LEGAL FOUNDATIONS

HSLC

Firm Update: We are Moving!

By: Chad J. Cochran

We find it hard to believe that nearly two years have passed since Hannah Sheridan Loughridge & Cochran, LLP opened its doors for business. The support we have received from colleagues and clients constantly humbles us and fills us with gratitude. The nature of the legal industry and the requirements of our clients are continually shifting. We took a hard look at these trends during our firm retreat last year and concluded it was time to move into a facility which was specifically designed for our firm's needs. Accordingly, we are pleased to announce that HSLC's new office will open Monday, July 13, 2015 at our new address—5400 Glenwood Avenue, Suite 410 Raleigh, North Carolina 27612.

Our new office is located on the top floor of the Carolina Corporate Center (picture below) with nearby access to the Raleigh Beltline and Crabtree Valley Mall. It started as a vacant space with a concrete floor and no interior walls. Over the past several months, we worked with architects and contractors to design a space specifically tailored to assist us in fulfilling our client's needs. Construction is complete, and we are excited about the results. The new space includes eight offices, a reception area, two conference rooms, a processing room, and a break room. The new large conference room includes views of downtown Raleigh and will include increased technological capacity. The processing and mail rooms will allow our paralegals to process filings with increased efficiency. And the larger work areas will allow our attorneys to better prepare for hearings, depositions, and trials.

We look forward to hosting visitors and are planning an open house. Please come visit. Our office is physically moving on the afternoon of Friday, July 10, 2015. We will remain available for client emergencies during that time. Our post office box and telephone numbers should remain the same. Benjamin Franklin once said, "Without continual growth and progress, such words as improvement, achievement, and success have no meaning." Without you, this growth would not have been possible. Please know that we genuinely appreciate your support and hope that we may work with you for years to come.

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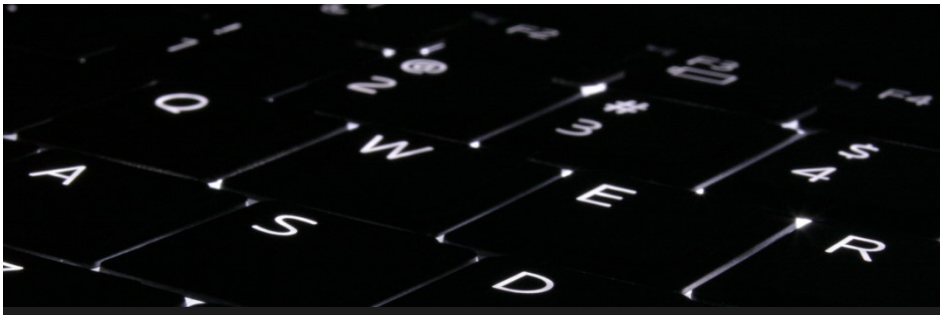

Civil Litigation

Consumer Debt Collection Practices

By: Paul A. Sheridan

Creditors and debt collection agencies are allowed to take reasonable steps to enforce and collect payment of debts. The rationale rests upon an efficient and productive economy requiring a credit process. The debt collection practice statutes promote credit extension and debt enforcement practices that are honest, fair and responsible. They do this by placing limits on the kinds of activities that creditors and debt collection agencies can employ to obtain payment of debts. Most people in the collections industry are aware of the lawsuits which arise for supposed violations, so it is incumbent upon good managers to reduce risk for their companies wherever possible. One of the best strategies is to have an understanding of the various laws, including both federal and state laws, regulating collections. Make sure that people on your collections team always think "compliance" before they act improperly.

Many in-house credit officers mistakenly believe that they are exempt from the collection law statutes, based on the fact that they are not "debt collectors" as defined by the federal Fair Debt Collection Practices Act (FDCPA). It is important to note that North Carolina law also includes a number of statutes affecting collection actions, as well as a set of statutes specifically directed at debt collection practices. These statutes are North Carolina General Statutes Chapters 58 (known as the NC Collection Agency Act) and Chapter 75, specifically §§ 75-50 to 75-56 (known as the NC Debt Collection Act). They protect consumers by regulating conduct undertaken to collect debt. They impose certain requirements on debt collectors. They prohibit various types of abusive collection conduct. And, upon violation, they permit a consumer to recover actual damages, statutory damages, and reasonable attorneys' fees. There are, however, key differences among these laws and their application. Chapter 75 of the North Carolina General Statutes contains laws relating to monopolies, trusts and consumer protection, including North Carolina's statute prohibiting unfair or deceptive acts or practices. This chapter also contains the provisions of the NC Debt Collection Act governing debt collection conduct generally. While the FDCPA generally does not apply to creditors collecting on their own behalf (15 U.S.C. §1692a(6)), the NC Debt Collection Act applies to any person engaged in debt collection from a consumer, which includes a creditor collecting its own accounts. (N.C. Gen. Stat. § 75-50(3)). Therefore, creditors and debt collectors alike must comply with the NC Debt Collection Act when attempting to collect debt from individual consumers. However, the NC Debt Collection Act's definition of "debt collector" expressly excludes anyone subject to the provisions of the NC Collection Agency Act.

The NC Collection Agency Act is located in Chapter 58 of the General Statutes, and this statute specifically governs conduct of collection agencies. Its provisions, related to unfair or deceptive acts, are similar to the NC Debt Collection Act and its civil liability and penalties provisions.

The NC Debt Collection Act is similar to the FDCPA in defining a "consumer" as a natural person alleged to owe a debt incurred for personal, family, or household purposes, although the NC law additionally includes agricultural purposes. On the other hand, the NC Collection Agency Act defines a "consumer" more broadly, including individuals, groups, or business entities that have incurred any type of debt. Thus, collection agencies must comply with the statutory requirements, whether they are undertaking consumer collections or commercial collections. ***-Continued on Page 3-***

Debtor-In-Possession Cont.

a state court action could make it insolvent. Using the Bankruptcy Code, the plan is to make certain all existing creditors are paid in full. If the state court action does result in an adverse verdict, then the amount recoverable by an insider's estate will be finite.

In the second example, the motion has just been filed, so the outcome is yet to be determined. The proposed asset purchase agreement appears to suggest that certain creditors may be treated differently from other similarly situated creditors. If that is the case, there is serious doubt that the court will allow the sale.

So, what is the take-away from events that a creditor cannot outright control? Stay involved when one of your customers files a Chapter 11. Being active and involved on the front-end can put you in the best position if one of these transactions should rear its head.

Consumer Debt Collection Cont.

As with the federal collections statutes, the North Carolina laws prohibit abusive debt collection conduct and provide for civil liability in the amount of actual damages, statutory damages, and reasonable attorneys' fees. In general, to successfully win a claim under these laws, a plaintiff must prove actual injury caused by the violation. Note that emotional distress damages may be sufficient to constitute actual injury. In addition to actual damages, a successful plaintiff may recover statutory damages of at least $500 but no more than $4,000 per violation. The plaintiff may also recover a reasonable attorneys' fee at the court's discretion.

It is important to be diligent and review your debt collections procedures and practices on a regular basis. If your company is having difficulty collecting on an account, the single most effective form of debt collection for a creditor is filing a lawsuit.

Construction Law

Contractor Coverage: "Insured & Bonded"

By: Cody R. Loughridge

It is a common mistake that being "insured" (i.e. insurance) and being "bonded" (i.e. surety bond) are one and the same. While it is important that a contractor both be insured and bonded, it is equally important to understand the distinction between the two.

Insurance: Generally speaking, the relevant type of insurance maintained by a contractor is liability insurance. Liability insurance covers instances where the contractor damages the property of another. (Note: This type of policy does *not* cover poor or unsatisfactory work by the contractor). A liability insurance policy is a two party agreement between the insurer (the insurance company) and the insured (the contractor), where the insurer promises to protect the insured against a covered loss or event. As with automobile insurance, there is some expectation by the insurer that certain losses will be incurred by the insured, and therefore, the insured pays premiums to the insurer to cover those anticipated and covered losses. In the event a claim is made against the policy by the insured to cover against a loss, the insured is generally not required to repay the amount paid by the insurer to the aggreived party. By way of example: contractor destroys scaffolding with a crane; contractor then notifies their insurance carrier of the accident; and the insurance carrier (presuming the injury is covered under the policy) pays the owner of the destroyed scaffolding. The insured is not required to repay the insurance company, though the insured can be certain that its premiums will increase. In short, an insurance policy is designed to protect the insured contractor from covered risks of loss.

Surety Bonds: A bond, as opposed to an insurance policy, protects a party if the contractor fails to perform its duties on the project (performance bond) or pay for materials or its subcontractors (payment bond). A surety bond is a contract between three parties: the bonding company (surety), the principal (contractor) and the obligee (owner). A surety bond is procured by the principal (contractor) not for the purpose of protecting itself (as seen with an insurance policy) but rather to protect the obligee (owner) against the principal's own non-performance or non-payment. Although the principal pays the premium to the surety for the bond, there is an inherit expectation that the principal will perform its contractual duties and that the surety will have no involvement with the project. However, by the principal paying the premium to the surety, it gives the obligee assurance that, in the event of non-performance by the principal (contractor), the surety will step in and remediate the situation for the benefit of the obligee. In the event the obligee is forced to call upon the surety to remediate the situation, the surety will later seek repayment from the principal for all sums expended to make the obligee whole.

In short, liability insurance protects the contractor against loss, while the bond protects third parties against the contractor's non-performance or non-payment of subcontractors or suppliers.

The attorneys of HSLC have extensive experience in dealing with both insurance companies and sureties. If you have additional questions, please contact our office.

Debtor-In-Possession Sale of Assets: How Does That Work?

Bankruptcy Law

By: Nan E. Hannah

We have recently seen a new trend developing, and it seems worth discussing in case it continues. Subcontractors and contractors with plenty of work on the books are finding themselves using Chapter 11 to stave off one aggressive creditor.

In one example, the debtor is clearly solvent, but involved in ongoing litigation the outcome of which could result in insolvency. In order to protect its vendors and subcontractors, the debtor sought Chapter 11 protection. Now, the debtor's principal has decided that selling the assets makes more sense to him, so a motion has been filed to allow the assets to be sold with certain guarantees that enough will be recovered as a result of the sale to pay all creditors – secured, administrative, and unsecured.

In a second example, a bank called due a line of credit. No one appears to be quite certain why the line of credit was called on a thriving business, but it is suspected that after a series of mergers, the new bank may have had different collateral criteria than its predecessor. Whatever the reason, the book of business held by the debtor was attractive to an investor/ competitor, so a motion has been filed to permit the sale of the debtor's assets.

What will a judge consider in determining whether to grant this type of motion? First and foremost will be consideration of who gains and who loses as a result of the transaction? Though it often does not seem this way, bankruptcy court exists to oversee the fair treatment of creditors while protecting debtors. Therefore, the court will look carefully to ensure that the debtor is not trying to use the bankruptcy court to unfairly circumvent a debt. The court will also seek to ensure that unsecured creditors receive no less than they would if the bankruptcy was converted to a Chapter 7 and the estate liquidated. If the debtor will survive by an infusion of cash, then the court will seek to confirm that the new investor does not benefit at the expense of existing creditors.

In the first of the two examples above, the court asked a lot of questions and ultimately permitted the sale via auction, but sought to make certain that there was no back room deal which might impact the fairness of the transaction. This debtor was solidly solvent at the time of the filing but was concerned that an adverse verdict in -***Continued inside on Page 2-***

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