

Evaluating Your Claim for Suit

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Collection efforts have not been successful in collecting your past due balance, and you are considering a collection law suit against your debtor. The purpose of this article is to review some of the practical considerations in evaluating your claim for suit.

a. Do you have a good case? Every story has two sides. If you're a parent, you know that to be a fact. Before you punish Johnny for hitting Susie, you have to hear from both kids so you can figure out exactly what happened. Even that may not be enough, but you'll be closer to the truth than if you hear only one side of the story. Lawsuits (as well as alternative dispute resolution) work the same way — you state your side, the debtor states his side, and a judge or jury (or mediator or arbitrator) tries to sort out what really happened. So find out your debtor's interpretation of the facts, and figure out your debtor's theories as to why you shouldn't be paid.

You also need to assess your own case and determine whether it's strong enough to win in either ADR or in court (we discuss both options in this chapter). Your evaluation of the evidence should include

- * **A review of any letters or other written communications exchanged with the debtor, and your notes on any comments made orally.** (It's very important to keep notes of all discussions with a debtor.)
- * **An analysis of the debtor's likely claims and defenses.** Determine whether you have sufficient information, evidence, and documentation to counter what you expect the debtor to say. Don't expect the judge or jury to simply take your word for what happened — you should be able to produce documents to support your position.
- * **An objective evaluation of the data before you.** It's easy to take the position that you're right, and therefore, you should win and the debtor should lose. Instead, step back and ask yourself whether the debtor may score some points with the judge or mediator based on your knowledge of or instinct about what the debtor's going to say.

Sometimes it's impossible to predict whether you'll win a lawsuit. When you're getting started, you're more likely to choose to hire a lawyer or get a "reality check" from collections professionals you work with. Over time and with experience, your forecasting skills will sharpen, and you'll become very good at

assessing whether a particular case is strong enough to win. Just look at how accurate weather forecasting is, now that the weather folks have experience . . . okay, bad example. Fortunately, collections cases are less susceptible to chaos theory than weather predictions.

What if you don't think you can win your lawsuit? You find problems with your documentation, you have a key witness quit and either become unavailable or too risky – such as an ex-employee with a grudge – or the debtor has strong defenses to your claims? Then you need to consider your options other than litigation, such as settling the case for whatever you can convince the debtor to pay, or writing off the debt. Generally speaking, it's not a good plan to try to win in court despite your awareness of serious problems with your case.

b. Does the likely outcome justify the costs of suit? Even if your claim is being handled on a contingency fee, there are costs to consider, the costs of suit, rarely less than \$300, and the potential costs of providing documents along with any travel for hearings, trial etc. If, for example, your debtor has a disconnected phone, mail is returned and the like, well, minimal, if any, costs may be justified!

c. Do you have the documents/witnesses? Invoices, delivery receipts, credit app (the agreement), ledger, etc....are they available? Is the witness who dealt with the debtor available or do you just have a "keeper of the records" person with no real knowledge.

d. Statute of Limitations and other concerns. Sale of goods, 4 years, other contracts may be 6 years or longer, but look at the documents, find the date of last payment.

e. Some states are more expensive than others! Let's say you have two accounts you plan on suing, only 20 miles apart, but in two different states..the costs for a suit, judgment and a writ of garnishment in one may be over \$750.00 while the other state may only charge \$250.00! I'm thinking of Pennsylvania and Ohio, but I'm sure there are many more examples. However, ***investing \$500 or even \$750 to collect a large account is almost always worth it if the debtor is reasonably believed to be collectable!!***