

To Sue Or Not To Sue: What Are The Questions?

By: Jim Hagen

One of the most confusing (and maddening) aspects of the collection process is the one that comes last: Litigation. Like it or not, most creditors, sooner or later, find themselves faced with the decision of whether to file a lawsuit against a delinquent customer. Knowing enough about the process of litigation, and about the factors that determine your probability of success, can make that decision (and its follow-through) a good deal simpler.

When should you sue?

Before you go calling Johnnie Cochran, it's a good idea to first determine what the results most likely will be if you *do* decide to sue. First, ask yourself what should be an obvious question: Am I going to win? Companies waste a lot of money that they already have, chasing money they don't (and probably won't). Take a hard look at what your debtor promised, and what the breach of that promise entailed. Is there a solid chance that a counter-suit will be filed against you? Did you perform all your own duties under the contract? Is the contract in writing? (This is not essential, but it simplifies your case.) And finally, are you sure you know where this person is, so that he can be served? When you sue someone, that person must be formally served with the complaint you have filed. In most jurisdictions, an individual called a Process Server must perform this service personally. Since a fee is charged for each attempt, if you're not sure where to find your debtor, you can run up significant costs before you even get started.

This brings us to the next obvious question to ask yourself: Are my damages large enough to justify all the costs I'll likely incur by suing to recover them? The cost of serving the debtor is just one of them; there are filing fees (also called "court costs"), travel costs for witnesses, non-contingent suit fees (fees paid to an attorney if your case goes to trial) and a host of other fees that must be paid in order to spin the wheels of justice. While no one wants to let a debtor off the hook, the only sensible policy is to set a minimum dollar threshold, below which amount you will not go to court to recover. However, keep in mind that you don't necessarily have to generate a large cash net-back in order to justify litigation: Some companies will gladly just break even, in order that their customers don't get the idea that their collection policies are lax.

Okay, so you've got an ironclad contract, a clear breach, and damages that would justify a ten-year trial. A no-brainer -- you file today, right? *Wrong*. All you have right now is a very good chance of getting a judgment -- try paying your rent with one of those. What if the company you're suing doesn't have any assets? What if they file for bankruptcy? What if they simply close up and disappear? A judgment then becomes worthless, and if you've gone all the way through the process of obtaining one, you're now out considerably more than the original amount owed. In order for you to turn a judgment into cash, it must be *executed*, and you can't execute a judgment where no assets exist. So before you consider litigation, you must also consider whether the debtor has enough assets, and enough stability, to make the effort worthwhile.

How do you begin?

If you've gone through the above process, and determined that litigation is both justified and likely to be successful, then it's time to get a lawyer to file your claim. Most collection agencies offer legal services, including obtaining counsel local to the debtor, managing the paperwork, and keeping you apprised of the progress of your claim. They typically charge a fee of 5-6% of the collected amount for this service (not including the fees the lawyer will charge), and the fee is *contingent on you collecting from the debtor*. For most companies, especially companies with out-of-state debtors, this is the best way to proceed. If all your debtors are local, or at least local to your field offices, then you may want to obtain your own counsel, but the chances are you'll pay just as much as you would have with an agency (even *with* the surcharge), because of their attorney discounts. Either way, your claim will be filed, your debtor will be required to

“Answer,” or respond to your claims, and the lawsuit proceeds. In many cases, it won’t get much farther than this – debtors with assets to attach don’t want a judgment to authorize attaching them. They’ll offer to settle, and you’ll have to decide whether to accept their offer. Don’t get too greedy – remember, the fee clock is ticking.

If they don’t make an offer, and you go through the process all the way to judgment, then that court proceeding is over. That’s right – the court doesn’t get your money for you! You have to do that yourself, or more likely, have your lawyer or agency do it for you. You may be able to attach bank accounts, place liens on property, garnish wages, or utilize any number of other collection mechanisms in order to satisfy your judgment. But remember, the same rule applies to collecting on your judgments as applies to every other collection: Don’t throw good money after bad. Just because you’ve already invested a lot of money to collect a debt, it doesn’t justify spending more if the outlook for success is bleak. There’s always another debtor – go start on someone else.

Lawsuits are expensive, time-consuming, and not always successful. But they also are a necessary component of any comprehensive accounts receivable strategy. If you’ve done your homework, weighed the costs, and calculated the risks, then there’s no reason to fear the court system – go get ‘em.