James F. Ogorchock
Direct dial: 603.627.8233
Fax: 603.641.2355
jogorchock@sheehan.com

Practice Areas

Business Litigation

Good Company

Check the Pocket Before You Docket: Steps For Ensuring That Your Lawsuit Will Produce a Collectable Judgment

Friday, October 13, 2006

When assessing litigation, many unsecured commercial plaintiffs carefully consider the likelihood of obtaining a judgment, but fail to properly conduct an upfront analysis of the likelihood of actually collecting on that judgment. Like the chance for success on the merits, collection risk should be assessed before suit is filed.

Assess the Financial Strength of the Defendant
The first step is to assess the financial strength of the defendant. If the claim is not something for which the defendant will likely be insured and the defendant is in a financially precarious position, the would-be plaintiff has two options:

This assessment is extremely fact-dependent and will change with every case – but it is important to ensure that both you and your lawyer focus on it at the outset of your case.

Seek Security
If the decision is made to proceed, the next step in increasing the likelihood of successful collection is to secure your interest.

A prejudgment attachment can turn an unsecured creditor into a secured creditor and substantially increase the likelihood that the judgment will get paid at the end of the case. Most commercial claimants are unsecured (i.e. they do not have a mortgage or a UCC-1 in place securing the amount owed). Unsecured creditors are at a significant disadvantage if the defendant is insolvent because there is no specific property set aside for the plaintiff to seize to satisfy a judgment. If the defendant files for bankruptcy, secured creditors are paid first, leaving all unsecured creditors to a pro rata share of whatever assets remain after the secured creditors have been paid off. This often results in unsecured creditors recovering nothing, or pennies on the dollar.

In order to obtain a prejudgment attachment in New Hampshire, the plaintiff simply needs to demonstrate a likelihood of success on the merits. Assuming the plaintiff is able to make that showing, the burden then shifts to the defendant to demonstrate that the defendant is likely to have sufficient assets to pay the judgment. If the defendant cannot make such a showing, the attachment should be granted. Like any other conveyance, a bankruptcy court can set attachments aside. If the defendant does not file for bankruptcy within ninety days of the attachment, however, the plaintiff is likely to become a secured creditor, substantially increasing the likelihood of being paid if the plaintiff obtains judgment.

Attach the Bank Accounts
Often, a defendant will not have any tangible assets to attach, or any assets that can be attached will be difficult to liquidate in order to satisfy a judgment. In such cases, it is preferable to attach the defendant's bank accounts, which will permit the plaintiff to obtain a check at the end of litigation instead of attempting to liquidate assets through a sheriff's sale. Perfecting a prejudgment attachment that freezes a substantial portion of a defendant's liquid assets also creates a compelling incentive for the defendant to resolve a case. A defendant with a weak defense and no access to attached funds will have little desire to prolong litigation.

Care must be taken, however, because an improper attachment can create negative consequences for a plaintiff. Additionally, many courts are reluctant to grant an attachment on an account if it will impair a defendant's ability to make payroll distributions to its employees.

In New Hampshire, attaching assets owned by a defendant, held by a third party (such as a bank), is known as "trustee process." The procedures for obtaining an attachment via trustee process are complex and filled with traps for the unwary. If an attachment via trustee process has not been obtained, the New Hampshire Supreme Court has ruled that a plaintiff, even with a judgment, may not proceed against a defendant's bank accounts for satisfaction of the judgment. Accordingly, issues on how the judgment will be paid are best addressed at the inception of the case, not after judgment has been obtained.

Turning a Judgment into Dollars
There are multiple avenues to enforce a judgment. Even without an attachment, a sheriff can seize property to collect on a judgment, but such efforts are rarely successful if the plaintiff can't identify a particular asset to be seized and sold at auction. Further, creditors that have an attachment or other security interest on an asset get paid in the order that their security interests were perfected. Again, it is easy to see the benefit of obtaining an attachment as soon as possible in the litigation.

A prevailing plaintiff can also request a Periodic Payment Order. If a plaintiff can show that a defendant has an ability to pay, the Court should issue an order requiring the defendant to make payments. Unfortunately, many periodic payment orders are inadequate because a defendant that is not paying one creditor likely is not paying other creditors either. If a defendant is facing numerous claims, it will typically argue that it has no ability to pay. Post litigation discovery is permissible and should be utilized to test the veracity of such claims.

Conclusion
In cases involving defendants with questionable or uncertain balance sheets, significant pre-litigation consideration must be given to how a judgment, if obtained, is likely to be satisfied. Otherwise, a plaintiff may end up with only the Pyrrhic victory of vindicating its position, a Judgment to hang on the wall and a defendant with empty pockets.

This article is intended to serve as a summary of the issues outlined herein. While it may include some general guidance, it is not intended as, nor is it a substitute for, legal advice. Your receipt of Good Company or any of its individual articles does not create an attorney-client relationship between you and Sheehan Phinney Bass + Green or the Sheehan Phinney Capitol Group. The opinions expressed in Good Company are those of the authors of the specific articles.