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To Sue…Or Not To Sue?

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Sometimes the most difficult part of a lawyer's job is to say "no" to a client. The job of a creditor's attorney is to maximize the monetary recovery for their client. It's all about the money. However, clients often want to sue when we believe it is not in their interest to do so. Here are some of the situations where the creditor should not sue.

If we know the defendant is not collectible. Every suit filed brings out the possibility of a counterclaim. The worst defendant is one that is uncollectible, but asserts a counterclaim. This means the creditor gets burdened with a lawsuit against an uncollectible debtor and has to pay out-of-pocket for defense of the counterclaim. While attorneys handle most collection cases on a contingency fee basis, counterclaims usually are defended on an hourly basis. Instead of making a recovery, the creditor ends up paying fees.

If the small claim is the tail end of a larger contract. Time and time again, we get a claim for a few thousand dollars that is the balance due on a contract ten times that number. When we sue for the small balance, we invite the debtor's attorney to carefully examine the entire transaction and possibly discover a basis to seek return of the amount already paid. When the creditor gets too greedy and wants every last cent, we invite the debtor to go on the offensive.

For example, there was a case which the creditor was a wholesale distributor of tile. The entire purchase for a project was approximately $50,000. The debtor paid all but the $5000 due to a dispute over the quality of the product. I counseled my client not to initiate litigation because it would jeopardize the $45,000 they already received. In addition, it would open the door to consequential damages. May client would not accept my recommendation and decided to litigate. As I predicted, we received counterclaims, but we were able to "wash out" our complaint and counterclaim. Unfortunately, the creditor did incur legal fees. The moral of this story is not to get too greedy.

If a suit is initiated by malice, intent to harm or make an example of the debtor. It's unlawful to file a suit where the primary object of that action is to cause harm to the defendant. Of course, the creditor can have more than one motive in filing a suit. However, if the suit is filed primarily to cause harm, both the creditor and creditor's attorney are in jeopardy. The debtor usually can figure out the motivation and will defend it with vigor. We all have read about lender liability suits in which loans made by a lender are motivated by malice. Collection cases involve money, and that is the best and most valid reason to sue.

If suits are initiated by professionals against former employees. When claims arise from professional services (such as medical, legal and accounting fees), the creditor always has to examine each claim to be certain that the suit is not giving rise to a dormant

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malpractice counterclaim. In addition, another area of danger that often comes up are suits against former employees. Not only does the debtor have special knowledge that the employee may be able to use against the creditor, but this also can dredge up a long-dormant claim for discrimination or other employee rights actions. Finally, any time the business relationship between a creditor and a debtor is complicated by a personal relationship, this is a signal for trouble because the creditor's attorney is usually not given all the facts in the beginning of a case.

If the major portion of the balance due represents late charges or interest on an open account. We are often confronted with situations in which debtors have paid a supplier out of the terms of the contract for years and owe substantial amounts of open account interest. Creditors feel that if they have a contract with the debtor, it requires the debtor to make these interest payments. However, if a creditor fails to enforce years of accrued interest, it is difficult for a court to take the creditor's position unless there is an express agreement to pay the interest. Sometimes as a creditor, it is better to be satisfied with a slice of the pie than the entire pie. If a creditor gets to greedy, it forces the defense counsel to actively seek ways to hurt the Plaintiff. The adage in the medical field is "above all, do no harm". This rule is applicable to law as it is to medicine.

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