Scribbles Squibs[1] #52 (December 14, 2016):

SECURE YOUR CONTRACT CLAIMS WITH 'REACH AND APPLY' ACTIONS

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I. INTRODUCTION.

For (unfortunately) many of our readers, the following may seem all too uncomfortably familiar (and painful). Somebody owes your company money. You sue. In superior court, that's about five years before you get to trial. That's five years of your lawyer billing you monthly, largely helping to pay for his new Rolls Royce.[2] You try your case and you win your case. The court gives you a 'judgment'. And, with that judgment, the clerk's office gives you an 'execution', [3] which is the paper you give to the sheriff to use to go and try to collect your money. Only to find out that five years later (and a lot of your personal time engaged in the litigation process), the defendant can't pay the judgment. Which leaves you . . . . holding what exactly? The proverbial bag. With nothing in it.

In the suing business, we try to avoid, whenever possible, filing 'unsecured' contract complaints/actions. An unsecured complaint/action is a lawsuit in which there is no remedy asserted from which the anticipated judgment can be paid. Claims against payment bonds and mechanics' liens are examples of 'secured' claims, as are bank account attachments and real estate attachments where available.

A 'reach and apply' action is another way of securing your anticipated future judgment.

So, what is a 'reach and apply' action?

II. A 'REACH AND APPLY' ACTION.

A. WHAT IT IS.

Let's assume that someone owes your company 50k for work that you have done at a certain project. There is no payment bond to sue and/or a mechanic's lien either isn't practical or may not be sufficient or available. Your debtor refuses to pay you. In fact, after a while, your debtor won't even return your phone calls or emails. Your debtor is, however, performing other contracts for other general contractors/owners.

In an appropriate case, you can apply to the superior court for an injunction to attach not only what monies are presently owed to your debtor on one or more of these contracts but such

future monies that might be owed to your debtor by his contracting party. (We'll assume his new contracting party is an owner, although it could just as easily be a subcontractor.) If you are successful in getting such a court order, typically what this means is that the next 50k owed to your debtor on this project can not be paid to this debtor but must be held 'until further order of the court' to abide further action in your legal action.

And, since it won't be clear whether or not your contracting party will actually be entitled to receive further/future payments on any specific new project, you try to get this order on two or three or even more such projects, not limiting yourself to just one project. While your debtor will likely argue to the court that this 'over secures' your claim (by attaching 150k on a claimed debt of 50k), your response is that this is necessary because there is no way for you to tell what further/future payments your debtor is/might be entitled to as to any particular contract. Maybe, the new owners will have counterclaims against your debtor's claims. Maybe your debtor will be terminated on one or more of the new contracts and/or fail to complete one or more the new projects. Thus (goes your argument), it is necessary for you to attach several different projects for these reasons.

A 'reach and apply' action would generally be just one 'count' of a complaint you file seeking payment. So, the underlying contract claim would also be a count, as might also be, for example, a claim for unfair and deceptive trade practices. Thus, a reach and apply action doesn't replace a contract claim. It simply augments and supports it.

B. WHY THIS WORKS.

When this works, it works for one or more of the following reasons.

First of all, since your debtor does not have the ability to use these monies for performing his[4] new contract, there is some incentive for him to use the attached monies (or other of his monies) to avoid this or other litigation you might file to collect your money on the job you did for him. He'll do this, if for no other reason, to minimize his legal costs on a case he can't win and to avoid damaging his relationships with his new owner(s). (We only care about getting paid and not for what his motivation might be.)

Secondly, when such an order is applied for, this may cause your debtor's owner to question his legitimacy. For, if he didn't meet his payment obligations to suppliers/subcontractors on this other project, might that not be an indication that he might not be paying material suppliers/subcontractors on this owner's project? This might cause the new owner to require your debtor to provide a payment bond for this new project. Or, this might have the new owner insisting on verifying payments to the new material suppliers/subcontractors by requiring partial lien waivers or releases for each and every requisition. Or, the new owner might insist on directly verifying with your debtor's material suppliers/subcontractors that they are getting paid and, if so, how much. Or, the new owner might insist on issuing joint checks for this new project. Your debtor will probably not want any of these things to occur. Any of these things potentially changes the dynamic your debtor has with his suppliers/subcontractors, causing him to lose leverage.

Thirdly, this may work as the new owner is likely to get seriously pi**** off. For, if contract money is restricted for the new project, your debtor might not have enough money to pay his material suppliers/subcontractors, which can increase the likelihood of mechanics' liens on the new project. And, since the attached monies will not be available to your debtor to perform the work of the new contract, this increases the possibility of your debtor's not having enough money to finish the new project. Apart from this, the new owner now has to participate in a lawsuit, with all of its attendant notoriety and attorneys' fees and court costs.

Note, that the new owner will not itself be liable to pay for your claim out of its own funds. Still, for all of these various reasons, the new owner will not want to have to participate in this litigation.[5]

III. LIMITATIONS ON REACH AND APPLY ACTIONS.

A. THESE WORK BEST WHEN DEALING WITH 'CLEAN CLAIMS'.

You will be applying to the court for an injunction or court order. One of the requirements of obtaining such an order is for you to be able to make an initial clear presentation that you have 'a reasonable likelihood of success on the merits' as to your underlying contract claim. In reality, this almost requires you to be able to quickly and convincingly demonstrate to a judge that you have a liquidated debt rather than a simple 'claim'.

If, on the other hand, your contracting party has a backcharge or counterclaim to your claim or there are legitimate 'performance' issues as to the work you did, it is unlikely that you will be successful in getting a reach and apply order. It is only when there is a reasonable chance of success that the increased cost of this type of complaint is warranted.

C. THE INITIAL PREPARATION COSTS FOR A REACH AND APPLY ACTION MAY BE SIGNIFICANTLY MORE EXPENSIVE THAN WITH AN ORDINARY, SIMPLER COMPLAINT IN THE SHORT RUN, WHILE BEING LESS EXPENSIVE IN THE LONG RUN BECAUSE, WHEN SUCCESSFUL, THERE WON'T BE A LONG RUN.

This type of court claim/complaint is more cost-intensive at its beginning. It necessarily involves a more complicated court complaint.

Let's compare this with a typical construction claim, such as a suit on a payment bond. Other than for the time necessary to review a client's files, the preparation of the complaint filing package itself is relatively minimal. Let's say the preparation of the complaint, the letter to the court and the preparation of a civil action cover sheet, all of which is required for the filing of a superior court action, takes 3.5 to 4.0 hours. Multiply that time by the operable hourly rate (after adding in some file review time preparatory to drafting the complaint) and you have some sense of what getting the ball rolling is likely to cost.

And, the filing of most litigations does not require any trips to court before the action gets filed. It's something that the lawyer prepares and sends in to the clerk's office. You possibly won't even see the complaint before it gets filed.

The intended purpose of a court complaint is to simply tell the defendant what your claim is about. It is not intended as actually proving the allegations therein contained. The complaint itself doesn't prove anything and doesn't constitute any form of evidence. It wouldn't ordinarily be an exhibit if the case goes to trial.

And, it doesn't necessarily have to be very long. I've been involved with some significant six and seven figure personal injury cases where the complaint was only one page long.

How is the preparation and filing of a reach and apply action different?

First of all, the content of the complaint will be more extensive. It will necessarily have to be more comprehensive and longer as, unlike the ordinary complaint, the complaint itself is some form of evidence, at least as to whether you state a claim that would justify a court's granting a reach and apply attachment/injunction.

And, while a client does not sign or 'verify' the ordinary lawyer-prepared complaint, the client will have to verify under the pains and penalties of perjury the factual content of the reach and apply complaint.

Secondly, the filing of a reach and apply complaint will probably require at least two visits to court. The first is to file the complaint, at which time the lawyer will ask that the court issue a 'short order of notice' for a court hearing on the request for the attachment within a fairly short period of time: typically, within ten days to two weeks. Since a party is only entitled to get a 'short order of notice' as the result of the filing of a motion for such, along with the actual filing of the complaint itself, this is the business of the first visit. The second visit will be the actual hearing on the request for a reach and apply attachment.

Thirdly, the complaint for a reach and apply attachment will typically be accompanied by a brief and, quite likely, factual affidavits where a witness – typically, the client – sets forth the transaction in some detail. There may be various attachments to such affidavit(s). And, unlike with the filing of a typical complaint, here the content of the complaint and of the affidavits offered in support of it is intended to try to convince the first judge who looks at your case that you do have a reasonable likelihood of success on the merits.

As a fourth point, while comparatively unimportant, the costs for the filing of such an action in terms of having to pay for the preparation of an injunction and for a more elaborate form of summons, are higher.

At the same time, in the appropriate circumstance, this may very well be worth the extra cost and effort. For, when your debtor is faced with you seriously upsetting one of his current customers – who will be named as a defendant and who will have to be represented by counsel,

in all likelihood – if he can pay you, he is more likely to do so in the face of a reach and apply action. So, although this is a more complex procedure initially, it has a greater likelihood of getting you paid much sooner than with a typical complaint. A plaintiff – the party suing - should know within a month or so of the filing of a reach and apply complaint whether or not the judge will issue a reach and apply attachment/order. With a typical construction case, the case will not reach trial for five years, possibly longer (depending on the county).

One should keep in mind that even if a party is successful in getting a preliminary injunction giving the reach and apply attachment, this is something that is only preliminary. Meaning, this order could be changed or reversed somewhere down the road. It is not in any fashion an adjudication of the merits. But, as a practical matter, the obtaining of a reach and apply injunction may assist with a successful completion of a court case without any further hearings and with no discovery. This can lead to all kinds of savings with fees and expenses. For example, the lawyer: (a) will not have to prepare a pretrial conference memorandum; (b) will not have to prepare witnesses for deposition and trial; (d) will not have to prepare trial briefs and various attendant filings, such as requests for finding of fact and for rulings of law. Avoiding some of these steps should make one's overall legal fees and court costs significantly less.

One of the biggest savings, however, is in minimizing your own personal investment of your own time to reach a successful result. Contractors make their money in preparing quality estimates and in excellent project management. Whether it is you or me or Donald Trump, none of us has any more than 24 hours in a day.

IV. THINGS YOU, THE CLIENT, NEED TO DO TO PREPARE FOR POSSIBLE FUTURE REACH AND APPLY ACTIONS.

The key thing is for you to be able to know where your debtor/contracting party is currently working and will be working. Your lawyer has no inherent ability to develop this type of information other than through discovery, the use of private investigators or through just plain ingenuity.

Oftentimes, once it is time to sue, you have to sue. Meaning that this is not the time to be thinking about – for the first time – what other jobs your guy is working on. Your lawyer will need this information. Now!

Where can this information be found? There is no one source. Here are seven ideas:

(1) Contractor periodicals indicating who the low bidder is on a public project.
(2) I get a lot of this information off of the debtor's own website, where the debtor identifies what jobs it has that are ongoing or are about to commence.
(3) Since most workers will spend a lot of time together at a jobsite – including during breaks and lunch – training your employees to actively seek this information out from your debtor's employees can be useful.

(4) Many debtors attempt to delay paying through getting you to accept ‘payment plans’. Trying to get this information as to other present and future jobs as part of the ostensible process of your considering whether or not to participate in a payment plan might be useful. E.g., the debtor says: “I’ll pay you one thousand dollars per month for the next five years.” Your response? “How do I know that you’ll actually have the ability to do this? From what job(s) are you going to pay me?”
(5) Since a debtor rarely just owes one contractor/subcontractor/supplier, you might be able to get some of this information from your competitors, who may be having similar problems in getting paid.
(6) Follow the debtor’s trucks from the yard at seven am. (One of my clients has claimed to do precisely that.)
(7) One credit management organization I am familiar with has periodic lunch or dinner meetings where after the food is consumed, someone locks the door and the various credit managers discuss who their current problem accounts are.

V. CONCLUSION.

Perhaps only about one percent of all superior court civil cases actually goes through the entire trial process.

There are only three real responses your contracting party might have after receiving your bill. To the good, responsible contractors tend to reasonably promptly pay their bills. To the bad, if a company simply doesn’t have the resources to pay you, there’s not much that can be done about that.

We try to focus our energies on those debtors who can pay but won’t, unless and until you give them a good reason to do so (or until they feel like it).

Tying up their money on other jobs along with how poorly this will play out with their current and future contracting parties can be helpful in getting that kind of debtor to say ‘yes’.

Put another way, assuming the debtor has some ability to pay you, those payment inclinations can be stimulated when the pain of not paying you exceeds the benefit of holding on to your money.

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OUR WISHES TO ALL FOR HAPPY HOLIDAYS AND A HAPPY (AND PROFITABLE) NEW YEAR!
AS TINY TIM SAID, "GOD BLESS US, EVERY ONE!"
AND (NOT BEING PARTICULARLY POLITICALLY CORRECT), WE'D LIKE TO WISH EVERY ONE

MERRY CHRISTMAS!

[1] A s*quib* is defined as 'a short humorous or satiric writing or speech'. If that definition doesn't float your boat, Wiktionary defines *squib* as "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

[2] Many of us in the 'burbs' aren't as pricey as some big city lawyers. Rolls Royces? Get real! We're talking post Great Recession here, where we all have had to learn to do with a great deal less. We drive a much more economical car. That would be a Bentley. You can get a Bentley with an eight cylinder engine rather than the double R's twelve cylinder engine, which is a real cost savings. A downer is that Bentleys don't seem to come with umbrellas in the doors. We solve this problem by buying umbrellas at CVS and then unobtrusively duct taping them to the doors. Not being able to decide on a color, I do have three of them. Of course, that only takes me through Wednesdays, after which point we are now talking bikes. For New England weather in the winter time, at least one of them would have to be a Ural, which is a three-wheel Russian motorcycle (most of them come with sidecars) which goes through almost anything, ice, snow and mud included. You can get a base model for about 15k and a really nice model for about 26k. One of the accessories one can purchase for $114.99 is a machine gun mount. That is, you know, something you can use to help you attach your, uh, machine gun to the bike. Those able to afford this option may tend to need legal assistance less frequently. But, they'll have to have, at minimum, a pretty serious Massachusetts License To Carry. Me? I'd rather rely on Rocco and Luigi. Of course, when you own one of these bikes, you are no longer a 'biker'. You are a comrade, Comrade!

[3] Empirical evidence has proven time and time again that the threat of an 'execution' is, in many instances, an effective strategy to pursue as an aid in encouraging the accounts payable-challenged to pay up. Quickly. Of course, we are talking about the court kind of execution here. Being court officers, that's the only kind they allow us lawyers to deal in - at least, officially. Some debtors I have pursued have (rather recklessly) alleged that I must have had Tony Soprano on speed dial until he died. Me? I'm not saying. I did lose, though, all respect for him after seeing what he did to Christopher. And, it's not like Tony didn't have a few character flaws and idiosyncrasies of his own. Let's start with all of that incessant throwing up! And, having to go to a head doctor to deal with his panic attacks. Is that the mark of a real hoodlum? One you can truly be proud of? Not in our book! A real man might have panic attacks. But, he knows enough to have them privately.

[4] We'll use, for convenience, 'his' rather than 'hers' or 'its'. Where appropriate, any of these is intended.

[5] Readers of prior Squibs may recall that a seriously annoyed general contractor or owner is one of the two basic reasons that mechanics' liens work.