

Stim & Warmuth, P.C.

Here are some ideas to protect your business. We hope they help you.

Joseph D. Stim
Paula J. Warmuth



Reduce Legal Fees

Many of you have asked us to bring a lawsuit on your behalf to collect a debt. If you send out monthly statements of account to your customers, the lawsuit is much easier. We can then sue for an "account stated." An action for an account stated exists when the defendant (the party we are suing) has received a statement of account from you and has not objected to it within a reasonable time. When we sue for an account stated, we can usually get a default judgment entered without the necessity of your testimony (and our presence) in court. The court clerk can enter the default judgment through the mail. This results in **substantial savings** to you. If you have any questions on how to set up a system of monthly statements, call us.

☠ Avoid Sanctions ☠

If you have a computer system which automatically sends out

monthly statements of account, this could be a problem if your customer goes into bankruptcy. When a bankruptcy petition is filed, the filing automatically stays most actions by you against the debtor. If you are an unsecured creditor (or an undersecured creditor), the amount of the debt is fixed as of the filing date. You are not entitled to charge for post-petition interest and late fees. However, some of your computers churn out monthly statements which continue to add on such items.

In a 1996 bankruptcy case¹, a bank sent statements to the debtor which were not correct. The bank argued that the "computer did it." The court rejected the defense "since intelligent beings still control the computer and could have altered the programming appropriately." Our advice is to stop sending statements of account as soon as you learn of your customer's bankruptcy filing.

Perfect Your Lien Rights

If you work on a private or public improvement and your customer then files for bankruptcy, you are **not** stayed by the automatic bankruptcy stay from filing a mechanic's lien. The New York Lien Law provides that your mechanic's lien relates back to the time of the debt's creation. Because of this relation-back provision, the Bankruptcy Code

allows you to file your mechanic's lien despite the automatic stay². You may also serve notice of the lien post-petition³, file proof of service of a notice of lien⁴, and file a notice of pendency to extend the lien⁵. You may not take any further action to enforce the lien⁶.

Avoid Default

Have you had the unfortunate experience of being sued? Hopefully, you gave the complaint to us and we defended you. However, what if you didn't know about the lawsuit and you lost by default? It happens all the time. Corporations can be served by serving the Secretary of State⁷. When you formed your corporation, you designated a name and address as your corporation's designee for service of process (process addressee).

. . . what if you didn't know about the lawsuit and you lost by default?

If you lose touch with the person you designated, the Secretary of State could mail the papers to your process addressee and the papers would never be forwarded to you. If you would like us to check the name and address of your process addressee to see if the information is current, please let us know. We can check this for you with the Secretary of State **without charge**.



Recent Decision

Stim & Warmuth represented a surety company that completed a construction project after the contractor defaulted. When the job was completed, there was a substantial final payment due from the City to the surety. The defaulted contractor (now in bankruptcy) brought an action against the surety and the City. The contractor claimed that this payment would result in the surety receiving a surplus over and above its reimbursement for loss and expenses. We were able to get the **complaint dismissed**. Bankruptcy Judge Jerome Feller held that under the laws of New York, the surety had no obligation to reimburse the contractor for any surplus that accrued on completion by the surety⁸.

Our Firm

You may have had dealings with our Law Clerk, Glenn P. Warmuth. Glenn has worked for Stim & Warmuth on and off since 1987. Glenn is in his last year at St. John's University School of Law. He received an "A" in Creditor's Rights last semester which will definitely benefit our collection and bankruptcy practice. This semester he is learning all about Trusts &



Estates and Administrative Law. Glenn has researched several issues for our estate practice and for our appellate briefs.

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¹*In re McCormack*, 203 B.R. 521 (Bankr. D.N.H. 1996).

²*In re Fiorillo & Co.*, 19 B.R. 21 (Bankr. S.D.N.Y. 1982).

³*Denoyelles Co. v. Requa Electrical Supply Co., Inc.*, 155 Misc.2d 451 (1992).

⁴*In re LoPriore*, 115 B.R. 462 (Bankr. S.D.N.Y. 1990).

⁵*In re Millerlee Corp.*, 70 B.R. 780 (Bankr. S.D.N.Y. 1987).

⁶*See Fiorillo*, 19 B.R. at 24.

⁷Business Corporation Law Section 306.

⁸*In re John's Insulation, Inc., Debtor*, Case No. 194-20121-353, *John's Insulation, Inc. v. Hartford Accident & Indemnity Co.*, Adversary Proceeding No. 197-1405-353 (E.D.N.Y. June 23, 1998).

Stim & Warmuth, P.C.
83 Prospect Street
Huntington, NY 11743
516-673-6200