

Legal Bits

a publication
for the business-
minded

Electronic Edition

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Making Sure You Get Paid

Whether you sell a business, lease out property or simply provide goods or services, others will owe you money. A few inexpensive techniques can insure that you will not be left in the cold when the debt is due.

Pay Up-Front

Undoubtedly, the best way to ensure prompt payments is to require that all payments are provided up-front. However, due to limited financial resources of the "debtor" (the party that owes you the money) or simply the nature of the transaction, an up-front payment is not always feasible.

WRITTEN AGREEMENT

If possible, write down all agreements for future payments on paper and have all parties date and sign the agreement.

Oral agreements may not be enforceable. For instance, an oral agreement for the sale of real property is not enforceable (ORS 41.580).

Most important, written agreements provide proof of the outstanding debt in the event of a dispute. You should have a qualified attorney review or draft the agreement to ensure its enforceability.

The use of a signed written agreement may not be practical due to restrictions such as geography, time or industry standards. However, an informal written agreement is still preferable to an oral agreement.

BATTLE OF THE FORMS

Customary practice with many types of businesses dictates the use of quotes followed by purchase orders followed by invoices,

instead of a single, fully executed agreement.

The seller's quote may contain terms of the agreement that conflict with the terms written on the purchaser's purchase order. Business owners often end up in court arguing over the terms of the agreement, such as the quantity or quality of goods ordered.

Since resolution of such disputes typically depends on the content of such forms, the business owner should be well-acquainted with such quotes, purchase orders and invoices and have a qualified attorney prepare or review such forms.

ATTORNEY FEE PROVISION

An often overlooked but significant term of an agreement is the attorney fee provision. By including such a provision you can force the debtor to pay the attorney fees you incur in attempting to collect the debt.

Likewise, you may wish to provide in the contract that the defaulting party pays an increased interest rate for any period of delinquency.

Besides the obvious benefit of recovering such amounts, these provisions may also serve as leverage to prevent the debtor from defaulting on his obligations to you.

SECURITY INTEREST

A security interest allows you to claim an interest in the debtor's property if you are not paid. In other words, future payments are secured by an interest in certain property of the debtor, known as "collateral."

For instance, if the seller of a restaurant is willing to accept payments for the purchase price, the seller should secure such payments through a security interest in the restaurant equipment or other property owned by the buyer. The security agreement should provide that if payments are not timely made, the seller shall obtain ownership of the equipment.

Generally, a security agreement is not enforceable unless the following four basic requirements are satisfied: it contains a description of the collateral, the debtor signs the agreement, value has been given and the debtor has rights in the collateral. (ORS 79.2030) A qualified attorney should review or draft the security agreement to ensure its enforceability.

COMPETING SECURITY INTERESTS

Suppose that two different parties sign security agreements for an interest in the same collateral. For instance, both the seller of the restaurant and the landlord, who leases the real estate to the current restaurant owner, may have competing claims to the restaurant equipment. (The landlord's security interest may secure lease payments.)

Both the landlord and the seller desire to defeat the other's claims to the equipment. In other words both parties desire for their security interest to take "priority" over that of the other. Generally, the party that "perfects" first takes priority over the other.

PERFECTING

Perfecting a security interest simply involves taking an additional step beyond creating the security interest to protect the interest from competing claims.

One may perfect most security interests by either (1) obtaining possession of the collateral or (2) filing a financing statement, known as a UCC-1.

The UCC-1 is filed with the state and provides notice to the public that one has an interest in the designated collateral. A qualified **attorney should assist in the perfection of a security interest to ensure its effectiveness.**