

SUE TO RECOVER YOUR RESIDUALS

You are a sales agent that has built up a sizeable residual stream with an ISO. You wake up one morning and are notified that the ISO has decided to terminate your residual payments without cause. Hard to believe but regrettably it happens from time to time in our industry. You decide that your only alternative is to sue so what can you expect in the lawsuit and what should you do to best protect your interests? I will explore the answers to these questions below.

The first urge most sales agents have is to move the merchants from the ISO that is not paying to another ISO. If you are planning on suing to recover your residuals this is not a good idea. Invariably, when you sue to recover your residuals, the ISO in question will sue you in what is called a cross claim if you move the merchants. By filing that cross claim, now the ISO is going on the offensive and potentially can recover from you a large amount of money for the value of the merchants you have moved. To make things better for you then, if you are going to sue you should make it a point not to move any of the merchants to another processor.

Once the lawsuit is going, you now have to gather evidence to prove your case through the discovery process. In discovery, the parties serve on each other written questions (“interrogatories”), requests to provide documents (“requests for production of documents”) and requests to the other party to admit or deny certain facts (“requests for admissions”). The other party has to answer the written questions and provide requested documentation unless the questions are improper, irrelevant or subject to any other objections.

Written discovery is generally of limited use to the parties. Most questions can be answered without providing any substantive facts that the other side can use against the answering parties. The requests for documents are usually the most useful form of written discovery and can lead to the “smoking gun” types of documents that can help a case. The documents are where you will be able to gather residuals reports for instance that you will need to prove up your damages in the form of the lost residual payments.

Written discovery usually precedes depositions in the case. In a deposition, one side is able to request that a witness appear and provide testimony that can be recorded by a court reporter. Depositions are where the real facts are developed in a case. The question and answer nature of the proceedings allows the attorneys to fully develop the facts surrounding the case. Also, people often get tired, cranky and generally fed up in depositions and because of that tend to offer up information that can be of great benefit to one party or the other.

Discovery is a long process that can take months, if not years to complete. The main thing driving the case to resolution is usually the trial date. Most people

procrastinate and only begin to take the case seriously as the trial date approaches. By then, the parties have a much clearer picture of their opponent's strengths and weaknesses in the case as well as the scope of the potential exposure and the amount of money that each side can be expected to pay or collect.

For this reason, and the fact that the parties are usually getting fed up with the litigation system, many cases are ripe for settlement at this point. This is a prime time to have a mediator sit down with the parties to try to see if a settlement is possible. Most all cases (well over 90%) settle before trial. Knowing that, you have to understand that in most cases you will not be getting all you want but instead will get some kind of mutually agreed upon settlement that discounts the value of your case.

Barring a settlement, you will get your day in court. It's not quite as romantic and exciting as on T.V. but is more of a very stressful and emotional experience. A trial will put you under more stress than most things in life. In addition, it is usually an all or nothing type of thing. If you lose, you lose your residuals and could also have to pay for the attorney's fees for the ISO you are suing. Given those high stakes, most people opt to settle before trial.

If you sue to recover your residual, be prepared for a long fight. But, if you are willing to take the time to go through the process, you can be handsomely rewarded.

* Paul A. Rianda, Esq. is an attorney who has specialized in providing legal advice to the bankcard industry for over 10 years. For more information about this article or any other matters, please contact Mr. Rianda at www.riandalaw.com, (949) 261-7700 or via email at paul@riandalaw.com

** The information contained herein is for informational purposes only and should not be relied upon in reaching a conclusion in a particular area. The legal principles discussed herein were accurate at the time this article was authored but are subject to change. Please consult an attorney before making a decision using only the information provided in this article.