THE IMPORTANCE OF A WITNESS IN A CONTESTED COMMERCIAL CLAIM

You have authorized your attorney to sue the debtor. A response is filed to your complaint. A trial or arbitration will ensue. How should you proceed?

First, this is an appropriate time to analyze the costs involved in proving your case. This may determine the feasibility of settlement negotiations. Remember, it is rare to defend a contested matter without supplying at least one knowledgeable witness. No matter how open and shut the case may appear to you, most debtors have the ability to muddy the waters for the finder of fact. The complexity of the case and nature of the defenses will also determine the number of witnesses required (to offset the debtor's defense).

Who Should Be the Witness?

In a typical case of goods or services sold to a debtor, the attorney will need a representative from the client's credit department familiar with the books and records. If the salesman is available and your record keeping system made him knowledgeable, he may suffice.

Many times there is considerable distance between the creditor-plaintiff and the place of trial. The vast majority of commercial litigation is brought in the county and state where the debtor is located. Expenses for transportation, lodging and time out of the office should be estimated. They should enter into your settlement calculations.

Often a knowledgeable manufacturers' representative or factory representative will be necessary (in addition to the credit person). The statements of such authorized representatives may, in the debtor's presentation, become transformed into warranties or additional contract terms, and the admissions of such witnesses may always be used by the debtor in court, notwithstanding your knowledge of your belief of non-authorization. Thus, your salesperson may be necessary for a rebuttal.

Before Trial

Secondly, your commercial attorney involved may be instructed to determine the scope of the debtor's defenses through pre-trial procedures, known as discovery. If permitted by court rules, the attorney may submit written questions (usually called interrogatories) and document requests to the debtor, in an effort to learn and possibly limit the debtor's position. Remember, under the same rules, written questions may be submitted to your attorney for your answer. Prompt attention to such requests for

information from your attorney is **imperative** because the courts operate under strict deadlines. Failure to comply, may result in sanctions, such as to reimburse debtor for his attorney fees and/or throw out your claim and tax you with court costs. On the other hand, authorizing your attorney's aggressive use of these discovery methods may force the debtor to "fish or cut bait" and come up with a settlement offer before the matter goes to trial.

You should review the information produced by the debtor with your attorney to determine the minimum number of witnesses required; you should notify each witness of the proposed hearing date and confirm his availability with your attorney. In some courts potential witnesses may give a statement, under oath and subject to cross-examination by the debtor's attorney, for use at trial under appropriate circumstances. If a knowledgeable witness is leaving the country, changing employers or is traveling beyond your out-of-state debtor's locale, you should contact your attorney to discuss that possibility and the expenses involved for such oral or written deposition.

Proving the Case

Third, under our court system, the debtor is accorded the privilege of having you, the creditor, prove its case. The credit manager and/or other knowledgeable witness(es) must meet the traditional burdens of establishing your claim and/or rebutting the debtor's defense or counterclaim. Various state courts have instituted arbitrations to relieve the backlog of what they deem minor cases before their judges. Unhappy litigants usually have the right of appeal, but the second trial is often many months or years later and when it occurs, all new evidence (testimony) must be presented as if the first hearing has never occurred. Further, various costs must be paid by the appellant before the judge ever sees the case. It is not enough "to know" that the debtor owes money or that the defense is "imagined", but facts must be proved with competent firsthand information. How is this accomplished?

Written documents such as a contract or purchase order signed by the debtor, along with invoices and relevant correspondence, constitute the usual initial documentation. These records will establish your agreement with the debtor, including terms of payment. But, they must be authenticated and identified in court by the witness who prepared them or handles them in the ordinary course of business, or through debtor's procedural admissions or responses to discovery prior to trial which permits the admission of your basic documents.

Any and all written documents that have a connection with the debtor should be supplied to your attorney for review. A well documented commercial transaction will increase your chances for a settlement or judgment and perhaps eliminate the need for a trial or shorten the trial.

Occasionally, certain documentation is not available. Perhaps your business policy allows for the acceptance of verbal orders, or there is no proof of delivery. Your method of operation may be considered a realistic business practice in your industry. If this is considered "a practice of the trade", then oral testimony may be used to supply such information with appropriate notice to the debtor.

Testimony

The person made available to testify for your firm will only be able to state facts known from personal knowledge or if he is competent by his job, based upon review of proper business records. (Remember, your attorney cannot be your witness.) Credibility is the essence of what your witness must project before the arbitrators or court to establish your case. The witness should follow these guidelines:

1. Arrive at the courthouse early to review your testimony with your attorney prior to trial.

2. Dress properly and professionally and conduct yourself to demonstrate respect for the court.

3. Listen! Listen to the questions asked! If you are not sure of the question, don't answer; ask for clarification. Do not guess.

4. Think! Think before you speak! Improper testimony may confuse the issues and cast doubt on your credibility. Worse, it is most difficult to correct erroneous testimony. Once you speak you cannot take your words back.

5. Stick to your answer. Inconsistent testimony will decrease your credibility. A good answer to a question asking whether you're absolutely sure of previous testimony is: "Yes, that is the way I remember it."

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