

CLIENT MEMORANDUM

DISCUSSING ISSUES OF INTEREST TO OUR CLIENTS

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SHOULD I TAKE THE MONEY OR SUE: PRACTICAL STRATEGIES FOR COLLECTIONS

By Darryl J. Horowitz

In prior newsletters, we have discussed various collection tips that focus primarily on preventing collection problems before they start. But what happens when your customer calls you and, despite taking thousands of dollars of product or services from you, says they cannot pay in full within the terms previously agreed? They nevertheless offer you payments over time or some other arrangement. You, however, are steamed that despite the many promises to pay, payments have simply not been made, and you question whether your customer will ever pay you even if they again agree to make payment arrangements. You are thus faced with the decision of whether to sue or accept a repayment arrangement. This article will offer common-sense solutions to this dilemma.

Know Your Customer

The first step in analyzing how to negotiate repayment is to know your customer. Do you have information regarding your customer, including a completed credit application? Have you done business with your customer for a long period of time and is it a recent phenomenon that your customer has been unable to make payment? Is non-payment or partial payment a constant pattern of conduct with this customer? Do other companies that do business with your customer have the same problems you are experiencing?

The answers to these questions should be known to you before you make any decision as to how to proceed against your customer. Most debtors are honest, hardworking individuals who, for one reason or another, get in over their head. It could be that your customer is having a difficult time collecting from its customers. It could be that your customer was a victim of fraud or embezzlement by one of their employees. It could also be that your customer experienced a theft which has not yet been paid by their insurer. These individuals want to pay you back because they value the relationship they have with

their customers and vendors and want to assure that they can keep supplying their customers in the future. In those instances, recognizing why your customer cannot pay you can help lead you to determine whether you should accept payments or sue.

If one category of debtors are good persons who simply have problems, the other main category of debtors are those who are out to take advantage of you. They are easy to spot. They are often the most demanding and slowest paying. They always have an excuse for non-payment which doesn't seem to withstand scrutiny. More importantly, they make promises to you they never keep. These customers are difficult to negotiate with because, no matter how many promises they make to you, you know that the promise will never be fulfilled.

Benefits of Accepting Payment Over Time

There are many benefits to accepting the payment over time. First, properly negotiated, you can convert your old debt into a promissory note which sets forth the terms of repayment. Whereas the former debt may have been created by the sale of goods on an open account basis, or even pursuant to the terms of a contract, once a promissory note is entered into which contains the terms for repayment, the promissory note takes the place of the old debt, especially where you are affording your customer additional time to pay. Whereas the original debt may have been unsecured, you can also negotiate security for the promissory note to assure that collateral can be repossessed to pay off the debt in the event the promissory note is breached. Security can include your customer's accounts receivables, real property, or equipment of your customer that is not already encumbered. Thus, by giving your customer additional time to pay, you may have placed yourself in a better position for repayment than if you had sued to enforce an unsecured agreement, regardless of whether or not the agreement was oral or in writing.

The agreement can also provide a fair interest rate. Whereas you may not have been charging interest to your customer originally, the promissory note can include interest at a fair rate. Do not, however, request an excessive rate, as that may be deemed usurious and may subject you to civil and criminal penalties for doing so. Generally, an interest rate not to exceed twelve percent per annum is permissible.

Entering into a promissory note may also allow you to recover attorneys' fees which were not previously provided for in your agreement with your customer. Then, if it is necessary for you to enforce the promissory note, you would be entitled to recover attorneys' fees. A lawsuit for breach of promissory note is relatively simple and straightforward and is often easier to obtain than a judgment to recover monies for goods sold and delivered.

Another option available to you when payments are to be made over time is a "Stipulation for Entry of Judgment." Unlike a promissory note, a stipulation is an agreement entered into at any time after the lawsuit is filed. Unlike a promissory note, the stipulation will provide that in the event of any default, and after appropriate notice is given to the debtor, a judgment can be obtained for any unpaid balance. Thus, using a stipulation eliminates the need for further litigation and provides an incentive to the debtor to pay.

More informal methods of resolution exist, such as letter agreements or oral agreements, but they are often more difficult to use. The main consideration, however, is whether you are going to take installment payments and wait some time for payment in full or whether you want to demand payment now.

Obviously, negotiating a repayment arrangement will save you the cost and expense of litigation. Moreover, it has been our experience that when you have a customer who merely has hit a rough patch, they will try very hard to repay you and avoid the entry of any judgment or a lawsuit. Informal negotiation thus often works better than proceeding with a lawsuit. Similarly, those who have no intention to pay may nevertheless offer to sign a promissory note or Stipulation for Entry of Judgment, believing that it will delay collections even further. They are thus willing to enter into the agreement, not realizing that you may ultimately have a judgment quicker by enforcing the agreement than if you had filed a lawsuit in court.

We have also observed many instances in which the debtor has promised to make payments over a period of time (normally not to exceed 12 to 24

months), but our client refuses to accept installment payments, demanding instead that the payment be made in full in one lump sum and proceeding with a lawsuit unless the lump sum payment is received. In the overwhelming majority of those cases in which the installment payment is rejected, the debtors go out of business shortly before or soon after a judgment is entered and after the client has paid several thousand dollars to obtain what is ultimately a worthless judgment. Our experience also shows that where debtors enter into a Stipulation for Entry of Judgment or sign a promissory note, the large majority of debtors pay under the terms of the promissory note in order to avoid a judgment being entered against them. For those who do not pay promptly, it is our experience that a judgment is entered by use of the enforcement procedures in the Stipulation for Entry of Judgment well before any judgment would have been obtained in court. In both cases, the clients have won because they have reduced the attorneys' fees they would have spent in obtaining a judgment, and the judgment is issued far quicker than if they had filed and pursued a lawsuit.

Please note that this rule does not apply in every case, and there are instances in which a debtor makes a concerted effort to defraud you, your attorney, and the court system. These debtors, however, make up a small percentage of the customers you will encounter, and good credit acceptance procedures at the inception of your relationship with a customer will further minimize the instances which result in no payment at all.

Costs of Litigation Versus a Settlement

It is difficult, if not impossible, for any attorney to tell you with specificity how much a lawsuit will cost to prosecute. All that is certain is that attorneys' fees will increase arithmetically, and perhaps geometrically, depending on the vigorousness of the defense put on by your customer. In instances in which you are not able to recover attorneys' fees, every dollar you spend for legal help diminishes your ultimate recovery. Conversely, an attorneys' fees clause may cause your customer to fight even harder, hoping that they will prevail and be entitled to an award of attorneys' fees. Moreover, unless you can actually collect the attorneys' fees from your customer, vigorously prosecuting your lawsuit will give you little benefit.

Conclusion

When evaluating collection alternatives, you need to determine in advance what your goals are. If they are to maximize your recovery, then often negotiation may be a better alternative to a lawsuit.

You will have to decide that for yourself. In doing so, however, we urge you to consult with an attorney to discuss all of your alternatives, since this article only discusses a few of the factors you should consider. Remember also to consult an attorney with experience in collections, because not all attorneys know about the remedies available to you to put pressure on your customer.

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