How to Make Your Debts Uncollectible, Create Risk, and Undermine Your Own Business

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Disclaimer

This information is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case.

Every effort has been made to assure this information is up-to-date. It is not intended to be a full and exhaustive explanation of the law in any area, nor should it be used to replace the advice of your own legal counsel.

Any opinions expressed are the opinions of the speaker(s) and not this organization.

What’s in the File?

Corporate Identity Traps

On the Paper

- Trade name
- Affiliate invoice
- Old entity
- Wrong suffix
- Merged seller

In the Case

- Real contracting party
- Real performer
- Real owner
- Real defendant
- Real witness

Authority and Capacity

Entity Promise

- Company name
- Signer title
- Authority
- Entity signature

Personal Promise

- Individual name
- Individual capacity
- Separate signature
- Consideration basis

Battle of Forms

Master	Application	PO	Invoice	Portal
Base terms	Credit terms	Buyer terms	Seller terms	Updated terms

No hierarchy | More litigation

Assignment Chain

Originator	Seller	Buyer	Firm
Creation records	Bill of sale schedule	Account match reconciliation	Standing proof

Account level linkage

Electronic Assent ≠ Courtroom Proof

- Exact term version
- Acceptance timestamp
- User or account
- Affirmative act
- Device or access log
- Immutable audit trail

Validity + authentication

Renewals and Amendments

- New terms
- New debtor entity
- New signatory
- Higher credit limit
- Expired guarantee
- Different venue
- Portal acceptance
- Supersession language

Reaffirm | Replace | Preserve

Where Do You Sue?



https://cdn.pixabay.com/photo/2017/05/17/07/29/direction-2320124_960_720.jpg

Venue

- “The neighborhood, place, or county in which an injury is declared to have been done, or a fact declared to have happened.”
- “The particular county or geographical area, in which a court with jurisdiction may hear and determine a case.”

Forum

- “A court of justice, or judicial tribunal”
- “A place of litigation; an administrative body”
- “Particular place where judicial or administrative remedy is pursued.”

Jurisdiction

- “The power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control of the subject matter and the parties.”

Shall Versus May

Shall

- Mandatory
- Exclusive
- Predictable motion
- Narrow venue set

Commitment

May

- Permission
- Possible alternative
- Venue dispute
- Drafting ambiguity

Option or Advantage?

Consumer Venue Override

Contract

- Chosen venue
- Chosen law
- Consent language

FDCPA

- Consumer residence
- Contract signing location
- Real property exception

FDCPA, 15 U.S.C. § 1692i

Where the consumer resides at the time of the initiation of the legal action; or

Where the consumer signed the contract that created the obligation upon which the legal action is based.

Home Venue or Real Recovery?

- Service
- Witness travel
- Default risk
- Domestication
- Local counsel
- Exemptions
- Asset location
- Elapsed time

Judgment location ≠ Asset location

Alternative Dispute Resolution

What Are We Talking About?

- “Any disputes arising from this agreement shall be resolved in mandatory arbitration before a nationally recognized alternative dispute resolution organization.”

When It Works!

- Arbitration can be much much faster.
- Tribunal are employees, not elected civil servants.
- Less adversarial than litigation.

Biggest Pitfalls

- Election of Remedies Preclusion
- Compromise in balance.
- Few rights of recourse. (No Appeal.)
- Arbitration will still have to be confirmed.

Arbitration Economics

File	Manage	Decide	Confirm	Collect
Filing fee	Case fee	Arbitrator	Court	Enforcement

Price every stage

American Arbitration Association

Amount of Claim	Initial Filing Fee	Final Fee
Less than $75,000	$1,450	$1,150
$75,000 to less than $150,000	$ 2,375	$1,825
$150,000 to less than $300,000	$3,675	$3,325
$300,000 to less than $500,000	$4,825	$4,175
$500,000 to less than $1,000,000	$6,650	$7,525
$1,000,000 to less than $10,000,000	$8,925	$9,675
$10,000,000 and above	$13,500 plus .01% of the claim amount above $10,000,000	$19,250
Undetermined Monetary Claims	$8,925	$9,675

Judicial Arbitration and Mediation Services

- Filing Fee
  - $2,000 (two parties)
  - $3,500 (three or more)
- Case Management Fee of 13%
- “Hourly rate is set by the individual arbitrator(s)”.

Unclear Contract Terms

Money

- Net 30

Money

- Net 30
- Late Fees

Money

- Net 30
- Late Fees
- With Statutory Interest

Money

- Net 30
- Late Fees
- With Statutory Interest
- Reasonable Attorneys fees

Money

- Net 30
- Late Fees
- With Statutory Interest
- Reasonable Attorneys fees
- Inclusive of all fees

Money

- Net 30
- Late Fees
- With Statutory Interest
- Reasonable Attorneys fees
- Inclusive of all fees
- Market Rate

Quality

- Best Efforts

Quality

- Best Efforts
- Industry Standard

Quality

- Best Efforts
- Industry Standard
- Standard Warranty

Quality

- Best Efforts
- Industry Standard
- Standard Warranty
- Necessary Materials

Quality

- Best Efforts
- Industry Standard
- Standard Warranty
- Necessary Materials
- Appropriate Methods

Quality

- Best Efforts
- Industry Standard
- Standard Warranty
- Necessary Materials
- Appropriate Methods
- Adequate training

Consequences

- Subject to penalties

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- Reserves the right to impose sanctions

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- Equitable resolution

Scope

- Small Business

Scope

- Small Business
- Sensitive / Confidential Information

Scope

- Small Business
- Sensitive / Confidential / Secure Information
- Risk transfers upon delivery.

Scope

- Small Business
- Sensitive / Confidential Information
- Risk transfers upon delivery.
- Upon Approval

Termination

- Terminate with cause

Termination

- Terminate with cause
- Upon mutual consent

Termination

- Terminate with cause
- Upon mutual consent
- Due to unsatisfactory performance

Termination

- Terminate with cause
- Upon mutual consent
- Due to unsatisfactory performance
- Upon reasonable notice

Questions?


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