



COLLECTION STRATEGY

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Creditors have a powerful tool to recover the amounts they're owed

Suppose you have a customer who hasn't paid its bills. You try all the usual tactics – phone calls, e-mails, letters. Maybe you even send in a collection agency; or have your lawyers write a stiff demand letter. Nothing. So you sue. You know the lawsuit will be time consuming and expensive, but this debt is too big to let go. Besides, you don't want to get the reputation of being a pushover.

Partway through the lawsuit you learn that your customer has gone out of business, maybe as part of a corporate restructuring. Or you win the lawsuit, but when you try to collect on your judgment you learn that your customer's directors have stripped the assets away.

What do you do now? Well, there are probably several options. But one that might not occur to you is the law of "shareholder oppression."

Wait a minute – shareholder oppression? But you're a creditor, not a shareholder. No problem! Creditors can also use the shareholder oppression provisions of Canada's corporate statutes. In the right circumstances, they can even be entitled to collect their debts from their customer's directors.

The Canada and Alberta Business Corporations Acts specifically include creditors as parties who can use their shareholder oppression provisions.

The British Columbia and Ontario statutes don't. But they do permit "any other person whom the court considers to be an appropriate person" to do so. The courts of those provinces have generally had no hesitation in concluding that creditors are "appropriate persons."

Whether creditors will be successful depends largely on their reasonable expectations. In one case, a

creditor sued its customer. The court ruled the creditor was entitled to damages, the amount to be set at a later hearing.

The customer then sold its only asset. The creditor was concerned about what would happen to the proceeds. So it applied to the court to appoint a receiver over them.

The customer testified it had no plans for the proceeds other than paying its legitimate debts. So the court did not appoint a receiver. The directors of the customer then stripped the sale proceeds out of the company. When the creditor's damages were set, the customer had no assets to pay them.

In another case of a creditor suing a customer, during the lawsuit the customer reorganized and went out of business, apparently for legitimate reasons. When the creditor won the lawsuit, the customer couldn't pay.

In another, a creditor won a judgment against a customer. They agreed the customer would secure the judgment with a renewable letter of credit while a related lawsuit was resolved. By innocent error the letter of credit was not renewable. It expired. Meanwhile the

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customer had wound up its business. When the related lawsuit was resolved, again the customer could not pay.

In all those cases the court concluded the customer had "oppressed" the creditor or prejudiced it unfairly in the circumstances. The creditors' objectively reasonable

expectations about the situation were crucial.

In the first case, the customer had misled the creditor into expecting it would have enough money to pay a judgment. There was no such evidence in the second case, but even there the court concluded the creditor reasonably expected its customer would not go out of business without retaining enough money to pay its debt. In the third case, the creditor reasonably expected the customer would renew the letter of credit, because it had agreed to do so.

As the customers did not act as the creditors reasonably expected them to do, the courts fixed the situations. How? In all three cases the courts ordered the directors of the customers to personally pay the creditors the amounts the customers owed them.

So, the law of "shareholder oppression" is not just

available to shareholders. It is also available to creditors. And, in the kinds of circumstances discussed here, it can be a powerful tool for creditors to recover the amounts they're owed. (The courts have even held that in some circumstances, a customer's directors owe its creditors a fiduciary duty, a duty to put the creditors' interests before their own. But that's another story!)

Creditors in this situation should consult lawyers experienced in this area. They should also be aware that they must make their claims "in a timely manner," that is, while the situation can still be fixed by the courts. ■

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