

When a Claim Goes to Court

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When a creditor places a delinquent receivable with a certified commercial collection agency for collection, the creditor may authorize the agency, when necessary, to retain an attorney in the area where the debtor is located. The attorney is selected by the creditor and/or the agency with a specific provision that a lawsuit will not be filed without the creditor's prior authorization. It is incumbent on the creditor to determine whether the likelihood of recovery on the claim, and the probable amount of recovery, will justify the time and expense of litigation. Consultation by an agency and attorney can assist in that task. The agency and attorney can evaluate the claim for suit worthiness, establish the viability of the corporate entity (and personal guarantor, if applicable), determine if the statute of limitations has expired, examine the risks of initiating a law suit and discuss the willingness to defend a counterclaim if brought against the creditor.

Agencies forward claims to a network of attorneys across the United States and abroad. The advantage of using an agency's network is that attorneys receive many claims in their locale from the agency and represent many of the agency's clients. A tenured, certified commercial collection agency has long-standing relationships with attorneys who specialize in creditors' rights within each state. These relationships ensure that the attorneys handle each matter in an expeditious manner, represent the creditors with the utmost professionalism and provide detailed and timely reports of progress throughout the life of the lawsuit.

The Triadic System

Another advantage of using the network of attorneys is that certified commercial collection agencies utilize a law list publishing firm when choosing counsel to represent its clients. Law lists, as they are known, confirm that the attorney is a member in good standing of its state bar association, lists the areas of practice (in addition to creditors' rights) by the receiving attorney firm, and also outlines the counties within the state the law firm serves.

Most importantly, when an account is "forwarded over a list", coverage through a multimillion dollar insurance program from a commercial insurer is activated. This coverage protects the creditor on each claim which is forwarded from theft by a law firm. In addition to the aforementioned coverage, most attorneys listed on a law list carry their own malpractice policies as well. These coverages are in addition to the surety bond coverage that an agency is required to hold, according to certification requirements.

Operating Guidelines

The triad of law lists, attorneys, and agencies provides an effective method for the flow of forwarded business, while also ensuring that all lines of communication are open to keep sustainability. Commercial Collection Agencies of America's Operative Guidelines have been developed and adopted to provide best practices in the forwarding and handling of business through the triadic system. These operating guidelines are "intended to set forth the basic framework within which members can conduct business guided by good practices and mutual respect, to encourage proper and unambiguous communication, and to foster amicable resolution of conflicts."¹

When an account is sent to an attorney, an agency chooses an attorney in the venue in which the debtor is located. A common question asked by credit practitioners is why litigation is recommended in the debtor's state, especially if the contractual agreement with the customer may state other venue options. One answer lies in the benefits afforded in the post-judgment execution stage of litigation, which will be addressed later in the article.

The Guidelines put forth that both receiving attorneys and forwarding agencies should uphold certain responsibilities. Furthermore, it states that it is the duty of the forwarder (the agency) to make available to the receiver (the attorney) all information regarding the claim

1 Commercial Collection Agencies of America Operative Guidelines

from the creditor. If the creditor wants the matter reduced to judgment, the forwarding agency should alert the creditor that testimony may be required, answer all questions relating to the claim, and give full support.

Receiving attorneys are responsible for immediately acknowledging claims received from agencies, conducting reviews of claims and giving feedback to the forwarder for the creditor on each file, including a recommendation for a lawsuit if appropriate.

The receiving attorneys are expected to update the agency on status of the claim as new information arises and, in turn, the agencies furnish that information to their clients. The agencies diary their file in accordance with the timeline set out by the receiving attorney.

Certified commercial collection agencies have dedicated personnel who act as liaisons between clients and attorneys, whose responsibility it is to keep the client's credit department apprised of all developments of the claims.

Court Costs and Suit Fees

If the creditor authorizes the filing of a lawsuit by an attorney, the agency will inform the creditor of the court costs and suit fees requested by the receiving attorney, which are in addition to the contingent collection fees.

Court costs are defined as the sum of money required to cover the expenses necessary to file all the paperwork for a lawsuit from the filing of suit through the entry of judgment. Court costs vary widely in different courts and different counties and states. If there are unused court costs at the end of the process, those costs are refunded. If the court costs expended are recovered from the debtor, those costs are also remitted to the creditor. The agency normally receives an itemization of costs expended and, in turn, that itemization should be supplied to the creditor.

Suit fees are payable to the attorneys, in addition to their commission, for legal services rendered on behalf of the creditor in connection with the court action during litigation. For example, such services as the preparation and filing of the summons and the complaint, along with exhibits if required.

Attorney suit fees are also charged for appearances in court by the attorney. The attorney fees may be contingent, charged only

if the debt is collected and retained only out of recoveries or, more commonly, non-contingent. Non-contingent suit fees are payable in advance by the creditor regardless of any collection. Oftentimes, an attorney will request a combination of both contingent and non-contingent suit fees.

The agency will communicate the amount of court costs and attorney suit fees to the creditor. According to the Code of Ethics of Commercial Collection Agencies of America, "a certified agency is required to communicate the exact amount of the attorney fees and court costs as stated by the attorney-not an estimate."² A check for the amount of court costs and suit fees, made payable to the attorney, is usually sent to the agency to be forwarded to legal counsel. Alternatively, creditors send the costs to the agency and the agency then remits the costs to the attorney. Some collection agencies charge an additional administrative or service fee if the suit is authorized. The Code states that the amount of any such fee should be clearly stated in the collection agency's agreement with the creditor.

The Litigation Process

Once litigation is commenced, the attorney will report to the agency, and sometimes include a copy of the summons and complaint. A logical follow-up date is offered to allow enough time for service of process to be completed.

If the debtor does not file an answer to the complaint or does not make a formal appearance in the case within a specified time period, the attorney may motion the court to grant a default judgment in favor of the creditor.

If there is an uncontested default judgment, it usually will not be necessary to provide witnesses to verify documents or allegations in the complaint. In some cases, however, courts may require a witness even in default situations.

If the claim is contested, it is usually necessary to have one or more witnesses who are personally familiar with the issues and can attest to the authenticity of the documentation which supports the claim.

If the debtor files a counterclaim which will require the creditor's defense, the attorney may require a separate fee in addition to his/her usual suit fees. It is not uncommon for attorneys, at this point, to request hourly compensation.

2 Commercial Collection Agencies of America Code of Ethics

If the result of the litigation is a default or summary judgment, the attorneys will perform post-judgment execution in order to collect the funds due the creditor. Post-judgment remedies vary by state. In addition, property exemptions also are different from state to state. Local attorneys understand their particular state's laws, rules and procedures which produce the most effective post-judgment collection of the claim. The result is that the judgment creditor avails itself of all enforcement remedies in that geographic area.

Litigation is a slow process. While in some instances the filing of a lawsuit may prompt the debtor to settle the case, crowded court dockets and tactics utilized by debtors can often delay a judgment for many months - or even years.

While it is the attorney who is actually working for the creditor, the forwarding agency is expected to make certain that the creditor

understands the role of the receiving attorney. It is ultimately the responsibility of the forwarding agency to communicate the process to the creditor to keep the file moving efficiently and in a timely manner. The agency's conduit role educates and expedites the sometimes arduous process.

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