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Issues and Information for the Insolvency Professional

Suggested Reading



Complete Guide to Credit and Collection Law

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Arthur Winston and Jay Winston
(Aspen Publishers, Second Edition)

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In our ever-expanding legal world, bankruptcy attorneys should be aware of the myriad body of laws that inevitably impact and intersect our practice. An excellent resource in achieving this daunting task is the *Complete Guide to Credit and Collection Law, Second Edition*, by Arthur and Jay Winston. In addition to providing a succinct and accurate statement of the law, the authors provide “credit and collection tips” that provide the reader with practical insight and assistance in dealing with often difficult and complex issues. For example, in Chapter 8, “Repossession of Property,” the authors suggest providing notice of repossession wherever there has been a history of not enforcing the strict contractual requirements to make payments on time. Their credit and collection tip following the specific heading of “Late Payments—Repossession” further states:

Fill out receipt for certified mailing. Do not merely staple it to default letter. By completing the form, it becomes a business record and is admissible as evidence. A blank form stamped as a receipt is susceptible to attack as unreliable.

Inevitably, a collection or credit problem will trigger a number of relevant issues that might, at first blush, seem unrelated or

unimportant to the immediate issue. For example, an attorney about to send out a demand letter for a client’s overdue secured-loan obligation who is being asked (a) whether the right to repossess the collateral is a permissible alternative, (b) how best to accomplish the repossession within the limits of existing law or (c) whether the client might be able to use a form collection letter, are just some of the critical issues that every attorney will want to carefully consider. Again, dealing with the specific issue of repossession, the authors immediately direct the attorney’s attention to the many state and federal laws that must be considered. Their introduction to Chapter 8 begins:

While the general law of repossession is covered under the Uniform Commercial Code (UCC), Article IX, the repossession of property is primarily restricted and controlled by the written installment contracts and consumer credit contracts which are entered into by the consumer. Since most repossessions involve consumers, consumer protection laws must be considered, including the Bankruptcy Code, Truth in Lending Act, Equal Credit Opportunity Act and the Fair Debt Collection Practices Act, in addition to the replevin laws of the respective states.



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The comprehensive contents set forth in the *Guide’s* 16 chapters, as well as its detailed subheadings, is likely to take one to the immediate area of concern with little need to consult the index. The explanations are clear and succinct, considering that this is often a difficult area when viewed from the number of conflicting court decisions. Another example of this approach is illustrated in Chapter 9, “Harassment, Intimidation and Invasion of Privacy.” In addition to providing an excellent explanation of the distinction between abuse of process and malicious pro-

secution, the authors provide the reader with current and relevant court decisions. In explaining a state court decision dealing with a consumer lawsuit alleging malicious prosecution, the authors summarize a likely trend by stating:

The case illustrates that the defendants in FDCPA claims are becoming more aggressive in prosecuting the growing number of attorneys who bring these suits for technical violations. Judges often refer to claims as purely “technical violations” and are becoming less and less favorable to the consumer when the consumer has suffered no damages. If malicious prosecution suits become more prevalent, this alone may become a deterrent to consumer attorneys so that future suits will be brought only for violations that cause injury and harm to the consumer.

The authors refer to a recent case where the collection efforts resulted in telephone calls made to the debtor at his residence, but where the debt itself was an obligation incurred by the debtor’s grocery business. The court decision to apply the FDCPA was based on the fact that the call was made to the personal residence of the debtor. The authors’ opinion is insightful and helpful by providing the following explanation:

The court seemed to be stretching, since the FDCPA covers only person, family or household goods. Nevertheless, it seems the phone calls were flagrant, and the court subjectively decided that it is unfair to the particular consumer to receive these phone calls and not have a remedy.

Much of the law dealing with Chapter 3, “Legal Remedies for Business Creditors,” has relevance to bankruptcy issues, especially regarding state granted licenses as property of the bankruptcy estate under the Bankruptcy Code. The authors, in examining the legal attributes of licenses as property subject to execution, state:

Property is a term that has a broad and comprehensive significance and

embraces everything which has a exchangeable value or is used to make up a person's wealth. Property may reasonably be construed to include obligations, rights and other intangibles, as well as physical things.

Although the subject content of this guide is clearly directed for the benefits of creditor attorneys, debtor's counsel will also benefit by the explanation and summaries provided. Chapter 5 sets forth an easy-to-follow breakdown of all the critical issues that creditors' attorneys encounter in dealing with a bankruptcy case. In explaining the very difficult issue of dealing with the bankruptcy court's ability to resolve dischargeability of student loans under the hardship standard, the authors explain:

Unfortunately, the courts accept that they must make a "yes" or "no" decision, where as in many instances, the debtor can pay some of the student loan, but not necessarily all of the student loan. This is predicated on the fact that usually the debtor can make some monthly payments and the court is examining some way to recover monies on the student loans and at the same time permit the debtor to carry on with his life.

The authors cite a Kansas BAP decision in 1998 that was based on an order confirming a chapter 13 case, and the court held that the order of confirmation provided *res judicata* effect on the issue of dischargeability and was therefore binding on the lender. In departing from the "all-or-nothing" approach, the BAP stated:

Permitting debtors to use one of the reorganization chapters to resolve disputes about dischargeability of such loans encourages the parties to find other inventive ways to reach an acceptable middle ground in this area.

Another illustration of this comprehensive type of coverage provided is found in Chapter 6, "Law Firms and Collection Agencies." In addition to all of the typical and basic key issues encountered in the collection process, this chapter concludes with problems encountered in international collections, and then completes its coverage with a brief explanation of champerty and maintenance.

In completing each of the subject-matter chapters, the authors provide an appendix with reference to relevant state or federal law and the utilization of typical forms. For attorneys engaged in any aspect of collection law, this guide is a must-read and more importantly should be treated as a

comprehensive reference to the ever-expanding law in all areas of collections. ■

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