

Commercial Counsel

General Discussion Relating to Business Legal Issues

The information contained herein is not provided as legal advice. Legal advice should be sought as to any factual and legal issue.

June 2008

THREE AREAS OF CURRENT CONCERN TO CORPORATE COUNSEL & CREDIT DEPARTMENTS

In recognition of our commitment to help clients stay on the cutting edge of developments relating to business and commercial law, KMKSC attorneys present three areas of present change and concern.

I Serious Increase in Electronic Discovery Burdens

KMKSC attorneys Robert L. Gegios and Stephen D. R. Taylor continue to warn clients that they are acquiring significant duties relating to electronic discovery. One direct source is the recently amended Federal Rules of Civil Procedure, which our attorneys analyzed by publication in the December 2006 issue of *Wisconsin Lawyer*. However, the ethos of the amended rules has also given impetus to incremental change through judicial decisions in federal and state courts around the country. Decisions in all states and circuits are relevant because, in an emerging area of law in which courts are struggling with technical issues and the costs of litigation, judges tend to review how counterparts have addressed similar issues. Thus a court that has not recently addressed the issue may “recognize” new and enlarged duties.

Although all decisions have some relevance, keeping abreast of developments in courts of all levels around the nation may tax the resources of many internal counsel. Clearly, the breadth and specificity of duties and burdens assigned to in-house counsel and businesses as a whole has accelerated in the last year. In the same period, judicial intolerance of unpreparedness or error has continued to increase.

Businesses that could become party to litigation, and their in-house counsel, now have affirmative duties to identify and protect information within exceedingly short time windows. The duty to preserve potential evidence arises the moment that a company is deemed to have been on notice of litigation—itsself a problematic trigger. Litigants must be able to identify with certainty all available information well in advance of trial. Failure to understand electronic records, systems and practices in the pre-trial phase can compromise the errant litigant’s ability to secure it’s own discovery, lead to harmful discovery that may have been avoided, and create significant additional litigation costs. Incomplete preservation or disclosure can saddle the errant litigant with stringent financial sanctions and severe procedural penalties such as exclusion of pleadings, evidence and even directed verdicts.

To aid our corporate clients with discovery compliance, we work with in-house counsel to provide explanations and solutions geared to their individual business and litigation needs. If your business needs counsel regarding the scope of its duties under new and changing electronic discovery standards, or how to be prepared to meet them, contact Stephen Taylor at staylor@kmksc.com, or 414 962 5110.



II Need for Prompt, Cost-Efficient Debt Recovery

In today’s tight economic climate, businesses must strive to minimize losses and delay in liquidating corporate debt. The failure to capture delinquent debt is too often the crucial “lost profit center.” KMKSC litigator Reneé Mehl realized that attorneys were neglecting statutory tools available to benefit clients in debt recovery. In her recent article in *Wisconsin Lawyer*, Ms. Mehl highlights the “GREATEST SET OF MOTIONS YOU’VE NEVER HEARD OF” and how the astute commercial litigator uses them for faster and more cost-effective recovery of debt. She explains how KMKSC constantly makes effective and unique use of motion practice to cut through the maze of dilatory tactics regularly utilized by attorneys for debtors to stall the liquidation of commercial debt.



If you would like to know more about these motions, or why KMKSC has achieved a national reputation for success enforcing the commercial rights of businesses, contact Steve Kailas at skailas@kmksc.com, or 414 962 5110.

III The Return of Fact Pleading?

For 50 years, litigants had a clear standard of what had to be pled to survive a motion to dismiss a lawsuit. In the 2007 *Twombly* decision, the U.S. Supreme Court changed all that, creating confusion for defendants and plaintiffs alike in the course of an opinion that judges and attorneys have conceded is confusing and contradictory on many levels.

More facts must be pled in certain initial pleadings, yet there is no consensus about whether this is required for all suits, or only for a limited segment of cases. Nor is it clear what degree of additional fact may be necessary. Though a federal issue, state courts have recently begun to consider the impact on their own proceedings.

For business litigants, whether plaintiffs or defendants, the impact creates serious uncertainty over litigation strategy. Defendants may need to marshal arguments related to plausibility of positions. Plaintiffs may find claims dismissed before discovery that, by the Supreme Court’s admission, might previously have survived and succeeded on the merits. A business plaintiff should expect to pay more up-front costs and account carefully for alternative explanations for the action complained by more detailed pleadings—particularly in complex claims or where discovery costs are expected to be significant. Selection of venue may now carry increased significance due to varying interpretation of *Twombly* in different jurisdictions.

KMKSC shareholder and litigator Robert L. Gegios has been at the forefront of local and national analysis and discussion of this issue. He has authored papers and chaired national and regional programs on *Twombly* and its implications. If you would like to know more about the ramifications for business litigants, contact Bob Gegios at rgegios@kmksc.com or 414 962 5110.



TIPS FOR PROSPERING IN A WEAK ECONOMY

In a difficult commercial environment, getting delinquent accounts off the books and into the bank is more critical and more challenging. Keep a close eye on debtor ratios: in slow economies debtors tend to take longer to pay and the risk is that bad debt may rise and profit fall if there is delay in addressing collection. The following are two tips for improving recovery rates.

A Stay In The Know

The easiest way to stay ahead of important business developments is subscribe to a monitoring service such as *Creditor's Edge*. One can track business performance of individual companies on a continual basis, on-line and in print. Learn more at <http://dailybusiness.creditmanagers.biz/>.

B Personal Guarantees

Requiring a new customer to sign a personal guarantee within a credit application is a powerful collection tool if the customer later defaults on the account. Your attorney then has the option to recover the loss from either the business' assets or those of the personal guarantor. However this significant benefit can be compromised if your attorney cannot substantiate the personal guarantor's signature. Frequently debtors challenge the authenticity signatures on personal guarantees. Following the guidelines below should effectively thwart this tactic.



1. Ensure your forms include a signature line for a "witness" to the personal guarantor's signature.

2. Make sure that your salesperson or credit manager actually witnesses the personal guarantor sign the application and indicates the date on which he or she did so.
3. Do not "pre-fill" in account forms with the name, address, or credit information of the customer. Unfortunately, debtors will use your helpfulness against you by stating that your salesperson or credit manager filled in the signature.
4. Require the debtor to return the original account application to you for your records. Debtors can conveniently lose these forms when the account goes into collection.

Following these simple steps will often save the account from being uncollectable. By personally obligating the customer, you secure a valuable asset that will greatly improve your position in the event of default.

If you would like to talk to us about opportunities to enhance your credit recovery process, contact Matthew Gerdisch on 414 962 5110, or at mgerdisch@kmksc.com.

KMKSC IS FIRST U.S. LAW FIRM ADMITTED TO U.K. CREDIT SERVICES ASSOCIATION

Our clients are increasingly seeking our help in enforcing contracts with overseas businesses. In accord with our commitment to leadership in this area, KMKSC has recently gained admittance to the CSA.

The CSA has members in many countries, including China, India and South Africa, and members handle claims of \$30 billion annually. Admittance has notably expanded our overseas debt liquidation resources, and offers competitive advantages both to us and to our clients.



LATEST SPEECHES AND PRESENTATIONS BY KMKSC ATTORNEYS

- January 30, 2008 – "**TECHNIQUES FOR PROTECTING REVENUE WHEN SELLING TO CUSTOMERS WITH MARGINAL CREDIT**," David M. Henry, Wisconsin Credit Association, Pewaukee, Wisconsin.
- February 20, 2008 - "**REGULATION B OF THE EQUAL CREDIT OPPORTUNITY ACT AND SPOUSAL SIGNATURES, CO-SIGNORS AND GUARANTEES**," Matthew P. Gerdisch before Loan Officers of the Community State Bank, Wisconsin.
- February 29, 2008 – "**WHY CROSS-CULTURAL COMPETENCE IS ESSENTIAL TO COMPETENT REPRESENTATION IN INTERNATIONAL TRADE**," Stephen D. R. Taylor, Marquette University Law School comparative law students, Milwaukee, Wisconsin.
- April 11, 2008 - "**EVOLVING PLEADING STANDARDS AFTER BELL ATLANTIC CORP. V. TWOMBLY: A MUDDLE WITHIN A MESS?**" Robert L. Gegios & Stephen D. R. Taylor, ABA Section of Business Law Spring Meeting, Dallas, Texas.
- April 21, 2008 - "**A PRIMER ON WAYS TO PROTECT YOUR MONEY**," Matthew P. Gerdisch, National Petroleum Energy Credit Association 71st Annual Conference, Savannah, Georgia.
- May 15, 2008 - "**VENDOR & CUSTOMER RELATIONSHIPS IN TOUGH TIMES**," Matthew P. Gerdisch, Wisconsin Chapter, Association Of Corporate Counsel of America Third Annual Conference, Osthoff Resort, Elkhart Lake, Wisconsin.
- May 29, 2008 - "**CROSS-CULTURAL DIFFERENCES: A CRUCIAL CONSIDERATION IN TRANSNATIONAL BUSINESS AND DISPUTE RESOLUTION**," Robert L. Gegios, ABA Section of Business Law Global Business Law Conference, Frankfurt, Germany.

MOST RECENT PUBLICATIONS BY KMKSC ATTORNEYS

- "**WISCONSIN DISCOVERY LAW AND PRACTICE**," supplements to chapters on **Introduction to Discovery, Scope of Discovery & Judicial Supervision and Enforcement**. Robert L. Gegios & Stephen D. R. Taylor, State Bar of Wisconsin, March 2008.
- "**ANNUAL SURVEY OF WISCONSIN LAW: DEVELOPMENTS IN BUSINESS AND SECURITIES LAW**," Alexander T. Pendleton, State Bar of Wisconsin, May 2008.
- "**A LETTER OF CREDIT AND THE BANKRUPTCY PARADOX, WILL IT PROTECT YOU??? - MAYBE!!!**" Matthew P. Gerdisch, special supplement to *Creditors' Edge*, February 2008.
- "**THE GREATEST SET OF MOTIONS YOU'VE NEVER HEARD OF**," Renee M. Mehl, Wisconsin Lawyer, Vol. 81, No. 3, March 2008.
- "**COLLECTING COMMERCIAL DEBT IN THE US NEED NOT BE DAUNTING**," Christopher C. Kailas & Stephen D. R. Taylor, News from the Credit Services Association, April 2008 (Great Britain).

If you would like another member of your organization to receive *Commercial Counsel* or any article, please contact Vicki Miller on (414) 962 5110 or at vmiller@kmksc.com.

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