

EFFECTIVE DEMAND LETTERS: *SECURING PAYMENT & AVOIDING LIABILITY*



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WHY?



Demand Letters . . .

Why Bother . . .

Take Time

Cost \$\$

WHY?



- Ask and you shall receive . . . Sometimes
- Increase chances of payment, if:
 - Clear
 - Concise
 - Supported
 - Call to action
 - Deadline
 - Ultimatum
- May be required by law or contract

WHY?



- Demonstrate:
 - Confidence
 - Organization
 - Commitment
- Apply pressure
- Strong reminder you are not going away
- Goal: Attention = Payment/Settlement

GETTING STARTED



- Contracts
 - Credit Application
 - Promissory Note
 - Security Agreement
 - Lease or Rental Agreement
 - All amendments, modifications
- Invoices and Statements of Account
- Communications to/from Debtor
 - All correspondence
 - Account notes
- Documentation Re: Defenses / Excuses
- Your “file” – Organized, chronological

GETTING IT TOGETHER



- Organization, complete documentation are key
- Eliminates confusion
- Ensures accuracy
- Aides in realizing payment & defeating defenses
- Cuts to the chase with debtor
- Saves you and your lawyer time
- Saves you money

DEBT



Consumer

vs

Commercial

DEBT



Consumer

- FDCPA applies
- State law equivalents may also apply
 - Restrictions
 - Required Disclosures
- Contract

DEBT



- FDCPA does NOT apply
- Other laws may apply (e.g., note acceleration)
- Contract

Commercial

FDCPA



- Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (the “FDCPA”):
 - Applies to debt for personal, family, or household purposes
 - Requires certain disclosures in demand letters and prevents creditors from revealing information regarding the amount/nature of the debt to third parties
 - Prohibits false representations under §1692e such as threatening to bring a lawsuit when not permitted or contemplated
 - Prevents creditor from filing a lawsuit during the 30-Day validation period after demand letter sent

CONSUMER V. COMMERCIAL FDCPA



- *Bloom v. I.C. Sys., Inc.*, 972 F.2d 1067 (9th Cir. 1992) (court focuses on the intent of the debtor (i.e., what is the purpose of the debt))
- *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C.*, 214 F.3d 872 (7th Cir. 2000) (relevant time frame for determining FDCPA applicability is when the debt arose, and therefore FDCPA applied to law firms' attempts to collect mortgage debt for house in which mortgagor initially resided, even though, at time debt collection efforts began, mortgagor was renting premises to strangers and thus was making business use of property)

CONSUMER V. COMMERCIAL FDCPA



- *Perk v. Worden*, 475 F.Supp.2d 565 (E.D. Va. 2007) (Even if corporate credit cardholder violated business cardholder agreement by incurring personal debt, she incurred consumer “debt,” subject to FDCPA; debt was personal at moment it was incurred)
- *First Gibraltar Bank, FSB v. Smith*, 62 F.3d 133 (5th Cir. 1995) (obligations arising out of commercial transaction is not debt under the FDCPA)
- *Garza v. Bancorp Group, Inc.*, 955 F.Supp. 68 (S.D.Tex.1996) (FDCPA did not apply to leases for security equipment obtained and installed by lessees in their family-owned and operated stores, inasmuch as Acts applied to debts arising out of consumer transactions for personal, family, or household purposes, and lessees used equipment for business purposes, even though equipment was intended to provide security to family members working at stores.)

BASIC ANATOMY OF A DEMAND LETTER



- Recipients
- Reference line
- Introduction
- Required Disclosures
- Basis of claim/demand
- Demand/directive/call to action
- Deadline
- Ultimatum
- Necessary enclosures supporting claim
 1. Contract
 2. Invoices

RECIPIENTS



- Follow contract notice requirements
- Blast additional recipients @ company?
 - Attention/Action/Payment
 - Secretary of State filings helpful
 - Registered Agent
 - Officers/Directors/Managers
- Additional valid addresses?
- Regular mail + CMRRR + Fax + Email
 - Hand delivery → ensure record of receipt
- Generally, do not send collection demands to third parties
 - Consumer – violation of FDCPA
 - Commercial/Consumer – risk defamation/libel, interference with contract claims etc.

FOR EXAMPLE...



June 5, 2009

**VIA REGULAR US MAIL,
FAX (999-999-999), AND
CM/RRR #7160 3901 9845**

ABC Wind Energy Corporation
c/o Mr. Brad Pitt, President
c/o Ms. Angelina Jolie, Vice President
9999 W. Star Blvd, Ste. 123
Chicago, IL 60631

**VIA REGULAR US MAIL, AND
CM/RRR #7160 3901 9845 8645**

ABC Wind Energy Corporation
c/o Ms. Maggie Manager, Accounting
9999 South Highway 123, Building G
Piper, MN 56162

**VIA REGULAR US MAIL, AND
CM/RRR #7160 3901 9845 8645**

ABC Wind Energy Corporation
c/o CT Corporation System, Registered Agent
350 N. St. Paul St.
Dallas, TX 75201

VIA EMAIL & REGULAR US MAIL

ABC Wind Energy Corporation
c/o Ms. Lois Lane (lois.lane@abc.com)
c/o Steven Spielberg
(steve.spielberg@abc.com)
9999 W. Star Blvd, Ste. 123
Chicago, IL 60631

Re: YOUR COMPANY INC.

Unpaid Account of ABC Wind Energy Corporation
Amount Unpaid: \$350.000.00
NOTICE OF DEFAULT AND DEMAND FOR
PAYMENT

RE: LINE



1. Reference contract, account
2. Reference amount due
3. May reference type of demand:
 - NOTICE OF DEFAULT & DEMAND FOR PAYMENT
 - NOTICE OF INTENT TO ACCELERATE
 - NOTICE OF ACCELERATION

Re: **NOTICE OF DEFAULT, DEMAND FOR PAYMENT,
AND NOTICE OF INTENT TO ACCELERATE**

| | |
|---|-------------------|
| Retail Installment Contract and Security Agreement: | November 23, 2002 |
| Original Principal Amount: | \$350,000.00 |
| Maker: | Jane Doe Debtor |
| Original Lender: | Bank ABC |
| Current Holder: | XYZ, Inc. |

Re: YOUR COMPANY INC.
Unpaid Account of ABC Wind Energy Corporation
Amount Unpaid: \$350,000.00
**NOTICE OF DEFAULT AND DEMAND FOR
PAYMENT**

BASIS



- Specific
- Only what is necessary – just the facts
- Confirmed and Accurate

As you know, on or about April 10, 2008, ABC engaged YOUR COMPANY INC. to provide contract staffing services and personnel, pursuant to a Serving Agreement entered by ABC and YOUR COMPANY INC., a copy of which is enclosed. YOUR COMPANY INC. has provided ABC with said contract staffing services and personnel, but ABC has failed to pay for all of the services rendered by YOUR COMPANY INC. as agreed.

DEMAND



- Specific
- Confirmed, Accurate, Supported

YOUR COMPANY INC. hereby makes demand upon ABC for payment in the amount of \$350,000, due and owing for the services rendered by YOUR COMPANY INC. The amount owing consists of Invoice No. 9864, a copy of which is enclosed.

DEMAND



- Demand for Interest?
- Avoid usurious interest and a usury counterclaim!
 - Usury: *Charging* more than the maximum allowable interest rate.
 - A function of state law.
 - Some states don't have interest limitations (e.g., Utah).
 - Texas has a whole host of interest limitations, for example.
 - ✦ In absence of a written agreement, 6% per annum limit
 - ✦ With a written agreement, up to 8% per annum as per agreement terms.
 - ✦ Penalties can be severe, including loss of principal amount due, treble damages.
- Attorneys' Fees?

DEADLINE



- Provide one. Don't leave it open ended.
- Consider objectives and circumstances in deciding on timeframe
- Consider applicable law and contract
 - FDCPA?
 - Contract provisions for cure?
 - State law for recovery of fees – “reasonable”?
- 3 days; 10 days; 30 days?

ULTIMATUM



If payment is not received within ten (10) days from the date of this letter, YOUR COMPANY will consider its legal remedies, including, but not limited to, filing a lawsuit against ABC on the unpaid account, for breach of contract, and/or for quantum meruit to recover the amount due, plus all pre- and post-judgment interest, court costs, and attorneys' fees, as permitted by applicable law.

If the deposit is not refunded within three days from the date of this letter, YOUR COMPANY INC. will consider all of its legal remedies, including filing a lawsuit against RECIPIENT for breach of contract and/or fraud, seeking the \$12,000.00, plus additional damages, including lost rentals, which to date are at least \$6,000.00, plus YOUR COMPANY INC.'s reasonable and necessary attorney's fees and pre- and post-judgment interest, as allowed by law.

ULTIMATUM



- “Consider all of its available legal remedies”
 - Keep chosen recourse open
 - Avoid threatening action or remedies you are not entitled to
 - Leave open the option of NOT taking action

HOW SENDER WILL PROCEED



- Do not limit your remedies
- Keep it open-ended, *i.e.*, you will consider all of your available legal remedies
- Do not threaten action you are not legally permitted to take, such as entering the property uninvited to take back collateral

If the deposit is not refunded within three days from the date of this letter, YOUR COMPANY INC. will consider all of its legal remedies, including filing a lawsuit against RECIPIENT for breach of contract and/or fraud, seeking the \$12,000.00, plus additional damages, including lost rentals, which to date are at least \$6,000.00, plus YOUR COMPANY INC.'s reasonable and necessary attorney's fees and pre- and post-judgment interest, as allowed by law.

FILE LAWSUIT WITH DEMAND LETTER?



- In the commercial context, you may be permitted to file lawsuit at the same time as the demand
 - May be necessary if you are up against a statute of limitations period
 - Shows commitment/confidence to collecting
 - Recipient may agree to a judgment in response to your demand letter as part of a payout agreement, which gives you a judgment to enforce later if recipient defaults on the agreement.

FILE LAWSUIT WITH DEMAND LETTER?



YOUR COMPANY INC., contemporaneously with this correspondence, has filed suit against RECIPIENT in the District Court of Harris County, Texas. A copy of Plaintiff's Original Petition is attached hereto for your review. If payment is not received and arrangements for the removal of the equipment have not been made within ten (10) days from the date of this letter, YOUR COMPANY INC. will proceed with this litigation and continue to seek, as provided by the Original Petition, the principal amount due, plus interest, court costs and attorneys' fees, as permitted by applicable law.

ENCLOSURES?



- Generally, you should attach any documents that you have that prove that payment is due, including, the original contract and invoices
- But, you may not want to do so if the contract is missing or poorly written

EXAMPLES



- Accounts
- Promissory notes
- Leases
- Guarantees
- Other commercial agreements

ACCOUNTS



- Be sure to collect/review all of the invoices and payments

ACCOUNTS



As you know, on or about April 10, 2008, RECIPIENT engaged YOUR COMPANY INC. to provide contract staffing services and personnel, pursuant to a Serving Agreement entered by RECIPIENT and YOUR COMPANY INC., a copy of which is enclosed. YOUR COMPANY INC. has provided RECIPIENT with said contract staffing services and personnel, but RECIPIENT has failed to pay for all of the services rendered by YOUR COMPANY INC. as agreed.

YOUR COMPANY INC., hereby makes demand upon RECIPIENT for payment in the amount of \$39,003.55 due and owing for services rendered by YOUR COMPANY INC. The amount owing consists of Invoice No. 9864, a copy of which is enclosed.

PROMISSORY NOTES



- Follow the appropriate progression of demand letters for the note:
 1. Notice of intent to accelerate and demand for payment – must be sent before acceleration
 2. Notice of acceleration
 3. Demand for return of collateral
- Notices for each step of the progression must be clear and unequivocal
- Notices are strictly construed

DEMAND FOR INTEREST?



- Applicable to account and promissory note demands
- Be careful when demanding interest to avoid usury violations
- Usury laws vary between state and type of payment due
- Demanding principle amount “plus interest” is a safe conservative demand

PROCEEDING AGAINST COLLATERAL



- Demand should require recipient to assemble the collateral and make it available for pickup at a certain time/location
- Provide contact information for arranging the pickup
- Self-help to recover the collateral is not permitted
- Useful to avoid the necessity of a writ of sequestration should a lawsuit be necessary

INTENT TO ACCELERATE



As of the date of this letter, the total amount of \$5,996.82 is currently past due under the Note. The total amount due includes the principal amount due of \$3,024.30 and outstanding interest in the amount of \$2,972.52. YOUR COMPANY INC. hereby makes demand upon you for payment in full of the total past due amount of \$5,996.82 within thirty (30) days of the date of this letter. In the event the past due amount indicated above is not paid within thirty (30) days of the date of this letter, the maturity of the Note shall be accelerated and the entire unpaid principal balance shall become due and payable.

In the event the maturity of the Note is accelerated, YOUR COMPANY INC. may seek to pursue its remedies under the Note, including but not limited to, repossessing the collateral and/or filing a lawsuit against you for all amounts due, plus court costs and attorneys' fees.

Unless you, within thirty days of your receipt of this notice, dispute the validity of the debt claimed in this letter, or any portion of the debt, we will assume that the debt alleged in this letter is valid. If we receive notice from you in writing within thirty days of your receipt of this notice that the debt claimed in this notice, or any portion of the debt, is disputed, we will obtain verification of the debt and will forward that verification to you. Also, upon written request to us within thirty days of your receipt of this notice, we will provide the name and address of the original creditor of the debt claimed in this notice, if different from YOUR COMPANY INC.

NOTICE OF ACCELERATION



As maker of the Note, you are hereby notified that the entire unpaid balance of the Note has been accelerated by YOUR COMPANY INC. and is now due and payable in full as a result of your failure to make the payments pursuant to the terms of the Note and as requested in my demand letter to you dated July 10, 2007. YOUR COMPANY INC. hereby makes demand upon you for payment in full of \$14,110.66 in principal, plus all accrued but unpaid interest, plus all attorney's fees and costs incurred in attempting to collect this debt, within ten (10) days of the date of this letter.

DEMAND FOR RETURN OF COLLATERAL



YOUR COMPANY INC. hereby demands that RECIPIENT relinquish possession of the PROPERTY and immediately return the PROPERTY to YOUR COMPANY INC. Please contact CONTACT at YOUR COMPANY INC. to make arrangements for the return of the PROPERTY. CONTACT may be reached at NUMBER.

Despite YOUR COMPANY INC.'S repeated communications and its demand for immediate payment, you have refused to pay the \$101,135.59 due and owing to YOUR COMPANY INC. on the account. Significantly, YOUR COMPANY INC. has recently been informed that RECIPIENT has ceased all of its business operations and has closed its doors. Accordingly, pursuant to the Security Agreement, YOUR COMPANY INC. hereby demands that RECIPIENT immediately assemble and deliver the Collateral, as defined by the Security Agreement, including any and all certificates of title and other documents related to the Collateral, to YOUR COMPANY INC. at ADDRESS.

GUARANTEE AGREEMENTS



- You may have a guarantor of an account/credit application; a lease agreement; or a promissory note
- You should send demand letter both to principal and guarantor when available

On or about August 7, 2008, you entered a Guaranty, personally, unconditionally, and irrevocably guaranteeing the TENANT'S obligations, including payment, under the Lease.

OTHER COMMERCIAL AGREEMENTS



- It is necessary to navigate the demand requirements in the agreement
- Short timelines for response may be permitted (unlike in the consumer context)

PITFALLS TO AVOID



- Collect all the facts before drafting the demand
 - At minimum, review the contract and the invoices.
 - Avoid mistakes that must be corrected later and create a paper trail of errors
- An effective demand letter contains enough detail through specific allegations to illicit performance. However, those facts must be backed up later and your client may be wrong about the details.

MORE PITFALLS TO AVOID



- Do not overstate your intentions (*i.e.*, do not promise a lawsuit by a certain date that you will not follow through upon)
 - May be illegal in the consumer context as a false representation under the FDCPA
 - Decreases credibility in the corporate context

CONSUMER ADVISORIES



- Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (the “FDCPA”):
 - Applies to debt for personal, family, or household purposes
 - Requires certain disclosures in demand letters and prevents creditors from revealing information regarding the amount/nature of the debt to third parties
 - Prohibits false representations under § 1692e such as threatening to bring a lawsuit when not permitted or contemplated
 - Prevents creditor from filing a lawsuit during the 30-Day validation period after demand letter sent
- State fair debt collection practices acts?

CONSUMER ADVISORIES



- The FDCPA requires debt collectors to provide debtors with a written notice containing the following information within five days after the initial communication with a consumer:
 - The amount of the debt;
 - The name of the creditor to whom the debt is owed;
 - A statement that the debt will be assumed valid by the debt collector unless the debtor disputes the validity of the debt within 30 days after receipt of the notice;
 - A statement that the debt collector will obtain and mail verification of the debt or a copy of the judgment to the debtor if the debtor notifies the debt collector, in writing, within 30 days after receipt of the notice;
 - A statement the debt collector will provide the debtor with the name and address of the original creditor, if it is different from the current creditor, within 30 days after receipt of the notice.
 - 15 U.S.C. § 1692g(a).

FDCA “MIRANDA WARNING”



- 15 U.S.C. § 1692e(11): the debt collector must also disclose in the initial communication, even if oral, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.

CONSUMER ADVISORIES



Re: NOTICE OF INTENTION TO ACCELERATE

Promissory Note dated: _____

Original Principal Amount: \$ _____

Maker: _____ **(Name)**

Payee: _____ **(Name)**

Security Agreement Dated: _____

Dear (Name):

YOUR COMPANY INC. is the owner and holder of the above-described Promissory Note ("Note"). As the owner of the Note, this debt is owed to YOUR COMPANY INC. You are advised that YOUR COMPANY INC. is attempting to collect a debt and that any information obtained will be used for that purpose.

Unless you, within thirty days of your receipt of this notice, dispute the validity of the debt claimed in this letter, or any portion of the debt, we will assume that the debt alleged in this letter is valid. If we receive notice from you in writing within thirty days of your receipt of this notice that the debt claimed in this notice, or any portion of the debt, is disputed, we will obtain verification of the debt and will forward that verification to you. Also, upon written request to us within thirty days of your receipt of this notice, we will provide the name and address of the original creditor of the debt claimed in this notice, if different from YOUR COMPANY INC.

CONCLUSION



- Q&A
- Thank you!