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What a Collection Lawyer Should Know About a Client's Information Management Systems

A collection of litigator's communications with the client include receiving and seeking information. That work is facilitated if counsel has a basic understanding of the lender's information management systems. Experienced litigators adapt their client communications and court filings to obtain and use the information lender clients can reasonably provide. Understanding the lender's information management systems also enables counsel to avoid onerous information requests to clients.

Necessary Financial Information

Lenders use software to manage their loan portfolios. Such software calculates the current principal balance, accrued interest on the loan balance, and daily interest accrual. Lenders sometimes provide this information to collection counsel via a "screenshot" from the computer monitor used by lender's employee. Often, counsel shapes this information into an affidavit in support of a requested judgment, a motion seeking appointment of a receiver, or some other court filing. Those affidavits include a required assertion that the affiant has personal knowledge of the facts and the accuracy of the statements. See, for example, Federal Rule of Civil Procedure 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, . . . , and show that the affiant or declarant is competent to testify on the matters stated.")

Here is an example of when a simple affidavit relying on "screenshot" information may not suffice. Many commercial loan documents have a "360/actual" clause like this: "All interest calculated under this Note shall be computed on the basis of a year consisting of a 360-day year but applied to the actual number of days elapsed." This clause makes the loan's printed annual percentage rate is slightly understated:

Consider a loan of \$1,000,000 with a stated 10% APR that was outstanding for exactly a year. A simple calculation using the stated APR would lead to the belief that \$100,000 (10% of \$1,000,000) in interest accrued in the year that the loan was outstanding.

However, when we use 360/actual, the interest is calculated on at a daily rate of 0.0002777% (10% divided by 360) creating a daily accrual of \$277.80^[1] when we multiply by the outstanding balance. Then, when the daily accrual is multiplied by the actual number of days the loan was outstanding (365) we get the actual interest charged, \$101,397 (365 times 277.80).

The extra interest generated by 360/actual compared to the stated 10% APR is \$1,397 in this example.

The impact of 360/actual is disclosed in most commercial loan documents I have seen and is not a secret. See, for example, [https://www.adventuresinincre.com/lenders-calcs/](https://www.adventuresinincre.com/lenders-calcs/.).^[2] When properly disclosed, these provisions should be enforceable. *Kreisler & Kreisler v. National City Bank*, 657 F.3d 729, 732–3 (8th Cir. 2011) (“The payment provision of the promissory note clearly sets out the time factor and the method for calculating interest, which the Bank followed. The description of the annual interest rate is comprised of two independent clauses. The first states that ‘annual interest rate for the Note is computed on a 365/360 basis.’ The second clause specifies exactly how a ‘365/360 basis’ works: by calculating a daily rate using the annual rate divided by a 360–day year and then multiplying the daily rate by the number of days the balance was outstanding and by the balance itself.”)

The questions at hand are (i) how does the lender’s software handle interest calculations and (ii) can the lender’s affiant explain what happens if the court filed affidavit is challenged? The answers to these questions should be known before counsel files an affidavit that purports to use personal knowledge to affirm the “accurate” accrued interest owed and the daily interest accrual. I usually do not include this type of detail in my initial affidavit filed in support of a dispositive or receivership motion; after all, why plant ideas in opposing counsel or the court? It is important, however, for counsel to know that the affiant has the requisite knowledge when the affidavit is executed – otherwise – opposing counsel’s successful

demonstration that the affiant does not have personal knowledge of the accounting facts makes all your factual assertions suspect.

In addition to interest rate issues, my experience has revealed the same need (ability to explain what otherwise seem like “black box” calculations that appear on a loan summary screen) applies to (i) the timing and accrual of late fees, (ii) the timing of default interest assertions, (iii) the application of all funds credited against the loan, and (iv) escrow account activity.

Who Has Knowledge

Perhaps the most common interrogatory collection litigators handle is: “who at the lender has knowledge of the lender’s dealings with the borrower” or some version thereof. The flip side of that question for counsel is which client employees can provide information and are possible witnesses. Beyond (a) the lender employee who has current responsibility for the lending relationship now that it is in trouble, and (b) the employee who initiated the lender / borrower relationship, the potential universe of lender’s employees with knowledge is every lender employee with access to information or contact with the borrower.

Many lenders have a customer relationship management (“CRM”) system. Typically, the CRM system permits the lender to control who can access information, records when and by whom information is accessed and offers an opportunity to capture information on every lender / borrower communication. Hopefully, these features are used, and lender’s employees record any appropriate information that is not captured automatically by the CRM system such as telephone conversations and in-person meetings.

A good CRM system that is used as intended can both (i) limit the universe of lender’s employees who might have knowledge about the borrower and, therefore, limit the scope of interrogatory responses, and (ii) easily identify employees involved with the borrower. Counsel who understands a client’s CRM system can quickly focus questions and document requests addressed to the client thus creating both prompter responses and limiting costs.

A Litigation Hold Is Required and Information Must be Accessible

CRM and other information management systems delete old data in the ordinary course of business. Hopefully, a lender's information relevant to any loan or borrower is never eliminated while that loan is outstanding or that borrower continues to have any relationship with the lender. There are two relevant points I want to discuss concerning information retention: (i) instituting a "litigation hold" to prevent the destruction of information; and (ii) ensuring that all relevant information is available.

A "litigation hold" preventing the destruction of potentially relevant information is required once litigation is reasonably anticipated. See, *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33 (NY 2012) and 49A Mass. Prac. Discovery Section 7.8 titled "Electronic discovery – preliminary considerations – the Litigation Hold." If lender's document retention plan controls all the relevant systems and does not eliminate any data while a loan is unpaid, then a litigation hold is most probably effectively in place when commercial collection litigation is contemplated. Collection counsel should still remind the client not to destroy information,^[3] but the danger is reduced. The point is that counsel should know how the client's CRM and other relevant technologies are used for information retention. That knowledge helps target litigation hold communications and impacts their urgency.

The second information storage issue that regularly arises is ensuring that all relevant information is available to counsel as required.^[4] The issue here is not just information that counsel needs to litigate the claim to successful collection, but also information that must be produced to opposing counsel. Counsel and client are routinely required to verify that all relevant information was produced to opposing counsel via document productions or interrogatory answers. This is hard to do if counsel does not understand the client's information retention system and the steps required to access all stored information.

Conclusion

To litigate successfully, efficiently and ethically, counsel need to understand the basic of the client's information management systems that impact litigation work. A couple hours of unbilled effort to understand how your clients handle information will make

your litigation work better for all concerned. In my experience, clients appreciate counsel's efforts to work as a value-added service provider.

Mr. Mauer has 30+ years of commercial litigation experience that often uses the knowledge he obtained earning his MBA and passing the CPA examination.

[1] As a check, we see that \$277.80 times 360 equals \$100,008 or almost exactly the expected \$100,000 amount.

[2] I am not a consumer loan specialist. I am told, however, that it is a violation of certain federal and state consumer laws to disclose a stated APR that is inaccurate because of how the interest due is calculated. See, *Chern v. Bank of America*, 15 Cal.3d 866, 544 P.2d 1310 (1976) ("We agree with plaintiff that the practice of computing interest quoted as a 'per annum' rate on the basis of a 360-day year is likely to deceive the public. 'Per annum' means literally 'by the year.'")

[3] A written reminder is almost always appropriate.

[4] I never ask clients to provide copious amounts of information until we know the litigation process will require that activity lest my requests cause a waste of the client's time and money.

View the original posting of this article: [The Commercial Litigator and His Client's Information Management Systems](#)

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