

Realizing Those Receivables: Is Your Standard Contract Good Enough?

Lisa Lawler Graditor, Associate

Regardless of the industry, everyone deserves to get paid for a job well done. However, in the current economic climate getting paid on the first, second, on third demand, can prove a serious challenge, especially for the small business operator. Armed with a well-drafted contract and a working knowledge of the procedures of the District Court of Maryland (the “District Court”), even the smallest business operator can begin writing off less and collecting more.

A well-drafted, standard short-form contract should serve as the foundation for streamlining and simplifying the collection process for any business operation, regardless of size. First and foremost, a standardized contract must clearly identify the parties, set forth in detail the precise work to be performed or the product to be conveyed, and state the consideration, i.e., the price to be paid, for that work and/or product. In addition, if the consideration is to be paid over time, or there are other agreed-upon payment terms, those terms need to be clearly defined in the body of the contract. For these basic aspects of a standardized contract, there are an abundance of discounted form contracts available on the internet. However, it is the provisions that many consider “boilerplate” in a standard form contract that have the power to transform collection efforts from expensive and protracted lawsuits into a standardized collection process. To be effective, this boilerplate needs to be narrowly-tailored to reflect the law and legal processes of the State of Maryland - a rare find amongst internet form contracts.

The first “boilerplate” provision we’d like to highlight is the attorney’s fee-shifting provision. In the State of Maryland, the general rule is that each party to a contractual agreement bears the cost of its own attorney in any litigation arising under the contract, and a collection action is perhaps the most straight forward example of a breach of contract – one party has fully performed its obligations under the contract and the other party, in refusing to pay, has breached its obligations under the contract. The most notable exception to this general rule (and there are other statutory exceptions which are beyond the scope of this article) is that parties can include attorney’s fee-shifting provisions in a written contract. Thus, including in a standardized form contract a provision whereby the losing party in any litigation arising from the contract pays the prevailing party’s attorneys’ fees can be a critical first step towards making the collection of unpaid receivables economically feasible. Without it, any attorneys’ fees incurred to collect the amounts due under a contract will most likely have to be deducted from the amounts collected.

A second powerful tool for cutting down on the time and expense of collecting unpaid receivables is the jury trial waiver. Article 23 of the Maryland Declaration of Rights ensures the right to a trial by jury for all civil claims where the amount in controversy exceeds the sum of ten thousand dollars (\$10,000); and for this calculation attorney's fees are not included. This right to a jury trial can be waived, by contract. However the contractual provision waiving the right to trial by jury will be strictly interpreted by the courts in order to preserve this important constitutional right. Since jury trials are necessarily longer and more expensive than bench trials conducted before a judge, including a carefully drafted jury trial waiver in a standard short-form contract is essential.

On the topic of expedient, cost efficient dispute resolution techniques, careful consideration should also be given to including in a standard short-form contract a mandatory arbitration provision, which stipulates that all disputes arising under the contract be settled by binding arbitration. Maryland courts will enforce mandatory arbitration provisions, which at their core, require that all disputes be resolved through commercial arbitration and not through traditional litigation – which is perceived as being a costly and protracted process. Because the District Court system, as discussed below, can be effective in expeditiously resolving legal claims where the amount at controversy is small, arbitration may not always be a better dispute resolution technique. We consider whether or not to include an arbitration provision in our standard form contracts on a case by case basis, depending on the industry and nature of the contract.

If the payment terms and financing structure related to a contractual transaction will include the execution of a promissory note, another powerful provision that should be considered for inclusion is a confessed judgment provision, because it offers the potential to facilitate the collection process. Confessed judgment provisions must be carefully drafted and reviewed by a Maryland attorney in order to ensure that the provision will be enforceable and does not violate specific statutory provisions designed to protect consumers in certain types of consumer and retail transactions. However, if not prohibited by law, including a provision in a written promissory note in which the debtor authorizes a judgment by confession for a liquidated amount can pave the way for an expedited judicial process for debt collection.

The Maryland District Court system has a separate form complaint for use with written contracts containing confessed judgment provisions, which is available on the District Court website at <http://www.courts.state.md.us/district/forms/civil/dccv003.pdf>. After completing this simple, one-page, Complaint for Confessed Judgment and attaching a copy of the written instrument authorizing the confession of judgment, these documents should be filed in the District Court. Upon receipt of the Complaint for Confessed Judgment, the court clerk will then enter a judgment by confession in the matter, and notify the debtor. The debtor then has thirty (30) days to respond, during which time

enforcement of the judgment is stayed. If the debtor responds during this thirty-day period, stating the legal and factual basis for its defense to the claim, the District Court will determine where there is a substantial and sufficient basis for an actual controversy. If there is, the Court will then order the Judgment by Confession opened, modified, or vacated and permit the defendant to file a responsive pleading and hear the case on the merits. If the debtor does not respond after the initial thirty-day period, the judgment by confession becomes final and formal steps can be taken to collect the judgment, i.e., wage garnishment, recordation of a lien in the County or Counties where the debtor owns real property. If drafted together and properly, the attorneys' fee shifting and confession of judgment provisions offer the potential for relatively quick and cost-effective debt collection of amounts due under the terms of a promissory note.

Now a few words on the District Court system. The District Court is Maryland's small claims court, and has exclusive jurisdiction over contract actions seeking money damages in amounts not exceeding five thousand dollars (\$5,000). For simple collection actions of receivables valued at less than five thousand dollars (\$5,000), the District Court serves as convenient venue for collection in which attorney representation is not required, although it may be recommended. In addition, the District Court website offers a series of educational materials designed to make the District Court system accessible to and useable by the general public. A general explanation of the overall small claims procedures can be found at: <http://www.courts.state.md.us/district/forms/civil/dccv001br.html>. The District Court materials on how to collect a judgment can be found at: <http://www.courts.state.md.us/district/forms/civil/dccv060br.html>; and specific information on the wage garnishment process can be found at, <http://www.courts.state.md.us/district/forms/civil/dvcv065br.html>. Unfortunately, given the limited jurisdiction of the District Court, if the amount of the receivables exceeds five thousand dollars (\$5,000), the District Court may or may not have jurisdiction over the collection action, in which case consultation with an experienced attorney is strongly advised. However, in claims exceeding five thousand dollars (\$5,000), the attorney's fee-shifting, jury trial waiver, and confessed judgment provisions discussed above will prove even more critical in making collection economically feasible.

Lastly, while this article has focused on drafting standardized form contract documents that facilitate collection, there are many other reasons to make sure that your standard form contract adequately protects your business enterprise from future liability. This Article does not purport to cover them all, and we may highlight other contractual provisions in future newsletters. However, a few other important contract provisions bear specific mention: capping or restricting potential liability for performance of the contract; including liquidated damages provisions; and removing any references to "seal" in the contract, which could extend the statute of limitations under the contract to twelve (12) years. Of course, it always bears repeating that any and all contracts should be executed in the name of the corporate entity, by its appropriate officer, in order to limit

the personal liability of the members, partners, officers, and/or stockholders of that corporate entity. Here at McEvoy & Dean, P.C., we view each of the provisions mentioned in this article as a potential risk reduction tool available to our clients. When preparing standard short-form contracts, we give careful consideration to how best to maximize our clients' interests in limiting their liability under the contract and facilitating collection of monies due under the contract. As always, the attorneys at McEvoy & Dean, P.C. are available to discuss the issues raised in this article, and to provide legal advice specific to your business enterprise on any other issues relating to commercial contracts.

Lisa Lawler Graditor is an Associate at McEvoy & Dean in Land Use, Business Law, and Commercial and Residential Real Estate. Email her at lgraditor@mcevoydean.com or call to schedule a consultation.