

South Oklahoma City Lawyers Association

Top 10 Creditors' Tools

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How harmful is an unpaid debt to the P&L?

Assume a business writes off a \$5,000 bad debt

It takes that business \$25,000 in revenue to offset that loss, assuming a 20% margin

It takes that business \$7,692.31 in revenue to offset that loss, assuming a 65% margin

Goals of the Creditor

1. Make the creditor whole (interest, fees and costs)
2. Preserve the business relationship with the debtor
3. Encourage the debtor to pay without the need for a lawsuit
4. Seek priority over other creditors
5. Use tools that remain viable even if the debtor files bankruptcy

Mechanics and Materialmen's Lien

See Handout *The Oklahoma Mechanics and Materialmen's Lien, 10 Things You Should Know*

Common troubles encountered by lien claimants:

1. Notice of lien sent to debtor by county clerk via registered mail return receipt requested; debtor never claims registered mail.
2. Lien claimant has privity with lessee, or public project.
3. Erroneous computation of time: months means months—days mean days.
4. Completion of work must be actual work.
5. Subcontractor fails to provide property owner and contractor pre-lien notice within 75 days of completion of work.

42 O.S. § 141 et. seq.

Oil and Gas Well Lien

- See Handout *The Oklahoma Oil and Gas Well Lien, 10 Things You Should Know*

Why is it so powerful?

- Suspension of production payments
- Constraints on borrowing
- Civil and criminal penalties for wrongful use of funds
- Lien may be perfected post-bankruptcy petition

42 O.S. § 144 et. seq.

Laborer's Lien

- Super-priority given to laborers
- Must be filed within 60 days
- Must include “exertion of musculature”
- Lien attached only while the title to the property remains in the original owner
- May stack this lien with other liens

42 O.S. § 92 et. seq.

Surety Bonds

- Used on public and private projects
- Creditor may attach surety bond and file mechanics and materialmen's lien
- Claims are time-sensitive
- On public projects, look to the contract or project owner (federal, state, city, or agency) to determine attachment process
- Surety must make a good-faith attempt to investigate creditor's claim

61 O.S. §§ 1-2 (Oklahoma's Little Miller Act that applies to Oklahoma public projects)

Garnishment

- Pre-judgment garnishment protects creditors when debtor is secreting property
- Post-judgment garnishments may be stacked, i.e. garnish from multiple sources simultaneously

12 O.S. 1170 et. seq.

Article 9 UCC Lien

- Creditors take a security interest in personal property
- Lien is consensual
- Generally, lien is perfected by filing a financing statement in Oklahoma County Clerk's office

12A O.S. 1-9-101 et. seq.

Third-Party Help

- Receiver 12 O.S. § 1551
 - Numerous circumstances where a receiver may be appointed
 - Tantamount to granting an injunction, e.g. irreparable loss
 - Receiver must post a bond
- Referee 12 O.S. §§ 611-624
 - Can be made without the parties' consent for fact issues that encompass accounting
 - No bond required

Confession of Judgment Clause

- Must be an antecedent debt, e.g. not effective in factoring agreements
- May not use with consumer debtors

“To further secure the payment of this note, Debtor irrevocably authorizes any attorney of any court of record to appear for Debtor in term time or vacation, at any time and from time to time after payment is due, whether by acceleration or otherwise, and confess a judgment without process against Debtor, in favor of Creditor for such sum as may appear to be unpaid and owing thereon together with interest, costs and five (5) percent attorney’s fees, with minimum attorney’s fees of Two hundred dollars and no cents (\$200.00) and to waive and release all errors which may intervene in such proceeding and consent to immediate execution upon such judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof. Debtor hereby waives the benefit of every statute conferring upon him any right or privilege of exemption, stay of execution, or other relief from the enforcement of a judgment.”

Swaps

- Creditors should opportunistically accept minerals, personal property, etc. from debtors
- Consider the case of Jones Oil Field Pipe

Friendly Reminder

- All undisputed sums should be tendered immediately to creditor
- Always seek personal guarantees
- Assignments of Proceeds clauses
- Mediation clauses

Questions