifax (CBI) (www.equifax.com); and Trans Union (www.transunion.com) . The full Credit Bureau files have restricted access. You can access information in the header

portion of the credit reporting files without actually being a member. You must have a legitimate reason to need this information in compliance with The Fair Credit Reporting Act. 15 U.S.C. ' 1681 *et. seq.* (The full text of the statute can be found at (www.ftc.gov/os/statutes/fcra.html)). The credit report header can tell you such things as the Debtor's addresses for the last ten years, social security number, and a spouse's name. If you want more information from the credit history portion of the file, you generally have to be a member.

b. Dun & Bradstreet. This is also a service to which you must subscribe. It gives good financial information on larger businesses. It is not too helpful for individuals or small businesses. You can access it on the internet at www.dnbcorp.com/home.cfm. Another site that gives capsule profiles on companies is www.companiesonline.com.

c. Better Business Bureau. This is a free service, but the usefulness of information is limited. It generally only records complaints. It is not usually helpful for obtaining financial information.

d. References. If the debtor has provided you with references, it may be helpful to contact them in the collection process. They may know the debtor's location or have much better information about what is going on with the debtor.

e. Court records. A check of the Plaintiff and Defendant index at the local Court Clerk's office can tell you a lot about the Debtor's problems. If you have one of many collection claims pending at the Courthouse, the chances of

ultimate recovery may not be too good. You can now access Oklahoma State Court Records for several counties through www.oscn.net. Federal Court for the Northern District of Oklahoma records can be accessed through www.oknd.uscourts.gov. The Bankruptcy Court for the Northern District can be accessed through www.oknb.uscourts.gov. The Eastern District Bankruptcy website is www.oked.uscourts.gov. Most Bankruptcy and Federal Courts can be accessed through PACER at a rate of \$0.07/page. Call 1-800-676-6856 or access pacer.psc.uscourts.gov to sign up for PACER. If you want to do a nationwide court search, try accessing www.merlindata.com. Then go to "Industry Links". The www.merlindata.com site also offers an excellent nationwide bankruptcy search for members. Another good site is www.courts.net.

f. UCC Records. (state and local). By checking the UCC records you can determine what liens exist on the debtor's assets. If you find that there are multiple liens on the same assets or a blanket security interest in all of the debtor's assets by a bank, the chance of ultimately forcing collection by seizing assets is greatly reduced. The Oklahoma County Clerk's UCC records can be accessed on-line at www.oklahomacounty.org/coclerk/default.htm.

g. Real Estate Records. Real estate records can be accessed to tell you if the debtor owns real estate. In many counties this will have to be done manually. In Oklahoma County, the Real Estate Assessors Office can be accessed at www.oklahomacounty.org/assessor/disclaimer.htm. At "Real Property Search" you can search for free by owner name, address or tax ID number. In Tulsa

County the website is www.public.tulsacounty.org. This site requires a fee and a password.

h. Private investigator/Search Firm. If you want to spend the money, there are several private investigators and search firms that will perform searches for you and give you a report. Hide-N-Seek and Great West Investigations (www.gwinvestigation.com) are a couple of reputable companies that can do this.

Check out www.opia.com for information on the Oklahoma Private Investigators Association. Sometimes a private investigator that will do a little surveillance or tailing could tell you a lot more about where the debtor is working and how the debtor is spending his time.

i. Internet. The internet can be wonderful tool for obtaining information. You may want to simply plug in the debtor's name and do a search to see what turns up. There are several companies that have assembled useful databases for financial information searches. There is usually an access fee, but if you do regular collection work, it will probably be worth it. Visit www.publicrecordsources.com for a good introduction to search firms. I use one that is called AutoTraxXP, which can be found at www.atxp.com. Another good one is www.merlindata.com. Each search has a minimal charge. There will normally be a monthly minimum charge. Try www.tray.com for information on voter registration. Many states will allow you to access motor vehicle records. There are restrictions to motor vehicle registration information as the result of the Driver Privacy Protection Act. 18 U.S.C. '2721 et. seq.

Attached is a list of thirty great websites for legal professionals seeking information from the internet.

j. Phone book. It may sound simple, but do not overlook the obvious. The phone book is a good source of names, addresses and phone numbers. Check the yellow page ads also. There are several online databases that work well. Try www.theultimates.com; www.anywho.com; or www.bigfoot.com; www.people.yahoo.com. If you need a cell phone number check out www.cellphonedirectory.com.

k. SEC filings. If the debtor's stock is publicly traded, it must file reports with the Securities and Exchange Commission. These reports are an excellent source of financial information. Try www.sec.gov/edgarhp.htm for online access to these records. Also try www.sec.gov.

l. Secretary of State. The Secretary of State can tell you the correct corporate name and registered service agent. This information is important but usually tells you little about the debtor's financial condition.

m. Certificates of Fictitious Partnership names. A partnership which does not have the name of the partners in the name of the partnership is required to file a certificate of fictitious name with the Secretary of State. 54 O.S. '81. By checking these records you can discover the names of the general partners of a partnership and include them as a target in your collection efforts. This presumes the debtor partnership has made the appropriate filing.

3. The Debtor's Financial Position

Ideally, your business client should obtain a financial statement on the debtor before advancing any credit. These financial statements should be updated periodically. Financial statements, including balance sheets and income statements, if properly done by the debtor, and reviewed by the creditor, will reveal a considerable amount of information regarding the value and character of assets and debts. Creditors should also look for information on growth, number of employees, gross and net income and a market analysis.

Most of the time, a business that has a bank loan will have been required to present a business plan to the bank. It is not unreasonable for a creditor to request a copy of the same thing that was provided to the bank.

B. When Not to Pursue the Claim

1. Understanding The Cost to Collect

Pursuing collection has a cost in terms of attorneys fees, filing fees, lost time and search firm expense. The trick is to accurately measure that cost against the likelihood of recovery. Whatever you can do to minimize costs and maximize recovery will help. Things that can be done to minimize costs include the following:

a. Volume

Attorneys and collection agents generally give cheaper rates for the more volume that is handled. Thus, if you are in a position to give a significant amount of volume, cases or claims, it should be easier to obtain better rates.

b. Contingency Fees

Many lawyers and collection agencies will handle collection matters on a contingency fee basis. This means they only collect a fee if they can collect from the debtor. This usually provides the attorney/collection agents with a better incentive to collect.

c. Internet Do-it-Yourself

Online research about the debtor can be done quickly and cheaply if you know what you are looking for and where to look. See the attached list of useful sites.

d. Small Claims

In Oklahoma, claims under \$4,500 may be filed in Small Claims Court. 12 O.S. ' 1751 et. seq. You don't need a lawyer to file in small claims. Thus, there is the potential for savings in terms of attorneys fees. Small Claims is also much quicker which usually translates into cheaper.

2. The Likelihood of Recovery

Find out as much as you can from the debtor himself/itself about why he/it is not paying. Is your claim the only one that isn't getting paid? If yes, it may not be a financial problem but instead a dispute/complaint with the product or services B watch out. This means counterclaim. If it is at the other extreme, *i.e.* nobody is getting paid, then the likelihood is that the debtor doesn't have the money and it will be difficult to find it or squeeze it out of the debtor.

3. Exposing the Condition of Assets

If the debtor has a store open to the public, go and look. If the debtor has a yard or warehouse with inventory, go in person and check it out. In addition, you should check all court records and UCC filings.

C. Pre-Suit Settlement

As stated at the beginning of this paper, information is key to the collection process. Information is also key to the pre-suit settlement efforts. If your information tells you that there will be a problem with establishing liability, then early settlement probably makes sense. These problems can be disputes over amounts owed, breach of warranty claims, counterclaims, or the presence of a stingy insurance company.

If your information tells you that there will be a real problem with collection, then pre-suit settlement is also advisable. Obviously, if the debtor has little or no available assets, you do not want to spend time and money chasing that debtor.

If the debtor has legitimate defenses to liability, you will more than likely hear about them before a lawsuit is filed. If the debtor pleads insolvency, the debtor should be willing to share information with you to prove the insolvency. If the debtor is reluctant to provide you information about its financial condition, this may be a red flag that assets are potentially available.

Most of the time if a settlement is possible, it can be negotiated directly between the parties. This is usually quicker and much cheaper. The involvement of lawyers who can objectively analyze the situation and give candid advice to their clients is helpful.

Private mediation or arbitration may be advisable in those situations where there is a true dispute over liability. Mediation and arbitration is also helpful in those situations where the emotions of the parties have clouded sound financial decisions.

D. Self Help Repossession and Other Pre-Judgment Procedures

1. Self Help Repossession

Self help is a term which is only available to a creditor that holds a security interest in collateral owned by the debtor or a third party. General unsecured creditors that do not have a security interest or lien right cannot exercise self help repossession.

If the creditor has a valid security interest in collateral, 12A O.S. '9-501(3) authorizes such creditor to take possession of collateral without the need of initiating a judicial proceeding. There must be a valid default on the debt before the right to repossess is triggered. Note that a default triggered by a bankruptcy filing is probably not enforceable. Even if it was enforceable, the automatic stay would come into play. See 11 U.S.C. § 362.

A creditor may repossess or seize its collateral so long as there is not a breach of the peace. If collateral is seized through the use of violence, the threat of violence or an unauthorized entry into a secured area, the court will probably find that the creditor has breached the peace. If a vehicle is locked behind a fence or in a garage, any broken locks, broken windows or broken doors constitute a breach of the peace. See Kroeger v Ogsden, 1967 OK 142, 429 P.2d 781; Leedy v GMAC, 1935 OK 760, 48 P.2d 1074.

If the creditor actually seized the collateral without breaching the peace, the creditor must either sell the collateral in a commercially reasonable fashion or the creditor may retain the collateral in full satisfaction of the outstanding debt.

The secured creditor would be well advised to videotape or take pictures of the collateral immediately after it has been repossessed. This will help fend off claims that the secured creditor damaged or devalued the collateral while in its possession.

The term "commercially reasonable sale" is not defined in the Uniform Commercial Code. The price obtained at such sale is not dispositive. First National Bank & Trust Company of Enid v Holston, 1976 OK 196, ¶ 9, 559 P.2d 440. Generally, it is the manner in which the sale was conducted that is important. Id.

The notice given is an appropriate consideration for the court. Posting notice of a sale on two telephone poles in two alleys on the side of a building is not considered "reasonable". See Wilkerson Motor Co. v Johnson, 1978 OK 12, ¶ 16, 580 P.2d 505. Whether at private sale or public auction, generally at least five days notice will be required to make the sale reasonable.

2. Pre Litigation Procedures

There are a lot of pre-litigation procedures that can be invoked to get the debtor's attention. Phone calls and demand letters are probably the most used methods. The frequency, tone and status of the call or letter all have an impact on the response. Frequent and repeated demands may obtain results under the "squeaky wheel" theory. The tone of the collection efforts (harassment vs. kindness)

often affect the results. When the collection efforts are initiated by the creditor, a collection agent or an attorney, the response may be different. Remember that collection agents must comply with the Fair Debt Collection Practices Act.

3. Prejudgment Procedures

a. Prejudgment Attachment. (12 O.S. '1151). Prejudgment attachment allows the creditor to seize property of the defendant for the purpose of satisfying a debt before the judgment is actually obtained. To invoke this procedure you must be able to establish one of the grounds listed in 12 O. S. '1151 and be able to post a bond for double the amount of the creditor's claim. 12 O.S. '1153. The request for Prejudgment attachment must be served upon the debtor who then has only five days in which to object.

b. Prejudgment Replevin. (12 O.S. '1571 et. seq.). Prejudgment replevin is available to seize a particular article of personal property. 12 O.S. '1571. It requires that the plaintiff either own or have a property interest (*i.e.* lien or security interest) in the particular personal property involved.

The plaintiff must file a verified petition with a specific recitation of the facts set forth in 12 O.S. '1571. The defendant has five days within which to object. The plaintiff must post a bond equal to twice the value of the property.

c. Receiver (12 O. S. '1551). Prejudgment receivers are quite common in the foreclosure context involving commercial property. 12 O.S. '1551.2. Receivers are also available in an action

By a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or

between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured.

12 O.S. ' 1551.1.

Occasionally, you may run into a situation where there is an internal power struggle within the debtor that is threatening to destroy the business and thus the collection prospects. The appointment of a receiver is an appropriate remedy in this context.

d. Temporary Restraining Order (12 O.S. ' ' 1382, 1384.1). A temporary injunction may be obtained when it appears "that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, or to render the judgment ineffectual..." 12 O.S. ' 1382. A temporary restraining order generally requires notice to the adverse party. A temporary restraining order or preliminary injunction generally requires proof of "irreparable harm". The mere fact that a judgment is uncollectible, should not be a proper consideration. In First American Bank v. Sawyer, 1993 OK CIV APP 115, 865 P.2d 347, 351 the court was faced with a collectability argument in connection with a claim for an injunction.

Appellee cites Am. Jur. for the proposition that a belief that the litigant will not be able to collect damages is an item the court may consider when deciding whether irreparable injury exists. 42 Am. Jur. 2d. Injunctions ' 49. Although other jurisdictions have used this claim as one of the criteria to be used in deciding whether there is irreparable injury, there is no Oklahoma case supporting this point. Perhaps in some actions the defendant's lack of financial resources might be a factor to consider in deciding whether there is irreparable harm, but we

are loath to call it a rule in Oklahoma. **We do not favor an action that allows injunctions against the poor or judgment proof but suits for damages against those the suer believes have sufficient resources to pay any damages.**

Id., 1993 OK CIV APP 115, ¶ 20, 865 P.2d at 351.

The ability to get prejudgment restraining orders was also dealt a significant blow by the United States Supreme Court. See Grupo Mexicano DeDesarrollo S.A. v. Alliance Bond Fund, Inc., 119 S. Ct. 1961, 527 U.S. 308, 144 L.Ed. 2d. 319, (1999). In Grupo Mexicano DeDesarrollo, S.A., an American creditor feared that the Mexican debtor would allocate its most valuable assets to pay its Mexican creditors first. The American creditor sought a preliminary injunction as a prejudgment remedy to stop certain transfers of assets. Id., 119 S. Ct. at 1963. The United States Supreme Court held that such a remedy was not available prior to judgment. The basis for the Supreme Court's rationale is that the district court lacked authority to issue such an injunction because such a remedy was historically unavailable from a court of equity. Id. 119 S. Ct. at 1963. A judgment was necessary to fix the debt before a creditor could take advantage of the relief afforded in a "creditors bill." Historically the creditors bill is used to discover information on the debtor's assets, reach equitable interests and set aside fraudulent conveyances.

A rule of procedure which allowed any prowling creditor, before his claim was definitely established by judgment, and without reference to the character of his demand, to file a bill to discover assets, or to impeach transfers, or interfere with the business affairs of the alleged debtor, would manifestly be susceptible of the grossest abuse. **A more powerful weapon of oppression could not be placed at the disposal of unscrupulous litigants.**

Id. 119 S.Ct. at 1969.

e. Discovery (12 O.S. ' 1334 et. seq.) The rule in Oklahoma Courts used to be that information on financial worth was not a proper subject for pre-trial discovery. See Cox v. Theus, 1977 OK 158, ¶ 12, 569 P.2d 447, 450. This rule has now been changed. In the case of YMCA of Oklahoma City v. Melson, 1997 OK 81, ¶ 25, 944 P.2d 304, the Oklahoma Supreme Court has determined that pre-trial discovery of financial information is possible. Thus, discovery of financial information, although not completely unrestricted, is a lot easier to obtain today than it used to be.

f. Involuntary Bankruptcy (11 U.S.C. ' 303). Creditors have the right to force a debtor into bankruptcy by filing an involuntary bankruptcy petition. 11 U.S.C. ' 303. If the debtor has twelve or more creditors, the involuntary petition requires the signatures of at least three unsecured creditors holding undisputed, non-contingent claims aggregating at least \$10,000. Normally, the prospects of recovery once the debtor is in bankruptcy are not very good. Involuntary bankruptcy can be very advantageous if you have reason to believe that the debtor has been siphoning off assets, making preferential payments or committing fraud. The bankruptcy process gives you a trustee who can focus recovery efforts on such problems and it gives you the bankruptcy court as an excellent forum to litigate these potential issues.

g. Prejudgment Garnishment. (12 O.S. ' 1172.1). Prejudgment garnishment is similar to prejudgment attachment except that it is directed at seizure

of wages or bank accounts. It requires a notice. 12 O.S. ' 1172.1.A.1. The debtor must receive notice of the request for prejudgment garnishment and then only has five days in which to object. If the court issues an order allowing prejudgment garnishment, the plaintiff/creditor must post a bond for double the amount of its claim.

USEFUL INTERNET SITES

1. Google, www.google.com

Google makes almost every other site on this list redundant. Use it to research law, people, places, products—whatever.

2. Findlaw, www.findlaw.com

If you could bookmark only one legal site, it would have to be this one. From a humble index of Internet resources, Findlaw has grown to be one of the best starting points for finding legal information on the Web.

3. GPO Access, www.gpoaccess.gov

This is the premier source for finding federal government primary-source materials online. Get the U.S. Code, the Federal Register, the Code of Federal Regulations, the Congressional Record, and countless other legislative and executive branch documents.

4. Legal Information Institute, www.law.cornell.edu

Cornell Law School's Legal Information Institute pioneered legal publishing on the Internet and has continued to innovate ever since. Its U.S. Code and U.S. Supreme Court opinion databases are easy to use.

5. American Bar Association, www.abanet.org

Since its debut in 1995, the ABA Web site has aspired to be more than a simple association site, serving instead as a central resource on the law for both lawyers and consumers.

6. Law.com, www.law.com

This site accurately describes itself as “first in legal news and information.” Owned by American Lawyer Media, it is the backbone supporting a wide-ranging network of news and information resources and law-related directories.

7. Thomas, <http://thomas.loc.gov>

From the Library of Congress, Thomas is dedicated to making legislative information freely available over the Internet.

8. U.S. Courts, www.uscourts.gov

The Internet hub of the federal judiciary, this site provides links to all federal courts and related entities.

9. VersusLaw, www.versuslaw.com

The first comprehensive case law research service on the Web when it launched in 1995, it is still a good deal today.

10. Martindale.com, www.martindale.com

Here is the searchable online version—a great way to locate a lawyer in another state without leaving your desk.

11. West Legal Directory, <http://lawyers.findlaw.com>

This is another place to search for lawyers by location and practice area.

12. Lawyers Weekly, www.lawyersweekly.com

The online edition of the biweekly national newspaper has lots of news and information, with even more resources in its subscribers-only area.

13. LLRX, www.llrx.com

Since 1996, this site has published leading-edge pieces on legal research, technology and management. Completely free, it is updated monthly with insightful feature articles and columns.

14. The Virtual Chase, www.virtualchase.com

From Genie Tyburski, a law librarian at Ballard Spahr Andrews & Ingersoll, this is a practical guide to legal research on the Internet.

15. Firstgov, www.firstgov.gov

Official gateway to U.S. government information on the Internet, it connects to more than 51 million pages on more than 20,000 federal, state, territorial and tribal sites.

16. Federal Judicial Center, www.fjc.gov

The education and research agency for the federal courts' site is replete with publications, manuals, studies and educational materials related to the courts.

17. National Center for State Courts, www.ncsconline.org

Even though it is directed to state court officials, there is much useful information here for the practicing lawyer as well.

18. Legalethics.com, www.legalethics.com

Since 1995, this site has been devoted to helping lawyers explore the unique ethical issues raised by the Internet.

19. Law Practice Today, www.lawpracticetoday.org

The Webzine of the ABA Law Practice Management Section is a key source for the latest on managing your firm, including cutting-edge information and articles on marketing, management, technology and finance.

20. SEC EDGAR, www.sec.gov/edgar.shtml

The site says it as well as we can: “All companies, foreign and domestic, are required to file registration statements, periodic reports, and other forms electronically through EDGAR. Anyone can access and download this information for free.”

21. LexisONE, www.lexisone.com

This site contains resources for the small firm lawyer, the most satisfying of which is the ability to search the past five years of state and federal court opinions (and U.S. Supreme Court from 1790 to present) for free.

22. Switchboard, www.switchboard.com

There are a number of White Pages directories on the Web, but Switchboard has consistently remained among the best.

23. MapQuest, www.mapquest.com

Get maps and custom driving directions from your location to your destination.

24. Hotels.com, www.hotels.com

Search for the best (or cheapest) lodging. Other travel or vacation information is available as well.

25. ABA TECHSHOW[®], www.techshow.com

ABA TECHSHOW, sponsored by the ABA Law Practice Management Section, bills itself as the world's leading legal technology conference, and looking at its program lineup and news items is a good way to keep abreast of legal technology trends.

26. Refdesk.com, www.refdesk.com

You've got questions? Refdesk has answers. This is the place to quickly find a lot of information.

27. Lex Mundi Guides to Doing Business, www.lexmundi.com/lexmundi/Guides_to_Doing_Business1.asp

Members of the Lex Mundi international law firm network prepare these comprehensive and frequently updated guides to doing business in more than 67 countries, the European Union and various U.S. states.

28. Jurist, <http://jurist.law.pitt.edu>

Focused on law schools and legal education, this site has significant content, including academic papers, a news feed and links to online law reviews, a growing number of which provide their full text online.

29. Daily Whirl, www.dailywhirl.com

The fastest route to the blogosphere. Free registration allows you to customize to your needs.

30. CIA World Factbook, www.odci.gov/cia/publications/factbook/index.html

A lot of facts are here that are hard to find elsewhere.