

A person in a dark suit is shown from the chest down, stacking light-colored wooden blocks on a dark, textured surface. The person's hands are visible, carefully placing each block. The background is a soft, out-of-focus grey.

# How to Identify Possible Counterclaims Before Suit

Prepared by:  
Lynda L. Laing  
*Strauss Factor Laing & Lyons*

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Published on [www.lorman.com](http://www.lorman.com) - August 2021

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## **How to Identify Possible Counterclaims Before Suit**

Potential counterclaims may be identified by a careful review of the client file. Before suit is filed, make certain you request all documents from your client. In that request, make certain your client gives you all email communication. This complete review of the file may alert you to possible counterclaims. Let your client know why you believe a potential counterclaim may exist so the client can determine whether they wish to file suit and be ready to defend the counterclaim.

Some potential counterclaims might include breach of contract, violation of a statute, statute of limitations or negligence. Research the defendant. By checking court records, you may find that the defendant files counterclaims when sued. This can also alert the client to be ready to defend and litigate the possible counterclaim. If the amount owed is small, the client might be better served to only attempt settlement with this type of defendant.

I find that avoiding counterclaims makes collections easier. In commercial collections, make certain the customer signs a contract as to the services desired. Include in that contract, where suit can be filed, finance fees, interest rate, collection and attorney fees, when and what a default is so you can eliminate some disputes as to services rendered or work performed. The customer should also sign and prepare a credit application with financial information including references.

## **What Happens When a Counterclaim is Filed?**

A counterclaim is filed with the answer and must be pleaded as required under your state Rules of Civil Procedure. Review the counterclaim to see if it is a permissive or compulsory counterclaim.

Rule 13 under the Rhode Island Superior Court Rules states:

**(a) Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action, or if the opposing party's claim is for damage arising out of the ownership, maintenance, operation, use, or control of a motor vehicle by the pleader.

**(b) Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing part.

If permissive, you may be able to dismiss the counterclaim. For example, if the plaintiff sues for unpaid invoices, a defendant may counterclaim. If the counterclaim is for damages relating to personal injuries the defendant suffered at the plaintiff's property, the counterclaim is permissive. Under our Rules, a Judge may dismiss the permissive counterclaim so

that plaintiff's insurance carrier can defend the personal injury suit.

The creditor must file its answer or other responsive pleading within 20 days after receipt of the counterclaim. If the creditor fails to do so, a default may enter against the creditor.

Rule 13 also covers omitted counterclaims. In Serra v Ford Motor Credit Co., 463 A.2d 142 (1983) the plaintiff filed suit against the creditor for wrongful possession of a vehicle and a writ of replevin. Defendant answered the complaint but did not file a counterclaim. In mid-trial, defendant moved to amend to add a counterclaim for the monies owed on the purchase price. The Trial Judge denied the motion as the Judge considered the counterclaim to be compulsory. However, the Supreme Court disagreed and allowed the defendant to amend using Rule 13 (f) which provides: "When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment."

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