

10 Questions to Ask *Before* Deciding to Sue a Debtor

You placed your claim with a collection agency. They've done their best to collect, but the debtor just isn't budging. They tell you that your only option is filing a law suit. That's going to cost you some out-of-pocket expense for court costs and possibly non-contingent suit fees.

ABC-Amega's Vice President, International & Corporate Quality, Robert Tharnish, suggests you get the answer to the following ten questions before making this important decision.

1. **Is your claim large enough to sue?** Most attorneys in the United States will not file a collection law suit under \$1,000 or even \$2,500. It's just not worth their while, and most likely wouldn't be worth yours either.
2. **Is the debtor still in business?** Seems like a no brainer. But if the firm is not in business, the assets have probably already been distributed and/or sold. Unless you have a personal guarantee from the owner or an officer, there's not going to be anything to collect on.
3. **If the debtor is not a corporation, is there an address where Service of Process can be made?** In the United States, Service of Process is the procedure whereby the debtor is given notice of the legal filing. In the case of sole proprietorships and partnerships, service must be made at the owner's primary place of business or residence.

If the debtor is a corporation, service should be made on an officer of the company. However, if that's impossible for some reason, service can be made on the Secretary of State where the company is incorporated.

4. **Does the debtor appear to have sufficient assets to satisfy a judgment if one is awarded?** Unless you simply want to make a point, or are hoping the debtor's business will pick up in the future, suing a debtor that doesn't have the ability to pay a judgment, even if you get one, may not be worth the time, effort and expense. However, some creditors will file suit just the same to get a judgment on record. In the U.S., the judgment will remain on file for 10 years and acts as a lien on any future assets.
5. **Does the attorney (or your collection firm) have any previous experience with the debtor?** If they have, they may also have a good idea whether the debtor has enough assets to pay a judgment. Or, exactly what his *modus operandi* (method of operating) is. Some debtors won't pay until a legal action is filed against them. Then they turn around and either offer a settlement or just pay up.
6. **Is the debtor disputing the account?** Are you sure you're in the right? If the debtor has any legitimate disputes of the account, you're generally better off accepting a settlement if one is

offered. Disputes might relate to quality, timeliness of delivery, non-performance of the contract, pricing changes, etc.

If the debtor feels he has a case, he might file a counter claim against you for damages. (See #8 below.)

7. **Can you supply sufficient documentation to substantiate the debt?** Here's a list of 5 minimum things you must prove in court to have any chance at winning:

- (1) You received an order from the debtor.
- (2) You and the debtor agreed on a price for the merchandise or service to be provided.
- (3) You delivered the merchandise or provided the service.
- (4) You made a demand for payment.
- (5) No payment has been received.

8. **Has the debtor threatened to file a counter claim (also called a countersuit)?** Defending against a counter claim can cost a lot of money and time. If you're not 100% sure that the debtor is wrong, and you are right, it's probably not worth taking the risk.

A countersuit is considered a separate action. Although you can use the same attorney for the initial filing and to defend the countersuit, the attorney will charge separate hourly fees for handling the countersuit.

Some debtors, even without legitimate disputes, will threaten or even actually file countersuits in an attempt to force you to back away from your lawsuit, or to accept a lower settlement.

9. **Will you be able to supply a witness if one is required?** If your case does end up going to trial (most are settled *out of court*), you will be required to provide a witness. An affidavit or deposition will not suffice. Before turning down any settlement offer, be sure to figure the costs of providing a witness into your calculation of the costs involved in pursuing a trial.

10. **Do the costs involved warrant filing a law suit?** Are they in line with what is owed? Generally, initial court costs should not exceed 10% of the value of the claim.

"Initial costs" generally include all of the filings required by the court to render a judgment. They usually do NOT include filing a Writ of Execution or any supplementary proceedings required to attempt collection, should the debtor choose to ignore the judgment. (See Robert Tharnish's article "Collection Suit Process: What to Expect".)

Conclusion

To determine whether there is a likelihood of obtaining a favorable judgment AND collecting it, carefully consider the answers to each of these 10 questions. If you've been utilizing the services of a professional collection agency and/or attorney, they should be able to guide you to the decision most favorable to your company.

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