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THE DIFFERENCE BETWEEN WINNING AND COLLECTING

Rich Goldwasser

FINANCING GROWTH WITH THE SBA

Joan Berg

About Our Law Firm

We are comprised of seasoned and dedicated professionals who familiarize themselves with our clients' industries as well as their legal issues. We strive to maintain long-term client relationships by keeping our clients fully informed and respecting their time and business resources.

Legal Practice Areas

- Banking and Creditors' Rights
- Condo-Community Association Representation
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- Employee Benefits
- Employment Law
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- Health and Fitness Industry
- Independent Sales Representatives
- Intellectual Property Law
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The Difference Between Winning and Collecting

Before proceeding with litigation, clients should understand that winning a commercial dispute and recovering the money owed them are separate matters. Often winning is the easy part; it's collecting the monetary award that can prove nettlesome. Winning means that a judge or a jury has ruled in your favor. But that alone doesn't put money in your pocket. A losing litigant may still refuse to pay the award, compelling the winner to begin a supplementary proceeding to enforce the judgment by discovering and attaching assets of the debtor. Aside from the additional attorney's fees and costs incurred in such a proceeding, the winning party faces the uncertainty about whether its adversary has the ability to pay its hard-won judgment. Filing for bankruptcy protection may be an option for the unsuccessful party. Winning at trial only to find out your opponent can't satisfy the judgment is a pyrrhic victory at best. In certain circumstances, however, Illinois law actually allows a party to attach an adversary's assets early on in a case and before it obtains a judgment. This avenue of relief is available both in state and federal court.

Under Illinois statute and the Federal Rules of Civil Procedure, a plaintiff can obtain a pre-judgment attachment of a party's assets in certain well-defined circumstances. 735 ILCS 5/4-101; Fed. R. Civ. P. 64. Perhaps the most relevant case, because of its simplicity, is where a party has a claim against a non-resident of Illinois. Other categories involve situations where a defendant is avoiding service of the lawsuit or has or is about to depart the state with the intention of removing its assets. The statute also allows for pre-judgment attachment in certain instances of fraud, such as where a party has conveyed or concealed its assets or is presently doing so to avoid creditors. Similarly, a pre-judgment attachment is available in pursuing a party for incurring debt in a fraudulent manner. Finally, a pre-judgment attachment is an option when proceeding against a person convicted of first-degree murder, Class X and other felonies. Because issues of proof can be difficult to ascertain at the early stages of litigation, the non-residency of the defendant, which can often be a straightforward proposition, ordinarily provides the most attractive basis to seek a prejudgment attachment.

Significantly, a prejudgment attachment is not limited to a debtor's assets located in Illinois, and a party may

be able to compel a defendant to deposit with the court funds that are found outside the state. "Illinois prejudgment attachment statute gives a court the authority to order a party over whom the Court has jurisdiction to bring assets into Illinois, so that the Court then might control them." *M.S. Distributing Co. v. Web Records, Inc.*, 2003 U.S. Dist. LEXIS 9092 at *7 (N.D. Ill. May 29, 2003).

To obtain a prejudgment attachment of assets, in addition to establishing that one of the ten categories applies, a plaintiff must show that it is likely to prevail on its claim and must post a bond twice the amount of its claim to protect a debtor against an attachment where the plaintiff fails to prove its case at trial. Because of the cost of the bond, a prejudgment attachment proceeding should be limited to cases of clearcut liability, which is the basis for the procedure.

In addition to securing recoverable assets, a pre-judgment attachment places the defendant at a distinct disadvantage. The defendant not only loses the freedom to dispose of its assets as it chooses but sustains a significant defeat early on in the litigation, which may cause it to re-evaluate its position, leading to favorable settlement.

The attachment statute can prove to be a powerful tool. In a recent case brought in federal court on behalf of a sales representative, our law firm invoked the statute to obtain a prejudgment order of attachment directing a non-resident Italian equipment manufacturer to deposit with the court \$750,000 in proceeds from the sale of a piece of heavy equipment to a third-party.

When clients perform the cost-benefit analysis before deciding to embark on litigation, it is imperative that they consider not only the amount of their claim, the probability of success, and the cost of litigation, but the likelihood of recovering the judgment. This usually requires some due diligence to gain information about the adverse parties' assets and sources of income. Where a party has a straightforward claim, under the right circumstances, the Illinois prejudgment attachment statute can be the difference between winning and collecting.

For any questions or additional information, please contact Richard Goldwasser at (312) 648-2300 or via e-mail at Richard.Goldwasser@sfbbg.com



Financing Growth with the SBA

Case Success Story

After two years of hard-fought litigation in Indiana and in the Circuit Court of Cook County, Illinois, and following a three-day, in person, bench trial in the Law Division of Cook County, on November 29, 2022, SFBBG litigation attorney Andrew Johnson successfully obtained a ruling in favor of a longtime business consultant and against a manufacturer who refused to pay commissions owed pursuant to their agreement and then terminated the commission agreement. The ruling denied any relief to the manufacturer on its counterclaim. In addition to awarding the full amount of commissions owed, the Court awarded future damages and ordered the manufacturer to account for and pay additional commissions due for other sales.

Recognized Achievements

On December 4, Joan Berg received the Gold Cross of the Greek Orthodox Metropolis of Chicago. This recognition comes in light of the pro bono work provided to a 6-state region as a legal advisor.

Speaking Engagements

Dan Beederman presented for the Manufacturers' Agents National Association on the topic "Creating Fair and Balanced Agreements" on November 16.

On December 5 and 12, Matt Tyrrell and Adam Maxwell conducted sexual harassment prevention training for restaurant and bar employees and managers for one of the Firm's clients. Topics covered included explanation of sexual harassment, examples of conduct that may constitute sexual harassment, summary of federal and state laws, remedies to victims and employer responsibilities.

2023 Super Lawyers

Congratulations to our 2023 Super Lawyers and Rising Stars*:

- Patrick Deady
- Terry Engel
- Norm Finkel
- Adam Glazer
- Michael Kim
- Adam Maxwell
- Jason Newton*
- Matt Tyrrell*
- Phil Zisook

2022 Holiday Season

SFBBG hosted many holiday activities, finally, ALL in person! During the week of December 12, each day was celebrated with a different holiday activity. From a cookie exchange to Secret Snowflake (f/k/a Secret Santa), to our ugly holiday sweater contest and hot chocolate bar, everyone participated and had a lot of fun returning back to what life looked like pre-COVID. Our holiday party was also celebrated in person and during the regularly scheduled time (rather than our 2021 office holiday party which took place in February 2022). On December 15, the Firm treated everyone to a casino party with lunch at The Exchange. SFBBG wishes everyone a very happy, healthy, and successful 2023.

This month marks the three-year anniversary of the Covid-19 virus disrupting and re-ordering our businesses and personal lives. With a little over 3.7 million diagnoses in Illinois alone, large and small business owners were no exception to the negative impact resultant from the pandemic. While larger businesses may have had an advantage in being able to transition to remote working options and other pandemic related adjustments, numerous small businesses were not able to be as flexible. With government-ordered closures, many small businesses could not maintain the revenue stream and avoid the devastating effects of closure. In order to avoid massive unemployment, the federal government offered the Paycheck Protection Program (PPP) loans to small businesses through its Small Business Administration (SBA).

The PPP loan became available in the spring of 2020 through local and national lenders. The ability to apply for a PPP loan ended on May 31, 2021. A feature of the PPP loan was that all or a portion of the loan was eligible for forgiveness if the loan proceeds were used for payroll costs, payments on business mortgage interest payments, rent, or utilities during either the 8-week or 24-week period after disbursement (Covered Period).

Nearly 12 million PPP loans were funded. Loans made prior to June 5, 2020 were known as First Draw Loans. Applications for loan forgiveness were due ten (10) months after the Covered Period, and First Draw loans matured in 2022, being two (2) years after the PPP loan was disbursed to the borrower. Second Draw loans were the PPP loans made after June 5, 2020. Similar to the First Draw loans, applications for loan forgiveness were due ten (10) months after the Covered Period, but the Second Draw loans mature five (5) years after the PPP loan disbursement to the Borrower.

Although some programs like PPP loans offered much needed assistance to businesses, in many cases, creativity is required in amending the financial terms of real estate and equipment leases, supply contracts and other necessary contracts. However, amending and revising existing contractual relationships may not be enough, and financing operations may be a consideration.

As business owners review the first full year without mandated closures, the reason for borrowing may be clearer: funds needed for equipment, general operations, expansion, or other similar operational needs. Nevertheless, the significant rise in the Prime Rate may give pause to the desire for financing. In December 2019, the Prime Rate was 4.75%. During the pandemic, the Prime Rate was reduced in 2020 to 3.73% and further reduced to 3.25%. No change was made to the Prime Rate in 2021. However, in 2022, the Prime Rate steadily increased to 7.50%, with forecast for further increases in 2023 to combat inflation.

While the SBA is no longer offering the PPP loans, it offers other financing vehicles, such as the SBA Express, SBA Microloan, SBA Advantage (7a), and SBA Grow Loan Program (504). These programs are available to businesses falling within the SBA's definition of small business that are operated for profit, and have reasonable equity invested in the business. Unlike the PPP loans, SBA lenders will require the borrower to meet certain lending and credit requirements.

The SBA Express Loan program offers a quick application review and response from the SBA. The program is designed for loans up to \$350,000, but some SBA lenders offer Express loans up to \$500,000. The program is beneficial for business expansion, acquisition, and cash flow management. This Loan program does not require lenders to take collateral for loans less than \$25,000, and for loans over \$25,000, the lender may follow collateral

policies that it has established for similarly-sized non-SBA guaranteed commercial loans. The maximum SBA guarantee offered the lender is 50% of the amount of the loan.

The SBA Microloan program offers up to \$50,000 to help start-up and expand small businesses, and some not-for-profit childcare centers. While the SBA reports that the average SBA Microloan is approximately \$13,000, some lenders offer Microloans up to \$350,000. Microloan proceeds can be utilized to rebuild, re-open, enhance or improve a business, but cannot be used to pay existing debts or purchase real estate. This loan program does not require lenders to take collateral for loans less than \$25,000, and for loans over \$25,000, the lender must take a first lien on the financed assets, including real estate, but allows lenders to otherwise follow collateral policies that it has established for similarly-sized non-SBA guaranteed commercial loans. The maximum SBA guarantee offered the lender is 85% for loans up to \$150,000 and 75% for loans greater than \$150,000.

The SBA 7a Loan program is the most popular of the SBA loan offerings. Similar to the Express Loan program, the SBA 7a Loan is designed to finance short and long term working capital, purchases of real estate, businesses, furniture, equipment and supplies. It also allows for the refinancing of business debt. Some SBA lenders allow the loan amount to exceed traditional bank collateral requirements. The popularity of the SBA 7a Loan programs may be due in part to the variety of loans available. Standard 7a Loans may be offered for up to \$5 Million and provide an opportunity for a revolving line of credit, subject to certain eligibility requirements and restrictions. The Standard 7a Loan program does not require lenders to take collateral for loans less than \$25,000, and for loans in excess of \$350,000, the lender must take collateral for the loan to the maximum extent possible. If the collateral is not sufficient, the lender must take available equity in the personal real estate of the business owners. The maximum SBA guarantee offered the lender is 85% for loans up to \$150,000 and 75% for loans greater than \$150,000. In addition, specific SBA 7a programs are available for businesses engaged in exporting and international trade.

The SBA Grow Loan (504) program offers long-term, fixed rate loans for major fixed assets, like the purchase or construction of buildings or land, new facilities, or long-term machinery or equipment. Loan proceeds also can be used to modernize or improve existing facilities. The applicant business must have a tangible net worth less than \$15 Million and have net income less than \$5 Million for the past two years. Unlike the SBA 7(a) Loan, the SBA Grow Loan cannot be used for financing working capital or refinancing existing debt. However, the SBA Grow Refinance Program provides eligible business owners the more options to refinance eligible fixed assets and business expenses. The SBA Grow Loan requires the borrower to demonstrate how the loan proceeds will advance business growth and creates jobs utilizing certified development companies. SBA Grow Loans are available for up to \$5 Million. Addressing public policy goals for greater energy efficiency, the SBA's 504 loan programs can increase to \$5.5 Million if the project can demonstrate a 10% reduction in building energy consumption or offset energy consumption by 10% with renewable energy sources.

While the SBA was a resource for small business during the Covid-19 shutdown, the SBA can continue to be a valuable tool for businesses as they grow in this post-pandemic environment. If you would like to discuss the SBA tools for your business, please contact Joan Berg at (312) 648-2300 or via e-mail at joan.berg@sfbbg.com.