masuda funai

News & Types: Commercial, Competition & Trade Update

Slow Creditor Loses Out on Chance to Collect $8 Million

12/13/2013

Practices: Commercial, Competition & Trade, Litigation

There are cases when creditors, who are rarely favored with the passage of time, wait far too long to collect their debt. An example of a creditor who waited too long is the recent case of *Apex Digital, Incorporated v. Sears, Roebuck & Company* (7th Circuit Court of Appeals, No. 12-3115, November 20, 2013).

Apex was an electronics supplier to Sears. Not unusual for big retailers, Sears applied a number of withholdings and charge-back deductions against Apex which eventually added up to almost $12 million. Apex also claimed more than $3 million in unpaid invoices. Apex filed a complaint against Sears claiming over $8 million. (The discrepancy was not explained in the opinion.) But the District Court held, and the 7th Circuit Appeals Court agreed, that the claim was filed too late.

The applicable statute of limitations is Uniform Commercial Code 2-725 which states, "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." Of course, the issue was when the cause of action accrued. There were a number of choices the court could have made.

- September 12, 2003 – Apex and Sears enter into a "Universal Terms and Conditions" (UTC) agreement. Apex and Sears start to conduct business and both parties' records reflect a "Net 60" payment term, meaning payment is due sixty days form the date of invoice. During its business with Apex, Sears applied withholdings and charge-back deductions.
- July 6, 2004 – Sears implements a Program Agreement to create a return reserve on Apex's account. In spite of it being termed an "Agreement", the court characterizes it as "an internal accounting mechanism used to place a negative dollar deduction on Apex's account. In other words, Sears would hold back any payment to Apex until the amount showing owed by Sears exceeded the amount of the reserve."
- November 9, 2004 – Apex issued its last invoices to Sears and, based on terms, payment was due by January 8, 2005.
- December 21, 2004 – Sears made its last deduction against Apex's account.
- March 6, 2009 – Apex filed its complaint against Sears.

So there are a number of possible dates for when the cause of action accrued. But what they all have in common is that they are more than four years prior to Apex filing its complaint against Sears.

So the court did not seem to labor much in determining the exact date upon which the cause of action accrued and the statute of limitations began to run. At one point in the opinion, the court states that December 21, 2004 (the date of Sears' last deduction) was the date when the statute of limitations began to run. But it also seemed to agree with the district court's conclusion that the breach occurred no later than January 8, 2005, which is the due date of Sears' payment of Apex's final invoice. The appeals court concludes, "Thus, on January 8, 2005, Apex had a legal right to demand payment from Sears."

Apex did not help its case in the proceedings. The court acknowledged that, on a review of a grant of summary judgment, the court will construe all facts and inferences in the light most favorable to the non-moving party (i.e., Apex). But Apex failed to properly respond to Sears' statement of facts in support of its motion for summary judgment, so the court accepted all of Sears' unopposed material facts as true.

Even with that, Apex was not without arguments. Apex argued that Sears' payment obligations were "advances against a debt" and payment was not due until Sears' final return of products in 2006. So Apex argued that a final accounting was required before the cause of action accrued. Apex asserted that the net 60 terms were not part of the Agreement, as they were not included in the UTC, purportedly an integrated document not to be supplemented or modified without the written consent of Sears. But the court viewed the parties' conduct which consistently reflected payment on 60 day terms. Once Apex knew Sears was not going to pay according to these terms, it had a legal right to demand payment.

"Apex sat on its right to sue for money that it was allegedly owed by Sears. This is the precise behavior that Section 2-725 of the UCC prohibits. Apex's claim has expired and it cannot prevail against Sears."

It seems very unlikely that Apex, in a litigation game of chicken, wanted to see how close it could come to the expiration of the statute of limitations before filing its complaint against Sears. Even crediting Apex's argument that the claim accrued in 2006, this still meant that Apex waited around three years before filing its complaint. What seems more likely is that the amount sat on Apex's balance sheet (or in a footnote) for years before someone decided to see if it was collectible.

The obvious lesson for creditors is waiting too long is bad. But another lesson is to carefully monitor when a cause of action accrued. The court is clear that a cause of action can accrue even if the amount is not fixed or not liquidated. Assuming there is plenty of time to take action and sitting on claimed rights is probably the worst mistake.

For more information about this article, contact Stephen M. Proctor, Chair of the Distribution and Sales Group, at 847.734.8811 or via e-mail at sproctor@masudafunai.com.