MEDIATION AND SETTLEMENT STRATEGIES FOR COLLECTION LAWYERS

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CHAPTER 10

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Education:
-University of Houston Law School, J.D., *summa cum laude*, 1980.
-University of Dallas, Constantin College of Liberal Arts, B.A. (Mathematics), *summa cum laude*, 1976.

Law Practice:
-President, Wells & Cuellar, P.C., 1987-present.
-Board Certified Consumer and Commercial Law Specialist, Texas Board of Legal Specialization, 1994-present.
-Certified Creditors' Rights Specialist, American Board of Certification, 1993-present.
-Litigation Attorney, Kirklin, Boudreaux & Joseph, Associate 1982-1984, Shareholder 1985-1987.
-Litigation Associate, Childs, Fortenbach, Beck & Guyton, 1980-1982.
-Member, Texas State Bar, American Bar Association, Houston Bar Association, College of the State Bar.

Litigation Experience:

Commercial Litigation: breach of contract, breach of warranty, Uniform Commercial Code, business organizations and affiliations, partnership disputes, commercial collections, commercial bank loan litigation and workouts, lease financing and recovery, oil and gas, lender liability, landlord/tenant, product liability, insurance defense and subrogation, personal injury, and business torts.

Creditors' Rights: collections, foreclosures, pre-judgment and post-judgment extraordinary remedies, receiverships, lien priorities, judgment enforcement, and creditors' rights in bankruptcy including collateral recovery, claim litigation, non-dischargeability, plan negotiations, preference defense, and involuntary filings.

Consumer Claims: Deceptive Trade Practices - Consumer Protection Act, Finance Code, usury, Truth-In-Lending, consumer collections, insurance, manufactured housing industry issues, discriminatory zoning, *ad valorem* taxation, and deed restrictions.

Appeals: Texas state and federal civil appeals in the above subject areas.

Alternative Dispute Resolution:
-Approved ADR Provider, United States District Court, S.D.Tx.
-Arbitration Panelist, American Arbitration Association.
-Arbitration Panelist, National Arbitration Forum.
-Med/Arb Neutral, Policyholder Remediation Plan, *In Re Prudential Insurance Sales Practices Litigation.*
-Mediation Certification (Section 154.052, Texas ADR Act), University of Houston, 1993.

Speeches/ Papers:
-National Association of Credit Management (over 33 CEU-approved presentations since 1988).
-International Energy Credit Association (6 annual conference break-out sessions since 1996).
-National Petroleum Energy Credit Association (21 annual conference keynote or break-out sessions since 1995).
-Texas Society of CPAs (over 66 CPE and CLE-approved seminar presentations since 1990).
-Harris County Constables: Precinct 5 (3 training programs since 1997).
-Equiva Services (Shell Oil Company) In-House Credit Seminars - 4 segments, 14 presentations (2002).
-Texas State Bar - Collections & Creditors' Rights: *Post-Judgment Receiverships & Turnovers* (2004).
-University of Houston - *Collecting Debts and Judgments*, Course Director (2008)

Organizations/ Activities:
-Past President, University of Dallas National Alumni Board.
-Past Chairman of the Board, Leadership Houston.
-Chairman of the Board of Trustees, Leadership Houston Endowment.
-Advisory Director, Alley Theatre.
-Past President, Alley Theatre Guild.
-Past Chairman of the Board, Galleria Chamber of Commerce.
-Leadership Houston, Class XIII Graduate (1995).
-Leadership 20/20, Class IV Graduate (1996).
-Recipient, Galleria Chamber of Commerce James E. Crowther Volunteer Excellence Award (2001).
-Recipient, Leadership Houston/Community Leadership Association Distinguished Leadership Award (2002).
-Recipient, Leadership Houston's 25th Anniversary Top 25 Distinguished Alumni Award (2006).
-Texas Monthly Magazine "Super Lawyer" - Creditor/Debtor Law (2008).
-National Arbitration Forum - Award for Excellence in ADR (2009).

TABLE OF CONTENTS

MEDIATION AND SETTLEMENT STRATEGIES FOR COLLECTION LAWYERS

I. SCOPE OF ARTICLE

Successful collection lawyers always keep their eye on the prize (*i.e.* money) and do not let their love of the litigation "game" become the priority. Thus, we settle most cases and take very few to trial or appeal. Even so, trials, post-judgment procedure, or appeals may sometimes be necessary. The art of maximizing net recovery includes efficiently optimizing the amount of time and money invested in prompting the debtor to pay at an appropriate level. Since settlement at some point along the way is the vehicle by which collection claims are most often transformed into economic recovery dollars, the collection attorney must become adroit at negotiating, achieving, documenting, and enforcing settlements that include payments by the debtor. A fundamental maxim of collection practice is that "You cannot make money at the Courthouse!" As a corollary, mediation, whether Court-ordered or by agreement, often creates the ideal environment for getting a settlement accomplished. This paper will explore strategies for achieving and documenting settlements in collection cases, whether or not mediation is involved.

II. THE "COLLECTION MENTALITY"

Clients do not expect collection lawyers to guarantee results, but they do expect a businesslike attention to costs versus benefits. The sooner you can turn a collection claim into viable cashflow, the more likely that you (and your client) will not be the victim of an uneconomic collection result (*i.e.* either no recovery or one where costs overwhelm benefits). If the attorney does not develop good intuitions and insights concerning settlement considerations, and make appropriate definite recommendations to the client at all points along the way, then the client will ultimately be disappointed. **Close communication with and status reporting to the client is instrumental to a collection lawyer's success. And if, at any point, it does not make sense to pursue collection, the attorney should be the first one to say so.** Thus, collection counsel should always be driven by the anticipated net recovery and develop confidence and competence in making solid recommendations for the client to settle when that is in the client's best interest. You will eventually drive clients away who have the impression that you are just "ringing the tambourine" at their expense. And if you are on a contingent fee arrangement, your own economic well being and outcome as a professional will be directly tied to knowing when to stop the bleeding and/or turn the collection claim into money. Generally, collection cases do not get better with age. **So settle early and often. Collection lawyers make money on volume and turnover.**

III. PRE-SUIT DEMANDS AND TELEPHONE CONTACTS

Making credible pre-suit demands sets the stage for renewed requests for payment any time you are in communication with the debtor or debtor's counsel. **In order to avoid missing opportunities for settlement and collection, you should always be asking for money.**

Debtors have different levels of tolerance for formal collection procedures. Different straws will break different camels' backs! Some debtors who have consistently ignored the creditor's pleas and demands will suddenly be interested in payment terms once a demand letter from an attorney is received. Demand letters should always set deadlines and those deadlines should be meaningful. Creditor's counsel cannot draw a line in the sand and then fail to take initiative accordingly -- credibility is lost when nothing "bad" happens upon expiration of a demand response period. Even if the debtor fails to respond, or is unlikely to respond, to a demand letter, there are often good legal reasons for sending one. For example, a written demand can predicate a right to recovery of attorneys' fees under Chapter 38, TEX. CIV. PRAC. & REM. CODE. Or a written demand with proper notice language may be the best way to demonstrate compliance with the federal Fair Debt Collection Practices Act ("FDCPA").

There may also be legal conditions precedent that need to be met. For example, there is no general rule for recovery of attorneys' fees by prevailing parties in Texas. However, a prevailing creditor in a collection suit may recover attorneys' fees if the underlying contract so provides or if the requisites of Chapter 38, TEX. CIV. PRAC. & REM. CODE, have been met. To recover attorneys' fees under that Chapter, the creditor-claimant must present the claim to the opposing party (usually via a pre-suit written demand letter), and payment for the just amount owed must not have been tendered before the expiration of the thirtieth (30th) day after the claim is presented. Also, a pre-suit demand letter from an attorney may be all that is needed to get some debtors to settle and pay.

In cases where the debtor is a consumer within the meaning of the FDCPA (generally, a natural person who incurred the debt in a transaction primarily for personal, family, or household purposes) it is critical to remember that the debt collector must disclose clearly in all communications made to collect a debt or to obtain information about a consumer "that the debt collector is

attempting to collect a debt and that any information obtained will be used for that purpose." 15 U.S.C. § 1692e(11). Failure to make such disclosure constitutes use of a "false, deceptive, or misleading representation or means" in connection with the collection of a debt and is a violation of 15 U.S.C. § 1692e. Likewise, at the demand stage, it is important to remember complete and literal compliance with the "Miranda Warning" of Section 1692g of the FDCPA.

Both Texas and federal law are much more protective of individual consumers than they are of business debtors during the collection process. It is an important distinction to make because of the potential application of the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§1692 - 1692o and/or the Texas Debt Collection Act, §392.001, *et seq.*, TEX. FIN. CODE. Both statutes are triggered in the case of "consumer" debts, which are "primarily for personal, family, or household purposes." While the FDCPA generally is only applicable to third-party debt collectors attempting to recover consumer debts, such as collection agencies or collection attorneys, the Texas Act includes within its concept of "debt collector," subject to the statutory strictures and penalties, the *creditor itself* collecting its own claims.

Is the debtor an individual, natural person? Debts incurred by statutory business entities are always business debts, but debts incurred by individual, natural persons may be either consumer or business obligations.

Is the individual's debt incurred "primarily for personal, family, or household purposes?" The answer is no if the obligation arises from a personal guaranty of a business entity's credit transactions. The answer is also no if the obligation arises from a credit transaction associated with the business activities of a sole proprietorship. See Beaton v. Reynolds, Ridings, Vogt & Morgan, 986 FSupp 1360 (W.D. Okla. 1998). But the line of distinction can become blurry if the consideration for the debt is not clearly understood to be outside of the "personal, family, or household" rubric. For example, a credit card held in the name of an individual may be used to buy office supplies for a proprietor's business, but it may also be used to buy the individual's groceries. The credit card company would be well advised to treat the unpaid credit card balance as a "consumer" debt to which the FDCPA and the Texas Act will apply. What about a commercial bank loan secured in part by a "home equity" lien on the proprietor's personal residence? Or what about the mortgage debt on a residence that is subsequently converted to business rental property? **When in doubt, you should always err on the side of treating the claim as a "consumer" debt.** There are no adverse legal consequences associated with erroneously treating a business debt as if it were a consumer debt. But there are serious adverse consequences, including the debt collector attorney's liability for statutory damages and penalties, associated with erroneously treating a consumer debt as if it were a business debt (and therefore ignoring the FDCPA and Texas Act when they are actually applicable).

Ten-day demand letters that threaten suit in the event of non-payment are routine when the claim is a business debt. However, the routine ten-day demand letter is a blatant violation of the FDCPA when the claim is a consumer debt to which the FDCPA applies.

One of the best reasons to send a demand letter is that it will prompt many debtors to initiate contact with you by telephone; or the demand letter will lay a good predicate for you in initiating the telephone contact with the debtor because your identity, client, expectation, and purpose are already on the table and you can get down to the business of motivating payment terms. Telephone collection, like all phases of collection, is an art and not a science. **The first and last goal of telephone contact with the debtor is to collect money, sometimes without the need for litigation.**

A. Telephone demeanor

1. Be firm and businesslike—but as nice as they will "let" you be. Gather your flies with honey, if possible.
2. Be flexible, but persistent.
3. Take your signals from the debtor's demeanor.
4. Always be alert and never lose your temper.
5. Never use obscene or abusive language.
6. Never suggest that there may be consequences more serious than enforcement of the obligation to pay money.
7. Never be coy about your true identity.
8. Never threaten criminal action. This is a disciplinary issue under Rule 4.04 of the Texas Disciplinary Rules of Professional Conduct. See also Brown v. Oaklawn Bank, 718 SW2d 678 (Tex. 1986).
9. Because your voice is all-important on the telephone, develop a slower, more soothing, and lower-pitched manner of speaking that is clearer to listeners and compels attention until you finish. You are hoping to develop rapport. Debtors who like you will pay willingly more often than debtors who have come to hate you.

B. Points to be covered in the contact

1. Identify yourself without ambiguity or hesitation.
2. Specify the amount of the debt and the nature of the debt: Is it an accelerated balance or an installment arrearage?
3. What is the name of the responding party?

4. Does the responding party have a title or job function he or she can describe? What is his relationship to the debtor?
5. Do the responder's duties and responsibilities include responsibility for the bills you are trying to collect? Remember—companies may owe the money, but people pay the bills.
6. How is the debtor legally organized: corporation, partnership, or proprietorship? LP, LLP, or LLC?
7. Who are the principals, owners, or officers of the business?
8. Which of those persons does the responding party report to? Will the boss get a report of this conversation?
9. Does the debtor use any assumed names or "trade" names?
10. What does the business do? Where is it physically located?
11. **Always make a "demand" or request for payment in full, without any embarrassment or apology.** Will the debtor mail the check today?
12. Identify whether the debtor claims any justifications or excuses exist for non-payment. Is this a habitually slow payer or a new, isolated problem?
13. Try to limit the scope of the justifications or excuses.
14. Make a good record of any admissions made by the telephone responder.
15. "Admit" nothing.
16. "Accept" only that which is consistent with your main mission - to recover money.
17. **Give the debtor a "deadline." What is the method, manner, amount, and timing of the payment? "Some money soon" is not acceptable.**
18. Give the debtor "homework."
19. Identify and inquire into any successor liability issues. Has the business been sold? Was it an asset sale or a stock sale? Are the same individuals still involved as principals?
20. Follow-up in a timely manner. In a reasonable timeframe, make another call and ask about your client's money.

C. Questioning strategies

1. Use "open" questions where you have no idea as to the probable response or the response you would like to hear.
2. Use "leading" questions where you are verifying data you already have at hand, or where you are trying to elicit an admission.
3. In deciding whether "open" or "leading" questions are preferable, use all tools and information available to you, including your client's original credit application file (if any), online advertising and websites, or information turned up by "Googling." For example, knowing the nature of the debtor's business may help you determine when to call.
4. Limit your own talking and do not routinely interrupt—you cannot talk and listen at the same time. Listening is often the more important priority in establishing rapport with debtors. Some debtors will be more likely to pay after they have vented to a good listener about whatever is on their mind.
5. Concentrate on what is being said, and shut-out outside distractions.
6. Take notes to decide what is relevant for logging after the call.
7. Listen for ideas that convey the whole picture—not just bits and pieces.
8. Be careful of interjections that suggest your approval or acceptance, like "OK," "I see," or "I understand."

D. Logging the information and results of the telephone contact

1. Make a memo of all pertinent facts and admissions discovered in the contact.
2. Use quotation marks to record the responding party's actual statements, clearly identifying who made them and his or her relationship to the debtor.

Successful collections often depends on (hopefully) invoking a positive response from the individual in a position to pay. To a great extent, this depends on your ability to develop a positive attitude from the payor. The telephone is often a perfect instrument for achieving the desired rapport. Given the restrictions and expense involved in forcing payment of debts, getting voluntary payment is certainly a desired outcome. The need to respect the legislated rights of your debtors is based on this desire as well as protecting yourself from liabilities and penalties for violations. *Always* extending basic courtesy and respect to your debtor are traits not commonly attributed to collection lawyers; however, these are efforts that will both increase collections and help maintain your client relationship.

Every unpaid account represents a story, a reason for non-payment. As collection attorneys, we hear these reasons often and tend to become immune to the effects. Using a more sympathetic approach, realize that in many cases this is a new situation for your debtor. Simple acknowledgement of empathy with the debtor's situation

("I'm sorry to hear that"), without admitting legal validity, can help establish a positive attitude on the part of your debtor without compromising your position as the creditor's attorney. Using techniques that include eliminating any valid reasons for non-payment, make the demand for payment with the expectation that your debtor's intentions are to pay. "How are we going to solve this $30,000.00 problem?" In providing the debtor an opportunity to explain any reason for non-payment and responding with a professional and respectful response, debtors with legitimate intent will respond with similar respect and professionalism and often grow to be collaborative with you about recovery of the debt.

The practical reality is that few people are willing to give any preference to someone who has personally offended them, including debtors. There is also an important issue of ethical responsibility. The duties that an attorney owes to a non-client debtor under the Texas Disciplinary Rules of Professional Conduct include truthfulness (Rule 4.01); avoidance of communication directly with a debtor who is represented by another lawyer (Rule 4.02); countering any impression on the part of an unrepresented debtor that the creditor's attorney-advocate is neutral or disinterested (Rule 4.03); and, not participating in or threatening any criminal charges solely to gain an advantage in the civil debt-collection effort (Rule 4.04).

IV. NOTE SETTLEMENTS

Debtors who respond to pre-suit demands and telephone contacts by a willingness to negotiate an installment arrangement and start paying should usually sign-up on a Promissory Note extended payment arrangement to "workout" of the problem. See Appendix "A" hereto. The ideal solution is, of course, for the debtor to pay 100% in full today. But the reality is that even the best intentioned debtors often need time to pay what they will acknowledge to you that they owe. And if you can get cash flowing your way, that is usually far better than insisting upon a lawsuit. Press for the largest downpayment you can get by asking the debtor to propose a specific amount first and then trying to negotiate it upward until you sense that the debtor's "real" limit has been reached. Then attempt to negotiate a monthly (or weekly) installment payment that the debtor can reasonably fit into its cashflow, but which maximizes your pace of recovery. It is often helpful to use lawful interest as a motivator to encourage a short term of payment: "We will not need to charge any interest on an amortization of less than six months, but if you need more than six months, I am required to run interest at 10% per annum."

Many of our volume collection clients with sufficient confidence in our ability and judgment will give us blanket terms of settlement authority, particularly in the pre-suit environment. This might be an instruction that at least "X" down and "Y" dollars per month is always acceptable, or any amortization of less than "Z" months is always acceptable. Having such blanket authority means that we only need to approach the client when we need to recommend a deal outside the parameters of their advance approval, which makes us infinitely more efficient. New clients will sometimes need to grow accustomed to working with you before it is feasible to request or expect blanket authority to be bestowed. In such relationships, you will need to go to the client about every extended payment deal, but be ready to point out patterns of consistency (or inconsistency) in their note settlement approvals, and contrast such patterns with your own judgments and recommendations. If you are having success collecting their money, which may include getting lots of note settlement arrangements into the pipeline, with the resulting "annuity" of a stream of payments coming in every month, eventually they are likely to see the virtues of blanket authority from the standpoint of conserving their own time and energy invested in the debt collection process.

If you can get collateral to secure the note, such as a Deed of Trust lien in commercial property or an Article 9 UCC lien in inventory or equipment, so much the better. It is also often available and advisable to expand the universe of potentially responsible debtors by taking guaranties or co-maker signatures on the settlement note. Once settlement terms have been negotiated in principle by telephone, they should be promptly reduced to writing, preferably in a Promissory Note, for the debtor to sign. If you ultimately have to sue, taking the note improves your prospects in the collection action because the note presents a simple straightforward claim with few viable defenses and "settles" any previous issues in dispute between the parties concerning the original transaction that gave rise to the debt. You can also potentially increase the universe of debtors by getting co-debtor signatures on the note to guarantee the debt (such as from individual principals of a debtor corporation). Promissory Notes are also an excellent way to "clean up" a usurious note or contract or a debt that is arguably barred by limitations. Prepare the note and send it to the debtor requiring signature and return to you, with the downpayment, in a short timeframe. If the signed note and downpayment are not timely forthcoming after you have offered a commercially reasonable solution and been given false assurances by telephone, then you know that you need to proceed immediately to prepare and file suit.

Where the full amount of the debt is acknowledged and an extension is requested, then get a Promissory Note payment deal in place right away. But sometimes the conversation with the debtor will include the debtor's disputes, excuses, and denials designed to lay blame on your creditor client or to criticize the product or service

that gave rise to the debt. Listen carefully to the denials, avoiding any admissions or acknowledgments. It is appropriate to disagree with the debtor's denials and complaints if they are truly not well-founded. But often a legitimate complaint is voiced which, upon your client's investigation or objective consideration, actually justifies a compromise or reduction in the amount of the debt to be collected. **It is always better to compromise such issues on a reasonable basis before suit, if that can be done, than to defend a counterclaim in your collection suit. Remember the virtues of recouping your client's own costs, even if they have to forego some of the profit that they originally built into the transaction.**

If a compromise is in order, strive to postpone the compromise or waiver on the creditor's part until the debtor has performed by payment. See Appendix "B" hereto. For example, if the account claim is for $10,000.00, but you and your client determine that a $2,000.00 compromise is appropriate because of some deficiency in the delivered product, a settlement note could be taken for $10,000.00 to be paid by the debtor at $1,000.00 down and $1,000.00 per month. A settlement letter agreement (or e-mail agreement) outside of the note can stipulate that if and when eight of the $1,000.00 payments have actually been timely made, then the last two scheduled installments will be forgiven and the note returned to the debtor marked "paid in full." If the debtor has mentioned or threatened the prospect of bankruptcy, this strategy of "back-end waiver" is even more important. Indeed, with a possible bankruptcy looming, the "back-end waiver" should not be given until ninety days have elapsed (without bankruptcy being filed) behind the last timely installment payment. Otherwise, there is a risk that the waiver will be applied but some of the recovery will nonetheless have to ultimately be given up by your client as a preference under Section 547 of the Bankruptcy Code.

In some cases it will be impossible to require a "back-end waiver" and a "front-end waiver" will be necessary. For example, if the account claim is for $10,000.00, but you and your client determine that a $2,000.00 compromise is appropriate because of some deficiency in the delivered product, it may be better to take the settlement note for $8,000.00 than to miss the chance to recover 80% of the account without a lawsuit. This should be done with caution as a matter of your client's business judgment and discretion advised by your experienced counsel, especially since some debtors simply will not sign a note for the uncompromised amount, no matter how strongly the "back-end waiver" is programmed. However, if the debtor is going to enjoy the benefit of a "front-end waiver," a release should probably also be signed in favor of your client to insure that the complaint or disputed issue which justified the compromise has been fully resolved.

V. AGREED JUDGMENT SETTLEMENTS

Some debtors do not show interest in responding to your demands for payment until they get sued. Others will sign up on pre-suit Note arrangements but then fail to perform them. In either case, you need to be prepared to get a collection lawsuit promptly underway on the theory that the early bird gets the worm and the squeaky wheel gets the grease. We also find that we enhance our options for shortening the litigation timetable and maximizing legitimate pressure on the debtor to pay by including Interrogatories, Requests for Admissions, Requests for Production, and Requests for Disclosures with all of our collection suits, whether they be based upon breach of contract, sworn account, Promissory Notes, or other legal theories.

If you stay focused on using discovery efficiently, many collection cases will settle in connection with the debtor's reaction to the burdens of responding to written discovery, appearing for a deposition, *etc.* The best time to settle is often when debtor's counsel wants something from you, such as an extension of time to respond to discovery or answer a Motion for Summary Judgment, a request to postpone a deposition or continue a trial setting. You may be surprised how often Requests for Admissions are not timely answered, thus supporting a Motion for Summary Judgment on the entire case. At such times, when any advantage in delay is exhausted, the debtor and debtor's counsel may decide that the time is ripe to "confess." For example, settlements may be achieved at the Courthouse, in connection with a hearing, which should be placed on the record to support their enforceability. If the record does not contain all of the terms of the settlement agreement, it is not enforceable. Milstead v. Milstead, 633 SW2d 347 (Tex. App. -- Corpus Christi 1982, no writ). And it is a good idea to ask the Judge to order the parties to perform their settlement placed on the record. See Samples Exterminators v. Larry Samples, 640 SW2d 873 (Tex. 1982). This avoids a subsequent revocation of consent because the Court has already "rendered" Judgment.

When you obtain a temporary litigation advantage over the debtor or debtor's counsel, try to settle the case and collect money before the temporary advantage evaporates. For example, if you have a Default Judgment that they have timely moved to set aside (and which is therefore *likely* to be set aside), cut a deal while they are unsure whether you might succeed in preserving your Judgment. The uncertainty that they might lose the Motion for New Trial has more value to you for purposes of settlement leverage than the Judge's definite ruling setting aside your default!

If the debtor has compelled you to proceed to suit in order to gain his attention, then 90% of the time, he should secure any negotiated payment terms by

submitting to an agreed or "confessed" judgment. See Appendix "C" hereto. At this lawsuit stage, we typically do not accept payment of principal only, but will want to add Court costs for the trouble and expense of lawsuit filing and service, and some amount to help defray our client's reasonable attorneys' fees. In a side letter we agree not to execute on the judgment or otherwise pursue formal post-judgment collection procedures such as abstracting, turnover, or garnishment so long as the debtor abides by the agreed payment terms. If a compromise has been negotiated in order to entice the debtor to commit to payment arrangements, then a "back-end" waiver can be programmed by setting the judgment award at an amount that exceeds the compromise balance the debtor has agreed to pay, but stays within the bounds of the lawsuit's pleadings. You will release the judgment in full once the installment payment terms have been fully performed. But if the debtor defaults in making payments as agreed, you allow him credit for the payments he has made and then proceed to utilize post-judgment collection remedies as to the uncompromised balance remaining.

Sometimes you do not have the leverage to insist upon an Agreed Judgment and/or the debtor simply refuses to submit to one because of the adverse credit implications of a "public" final judgment being of record at the Courthouse. In such cases, you have the option of non-suiting the collection case and signing up the debtor on a "private" Promissory Note settlement as discussed above; but you are obviously not nearly as well protected against default if you have to file a new lawsuit on the note rather than simply invoking the rights and remedies of a judgment-creditor holding a final unappealable judgment.

Be wary of taking an "Agreed Judgment" that does not get immediately filed with the Court for signature by the Judge, but instead is held by you for later filing in the event the debtor defaults in making his payments as agreed. The debtor's consent to the entry of an Agreed Judgment must exist at the time the Judge signs it. A consent Judgment cannot be rendered by a trial Court when consent of one of the parties is lacking, even though consent may have previously been given by signature of the debtor or debtor's counsel. Consent must exist at the very moment the trial Court undertakes to make the agreement the Judgment of the Court. Carter v. Carter, 535 SW2d 215, 217 (Tex. Civ. App. -- Tyler 1976, writ ref'd n.r.e.). Therefore, the debtor's consent to the Agreed Judgment can be withdrawn any time before it is signed by the Judge.

Another alternative in cases where the installment payment term is short, and within the tolerance of the Court in allowing the case to remain pending without disposition, is to secure a stipulation from the debtor or debtor's counsel that will fully support your Motion for Summary Judgment in the pending case, without risk of opposition, in the event of the debtor's default. See Appendix "D" hereto and Rule 263, Tex. R. Civ. P. An agreement to settle a lawsuit for payments extended over time must conform to Rule 11, Tex. R. Civ. P., or it is not enforceable. See Kennedy v. Hyde, 682 SW2d 525 (Tex. 1984). Rule 11 requires that all agreements affecting any matter in litigation must be in writing, signed by the parties or their attorneys, and filed with the Clerk of the Court in the case file. In practice, the existence of the stipulation and the pendency of the lawsuit are usually sufficient incentive to secure payments being made, but occasionally you will have to move for judgment based upon the stipulation, and in such event you will regret not having a final and unappealable Agreed Judgment, but will be glad you were not satisfied with only a Promissory Note that would require filing of a brand-new lawsuit.

VI. POST-JUDGMENT MORATORIUM AGREEMENTS

At every stage in the collection process, from the initial demand all the way through to post-judgment execution, as you gain ground, there will be opportunities to cut deals for payment. Keep your ears open, suggest such agreements constantly, and go for them if the opportunity presents itself. And of course, after you already have in hand a final, unappealable Judgment, you have strong leverage to negotiate such deals. This may happen in the context of post-judgment discovery, execution, garnishment, and/or turnover. See Appendix "E" hereto. In every scenario, go to some lengths to avoid prejudicing or "settling" your Judgment. Post-judgment moratorium terms are agreements for *paying* the Judgment, not *settling* the Judgment.

The most effective formal post-judgment discovery under Rule 621a, TEX. R. CIV. P., is a subpoenaed post-judgment deposition with comprehensive *duces tecum* document production by the judgment-debtor. The opportunity to negotiate a post-judgment settlement may be manifested by a telephone call from the debtor upon being served with the burdensome subpoena. Or the opportunity may arise once the debtor is in your office for post-judgment deposition, sometimes before, sometimes after the testimony.

Effective execution strategy under Chapter 34, TEX. CIV. PRAC. & REM. CODE, and Rules 621-656, TEX. R. CIV. P., is both an art and a science. **Although the power of a writ of execution is the ability to seize and sell property, green money is still usually the better product of an execution procedure.** The threat of seizing and selling exists in the context of the actual non-exempt real or personal property available to be levied upon. For example, if the property available to be levied upon looks like it might bring $20,000.00 in an execution sale, but the judgment-debtor will come up with

$15,000.00 cash to avoid seizure, I will gladly take the cash every time. Sometimes the execution scene is a perfect environment to negotiate an immediate cash partial payment (through the Sheriff or Constable) toward the judgment and a post-judgment moratorium agreement to collect the rest. **I routinely carry a digital audio recorder and a smartphone videocamera to every execution procedure to avoid any possible future debate about what happened at the scene (*i.e.* condition of the premises upon arrival, what was said and by whom, what was loaded onto the truck, what options were presented or discussed, what post-judgment payment arrangements were agreed upon, *etc.*).** For example, in the case of individual judgment-debtors, you always want the serving officer to give the judgment-debtor an opportunity to waive his exemptions by designating property to be seized under Rule 637, TEX. R. CIV. P. The audio or video recording is the best way to document what was actively designated by the debtor. It is also a great way to preliminarily document the agreement between you and the judgment-debtor on post-judgment moratorium installment terms (I usually also document in writing the post-judgment moratorium, allowing the recording and the writing to punctuate one another in the debtor's sensibilities).

At the post-judgment stage, no bond need be posted for garnishment, but this remedy to capture funds or property in the hands of third-parties such as banks, is still only available upon proof that the debtor does not, within the knowledge of the plaintiff, have property in Texas subject to execution sufficient to satisfy the judgment. A good record of return of execution *nulla bona* is important both in terms of predicating garnishment, and extending the life of the judgment under §34.001, TEX. CIV. PRAC. & REM. CODE. **To set up garnishment, we always ask the judgment-debtor in his post-judgment deposition if he has assets in Texas subject to execution sufficient to satisfy the judgment. They usually say "no," in which case your risk of wrongful garnishment is minimized.** If they say "yes," then that admission of course leads to some interesting questions. We also have a provision in every post-judgment moratorium payment agreement whereby the debtor stipulates that he does not have assets in Texas subject to execution sufficient to satisfy the judgment, and thus is receiving valuable consideration by entering into extended payment installment terms.

The Turnover Statute at §31.002, TEX. CIV. PRAC. & REM. CODE, gives the Court a great deal of discretion to meet the needs of particular judgment collection scenarios that do not fall squarely within the traditional remedies. For example, the Court may order turnover of specific property (a form of injunction) and/or appoint a receiver, without the conditions, obstacles, and bonding requirements ordinarily encountered prejudgment or at common law. The legitimate pressure that this puts on the debtor maximizes your leverage to negotiate moratorium payment terms in the most potent way.

VII. MEDIATION

Be a believer in mediation, whenever the opportunity arises! It serves the collection process well by pretermitting the need for a lot of counter-productive litigation effort and the concomitant risk to your success. The advent in 1987 of the Texas Alternative Dispute Resolution Procedures Act at Chapter 154, Tex. Civ. Prac. & Rem. Code, coupled with the acceptance of mediation as a routine litigation tool by Judges and litigants across the board, have served collection lawyers particularly well.

There are certain collection scenarios where mediation is especially well-advised:

A. The screamer or the nut

You have tried to talk with the debtor by telephone, but he quickly becomes completely irrational. This is particularly problematic if he is representing himself *pro se* and having the good fortune to thwart your usually effective strategies by dumb luck or ineptitude. Do not attempt to discuss financial or Court business with a screaming or irrational person. But a strategic Court-ordered referral to mediation where the debtor can be face-to-face with both you and the mediator may be your salvation!

B. The seasonal or cyclical business

If the debtor's business is the type that generates its largest cashflows in predictable cycles, you may have to be creative about setting up a settlement arrangement that calls for lower payments (or no payments) during the periods when cashflows are reduced. Mediation can be the perfect environment for such creative approaches.

C. The turnip

Your debtor is on the brink of financial disaster, as you confirm by reviewing credible financial statements or a sworn financial disclosure form the debtor has completed at your request. You are owed $100,000.00, but your debtor proves to you it has a long list of unsatisfied payables and only has assets amounting to $10,000.00. Under such circumstances, it may be prudent to take the $10,000.00, since that is all of the blood that is in the turnip. However, try not to give up the rest of your claim until ninety days has gone by following the $10,000.00 payment with no bankruptcy having been filed by or against the debtor. Otherwise, you may give up the $90,000.00 in settlement and then be forced to give up the $10,000.00 as a preference under Section 547 of the Bankruptcy Code. Substantiating that you have a turnip on your hands, and getting your client to react

soberly to that reality, sometimes is best achieved in mediation.

D. The unresolved dispute

You have a $100,000.00 receivable to collect, but the debtor has convinced you of a problem that you believe justifies a $20,000.00 compromise or discount. The debtor, however, insists that a $50,000.00 compromise adjustment is called for. As long as there is a stalemate on this issue, the debtor is not paying anything, but you know that at least $50,000.00 is eluding the grasp of you and your client. If you sue, you expect to have to defend a counterclaim. **Consider calling upon mediation, even pre-suit.** Although most mediation is conducted while a lawsuit is pending (and this may be more strategic in particular cases), it is not essential. If your debtor is reasonable and willing to participate in mediation, a final compromise may be negotiated and documented that allows you and your client to collect some serious money (*e.g.* $65,000.00?). Even if a settlement is not concluded as a result of the mediation, at a minimum you will learn a great deal of useful information to support your effective use of the Court system to attempt to collect the money thereafter. In cases that fail to settle at mediation, I routinely ask the mediator for an advisory opinion (and sometimes get one!) to facilitate further settlement efforts after mediation.

Notwithstanding the benefits of mediation for the collection process, many creditors' attorneys fail to take best advantage of the mediation opportunity by making the following mistakes:

1. Failing to Prepare a Confidential Mediation Memorandum for the Mediator. Sections 154.053 and 154.073, Tex. Civ. Prac. & Rem. Code, guarantee that all of your written and verbal communications with the mediator will be confidential, unless you authorize disclosure to the other side. You should always prepare a Confidential Mediation Memorandum for the mediator in every case, laying out your best arguments on the facts and law, and deliver same to the mediator several days in advance of the mediation. This facilitates your preparation, as well as that of the mediator. After the mediator has had time to receive and read the Memorandum, call for a short telephone discussion on the same subjects. Mediators are not Judges and *ex parte* communications with them are not forbidden. Indeed, the more communication in advance, typically the better the outcome for you.

2. Failing to Prepare the Client to Understand the Virtues of Compromise. Nobody comes to mediation to capitulate to the other side, and the mediator has no authority to impose disagreeable outcomes. The only possible outcome of a successful mediation is a compromise that takes into account the risks (and costs) of the venture on both sides. Yet many unsophisticated creditor clients who are not conditioned to understand this come to mediation expecting to "win" by collecting 100% of their claim plus all attorneys' fees and costs. "They owe every bit of the money!" The best vehicle for handling this is reviewing with the client the Confidential Mediation Memorandum you have prepared for the mediator. In reviewing the Memorandum with the client, you can drop "footnotes" to alert them where their case is strong, but also where it is weak, where there are reasons to trade certainty for risk, and where they should "believe" and "not believe" your lines of argument.

3. Failing to Prepare an Opening Statement. The opening statement in mediation should be prepared just as thoroughly as a *voir dire* or opening statement in front of a jury. You are aiming to be persuasive for the benefit of your opponents and the mediator so as to justify your negotiating strategy.

4. Coming to Mediation Without a Negotiating Strategy or a Vision of Settlement. You should prepare enough to know your opening bid, your bottom-line, and a strategy for responding to offers from the other side. Bring with you the documents for concluding a successful settlement (*e.g.* Agreed Judgment form, moratorium terms, stipulation, *etc.)* at mediation that efficiently enhances your opportunity for collection post-mediation. If agreement in principle is reached, do not leave the mediation site without a signed mediation settlement agreement, even if it is midnight! But once the agreement is in writing and signed and you have a copy of it, leave. Do not stand around talking with the opposition and give the deal a chance to come apart. A mediation settlement agreement which complies with Rule 11, Tex. R. Civ. P., will be enforced by the Court, and if one party revokes, judgment may be entered on the agreement. Scott-Richter v. Taffarello, 186 SW3d 182, 189 (Tex. App. -- Fort Worth 2006, no pet.).

VIII. CONCLUSION

Successful collection lawyers always keep their eye on the prize (*i.e.* money) and do not let their love of the litigation "game" become the priority. Time is money, and money is always the first agenda item. Settlement is usually the best way to optimize the creditor's collection cashflow. Thus, we need to be constantly in a state of evaluation of costs versus benefits, ready for settlement, and taking advantage of opportunities like mediation to accomplish recovery. Does this mean we will never try a case or prosecute an appeal? No, but the trials and appeals will stand out in your experience relative to the 95% of your collection cases that settle opportunely, at some point along the way

(whether pre-suit, during the discovery phase, or post-judgment), if you are savvy about collection economics.

IX. ACKNOWLEDGMENT

The author of this paper would like to acknowledge the immensely helpful assistance of John Mayer of the Houston firm of Ross, Banks, May, Cron & Cavin, P.C., who has previously given and authored a similar paper and has graciously supplied input, suggestions, and authorities for this one.

APPENDIX A
(Pre-Suit Note Settlement)

February 26, 2009

Michael Ball, Individually and
d/b/a Northwest Pool & Spa
4646 Hwy. 59, Suite 140
Missouri City, Texas 77478

Re: Southwestern Advertising, Inc. vs. Michael Ball, Individually and d/b/a Northwest Pool & Spa; Account No. 17085627699-00000; Principal Balance Due: $11,096.90

Dear Michael:

Thanks again for calling me to discuss the above-referenced obligation. Enclosed is a Promissory Note designed to set up the payment arrangement discussed between you and me in our conversation of February 19, 2009. As you will observe, the Note calls for $1,000.00 to be paid by March 15, 2009, and $500.00 monthly on the fifteenth day of each month thereafter, until the final installment in the amount of $596.90 is paid, which is due on or before November 15, 2010. The Note does not contemplate accrual of interest, except in the event of default. The no-interest arrangement is your incentive to faithfully pay each and every month without delinquency or default.

Please sign and return the original of the Note to me at the letterhead address together with your $1,000.00 downpayment, on or before March 15, 2009. Since no reminders will be forthcoming from this office, I urge you to calendar all of the installment due dates prescribed by the Note and amortization schedule, attached hereto for your convenience, to avoid any delinquency in payment. All payments should be directed to my attention at the letterhead address, as no other Southwestern Advertising address will properly apply credit toward this settlement.

Notice that there is no pre-payment penalty. You are welcome to pay off the Note at any time prior to the final payment due on November 15, 2010. If this becomes feasible, please feel free to call me any time for a payoff balance.

Your execution of the Note and full and timely payment of the entire $11,096.90 balance will satisfy the above-referenced Account obligation.

Thanks for your assistance and cooperation, and please feel free to call me with any questions or comments you may have.

Sincerely,

WELLS & CUELLAR, P.C.

by D. Brent Wells for
SOUTHWESTERN ADVERTISING, INC.

Enclosure

APPENDIX A

PROMISSORY NOTE
Account No. 17085627699-00000

$11,096.90 Houston, Texas March 15, 2009
Principal Amount

FOR VALUE RECEIVED, the undersigned Maker, MICHAEL BALL, Individually and d/b/a NORTHWEST POOL & SPA ("Maker") promises to pay to the order of SOUTHWESTERN ADVERTISING, INC. ("Holder"), c/o Wells & Cuellar, P.C., 440 Louisiana, Suite 718, Houston, Texas 77002, or at such other place as the Holder hereof may designate, the principal sum of $11,096.90, as contemplated by the attached amortization schedule, with no interest accruing thereto except in the event of default.

This Note will be payable in twenty-one (21) monthly installments, as follows:

a. an initial payment in the amount of $1,000.00 due on or before March 15, 2009; followed by

b. nineteen (19) monthly installments in the amount of $500.00 each; and

c. one (1) final installment in the amount of $596.90.

Following the initial payment due on March 15, 2009, the remaining installments prescribed above shall be due on the fifteenth (15th) day of each successive calendar month thereafter until November 15, 2010, pursuant to the attached amortization.

The privilege is reserved by the Maker of this Note to prepay, before the prescribed due date, all or any part of the principal amount of this Note without penalty or fee. Each timely payment made under this Note will be applied to principal and no interest will accrue unless and until an event of default occurs as set forth herein below.

If any payment is not received by its respective due date, then instead of the no-interest provision specified above, the following provision shall be applicable until the entire principal installment and all accrued interest is paid: past due interest on the entire unpaid principal balance owing under this Note at the payment due date shall accrue and become immediately due and payable from the respective installment due date until the installment is paid, at the rate of eighteen percent (18%) per annum, calculated daily but not compounded; PROVIDED, HOWEVER, the parties to this agreement intend to comply strictly with applicable usury laws. Thus, notwithstanding any provision in this agreement to the contrary, it is agreed that the aggregate of interest and other charges constituting interest under applicable law shall, under no circumstances, exceed the maximum amount of interest allowable by law. Any excess shall be deemed a mistake and cancelled automatically, and if theretofore paid shall, at the Holder's option, be refunded to the Maker or credited to the principal debt. In the event that the entire unpaid balance of this Note is declared due and payable by the Holder, any unearned interest shall be canceled automatically.

It is expressly agreed that in the event of default in the payment of any installment when due, or in the event any Maker, endorser, guarantor, or surety hereof is the subject of bankruptcy, insolvency, assignment for the benefit of creditors, or appointment of a receiver (all of such events herein referred to individually and collectively as "default"), then the Holder may declare the unpaid principal amount of this Note together with accrued and unpaid interest immediately due and payable at once.

The failure to exercise the option to accelerate the maturity of this Note upon the happening of any one or more of the events of default hereunder shall not constitute a waiver of the right of the Holder of this Note to exercise the same or any other option at that time or at any subsequent time with respect to such uncured default or any other event of default hereunder. The acceptance by the Holder of any payment under this Note which is less than the payment in full of all amounts due and payable at the time of such payment shall not constitute a waiver of, or impair, reduce, release, or extinguish any remedy of the Holder or the rights of the Holder to exercise the foregoing option, at that time or at any subsequent time, or nullify any prior exercise of any such option.

In the event that this Note is placed in the hands of an attorney for collection, or is collected through bankruptcy or other judicial proceedings, or suit is brought hereon, the Maker agrees to pay all costs of collection, including reasonable attorneys' fees, in addition to the unpaid principal and interest then owing.

The Maker hereof and all endorsers, sureties and guarantors hereof, as well as all other persons liable or to become liable on this Note, hereby waive grace, protest, notice of protest, demand, notice of intention to accelerate, notice of acceleration, presentment for payment, notice of nonpayment, bringing of suit, diligence in collection, and notice of, or defense on account of, the extension of time for payment, or change in the method of payment hereof, and consent to any and all renewals and extensions in the time of payment hereof.

This Note is performable in Houston, Harris County, Texas, and shall be governed by the laws of the State of Texas.

Maker:

_____

MICHAEL BALL, Individually and
d/b/a NORTHWEST POOL & SPA

APPENDIX B
(E-Mail Note Settlement with Back-End Waiver)

Albert- We are going to take you up on your Proposal #3, except as modified by the further terms of this e-mail and the attached Settlement Promissory Note.

As you will see by the terms of the Note, the three (3) $6,000.00 installment payments have been scheduled as you proposed. This e-mail is my authorized commitment on behalf of Master Electric, Inc. that the fourth (4th) scheduled installment of $5,230.73 will be entirely waived and the original Note returned to you marked "PAID IN FULL" to evidence full satisfaction and release of the indebtedness which was the subject of my demand letter dated 12/31/08, if but only if the first three (3) installments totaling $18,000.00 are timely paid and received without any delinquency or default, on or before their respective due dates. Of course, in the event of any delinquency or default in payment of the $18,000.00, the fourth (4th) installment will *not* be waived and the no-interest amortization of the Note will be replaced by default interest at 18% per annum, pursuant to the Note. The whole point is to encourage the debtor to "earn" the compromise by paying the $18,000.00 as agreed. We prefer checks to electronic transfers, but thanks for that suggestion.

Please accept this settlement by returning to me, by both e-mail and regular mail, the authentic original signature of Adolf Valdez on the Settlement Promissory Note on or before 1/12/09. I will then look for the $6,000.00 installment due 1/20/09. Needless to say, I hope we can conclude this settlement on these terms, as otherwise my client has instructed me to file suit on 1/13/09.

Thanks for your assistance and cooperation in negotiating a commercially reasonable resolution in this matter. Best wishes. DBWells

This message and any files transmitted with it are confidential and may be privileged and/or subject to the provisions of privacy legislation. This information is intended for the use of the named recipient(s) only. If you are not an intended recipient, please notify us immediately by reply e-mail and delete this information from your system. Unauthorized disclosure, copying, or distribution of this information is prohibited.

D. Brent Wells, Wells & Cuellar, P.C., www.wellscuellar.com, (713) 222-1281

APPENDIX B

SETTLEMENT PROMISSORY NOTE
Account Nos. 279279, 279999, and 280009

$23,230.73 Houston, Texas January 12, 2009
Principal Amount

FOR VALUE RECEIVED, the undersigned Maker, ADOLF VALDEZ, Individually and d/b/a FRIENDLY ADULT DAY CARE ("Maker") promises to pay to the order of MASTER ELECTRIC, INC. ("Holder"), c/o Wells & Cuellar, P.C., 440 Louisiana, Suite 718, Houston, Texas 77002, or at such other place as the Holder hereof may designate, the principal sum of $23,230.73, in four installments as contemplated by the schedule below, with no interest accruing thereto except in the event of default.

Due Date	Amount
1/20/09	$6,000.00
2/20/09	$6,000.00
3/20/09	$6,000.00
4/20/09	$5,230.73

The privilege is reserved by the Maker of this Note to prepay, before the prescribed due date, all or any part of the principal amount of this Note without penalty or fee. Each timely payment made under this Note will be applied to principal and no interest will accrue unless and until an event of default occurs as set forth herein below.

If any payment is not received by its respective due date, then instead of the no-interest provision specified above, the following provision shall be applicable until the entire principal installment and all accrued interest is paid: past due interest on the entire unpaid principal balance owing under this Note at the payment due date shall accrue and become immediately due and payable from the respective installment due date until the installment is paid, at the rate of eighteen percent (18%) per annum, calculated daily but not compounded; PROVIDED, HOWEVER, the parties to this agreement intend to comply strictly with applicable usury laws. Thus, notwithstanding any provision in this agreement to the contrary, it is agreed that the aggregate of interest and other charges constituting interest under applicable law shall, under no circumstances, exceed the maximum amount of interest allowable by law. Any excess shall be deemed a mistake and cancelled automatically, and if theretofore paid shall, at the Holder's option, be refunded to the Maker or credited to the principal debt. In the event that the entire unpaid balance of this Note is declared due and payable by the Holder, any unearned interest shall be canceled automatically.

It is expressly agreed that in the event of default in the payment of any installment when due, or in the event any Maker, endorser, guarantor, or surety hereof is the subject of bankruptcy, insolvency, assignment for the benefit of creditors, or appointment of a receiver (all of such events herein referred to individually and collectively as "default"), then the Holder may declare the unpaid principal amount of this Note together with accrued and unpaid interest immediately due and payable at once.

The failure to exercise the option to accelerate the maturity of this Note upon the happening of any one or more of the events of default hereunder shall not constitute a waiver of the right of the Holder of this Note to exercise the same or any other option at that time or at any subsequent time with respect to such uncured default or any other event of default hereunder. The acceptance by the Holder of any payment under this Note which is less than the payment in full of all amounts due and payable at the time of such payment shall not constitute a waiver of, or impair, reduce, release, or extinguish any remedy of the Holder or the rights of the Holder to exercise the foregoing option, at that time or at any subsequent time, or nullify any prior exercise of any such option.

In the event that this Note is placed in the hands of an attorney for collection, or is collected through bankruptcy or other judicial proceedings, or suit is brought hereon, the Maker agrees to pay all costs of collection, including reasonable attorneys' fees, in addition to the unpaid principal and interest then owing.

The Maker hereof and all endorsers, sureties and guarantors hereof, as well as all other persons liable or to become liable on this Note, hereby waive grace, protest, notice of protest, demand, notice of intention to accelerate, notice of acceleration, presentment for payment, notice of nonpayment, bringing of suit, diligence in collection, and notice of, or defense on account of, the extension of time for payment, or change in the method of payment hereof, and consent to any and all renewals and extensions in the time of payment hereof.

This Note is performable in Houston, Harris County, Texas, and shall be governed by the laws of the State of Texas.

Maker:

_____

ADOLF VALDEZ, Individually and
d/b/a FRIENDLY ADULT DAY CARE

APPENDIX C
(Agreed Judgment Settlement)

January 25, 2009

VIA TELEFAX and
FIRST CLASS MAIL

Ms. Nelly T. Henry, Attorney at Law
1513 Weslayan Tower
24 Greenway Plaza
Houston, Texas 77046

Re: No. 827,999; *Southwestern Advertising, Inc. vs. Peter Joseph Humphreys, Individually and d/b/a Plastic Coating of Houston*; In the County Civil Court at Law No. 3 in Harris County, Texas.

Dear Nelly:

This letter agreement is intended to document the specific agenda which we have negotiated for settlement of the above-referenced case, wherein I represent Plaintiff Southwestern Advertising, Inc. ("Advertising"), and you represent Defendant Peter Joseph Humphreys, Individually and d/b/a Plastic Coating of Houston ("Humphreys"):

1. Humphreys agrees to pay to Advertising in settlement the total principal sum of $52,583.66, together with agreed interest lawfully accruing thereto at the rate of 10% per annum, compounded monthly, pursuant to the following schedule and the amortization enclosed:

   (a) a down payment of $500.00 due on or before February 15, 2009; and

   (b) followed by eleven (11) monthly installments of $500.00 each commencing March 15, 2009, and continuing thereafter on the fifteenth (15th) day of each successive calendar month; and

   (c) followed by twelve (12) monthly installments of $1,000.00 each commencing February 15, 2010, and continuing thereafter on the fifteenth (15th) day of each successive calendar month; and

   (d) followed by twelve (12) monthly installments of $1,500.00 each commencing February 15, 2011, and continuing thereafter on the fifteenth (15th) day of each successive calendar month; and

   (e) followed by twelve (12) monthly installments of $2,629.50 each commencing February 15, 2012, and continuing thereafter on the fifteenth (15th) day of each successive calendar month.

   All payments should be payable to "Southwestern Advertising, Inc." and mailed to this office at the letterhead address (no other Advertising address will properly apply credit for payments received on this settlement). **Please be advised (and please advise Mr. Humphreys) that your client will not receive advance monthly reminders when the payments are due.**

2. To secure timely payment pursuant to the terms set forth above, Advertising will require that an Agreed Final Judgment in the form enclosed be signed by you on behalf of Humphreys and filed with the Court for signature by the Judge. The Agreed Final Judgment is incorporated herein by this reference as if set forth verbatim.

3. Advertising will not abstract, record, or levy execution on the Judgment in the event that all payments are timely made as contemplated in numbered paragraph 1 above. However, in the event of any default, in any respect or for whatever reason in the making of any of the payments as required, Advertising would then have and invoke all of the rights and remedies available to a judgment-creditor under Texas law, would abstract the Agreed Final Judgment against Humphreys, and would vigorously pursue full collection of the entire balance remaining on the Judgment. In such event, Humphreys will not have earned any discount or compromise, and any payments theretofore made by him would simply be applied to the aggregate, accruing Judgment debt awarded against Humphreys, as of the date received.

4. This agreement is without prejudice to the Agreed Final Judgment; however, upon timely completion of Humphreys' obligations and undertakings pursuant to this agreement, Advertising will agree to provide him, at that time, with an executed Memorandum of Release and Satisfaction of Judgment.

5. Humphreys represents and affirms by his signature below that he does not have assets in Texas subject to execution sufficient to satisfy the Judgment, and therefore, is receiving a benefit by reason of the extended payment arrangement described in numbered paragraph 1 above.

6. No other promises, assurances, or representations are contemplated by this settlement, except what is expressly set out in writing in this letter and its enclosures. Neither Humphreys nor Advertising shall be bound by any agreement or understanding concerning this settlement not expressed by these written instruments, and verbal exchanges surrounding this settlement shall not vary, add to, or modify it with any force or effect whatsoever beyond these specific written terms.

Your client's execution of this letter agreement, and your signature on the Agreed Final Judgment, will signify acceptance of these terms and conditions of settlement. We are pleased to resolve this matter amicably, and look forward to the return of an executed counterpart of this agreement and the Agreed Final Judgment, together with the $500.00 down payment, on or before February 15, 2009.

Sincerely,

WELLS & CUELLAR, P.C.

by D. Brent Wells for
SOUTHWESTERN ADVERTISING, INC.

Enclosure

APPROVED AND AGREED:

_____

PETER JOSEPH HUMPHREYS, Individually and
d/b/a PLASTIC COATING OF HOUSTON

APPENDIX C

No. 827,999

SOUTHWESTERN ADVERTISING, INC.,	§	IN THE COUNTY CIVIL COURT
Plaintiff,	§	
VS.	§	AT LAW NO. 3
PETER JOSEPH HUMPHREYS, Individually and d/b/a PLASTIC COATING OF HOUSTON,	§	
Defendant.	§	HARRIS COUNTY, T E X A S

AGREED FINAL JUDGMENT

BE IT REMEMBERED that the above-styled and numbered cause came on for disposition on the merits pursuant to the agreement of the parties, as reflected in the signatures of their respective counsel of record set forth hereinbelow. In consideration of such agreement, the Court is of the opinion that this Agreed Final Judgment should be accepted and signed as the Court's adjudication of the action. It is, therefore, hereby

ORDERED, ADJUDGED, AND DECREED that Plaintiff SOUTHWESTERN ADVERTISING, INC. does have and recover judgment of, from, and against Defendant PETER JOSEPH HUMPHREYS, Individually and d/b/a PLASTIC COATING OF HOUSTON for the principal sum of FIFTY-TWO THOUSAND FIVE HUNDRED EIGHTY-THREE AND 66/100 DOLLARS ($52,583.66), all costs of Court, reasonable attorneys' fees for efforts to date in the amount of TWO THOUSAND AND NO/100 DOLLARS ($2,000.00), and post-judgment interest on all of the foregoing at the agreed and lawful rate of ten percent (10%) per annum from the date of signing below until finally paid. It is further

ORDERED, ADJUDGED, AND DECREED that inasmuch as this is intended to be a Final Judgment, (1) all relief requested in the above-styled and numbered cause which is not expressly granted herein is hereby DENIED, and (2) execution may issue for the enforcement and collection hereof.

SIGNED this the _____ day of _____, 2009.

_____
JUDGE PRESIDING

AGREED, APPROVED, AND SIGNATURE REQUESTED:

WELLS & CUELLAR, P.C.

By:_____
D. Brent Wells
State Bar No. 21140900
440 Louisiana, Suite 718
Houston, Texas 77002
(713) 222-1281 Telephone
(713) 237-0570 Fax

Attorneys for Plaintiff
SOUTHWESTERN ADVERTISING, INC.

_____
Nelly T. Henry
State Bar No. 09491399
1513 Weslayan Tower
24 Greenway Plaza
Houston, Texas 77046
(713) 850-9799 Telephone
(713) 850-8399 Fax

Attorney for Defendant
PETER JOSEPH HUMPHREYS, Individually and
d/b/a PLASTIC COATING OF HOUSTON

APPENDIX D
(Stipulation in Pending Lawsuit)

December 19, 2008

TELEFAX and
REGULAR MAIL

Mr. Allen D. Humphrey
Brown & Humphrey, P.C.
7711 West Loop South
Houston, Texas 77027

Re: No. 927,499; *Riley Oil & Gas Onshore LP vs. Jayco, Inc.*; In the County Civil Court at Law No. 1 of Harris County, Texas.

APPEARANCE OF COUNSEL, STIPULATION, AND RULE 11 SETTLEMENT AGREEMENT

Dear Allen:

This letter is intended to document a full and final settlement of the above-referenced lawsuit, in connection with which I represent the Plaintiff, Riley Oil & Gas Onshore, L.P. ("Riley") and you represent the Defendant, Jayco, Inc. ("Jayco"). The terms and conditions of such settlement would be as follows:

1. Entry of Appearance. Upon the filing of this letter agreement with the Court, you will be deemed to have entered your appearance for Jayco;

2. Stipulation Under Rule 263, Tex. R. Civ. P. Riley and Jayco stipulate and agree that Jayco owes Riley the full $50,449.47 principal account balance sued upon, together with lawful pre-judgment interest at the rate of six percent (6%) per annum from and after August 7, 2008, plus reasonable attorneys' fees of $5,000.00, and all costs of Court; and this stipulation is admissible in evidence to support a Judgment in favor of Riley, after credit for any payments hereafter made, in the event of any default by Jayco in timely payment of any of the three (3) installments contemplated by numbered paragraph 3 below;

3. Payment. Jayco agrees to pay Riley a total settlement consideration of $52,000.00 (consisting of the principal balance of $50,449.47 + Court costs incurred to date of $261.00 + $1,289.53 to help defray Riley's attorneys' fees to date, which have actually been in a larger amount), pursuant to the following schedule of three (3) installments, each of which is to be delivered to the attention to the undersigned attorney at the letterhead address on or before its due date, understanding that time is of the essence:

Due Date	Amount
12/29/08	$17,333.33
1/29/09	$17,333.33
2/27/09	$17,333.34
TOTAL	**$52,000.00**

4. Dismissal. In the event that all three installments of numbered paragraph 3 above are timely paid without any delinquency or default, then Riley will voluntarily dismiss the lawsuit with prejudice to re-filing as soon as reasonably practicable following receipt of the last timely installment and verification of good funds; PROVIDED, HOWEVER, that in the event of any default by Jayco in timely payment of any of the three (3) installments contemplated by numbered paragraph 3 above, Judgment will be sought as contemplated by numbered paragraph 2 above, and Jayco will have no objection to any such request for Judgment.

If the foregoing sets forth an acceptable set of terms for full and final resolution between our respective clients, then please fax back your signature below on behalf of Jayco on or before December 24, 2008, and we will look for the first installment of $17,333.33 on or before December 29, 2008. Thanks for your assistance and cooperation in this regard.

Sincerely,

WELLS & CUELLAR, P.C.

by D. Brent Wells for
RILEY OIL & GAS ONSHORE, L.P.

AGREED:

_____
Allen D. Humphrey for JAYCO, INC.
Date:_____

APPENDIX E
(Post-Judgment Moratorium)

March 31, 2009

TELEFAX and
REGULAR MAIL

Mr. Charles S. Wurst
1214 Stonebrook Drive
P.O. Box 62
Seabrook, Texas 76268

Re: No. 851,499; *Houston Hot Magazine, Inc. vs. Rick Flowers, Individually and d/b/a Flowers' Lawn Care Service*; In the County Civil Court at Law No. 3 in Harris County, Texas.

POST-JUDGMENT PAYMENT AGREEMENT

Dear Charles:

This letter is intended to document an Agreement concerning collection and payment of the Judgment ("Judgment") in the above-referenced case, wherein I represent Judgment-Creditor Houston Hot Magazine, Inc. ("Magazine"), and in which you represent Judgment-Debtor Rick Flowers, Individually and d/b/a Flowers' Lawn Care Service ("Flowers"). I understand that the following are our negotiated terms and conditions of compromise and resolution:

1. Flowers has agreed to pay monthly installments to Magazine, for application to the Judgment obligations, pursuant to the following schedule:

   (1) $1,000.00 per month in the calendar months of October, November, December, January, February, March, and April; and

   (2) $2,000.00 per month in the calendar months of May, June, July, August, and September.

   All such payments are due by the fifteenth (15th) day of each respective successive calendar month, should be payable to "Houston Hot Magazine, Inc.," and mailed to this office at the letterhead address. **Any payments inadvertently mailed to any other Magazine address will not be properly applied to this Agreement. Please be advised, and please advise Mr. Flowers, that he will not receive advance monthly reminders when the payments are due.**

2. The payments contemplated by numbered paragraph 1 above will continue until payment of the Judgment in full, except that all of the post-judgment interest awarded by the Court will be waived by Magazine when and if all other awards of the Judgment have been fully paid and satisfied in a timely fashion in accordance with numbered paragraph 1 above and without any deviation or default.

3. Magazine will not initiate further execution or other formal post-judgment collection remedies on the Judgment in the event that, and so long as, all payments are timely made as contemplated in numbered paragraph 1 above. However, in the event of any default, in any respect or for whatever reason in the making of any of the payments as required, Magazine will then immediately have and may then again invoke all of the rights and remedies available to a judgment-creditor under Texas law, in the interest of pursuing full collection of the entire balance remaining on the Judgment without any interest waiver or compromise having been earned by Flowers. In such event, any payments theretofore made by Flowers pursuant to numbered paragraph 1 above would simply be applied to the aggregate, accruing Judgment debt awarded against him, as of the date received in this office.

4. This Agreement is without prejudice to the legal efficacy and validity of the Judgment, which is incorporated herein by this reference and hereby ratified and affirmed; however, upon timely completion of Flowers' obligations and undertakings pursuant to numbered paragraph 1 and subject to numbered paragraph 2 above, Magazine will agree to provide Flowers, at that time, with an executed Release of Judgment and Judgment Lien to be recorded in the real property records of Harris County, Texas, where the Abstract of the Judgment is currently of record.

5. In connection with negotiating this Agreement, we have resolved and put to rest all issues between (1) you and Flowers, on the one hand, and (2) Magazine, the Precinct 5 Constables, and the undersigned firm of attorneys, on the other hand, concerning the recent execution levy on Flowers' 2006 Dodge Ram pickup truck, including the claims and issues raised by your letter of March 24, 2009, your letter of March 27, 2009, and your letter of March 27, 2009, to the undersigned.

6. Flowers represents and affirms by his signature below that he does not have assets in Texas subject to execution sufficient to satisfy the Judgment, and thus, he is receiving a benefit by being extended the installment arrangement contemplated by numbered paragraph 1 above, and the other considerations of this Agreement.

7. No other promises, assurances, or representations are contemplated by this Agreement, except what is expressly set out in writing in this letter. Neither Flowers nor Magazine shall be bound by any agreement or understanding concerning the Judgment, its payment, or collection, not expressed by this written instrument, and verbal exchanges surrounding this Agreement shall not vary, add to, or modify it with any force or effect whatsoever beyond these specific written terms.

Your client's execution of this letter Agreement, and return of same to me together with the $1,000.00 installment due April 15, 2009, will signify a complete accord and understanding between the parties concerning the Judgment. My signature below is fully authorized on behalf of Magazine. Thanks again to you and your client for your efforts to achieve an amicable understanding.

Sincerely,

WELLS & CUELLAR, P.C.

by D. Brent Wells for
HOUSTON HOT MAGAZINE, INC.

AGREED:

_____

RICK FLOWERS, Individually and
d/b/a Flowers' Lawn Care Service