

Handling Small Claims Collection Cases

This outline is designed to provide a brief introduction to some of the issues you will face when filing small claims cases. The outline is only intended as a starting point. After you read this outline, for a more in-depth discussion of the topics, I would suggest reading some of the sources mentioned in this outline.

I. Creating a Viable Business Plan

Is it worth filing? This is perhaps an obvious, but important question.

Costs and time should be a primary concern. Operating a law practice handling smaller contract claims needs to be a viable fit for both you and your client. You do not want to be in the position of losing money handling such claims. Additionally, you do not want to fail to meet realistic client expectations by charging too much relative to the amount of the claim.

Many firms that practice in this area maintain a viable practice by working very efficiently and handling cases in larger volumes. For example, it is not uncommon for many experienced attorneys or firms to have thirty cases on a single call in court on a particular day.

You should also keep in mind the court costs and other out-of-pocket costs you will incur for even the most basic breach of contract case. For example, the cost to file the complaint in Cook County ranges between \$119 and \$247.¹ Additional costs will include other out-of-pocket costs and likely post-judgment collection-related filing costs. Costs of post-judgment citations in Cook County currently range from \$25 to \$80 each.² While filing costs vary between different counties and cases, a typical case may require several hundred dollars in filing costs from the initial filing to resolution. And, of course, many of these judgments may not be collectible.

To make sure you have a profitable practice and happy clients, you should carefully evaluate your handling of these cases. Make sure you are working efficiently and delegating work wherever possible. Consider setting a specific dollar threshold for cases at a point where you know you can operate profitably and still meet client expectations in terms of costs and results.

II. Preparing for Litigation

Just like any other case, you will need to gather information to file the complaint. Minimally, you will want information and documents from your client supporting the amount of debt owed and the source of the debt. For example, in a breach of contract for services where the defendant has failed to pay, you will minimally need the contract, details about the services provided and the amounts paid, if any.

¹ All of the filing cost information in this paragraph was obtained from the Cook County Clerk of the Circuit Court website at http://198.173.15.31/Forms/pdf_files/CCG0603.pdf.

² *Id.*

III. Contacting the Client

The more you know, the better suited you are to evaluate the case. Information you obtain from your client should include the debtor's name, address, and other contact information. Depending on the type of case, it may also include copies of written instruments, billing and invoices, and correspondence between parties. It is best to get the entire billing file from your client, especially if you have any concerns about the client's accounting. For post-judgment collection purposes, you should also obtain any available employment and bank information for the debtor.

You should also consult with your client regarding any possible counterclaim. If your client is aware in advance of the possibility of a counterclaim, it will be less of a surprise if it happens. Also, consider bringing up other issues that may be relevant to the specific client. For example, if your client is a professional seeking collections for failure to pay a bill for their services, you might want to advise your client to check their malpractice policy before proceeding with the case.

When you receive the facts and documents from your client, it is a perfect time to evaluate the applicable statute of limitations. Review 735 ILCS, Article XIII, Parts 1 and 2 for various statutes of limitation. 735 ILCS 5/13-205 and 5/13-206 are two of the statutes likely to be applicable to the claims we are addressing in this outline. If the statute of limitations has already passed or is close to passing, make sure you notify the client and take any necessary actions immediately.

As you undertake more cases, you will likely want to create and utilize efficiency tools such as forms and electronic transmission of information to allow your clients to provide as much information as possible upfront and eliminate unnecessary legwork for you. Many experienced collection firms have systems in place for downloading files and accepting constant electronic data transmissions from their client.

You will also need to put sufficient effort into skip tracing the debtor prior to litigation. You can research and confirm the debtor's address internally, outsource it for skip tracing or utilize a combination of both methods. There are commercially available tools such as Accurint, offered by Lexis Nexis. Additionally, outside skip tracing vendors should be easy to find. If you are unfamiliar with such vendors, one good place to start your search is by looking at vendors through a collection attorney association, such as the Illinois Creditors Bar Association. It is in your best interest, financially and professionally, and also in your client's best interest that you have the most accurate address information prior to filing.

IV. Sending a Demand Letter

The Fair Debt Collection Practices Act ("FDCPA") will be discussed in detail in one of the other segments in this seminar later today, so it will only briefly be discussed in this section. If the FDCPA applies to you and your case, you must follow its requirements. If you have any doubts at all, it is advisable to assume the FDCPA applies and follow it strictly.

If you are subject to the FDCPA, you will be required to send a demand letter. 15 U.S.C. § 1692g. You should carefully review the FDCPA portion of this seminar to make sure you send a timely demand letter that fully complies with the FDCPA.

Sending a demand letter is good practice whether or not the FDCPA is applicable. Sometimes debtors will actually pay. In other instances, you may find out that your client made an error and the amount of debt is incorrect. You may also find out other useful information, such as defenses the debtor might try to claim once you file the complaint.

A FDCPA-compliant demand letter must allow the debtor thirty days to dispute the amount of the debt. 15 U.S.C. § 1692g. However, a collection attorney can still proceed during this time. *E.g. Bartlett v. Heibl*, 128 F.3d 497, 501 (7th Cir. 1997).³ In addition to the FDCPA materials included with this course, I would recommend reading Chapter 7 of IICLE's *Creditor's Rights* book for a good, in-depth analysis of the FDCPA.

V. Selecting the Proper Venue

Be sure to file suit in the county of residence of the defendant or the county where the transaction or some part of it occurred, unless you fit within a limited exception, such as a lawsuit to recover possession of real estate. 735 ILCS 5/2-101; 735 ILCS 5/2-103(b).⁴ In some cases, this gives you the option of two separate counties, and you are free to choose the county in which you will proceed. Post-judgment proceedings will likely be easier in the county where the debtor resides, particularly where you may need to seek a rule to show cause or body attachment at a later stage in the case to enforce court orders. My preference is to always file suit in the county where the debtor resides, even if another county is allowed by law.⁵

VI. Selecting the Proper Division or Department

After selecting the venue, but before filing the complaint, check the dollar amount you are seeking and make sure you are in the proper court division or department for your county. The terminology describing the courts may be different from county to county. For example in Cook County, cases under \$30,000 would be filed in the Municipal Department. Circuit Court of Cook County, General

³ In both *Bartlett v. Heibl* and *Miller v. McCalla*, 214 F.3d 872, 876 (7th Cir. 1998), the Seventh Circuit provides safe harbor language for attorneys to use in FDCPA demand letters. You should read both of these cases before sending such a demand letter.

⁴ If you are filing suit to recover possession of real estate, the suit should be filed in the county where the real estate is located. 735 ILCS 5/2-103(b).

⁵ Suing the debtor in the county where they reside will insure that you comply with the FDCPA requirement, if applicable. 15 U.S.C. § 1692i(a)(2). Note that there is a different rule regarding a suit to enforce an interest in real property. 15 U.S.C. § 1692i(a)(1).

Orders 2.1(a), 2.3(b).⁶ In Lake County, like many other counties in the state, all cases under \$10,000 are heard in the Small Claims Court.⁷

Selecting the proper court is important to save time and avoid having to transfer the case later. Additionally, selecting the proper court is important because you may be able to save time and fees for your client. Review the dollar limits carefully, because if you can properly fit into a small claims court, for example, you might have a lower filing fee and you might be able to serve the debtor by certified mail if local rules and general orders allow.

VII. Preparing and Filing the Complaint

Prior to filing, review local court rules and general orders of the court. Some rules may not always be intuitive so make sure you know what they are. Also, for filing questions, it never hurts to contact the clerk's office. After filing, read the standing orders of the assigned judge or of the specific court division or department, if there are any.

There are different types of complaints that you might file. Two of the most likely are general breach of contract and account stated complaints. The elements of an account stated complaint require the showing of a statement of an account rendered by one party to another and that the statement is retained by the receiving party beyond a reasonable time without objection. *Chicago & E. RR. Co. v. The Martin Bros. Container & Timber Products Corp.*, 87 Ill. App. 3d 327, 330 (1st Dist. 1980). This is presumed to constitute an acknowledgement that the balance due on the account is correct. *Id.* The basic contents of a simple contract complaint would normally include:

- (1) contract creation and terms;
- (2) plaintiff's performance or tender of performance in full;
- (3) specific factual allegations of defendant's breach by nonperformance;
- (4) damages to plaintiff as a result of the breach; and
- (5) in the case of nonpayment, that payment was requested by the plaintiff and nonpayment continues by the defendant.⁸

There are other potential applicable claims that may be useful as part of your collections practice, including eviction, replevin, and foreclosure claims. Do not hesitate to consult secondary sources to assist you in drafting any of these different varieties of complaints. Illinois Civil Practice Forms and Nichols Illinois Civil Practice with Forms are good sources to use to find form complaints with paragraphs that might be useful when you are drafting a complaint.

⁶ The Circuit Court of Cook County has different thresholds for some of its Municipal Districts. The dollar thresholds for Districts Two, Three, Four, Five and Six are different than the dollar threshold for the First District. Circuit Court of Cook County General Orders 2.3(b)(1) and (2).

⁷ The Lake County Circuit Court divisions are designated by the Chief Judge pursuant to Local Rule 1.03.

⁸ This succinct summary is derived from Illinois Civil Practice Forms, Section 83:1, p. 447-48 (West 2010). As mentioned further, this source is a good option for researching different forms of sample contract complaints.

Complaints may be verified and include appropriate affidavits. Verification is governed by 735 ILCS 5/2-605. Alternatively, you might prefer to wait to see if you receive a default judgment and then file a supporting affidavit prior to the prove-up of your default judgment.

Do not forget to attach a copy of the contract or other written instrument or an allowable alternative, as required by 735 ILCS 5/2-606 and Supreme Court Rule 282.

Either the plaintiff or the defendant may demand a jury trial. IL SUP. CT. R. 285. If you want a jury trial for your case you must file the demand at the time the action is commenced. *Id.* You should consider costs and strategy when deciding whether to file a jury demand. A jury demand will cause the filing costs to be a little higher. It will also increase the preparation time and length of any trial. A bench trial may be a good option, depending on the judge or judges assigned to hear small claims cases in the county in which you are filing.

VIII. Serving the Opposing Party

Locating and serving the debtor can be one of the most difficult challenges for attorneys attempting to collect debt. Many debtors may have moved or be difficult to locate. Others may actively be attempting to evade service. One of the main factors in extending the length of these cases is the inability to serve the debtor. Such delays make it more expensive for you to litigate your case and delay the opportunity to obtain positive results for your client.

Filing a small claims action may allow you to avoid some of potential costs and delays. In small claims cases, you can utilize service by certified mail unless the local rules provide otherwise. IL SUP. CT. R. 282. Read this rule carefully, because although it allows for service by certified mail, it sets forth a special process where you file a summons, affidavit and complaint with the clerk's office and the clerk of court actually sends the certified mail. *Id.* The affidavit must include the defendant's last known mailing address. *Id.*

Supreme Court rules require the return date for the summons to be between fourteen and forty days after issuance. IL SUP. CT. R. 283. Make sure to check the local rules and standing orders to see if there is any other restriction on the return date for your summons. Depending on the local rules and general orders, the case may or may not be tried on the return date. IL SUP. CT. R. 286.

If the local rules in the county where you file do not allow for service by certified mail, you will be following the typical rules involving service, which would require the summons to be initially placed with the sheriff or other authorized person and then subsequent service attempts via alias summons, if necessary. IL SUP. CT. R. 102, 103. If alias summons attempts are unsuccessful, appointment of a special process server is an option that will likely be approved by the judge.

IX. Litigating the Case

Supreme Court rules provide that a small claims case will be tried on the return date unless otherwise ordered. IL SUP. CT. R. 286. Check the local rules and general orders in your county, because many counties have opted out of this rule.

In many cases, the defendant may fail to appear. In such cases, seeking default judgment is appropriate. 735 ILCS 5/2-1301(d). The court may require proof of the allegations in the case. *Id.* Presenting a verified complaint or affidavit in support of the complaint is often used to prove up the case. After entering the default judgment, make sure you send proper notice of the default order as required by 735 ILCS 5/2-1302. The default judgment can be set aside within thirty days after entry. 735 ILCS 5/2-1301(e).

If the defendant does appear, depending on the county, there might be a mandatory arbitration requirement. If so, make sure you are prepared and ready to make a good faith effort at arbitration. In small claims, arbitration sessions may be informal and could be held in the courtroom or outside in the hallway.

X. Presenting Evidence at Trial

If you proceed to hearing, you will likely have an informal hearing. An informal hearing is allowed by motion of either the court or of any party. IL SUP. CT. R. 286(b). With an informal hearing, the rules of procedure and evidence are relaxed. *Id.*; IL R. EVID. 1101(c). The court may question witnesses *sua sponte* and at the end of the hearing may render an immediate judgment. IL SUP. CT. R. 286(b). Be wary of the relaxed rules. Rule 286 does not require the defendant to file an answer, so the opposing party has an opportunity to surprise you at the hearing. If you are concerned about this possibility, you can seek discovery, which can be allowed by leave of court. IL SUP. CT. R. 287.

At trial, you should expect the possibility that most, if not all, hearsay will be allowed. If you are opposing a *pro se* litigant, you may be held to a higher evidentiary standard than they are. Pursuant to Rule 286, the court can call any person present to testify, so keep this possibility in mind when deciding which client representatives should attend the trial.

In small claims, the judge has the authority to enter an order requiring the judgment to be paid on a specific date or by installment payments. IL SUP. CT. R. 288. The judge may also stay enforcement of the judgment during the time period if the defendant is complying with the order. *Id.* The period of installment payments must be three years or less. *Id.* The court has the authority to modify or vacate the stay. *Id.*

XI. Collecting the Judgment

Now you are ready to commence post-judgment proceedings to get the money collected. Some of the remainder of this seminar focuses on post-judgment proceedings and issues related to such proceedings. In addition to the materials offered in the rest of this course, two sources I would strongly

recommend reading are IICLE Creditors' Rights and IICLE Basic Enforcement of Judgments. Additionally, you may find other sources such as Nichols Illinois Civil Practice with Forms Volume Four Judgments and Volume Five Enforcement of Judgments to be very useful.

XII. Recommended Reference Sources

IICLE Creditors' Rights (IICLE 2009).

IICLE Basic Enforcement of Judgments: Enforcement & Collection (IICLE 2007).

Illinois Civil Practice Forms (West 2010).

Nichols Illinois Civil Practice with Forms (West 2011).

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Supreme Court Rules relating to Small Claims Cases

Note: These rules are taken directly from the Supreme Court's website at <http://www.state.il.us/court/SupremeCourt/Rules/default.asp>. The committee comments and effective dates have been omitted, but if you would like to review those, they are available on the Supreme Court's website.

Rule 281. Definition of Small Claim

For the purpose of the application of Rules 281 through 288, a small claim is a civil action based on either tort or contract for money not in excess of ~~\$5,000~~ \$10,000, exclusive of interest and costs, or for the collection of taxes not in excess of that amount.

Rule 282. Commencement of Action--Representation of Corporations

(a) Commencement of Actions. An action on a small claim may be commenced by paying to the clerk of the court the required filing fee and filing a short and simple complaint setting forth (1) plaintiff's name, residence address, and telephone number, (2) defendant's name and place of residence, or place of business or regular employment, and (3) the nature and amount of the plaintiff's claim, giving dates and other relevant information. If the claim is based upon a written instrument, a copy thereof or of so much of it as is relevant must be copied in or attached to the original and all copies of the complaint, unless the plaintiff attaches to the complaint an affidavit stating facts showing that the instrument is unavailable to him.

(b) Representation of Corporations. No corporation may appear as claimant, assignee, subrogee or counterclaimant in a small claims proceeding, unless represented by counsel. When the amount claimed does not exceed the jurisdictional limit for small claims, a corporation may defend as defendant any small claims proceeding in any court of this State through any officer, director, manager, department manager or supervisor of the corporation, as though such corporation were appearing in its proper person. For the purposes of this rule, the term "officer" means the president, vice-president, registered agent or other person vested with the responsibility of managing the affairs of the corporation.

Rule 283. Form of Summons

Summons in small claims shall require each defendant to appear on a day specified in the summons not less than 14 or more than 40 days after issuance of the summons (see Rule 181(b)) and shall be in the form provided for in Rule 101(b) in actions for money not in excess of \$50,000.

Rule 284. Service by Certified or Registered Mail

Unless otherwise provided by circuit court rule, at the request of the plaintiff and in lieu of personal service, service in small claims may be made within the state as follows:

(a) For each defendant to be served the plaintiff shall pay to the clerk of the court a fee of \$2, plus the cost of mailing, and furnish to the clerk an original and one copy of a summons containing an affidavit setting forth the defendant's last known mailing address, and a copy of the complaint in addition to the original. The original summons shall be retained by the clerk.

(b) The clerk forthwith shall mail to the defendant, at the address appearing in the affidavit, the copy of the summons and complaint, certified or registered mail, return receipt requested, showing to whom delivered and the date and address of delivery. The summons and complaint shall be mailed on a "restricted delivery" basis when service is directed to a natural person. The envelope and return receipt shall bear the return address of the clerk, and the return receipt shall be stamped with the docket number of the case. The receipt for certified or registered mail shall state the name and address of the addressee, and the date of mailing, and shall be attached to the original summons.

(c) The return receipt, when returned to the clerk, shall be attached to the original summons, and, if it shows delivery at least 3 days before the day for appearance, shall constitute proof of service.

(d) The clerk shall note the fact of service in a permanent record.

Rule 285. Jury Demands

A small claim shall be tried by the court unless a jury demand is filed by the plaintiff at the time the action is commenced or by the defendant not later than the date he is required to appear. There shall be 6 jurors unless either party demands 12. A party demanding a jury shall pay a fee of \$12.50 unless he demands a jury of 12, in which case he shall pay a fee of \$25, or, if another party has previously paid a fee for a jury of 6, \$12.50.

Rule 286. Appearance and Trial

(a) Unless the "Notice to Defendant" (see Rule 101(b)) provides otherwise, the defendant in a small claim must appear at the time and place specified in the summons and the case shall be tried on the day set for appearance unless otherwise ordered. If the defendant appears, he need not file an answer unless ordered to do so by the court; and when no answer is ordered the allegations of the complaint will be considered denied and any defense may be proved as if it were specifically pleaded.

(b) **Informal Hearings in Small Claims Cases.** In any small claims case, the court may, on its own motion or on motion of any party, adjudicate the dispute at an informal hearing. At the informal hearing all relevant evidence shall be admissible and the court may relax the rules of procedure and the rules of evidence. The court may call any person present at the hearing to testify and may conduct or participate in direct and cross-examination of any witness or party. At the conclusion of the hearing the court shall render judgment and explain the reasons therefor to all parties.

Rule 287. Depositions, Discovery and Motions

(a) No depositions shall be taken or interrogatories or other discovery proceeding or requests to admit be used prior to trial in small claims except by leave of court.

(b) **Motions.** Except as provided in sections 2--619 and 2--1001 of the Code of Civil Procedure, no motion shall be filed in small claims cases, without prior leave of court.

Rule 288. Installment Payment of Judgments

The court may order that the amount of a small claim judgment shall be paid to the prevailing party on a certain date or in specified installments, and may stay the enforcement of the judgment and other supplementary process during compliance with such order. The stay may be modified or vacated by the court, but the installment payments of small claims judgments shall not extend over a period in excess of three years' duration.

Rule 289. Service of Process in Proceedings to Confirm a Judgment by Confession or to Collect a Judgment for ~~\$5,000~~ \$10,000 or Less

In proceedings to confirm a judgment by confession or to collect a judgment for money, in which the judgment is for ~~\$5,000~~ \$10,000 or less, exclusive of interest and costs, process may be served in the manner provided in Rule 284.

Small Claims Evidentiary Rule

Note: This rule is taken directly from the Supreme Court web site at <http://www.state.il.us/court/SupremeCourt/Evidence/Evidence.pdf> and the effective date has been omitted.

Rule 1101.

APPLICABILITY OF RULES

(a) Except as otherwise provided in paragraphs (b) and (c), these rules govern proceedings in the courts of Illinois.

(b) **Rules Inapplicable.** These rules (other than with respect to privileges) do not apply in the following situations:

(1) **Preliminary Questions of Fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(2) **Grand Jury.** Proceedings before grand juries.

(3) **Miscellaneous Proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation, conditional discharge or supervision; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise, and contempt proceedings in which the court may act summarily.

(c) **Small Claims Actions.** These rules apply to small claims actions, subject to the application of Supreme Court Rule 286(b).