



TOOLS OF THE TRADE: THE BILL OF PARTICULARS

By Hal Chase Jr.

In this difficult economy, many individuals, families, and small businesses get behind and find themselves facing aggressive bill collectors. In fact, one troubling recent study indicates that as many as 30 percent of families in the United States have at least one account in, or headed to, collections.

Debtors who are financially unable to pay their obligations tend to be overwhelmed. When faced with unpaid bills they turn to avoidance, allowing dunning notices to gather unopened in denial piles that eventually drift into bags or drawers. When a debtor fails to respond over time to claims, the creditor may eventually argue that the underlying account is valid because it has not been contested. Debtors with non-performing consumer accounts are the saddest of all clients. Once the claim is focused in a complaint, debtors tend to further ignore it until a default is taken. Once that occurs, the consulting lawyer has little he or she may provide in the way of practical suggestions, other than consulting their address book for the name of a good bankruptcy attorney.

On the other hand, before default is entered in a collection action, the situation is far from hopeless. When beleaguered and cash-strapped clients step into your office waving dunning letters or a complaint and looking hopefully to you for assistance, you will now be able to advise them of reasonably inexpensive tools that allow them to seize the initiative and require a plaintiff to explain the details upon which the claim is based.

Prior to litigation, federal and state law permits a debtor to send pre-litigation demand letters to any creditor or debt collector disputing the debts. The letter must request the name and contact information of the original creditor. Such a communication requires the debt collector to verify the debt with the original creditor before taking further measures to enforce the debt. Verification usually includes the amount of the debt, its date, and contact information for the original creditor. Under certain circumstances the verification should include the original signed contract. If the debtor contests the nature or amount of the debt, he or she is entitled to the record of all charges, payments made, and interest. It takes only a few minutes to write such a letter

and requires the creditor or collection agency to explain the basis for the claim and the parties' legal relationship. The underlying statutes providing such protections are available on the web or through such services as Lexis-Nexis.

However, what, if anything can be done when the client comes into your office after having been served with a lawsuit from the creditor or collection agency? Thankfully, the State of California provides a powerful tool for debtors in such a situation. Code of Civil Procedure §454 allows a debtor to send a written demand to the plaintiff for something called a "Bill of Particulars."

The process is quite simple.

As a preliminary matter, the assisting lawyer must make sure the debtor files a timely answer to the complaint so that no default may be taken. Once that is done, a CCP §454 Demand for Bill of Particulars must be served.

Normally, a creditor needs not plead any particular item of an account for which collection is sought. Rather, the complaint may generally allege the existence of an obligation, the plaintiff's standing or capacity to bring the action, and a general statement of the total amount owing. However, a Demand for a Bill of Particulars requires a plaintiff to provide meaningful underlying detail.

The procedure works like this: CCP §454 requires the plaintiff, within ten days after service of a demand from the debtor, to provide a copy of the account and all the items thereof, **or be precluded from giving evidence thereof**. The Bill is a detailed, formal, written statement setting forth the claimed items that are the basis for the lawsuit against a debtor.

As a general proposition, demands under CCP §454 tend to be poorly understood by collection agencies and their attorneys. Since the industry has little appreciation of the importance of such demands, they may be ignored. Collection agencies tend to employ a *litigate-by-the-numbers* approach to debt prosecution. Often the responsible lawyer is unavailable, does not return telephone calls, and eschews motion practice. After all, debt collection is a volume business and most prosecuting attorneys expect that the only time they will appear in court will be for five minute prove-up proceedings following the debtor's default.

The failure of the creditor to respond to a CCP §454 Demand within the ten day period (15 days if the demand is served by mail), entitles the debtor to bring a motion to exclude the plaintiff from "giving evidence" of the account and to obtain an order dismissing the action. Many collection actions derive from uninvolved and uninterested

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assignors such as hospitals, medical corporations, internet vendors, etc. who provide the collection attorney with little information other than the name of the debtor and the claimed amount owing. Often these organizations have no available personnel to provide any information regarding account particulars.

If the creditor's attorney ignores the demand and the debtor moves to exclude items of account or dismiss the action, it is possible that the creditor's attorney may be facing an order of dismissal before he or she even understands what is going on.

This technique will not work if the collections lawyer is even vaguely familiar with the law and the creditor is a large company who is able to produce the basic items of a debtor's account. Reasonable attempts by a creditor to comply with a CCP §454 Demand will likely serve as a bar to any motion to exclude/dismiss. However, a timely response to the Demand for a Bill of Particulars will at the very least provide the debtor with far more information than would have been available if the exercise had not been made. Indeed, a detailed Bill of Particulars will present the debtor with the necessary information to dispute or question particular charges in the account. It also provides the debtor with the opportunity to submit meaningful settlement overtures before trial.

And, if the plaintiff's response to the Demand is too general, the debtor may ask the court to order a further accounting. When the complaint is verified, the accounting must also be verified by appropriate personnel of the original creditor, with an attestation stating that he believes the items in the account to be true. If the party required to verify the account is unable to do so, or his office is in another county, the attorney or local agent must submit the verification. In the event the collection complaint is verified but the response to a Demand for Bill of Particulars is not, then the debtor should argue the Bill of Particulars is defective, not in compliance with Code of Civil Procedure §454, and the court should be urged to dismiss the matter.

In summary, a Demand for Bill of Particulars is a powerful legal tool that requires a plaintiff in a collection action to produce the underlying agreement upon which the claim is based and all items of account for which judgment is sought. If a collection plaintiff fails to provide the requested information within ten days of a Demand he or she may be barred from presenting any evidence of the account at trial. Even if the plaintiff does respond, the debtor is at least in a position to verify the relationship between him and the creditor and to review each item of account. Information is power and a Demand for Bill of Particulars requires the

plaintiff to either provide the quantifiable material upon which the lawsuit is based or stand down.

Sample Demand for Bill of Particulars

No specific rules set forth the requirements that should be made in a formal demand for Bill of Particulars. Many examples are available on the web. The following appears to cover most of the matters for which a creditor's response is required under CCP §454:

To: Plaintiffs and Their Attorney of Record:

Defendant herein demands that you provide defendant with a Bill of Particulars that sets forth all items and details of the account upon which you have sued, whether for money had and received, goods sold and delivered, money lent or paid, or quantum meruit. This request is made pursuant to CCP § 454 and requires you to provide, within ten days from this request, all of the particulars of the account in question, including the date of each transaction, a description of the services, materials or goods supplied or other considerations rendered, the price or charge made for each item, all payments or credits that have been made to the account, and any agreement assigning the account at issue to the plaintiff. You are further required to provide any agreement between defendant and the creditor that has created any account concerning which your lawsuit is based.

/s/ Debtor's Attorney

Hal Chase is an associate at Vasquez Estrada & Conway LLP. He has practiced civil litigation in the Bay Area for 34 years. This series of articles, Tools of the Trade, is intended to benefit the general civil practitioner by discussing certain issues and areas of law that may not be well understood, but which most lawyers will invariably face at least once in their career. Chase's caveat is that these articles are informational only and any interested practitioner should do his or her own research. The law is always in flux, subject to continual change and reinterpretation by statute and courts. He can be reached at (415) 453-0555 or at hchase@vandelaw.com.

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