

Being sued



Accidents, mistakes and misunderstandings can happen in any business. Sometimes these grow into full-blown disputes, and before you know it, you are facing a legal claim.

Being sued is stressful, time consuming and expensive — three good reasons for settling quickly (or, better still, putting in safeguards to prevent disputes arising in the first place). But unless you are clearly at fault, or fail to follow the court procedures correctly, the odds are in your favour.

This briefing outlines:

- The first steps to take.
- How to reduce, admit or defend the claim.
- The implications of criminal proceedings.
- The options for alternative dispute resolution.

1 First defensive steps

If you are served a claim form, follow these steps.

1.1 Consult legal representatives.

It is usually worth seeking legal advice, even if only to ask about admitting liability and making a reasonable offer of settlement.

- A director or officer of your company can appear for the company.
- Directors and officers named separately as defendants may be personally liable. Establish whether you will need separate lawyers.

1.2 Act promptly, following the legal formalities to the letter.

- You must respond within 14 days to a High Court or county court claim. Otherwise, the claimant can obtain judgment in default against you (see 4.3).

1.3 Decide what to do.

You can make an offer to settle (see 1.4), admit liability (see 2) or defend the case (see 3).

- It may make financial sense to settle, even if you believe the claimant has a weak case.
 - If you win, you are unlikely to recoup all your costs. If you lose, you may have to pay most or all of the claimant's costs, as well as your own.
- 1.4 A formal offer to settle**, (a Part 36 offer) for part of the amount of the claim may settle the dispute.

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- There is a good chance that the claimant will accept a compromise offer, rather than risk spending time and money pursuing a court case.
It can save both of you significant costs.
- You may need to make a 'payment into court' if your ability to pay is in question.
- If the claimant later wins the amount you offered (or paid in), or less, the claimant will have to pay some of your costs.

2 Admitting liability

If you are in the wrong, it is usually best to admit it, after checking with any interested parties, such as your insurers.

Even if you could use procedural rules to delay final judgment, you are likely to end up paying the claim — and the costs of the case.

2.1 You can agree to pay the **full amount**.

- If you admit liability within 14 days in a claim for a specified amount, court costs will be a relatively small fixed amount.
- If the claimant did not allow you a reasonable opportunity to investigate and settle the claim before issuing proceedings, you may be able to make the claimant pay the court costs.

2.2 You may be able to pay by **instalments** if the claimant — or the court — agrees.

Your offer must state how much each instalment will be and when the instalments will be paid.

- If you miss any payments, you may be required to pay in full.

2.3 You can admit liability but make a **counterclaim**.

- For example, a customer might sue you for non-payment of an invoice for goods supplied, but you may wish to counterclaim for losses caused to you because the goods were defective.

2.4 You can make a **reasonable offer**.

- Calculating a reasonable offer of settlement in a purely financial claim (eg for breach of contract) is relatively straightforward.
- Compensation for personal injuries is based on previous awards. Professional advice on current rates is essential.
- Unless the claimant agrees to accept the offer (or an improved offer) before or at the hearing, you will have to defend the case. If the claimant later wins the amount you offered, or less, the claimant will have to pay some of your costs, provided you have paid the amount of your offer into court.

2.5 Any negotiations you conduct which are intended to put an end to the proceedings are not admissible as evidence in court. For clarity, state that the negotiations are conducted '**without prejudice**'.

- State this at the beginning of any conversation or any correspondence with the claimant or the claimant's advisers.

3 Defending the claim

Only defend the claim if you have good legal reasons for doing so, or if the claimant refuses to accept a reasonable offer.

3.1 You can ask for more **details** of the claim, including specific answers to specific questions.

3.2 You must file a **defence** within 14 days of receiving the claim form — or 28 days if you file an 'acknowledgment of service'. State in detail why you dispute the claim. It is up to the claimant to prove their case.

➡ The law is complex. This briefing reflects our understanding of the basic legal position as known at the last update. Obtain legal advice on your own specific circumstances and check whether any relevant rules have changed.

“Be realistic. If you owe part of the sum claimed, offer it at an early stage or pay it into court. It may settle the dispute and will at least make your opponent question the cost-effectiveness of going further.”
William Whiteley, Clarke Willmott solicitors

“Conducting negotiations 'without prejudice' can enable you to discuss the problem without either party being able to use what was said in court.”
Mark Goodman, Picton Howell solicitors

Protecting the company

Simple precautions can minimise the risk of being sued in the first place.

- A** Use **written contracts** which set out exactly what is agreed.
- B** Cover yourself against **accident claims**.
 - Make sure that working conditions and procedures are safe.
 - Ensure that employees are responsible and use any protective clothing, equipment and systems provided.
 - Check the company is adequately insured.
- C** Use appropriately qualified and **skilled** employees and professional advisers.
- D** Keep books, records and accounts that comply with the **Companies Act**.
 - Failure to meet the requirements of the Companies Act can lead to prosecution (see **6**).

- Only cover allegations which have been included in the claim.
- Put forward your own version of what happened, in full.

You may include documentary evidence, such as copies of correspondence, witness statements and expert opinions.

3.3 Seek to reduce your **costs**. Defence costs can be reduced if:

- You can prove the claimant is partly liable.
- A partial admission may bring the claim into a lower track, reducing your liability for costs.
- The claim is issued in the county court, rather than the High Court (see **4.1**), as the court fees are lower.
- You agree as much evidence as possible with the claimant before the trial starts. If you have failed to exchange information and documents before the trial, you may be penalised later by having to pay a greater share of the costs. Arguing it all in court is a waste of everybody's time.

The initial court process

A typical claim against you might follow the initial stages outlined below.

- A** The claimant and you **try to resolve** the dispute. You both exchange information explaining your own positions.
- B** The claimant lodges a **claim form** at the court. The court sends ('serves') the claim form, with a response pack, to you.
- C** You send ('file') an **acknowledgment of service** to the court.
- D** You **file a defence**, using form N9B or N9D.
- E** The court sends you an **allocation questionnaire**, to complete and return. This helps them allocate the case to the small claims track, fast track or multi-track.
 - If the case is automatically transferred, you will receive a notice of transfer.
- F** The court sends you a **notice of allocation**, allocating the case to a track. Thereafter the court fixes a date for the trial and gives directions to prepare you.

3.4 In more complex cases, the best defence can collapse if you cannot **afford** to run the case.

- Defending yourself may be an option in a straightforward case.

4 Which court track?

4.1 **Cases are allocated** to a small claims track (claims of up to £5,000), a fast track (£5,001 to £15,000), or a multi-track (more than £15,000).

- Reasonably straightforward claims of more than £5,000 can be allocated to the small claims track, if the court and both parties agree.
- Claims for £15,000 and less must be issued in the county court. Claims for more than this can usually be issued in either the county court or the high court. The main exception is for personal injury claims up to £50,000, which must be issued in the county court.

4.2 The small claims track and fast track both use standard, **simplified procedures**.

By contrast, the multi-track allows the court flexibility to use a variety of approaches, depending on the complexity of the case. Consequently, the costs of multi-track claims are generally significantly higher than costs on a fast-track claim.

- In a small claims hearing (only), you do not have to attend the hearing, provided you submit written evidence to the court and a notice of non-attendance (stating that you wish the court to deal with the case in your absence) at least seven days beforehand.

4.3 Observe all the **legal formalities** to the letter, including any deadlines you are given.

- Otherwise, you may provide the claimant with valid grounds for obtaining a judgment in default against you, which means you automatically lose the case.

4.4 If you are an individual (eg a sole trader), and the claim is for a specific amount, the case is transferred automatically from the claimant's **local court** to your own. Otherwise, the case is heard at the claimant's local court — unless you make a successful application to transfer it to your local court. For more details, visit www.hmcourts-service.gov.uk.

► The Law Society's 'Lawyers For Your Business' initiative can provide you with a free information pack and a free half-hour consultation with a participating firm of solicitors (020 7405 9075).

► Some small business organisations provide legal helplines. Your trade association may also be able to help, particularly if the litigation relates to your specific trade.

“Make sure you ask your lawyer to give you clear written estimates of costs of going to court, and get regular updates.”
Andrew Corke, Lester Aldridge Fast Track solicitors

“The general rule on recoverable costs is that they must be proportionate to the claim.”
David Greene, Edwin Coe solicitors

5 Losing

5.1 You may be able to **appeal** against a wrong decision.

- It is more difficult in small claims. You must show that the hearing was improperly conducted or that the decision contained an error in law.

5.2 Judgment in debt claims is noted against your business address on the **Register of County Court Judgments**.

- Your credit rating will be affected unless you pay in full within a month and pay the court to delete the entry.
- Otherwise, the entry stays on for six years. Payments are noted against the entry. Once you have paid in full, you can pay the court a fee to delete the entry.

5.3 The directors and officers of the company are responsible for **complying** with the judgment.

- Non-compliance with a judgment is grounds for winding up the company, if the claim exceeds £750.

6 Criminal proceedings

6.1 As well as being sued under civil law, the company and its officers can be **prosecuted** under criminal law.

You can be prosecuted under:

- Health and safety legislation. For example, if your business activities endanger public health.
- Consumer safety legislation. For example, selling unsafe goods.
- Licensing laws. For example, selling alcohol from unlicensed premises.
- The Companies and Insolvency Acts. For example, failing to keep proper accounting records.

6.2 Conviction can have serious repercussions.

For example:

- For offences connected with the Companies Act, directors can be disqualified from acting as directors for up to 15 years.

6.3 You must pay the **costs** of defending yourself. You may be able to reclaim these costs (but not any fines paid) from the company.

- Directors and Officers insurance is available to cover this risk.
- Legal Aid is only available to individuals, not to companies. To qualify you must fall within strict income and capital limits.
- Costs are relatively low in the magistrates court, but can be very high in Crown Court fraud cases.

7 Alternative dispute resolution

There are a number of different methods of resolving disputes without resorting to litigation. The advantage of alternative dispute resolution (ADR) are that it is generally regarded as being quicker and cheaper than court proceedings. It is also more likely to preserve any future relationship between you and your customers or suppliers.

7.1 The main attraction of this approach is the **flexibility** it provides.

- You can agree how formal the procedure should be and who should act as the arbitrator or mediator. In this way you can control costs.
- Disputes can be resolved more quickly than in court.
- The process can be less confrontational than going to court.

7.2 If the parties agree, there are two forms of ADR, **arbitration** or **mediation**. Both procedures are legally binding. In commercial disputes:

- Arbitration is inappropriate for claims below £20,000, due to the costs involved. The main exception is 'paper arbitrations' (where the arbitrator's decision is based solely on written evidence that both parties have submitted), which can be used for small claims.
- Mediation can be used for claims of any size. It is less formal, time limited, cheaper, and under the parties' control as the mediator assists the parties to reach their own decision.

Contact the Chartered Institute of Arbitrators (020 7421 7444 or www.arbitrators.org). Some courts offer mediation facilities.

Expert contributors

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