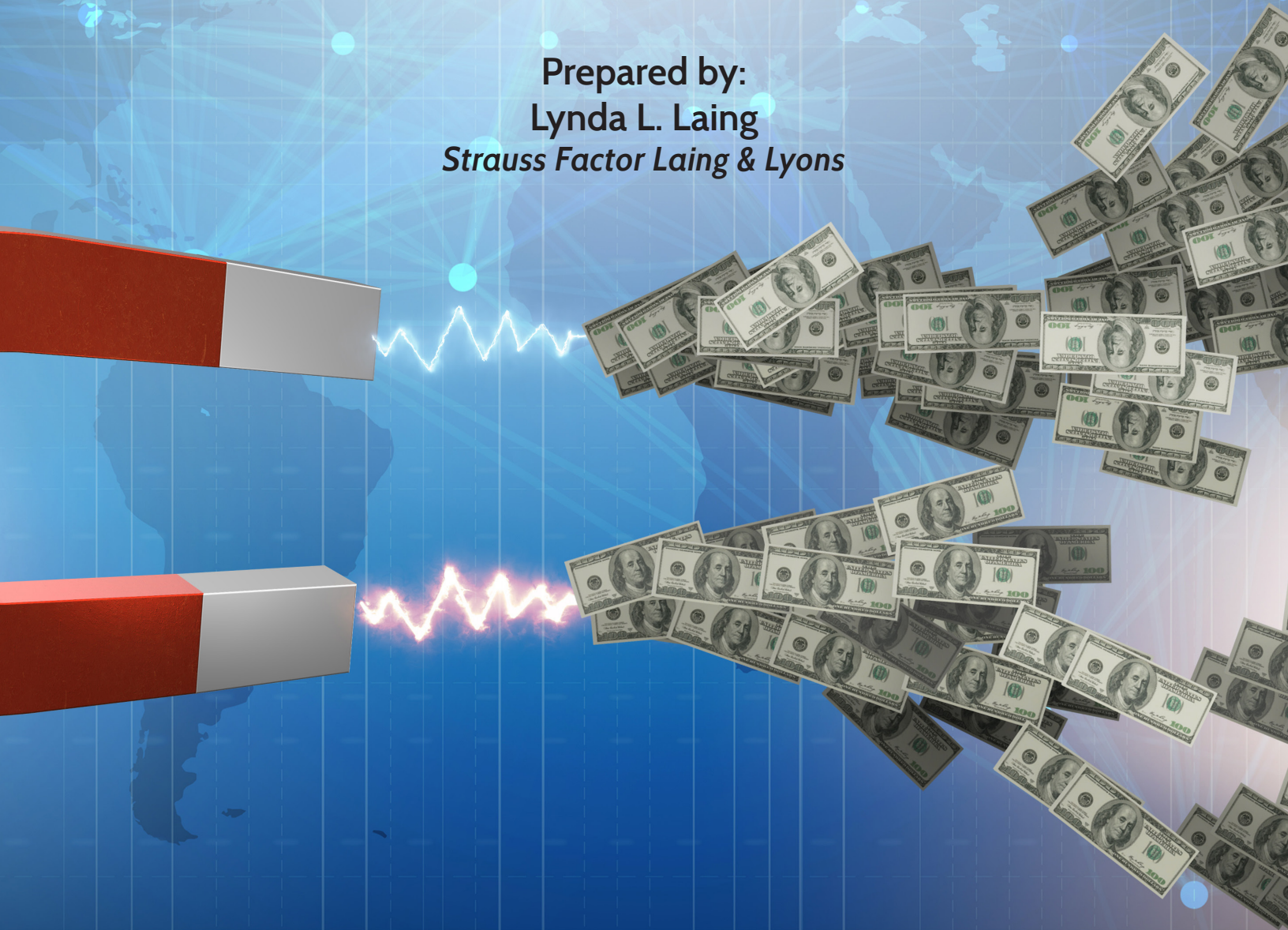


Handling Unique Collection Situations:

International Collections and Contracts and Personal Guaranties

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Published on www.lorman.com - March 2022

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Handling Unique Collection Situations

INTERNATIONAL COLLECTIONS

International collections may require co-counsel in the country you are proceeding in. However, if your defendant has contacts with your state, an attorney may serve the State's process in the foreign country if the country signed the Hague Service Convention. Depending on the country, you may be able to use the Hague Envoy platform at USM94.com to complete the forms. Make certain the document is complete and concise and it must be signed by a court official or an attorney. Some Countries may require the summons and complaint to be translated. Under Article 5, the forms must be sent to a central authority in the foreign country for service. The service may take 4 to 12 months for processing. Article 10 allows mail service if the country has adopted Article 10. For example, Germany, Switzerland, and South Korea do not allow such service.

Subpoenas must be served by letter rogatory for all countries. For countries not signatories to the Hague Service Convention, letters rogatory must be used for service of the summons and complaint. Letters rogatory are a formal request to issue a judicial order from a court where the proceedings are underway to a court in the foreign country. The foreign ministry will forward the papers to the local court where the defendant resides.

Our office will handle foreign companies' collection matters in the United State against Rhode Island companies. When negotiating your contract, make certain the client understands your state's laws concerning appearances on depositions and attorney fee awards. Review the contract as it will be important to determine what countries law applies. Be prepared to hire translators if needed and you may need to collaborate with local counsel in the foreign country if that law applies.

CONTRACTS AND PERSONAL GUARANTIES

A contract is formed when the parties enter into an agreement that defines the rights and duties between the parties. Depending on the contract, a party extending credit can require a personal guaranty. For example, a company selling goods to a company under a credit agreement may require a personal guaranty of the owner. Usually, the Lender requires the guaranty, so the creditor has the ability to collect from all parties if the Loan goes into default. The SBA requires a guaranty by a person who has an ownership interest of 20 percent or more. By having a guaranty, the business may receive a lower interest rate or increase the amount it can borrow.

Both documents must be clear and not ambiguous on its face. If there is any ambiguity, the documents are construed against the draft person. The language in the personal guaranty can be for future advances. For example, in **Rhode Island Depositors Economic Protection Corporation v Coffey and**

Martinelli Ltd. Et al. The defendants signed a personal guarantee when the first loan was made to the firm. The Bank also gave a line of credit to the defendant firm. A third loan was made 2 months later. The guarantors argued that their guaranty did not apply to the third loan. The Court disagreed and held that the guaranty did extend to the 3rd loan. The court reasoned that the loan agreement provided that "the note and all presently existing and hereafter arising indebtedness shall be secured by... the guaranty."

A party to a guaranty can raise a defense that the party was fraudulently induced by the other party to the contract when he signed the contract. If such fraud occurred, the contract is not binding. The party raising this defense must assert it as an affirmative defense.

A guaranty can be discharged in a Chapter 7 no-asset case. If a Chapter 13 bankruptcy is filed, the creditor may receive payments as set forth in the approved plan.

Be careful of defenses raised on guarantees. If the promissory note has a usurious rate the loan and guarantee can be void. In Rhode Island, interest rates of more than 21 percent per annum are deemed usurious. RIGL 6-26-2(a.) A borrower is entitled to recover any amount paid on the loan and the loan is void.

Be careful of the signature on the guaranty. If the person signing the guaranty adds his business status, the guaranty may not be valid. For example, if I sign a personal guaranty as Lynda

Laing, President. My signature raises an intent issue as to whether I intended to sign in a personal capacity.

Finally, a guaranty must not be revoked. Most guaranties have a method to revoke a guaranty so make certain your defendant has not done so when you decide to enforce the guaranty.

Many potential clients ask if text messages can form a contract. It depends on your state's statute of frauds law. If the statute of frauds requires the contract to be in writing if performance is longer than 1 year or if the contract concerns real estate, a text message will not be sufficient. However, if the contract is to be performed in a year and it contains all the terms of a contract, the text message may form a contract. The basic elements of a contract are an offer, acceptance of that offer, and some form of consideration.

The case of **St. John's Holdings, LLC v Two Electronics, LLC**, No. 16-P-1701 Appeals Court of Massachusetts 2017 held that text messages could be considered concerning whether St. John's broker had the authority to bind a contract between the parties. The court held the broker did not have authority to bind a contract based on a text message between the parties. To be safe I suggest that if you do not want to create a contract in your text message, state that is your intent.



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