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LEGAL UPDATE

Insights and Developments in the Law

Winter 2009

Getting Paid During a Recession Economy Part I—An Ounce of Prevention

By Wendy R.S. O'Connor

There are few businesses which have been unaffected by a downturn in the economy, and perhaps the biggest impact on the small business concerns

accounts receivable. More and more, trying to collect on outstanding invoices may be the greatest challenge currently faced by small businesses.

While there may be little the small business can do to collect an amount owed by a customer who is in real financial hardship, there are strategies which can be employed on the front end which may greatly reduce the time and expense associated with the collection of delinquent accounts. At TH&S, it has been our experience that the small business that takes the time to create comprehensive sales documents and obtain complete customer information in the beginning of the business relationship has a much greater chance of collecting on delinquent accounts.

As an initial matter, all new customers should fill out detailed intake forms which clarify who the actual customer will be. This information should include the form of business venture (incorporation, partnership, limited liability company or fictitious name). It is often difficult to locate a business once it begins to experience financial troubles, and the more addresses and contact information you have, the better the chance you will be able to track them down. Sometimes, just finding the debtor is the most difficult aspect of a collections matter, so don't hesitate to request the home address of the

TH&S Labor and Employment Department to Present Seminars Discussing *The Employee Free Choice Act*

- On Wednesday, February 18, 2009, from 9am to 11am, Attorneys George C. Hlavac and Jeffrey S. Stewart will present "The So-Called Employee Free Choice Act" seminar for the Society for Human Resource Management at the Lehigh Valley Iron Pigs' Coca-Cola Stadium, 555 Union Boulevard, Allentown, PA. To register for this seminar, contact the Society for Human Resource Management at shrmv@enter.net
- On Wednesday, February 18, 2009, from noon to 1pm, Attorneys George C. Hlavac and Jeffrey S. Stewart will present "The So-Called Employee Free Choice Act" seminar for the Lehigh County Bar Association at 1114 W. Walnut Street, Allentown, PA; 1 substantive CLE credit. To register for this seminar, contact the Lehigh County Bar Association at balc@lehighbar.org
- On Thursday, February 19, 2009, from noon to 1:30pm, Attorneys George C. Hlavac and Scott B. Allinson will present an informational seminar for the Greater Lehigh Valley Chamber of Commerce at the Hotel Bethlehem, discussing in detail all of the major provisions of the Employee Free Choice Act and how the proposed changes to the existing National Labor Relations Act will likely impact employers and businesses throughout the Lehigh Valley. To register for this seminar, contact the GLVCC at lorier@lehighvalleychamber.org

Continued on page four.

Mortgage Foreclosure—How Does It all Work?

By Stephanie A. Kobal

The mortgage foreclosure crisis is covered nightly on national TV and on the front page of every daily newspaper across the United States. One way or another, this crisis is affecting people of all socio-economic classes. While foreclosure is highly publicized, the process is often misunderstood.

In the event a lender wishes to begin a foreclosure action because a debtor has defaulted, the lender must first notify the debtor of the default. In Pennsylvania, there are two types of notices that are statutorily required: the Act 6 Notice, codified at 41 P.S. § 101 *et seq.*, and the Act 91 Notice, codified at 35 P.S. § 1680.101 *et seq.* The lender should also review the loan documents to ensure that additional notices are not required pursuant to the terms contained in the loan documents.

The Act 6 Notice is required for residential mortgages where the bona fide principal amount of the mortgage is less than \$217,873. 41 P.S. § 101. The primary purpose of the Act 6 Notice is to alert a debtor to the nature of the default, what actions can be taken to cure the default and what will occur if the default is not cured. 41 P.S. § 403.

The Act 91 Notice is also required prior to commencing any foreclosure action upon a mortgage secured by the mortgagor's principal residence. 35 P.S. § 1680.402c. The Act 91 Notice provides the debtor with notice of available consumer credit counseling and notice that the debtor may qualify for financial assistance. 35 P.S. § 1680.403c.

Last year, the Act 91 Notice requirements were amended; the bill stated that the Pennsylvania Housing and Finance Agency shall prepare one notice which includes all of the information required by Act 6 and Act 91. S.B. 486, 2007 Gen. Assem., Reg. Sess. (Pa. 2008). This notice must be sent via registered or certified mail to the debtor, as regular, first-class mail and hand delivery are insufficient to

fulfill the requirements of Act 6. *Gettysburg Nat'l Bank v. Trace*, 13 D&C 3d 679 (Pa. C.C.P. 1980).

Both the Act 6 and Act 91 Notices are jurisdictional requirements. This means that if the lender fails to provide the requisite notice, a judge can dismiss the case and the lender will not be able to proceed with foreclosure proceedings, including execution at a sheriff's sale. Therefore, it is impera-

tive that these notices be sent pursuant to all statutory requirements.

If the debtor does not take any action within thirty-three (33) days pursuant to the notices, the lender can commence foreclosure proceedings, which are generally in conformance with the civil procedure rules governing civil actions. Foreclosure proceed-

Continued on page three.

Announcements

F. Peter Lehr and **S. Graham Simmons, III** were both recognized as "Rising Stars" for 2008 by *Philadelphia Magazine* and *The Journal of Law & Politics*. This is the equivalent of "Super Lawyer" recognition for lawyers, age 40 or younger, who have been selected by their peers statewide and represent the top 2.5 percent of up-and-coming attorneys in Pennsylvania.

Frederick J. Stellato was recently elected as CEO and re-elected as Chairman of the Board of Directors of the Pennsylvania Stoners Sports Academy (PSSA). As part of its nonprofit activities, PSSA brought minor league soccer back to the Lehigh Valley this past summer and in its inaugural season the Pennsylvania Stoners won the championship of the National Premier Soccer League. PSSA looks forward to broadening its community outreach programs this year while maintaining a championship level of play with its minor league team.

On January 14, 2009, **George C. Hlavac** and **Steven E. Hoffman** conducted a seminar for the Northampton County Bar Association entitled "The So-Called Employee Free Choice Act." The seminar discussed in detail all of the major provisions of the Employee Free Choice Act and how the proposed changes to the existing National Labor Relations Act will likely impact employers and businesses across the country.

On January 21, 2009, **George C. Hlavac**, Chairman of the Tallman Hudders & Sorrentino Labor and Employment Law Department, conducted a seminar for the Pennsylvania Health Care Office Managers Association outlining the labor law changes that would occur with the enactment of the Employee Free Choice Act and discussing the ramifications for the health care industry.

Mortgage Foreclosure

Continued from page two.

ings are commenced when the lender files a civil complaint in mortgage foreclosure with the Court of Common Pleas in the county where the land is located. Pa. R.C.P. 1142, 1143. While the lender may state in the complaint two or more grounds for the actual foreclosure, the lender cannot state more than one cause of action (*i.e.* a claim for personal liability). Pa. R.C.P. 1146.

After the complaint is filed, the complaint is served upon the debtor by the sheriff. If the sheriff is unable to locate the debtor, the lender must make a reasonable inquiry into the debtor's whereabouts. This reasonable inquiry consists of the following: (i) an inquiry of Postal Authorities pursuant to the Freedom of Information Act; (ii) inquiries of relatives, neighbors, friends and employers; and/or (iii) examining local telephone directories, tax records, voter registration records and motor vehicle records. If no address is uncovered, the lender will be required to file a Motion for Alternative Service in accordance with Pennsylvania Rule of Civil Procedure 430 which includes service by publication in the local newspaper.

Once service is effectuated, if an answer or a defense is not filed within twenty (20) days and the debtor does not respond to the lender's notice of intention to enter default judgment, the lender can seek a default judgment. A default judgment is equivalent to losing a case without the merits of the case ever reaching a judge's chambers.

Following judgment, the property will be listed for sheriff's sale by the lender filing the proper execution documents with the prothonotary and the sheriff. While many of the execu-

tion documents are standardized, each county varies slightly and it is prudent to speak with the prothonotary and consult the local rules of civil procedure for specifics. The execution is achieved by a writ of execution in the form as provided in Pennsylvania Rules of Civil Procedure 3180 and 3257. The writ of execution is filed with the prothonotary, who forwards the writ to the sheriff for service on all required parties.

The Pennsylvania Rules of Civil Procedure provide that notice of a sheriff's sale must be provided to the debtor, to every person who has any record lien on the property, to every person with a record interest in the property and to every person who has an interest in the property that is not recorded. Pa. R.C.P. 3129.1(b). Pennsylvania Rule of Civil Procedure 3129.1 sets forth that an affidavit must be filed with the court setting forth the required information as stated above (the "3129 Affidavit"). Notice of the sale must be served on all parties named on the 3129 Affidavit at least thirty (30) days prior to the sale. Pa. R.C.P. 3129.2(c). If the debtor has not entered his or her appearance, service is required to be effectuated by sheriff. *Id.*

Pennsylvania law permits sheriff's sales to be postponed up to one hundred and thirty (130) days from the originally scheduled sale date. Pa. R.C.P. 3129.3(b). Postponing a sale is helpful when difficulties arise in serving the debtor, the debtor is attempting to re-finance the obligation in an attempt to cure or a forbearance agreement is being negotiated. As a courtesy, the lender should provide the sheriff with notice of its need for a postponement as soon as the need arises.

The sheriff's sale is the culmination of the foreclosure action. At the sale,

the sheriff auctions the property pursuant to the writ of execution. Because a sheriff's sale is a public auction, any person desiring to bid on property should review and become familiar with the terms and conditions of the sale prior to the date of the sale. The terms and conditions of the sale vary by county and can be obtained from the sheriff's office or website.

Generally, a sheriff's sale discharges all liens except: (i) prior mortgages not proceeded by a judgment lien; (ii) real estate taxes; (iii) municipal liens and assessments; and (iv) taxes, municipal claims and assessments whose lien though afterwards is given priority by virtue of a statute.

While the foreclosure process can be expensive and overly burdensome, it can be successfully negotiated through effective planning. If you receive a notice of foreclosure, all hope is not lost and you should consult an attorney; defenses to foreclosure exist and an attorney can assist you to keep your home. If you are a lender wishing to foreclose, an attorney can make the process run smoothly and be more cost effective.

Actual resolution of legal issues depend upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Getting Paid

Continued from page one.

president or owner of the company as well—this may be the only location where you will be able to find a company representative. Remember, also, to note all changes of address, which occur frequently.

The customer intake form should also ask for credit information, including references, as well as checking account data. Be sure to ask the customer to provide the name on the account, the name of the financial institution, and the account number or numbers. This information will greatly streamline efforts to execute on a judgment against the customer in the event of non-payment; since garnishment of a debtor's bank account is the easiest and most efficient method of satisfying a judgment in your favor, you will want to be sure to have this information in your files. In the event that your customer refuses to provide such information, make sure you photocopy any checks received from the customer, since they will contain the information you need.

Next, a small business should utilize its sales documents—contracts, invoices, terms and conditions—to further insulate itself in the event of non-payment. TH&S attorneys can help you decide whether to request a personal guarantee from business clients who seek an extension of credit, and whether to include confession of judgment language. The personal guarantee enables the small business to proceed against the guarantor's personal assets—helpful when the company which owes you money is leveraged to the hilt, where all assets already serve as collateral for larger, previously secured debt. The confession of judgment

permits a creditor to avoid adjudication on an overdue account and proceed directly to judgment. Keep in mind that confession of judgment language may not be used against individual consumers.

A final thought on your sales documents: Be sure they include information as to terms of payment, the application of finance charges, fees, or penalties in the event of non-payment, and the provision for collection of attorneys' fees and legal costs in the event that litigation is necessary to obtain collection on an outstanding account. If they don't, a TH&S attorney can help you draft language which will enable you to seek this relief. Finally, it's a good idea to include a choice of law and forum selection clause; this means that you, the creditor, will be able to select the court in which any payment dispute must be litigated, and you get to pick which law will apply. The inclusion of a forum selection clause enables you to avoid having to litigate a matter far from your home base, therefore avoiding unnecessary travel expense and time out of your schedule on the day of the hearing.

What do your new customer intake and sales documents look like? Do they contain these sorts of provisions? If not, TH&S can help you revise your forms for maximum protection on the front end. You may not be able to change the course of the present economy, but you can take these small steps to protect yourself in the event of the delinquent account. A review of your customer intake documents, contracts, terms and conditions by a TH&S attorney is a relatively inexpensive and speedy process that can make a huge difference down the road.

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