

WRITTEN MATERIALS

How to Make Your Debts Uncollectible

How ordinary contract and file mistakes turn good receivables into bad lawsuits

Commercial Law League of America

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Portfolio Recoveries

Current through September 4, 2026

National overview. Apply controlling state law, local procedure, and current provider rules.

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Program purpose and scope

Most bad collection files are not born bad. They are made bad, one harmless looking decision at a time. The wrong company signs. The guaranty disappears into the signature block. The portal replaces the governing terms and preserves none of the old ones. The account is sold, but the records stay behind. By the time collection counsel receives the file, everyone agrees that the debt is obvious. Perhaps it is. The lawsuit is not.

These materials address the contract terms, proof requirements, forum choices, and collection consequences that determine whether a valid receivable can actually be enforced. They focus on commercial claims, with separate treatment of consumer venue rules. They are written for a national audience. Contract law, evidence law, interest rules, statutes of limitation, usury rules, guaranty law, and collection remedies vary by state. Test every clause and filing decision under the governing law and the law of the forum.

Accuracy and scope. These materials are current through September 4, 2026. Provider fees, procedural rules, statutory rates, and state law change. Verify them when the contract is drafted and again when a dispute is filed. These materials are educational, are not legal advice, and do not address every jurisdiction or fact pattern.

Learning objectives

- ☐ Identify contract and file defects that can convert a valid account into an unprovable claim.
- ☐ Distinguish forum, venue, personal jurisdiction, and subject matter jurisdiction when drafting and enforcing dispute clauses.
- ☐ Evaluate whether arbitration improves the expected recovery after fees, confirmation, and enforcement costs.
- ☐ Replace vague payment, performance, remedy, scope, and termination language with terms that can be proved and applied.
- ☐ Build a litigation ready evidence package before placement or assignment.

Five questions before suit

Legal collectibility is not the same as accounting validity. Before filing, ask five questions: Who is obligated? What exact terms apply? What admissible proof exists? Where may the claim be brought? What remedy can reach actual assets? One bad answer weakens the case. Several bad answers turn a receivable into an expensive explanation.

1. Identity: confirm the claimant, defendant, guarantor, and every predecessor or affiliate.
2. Terms: identify the controlling agreement, incorporated documents, amendments, and priority rules.
3. Proof: preserve the records and witnesses needed for formation, performance, amount, assignment, and damages.
4. Forum: determine jurisdiction, venue, governing law, service, arbitration, and consumer restrictions.
5. Recovery: map assets, exemptions, priority, security, domestication, and enforcement cost.

Prefiling rule: *If counsel cannot state the five answers in one page at intake, the file is not ready for suit.*

1. The identity and capacity traps

Name the legal person, not the brand

A trade name or division ordinarily is not a separate legal person. Suing the logo is rarely productive. An invoice from a familiar brand may be issued by a parent, a subsidiary, a servicing affiliate, or a predecessor that has since merged. If the contract names one entity, the invoices identify another, and the payment history runs through a third, the debtor can challenge standing, consideration, performance, or the amount owed. The claimant may be forced to prove agency, assignment, merger, or succession before reaching the merits.

At onboarding, use the exact legal name, entity type, jurisdiction of organization, principal address, and an objective identifier such as a state filing number or tax identification number. Confirm assumed names and recent conversions or mergers through public records. Repeat the exact legal name on the application, master agreement, guaranty, purchase orders, invoices, and account statements. A suffix is not decoration. Corporation, LLC, LP, and LLP identify different legal persons and liability structures.

The file should explain why the claimant has the right to sue and why the defendant has the duty to pay. That explanation may be simple when the contracting party performed and still owns the account. It becomes more demanding when an affiliate performed, a centralized billing entity invoiced, or a merger changed the creditor's name. Preserve intercompany agreements, agency records, merger certificates, and account transfer records that connect each role.

Party identification: “Seller” means Orion Components LLC, a Delaware limited liability company, file number 7654321, with its principal office at [address]. Orion Components is the only seller under this Agreement. No affiliate may become a party except through a written assignment or amendment signed as provided below.

Signature authority and entity liability

An entity promise should show the entity name, the signer's representative title, and a signature expressly made for the entity. Authority may arise from actual authority, apparent authority, ratification, or governing law, but those doctrines are fact dependent and expensive to litigate. The better file contains an officer certificate, board or member approval when appropriate, or another record showing authority for the transaction and any material later amendment.

A signature block should not become a riddle. State the company, the signer's title, and whether the signer is binding the company, the signer personally, or both under separate promises. The general rule that an agent for a disclosed principal is not personally liable can be overcome only by sufficiently clear language under the governing state law. Courts often treat the form of the signature as powerful evidence of capacity. See *Savoy Record Co. v. Cardinal Export Corp.*, 15 N.Y.2d 1, 4 to 6 (1964), as one state law illustration.

Entity signature:

ORION COMPONENTS LLC

By: _____

Name: _____

Title: _____

The signer executes solely in a representative capacity for Orion Components LLC.

A personal guaranty should look personal

A guaranty is a separate promise. It should identify the guaranteed obligations, the creditor, the debtor, the guarantor, the consideration, the duration, any cap, and the events that terminate or continue the obligation. It should have a separate heading and signature. If the guaranty is obtained after credit was extended, identify the new consideration supporting it. State law formalities and statutes of frauds must be checked.

Do not assume that a guaranty automatically follows every renewal, increase in credit, new product line, amendment, assignment, or holdover term. Guaranties are often strictly construed. A material modification made without the guarantor's consent can create a release argument. See *White Rose Food v. Saleh*, 99 N.Y.2d 589, 591 (2003). A continuing guaranty should say what changes are consented to and whether a maximum liability applies. Even broad advance consent language should be reviewed under the chosen state law.

Limited continuing guaranty: *In consideration of Seller extending or continuing credit to Buyer, Guarantor unconditionally guarantees payment of Buyer's Obligations under the Agreement, including authorized renewals and written amendments, up to a principal cap of \$[amount], plus interest and recoverable enforcement expenses. Guarantor consents to extensions of payment time and changes in credit limits that do not increase the principal cap. No other material change expands this Guaranty without Guarantor's written consent. This Guaranty continues until Seller receives written revocation, but revocation does not affect obligations arising from transactions accepted before receipt.*

If personal liability matters: *Make the guaranty unmistakably personal. Hiding it in dense boilerplate is an excellent way to pay lawyers to litigate whether it exists.*

2. Controlling terms and the battle of forms

Build a hierarchy before the dispute

Commercial accounts frequently contain a master agreement, credit application, purchase order, invoice, portal terms, product schedules, email changes, and renewal documents. Each may contain a different forum clause, interest rate, warranty, arbitration provision, or limitation of liability. "The contract" is therefore a conclusion, not a document label.

For sales of goods, enacted Uniform Commercial Code Article 2 may govern. Section 2-207 can recognize a contract even when acceptance contains additional or different terms. The treatment of different terms varies among jurisdictions, and the rule has separate consequences when both parties are merchants. Article 2 does not automatically govern services. Mixed transactions require the forum's classification test, commonly a predominant purpose analysis. International sales may also implicate the United Nations Convention on Contracts for the International Sale of Goods unless excluded.

A master agreement should state an order of precedence and explain whether purchase orders and invoices may alter legal terms. Do not write "all other terms remain unchanged" when no one can identify which terms supposedly remained unchanged. If a portal permits updated terms, define when updates become effective, how notice is delivered, whether existing orders are affected, and what evidence will establish acceptance.

Order of precedence: *If documents conflict, the signed amendment with the latest effective date controls, followed by the signed master agreement, an incorporated product schedule, and an accepted order. A purchase order, invoice, portal entry, acknowledgment, or other operational document does not amend legal terms unless it specifically identifies this Agreement and is signed by an authorized representative of each party.*

Acceptance, modification, and waiver

Formation and modification are different questions. Uniform Commercial Code section 2-209 generally removes the common law consideration requirement for an agreement modifying a sale of goods, but the modification must satisfy good faith and any applicable statute of frauds. A signed modification requirement can matter, yet course of performance and waiver can still create disputes. Service contracts remain governed by state common law unless another statute applies.

The file should preserve the offer, the acceptance, and the version in force at the time of each transaction. If a customer repeatedly pays invoices containing terms, that conduct may support an argument, but it is not a substitute for a planned assent process. The litigation question is not whether the current portal displays reasonable terms. It is whether the creditor can prove the terms presented to this user for this transaction.

Renewals and amendments

Every renewal or amendment should be treated as a new proof event. Confirm the debtor's current legal name, authority of each signer, the exact documents being changed, the effective date, and the provisions that survive. Identify whether a guaranty, security interest, confession of judgment where permitted, or arbitration agreement continues. A new credit limit, a new venue, or a materially different product can exceed the assumptions reflected in the original file.

Amendment record: *This Amendment modifies only Sections [x] and [y] of the Agreement dated [date]. The Agreement, as modified, remains in effect. Buyer ratifies all unpaid obligations through the effective date. The Guarantor joins solely to consent to this Amendment and confirm that the Guaranty continues subject to its stated cap.*

3. The evidence package

A spreadsheet does not prove itself

Collection lawyers regularly receive a beautiful spreadsheet prepared after default. It has columns. It has totals. Sometimes it even has colors. What it does not necessarily have is a business records foundation. Courts remain stubbornly unimpressed by attractive formatting.

Federal Rule of Evidence 803(6), and state counterparts, generally require a record made at or near the time by someone with knowledge, kept in the course of regularly conducted activity, and made as a regular practice. A qualified witness or certification must supply the foundation, and circumstances suggesting untrustworthiness can still keep the record out. Authentication is a separate requirement. Federal Rules of Evidence 901 and 902 provide several routes, including certifications for domestic business records and certain electronic processes or data.

The witness does not need to have typed every entry or watched every invoice leave the building. The witness does need to understand the system well enough to explain who created the records, when they were created, how they were stored, and how the business relied on them. A title alone will not do the work. Neither will an affidavit that recites the rule and then leaps directly to the balance due.

Records received from another business require more. Purchased records do not become admissible by osmosis. Some courts admit incorporated records when the receiving business regularly relies on them and has adequate verification or another assurance of accuracy. Other courts require a stronger foundation. The transfer process therefore must preserve not only the data, but also the information needed to explain where the data came from and why anyone should trust it.

New York debt buyer decisions illustrate the problem. In *Midland Funding, LLC v. David*, 67 Misc. 3d 1209(A), the court rejected the assumption that an earlier business's records automatically became admissible through a later holder. In *Autovest, LLC v. Cassamajor*, 195 A.D.3d 672, 673 (2d Dep't 2021), the foundation failed because the affiant did not establish knowledge of the original creditor's practices or adequate incorporation and reliance. These consumer cases do not establish a national commercial rule. They do establish something more basic: ownership of the account and admissibility of the records are separate questions.

Minimum evidence package for an original creditor

- ☐ The signed agreement or reliable formation record, including every incorporated document and the version history.
- ☐ Evidence of delivery, performance, acceptance, or use, tied to the account and transaction.
- ☐ Invoices and a transaction level ledger showing charges, credits, payments, reversals, fees, and the balance calculation.
- ☐ Aging reports and account statements produced in the ordinary course, not a spreadsheet first assembled for litigation.
- ☐ Communications concerning disputes, promises to pay, payment plans, returns, offsets, and acknowledgments.
- ☐ The record retention policy and a witness who understands the applicable systems.
- ☐ Entity, authority, guaranty, security, amendment, and termination records.

Assignment chain and account level linkage

A bill of sale may prove that a portfolio changed hands without proving that this account was in it. The distinction is not academic. A witness must be able to connect the originator, every seller, every buyer, the current claimant, and the specific account. Portfolio schedules may be redacted for unrelated accounts, but the retained original must permit a witness and the court to match a stable account identifier, debtor, balance, and transfer date.

Each transfer should include the contract, statements, ledger, payment history, correspondence, dispute data, charge and credit codes, and enough system documentation to explain the records. The buyer should document reconciliation, exceptions, and incorporation into its own system. A conclusory affidavit cannot replace the missing ledger. It cannot replace the missing account schedule. It cannot travel backward in time and create records that no one preserved.

What the chain should show: the originator's creation records; the seller's bill of sale and account schedule; the buyer's account match and reconciliation; every intermediate transfer; the current claimant's ownership record; and a witness foundation for the records offered.

Courtroom rule: The affidavit explains the foundation. The attached records prove the balance, the account, and the transfer. Asking the affidavit to do both jobs does not make the missing documents less missing.

An electronic signature still needs proof

The Electronic Signatures in Global and National Commerce Act generally prevents a signature, contract, or record in interstate or foreign commerce from being denied legal effect solely because it is electronic. 15 U.S.C. section 7001. It does not abolish ordinary contract formation rules. The proponent still must prove reasonable notice, acceptance, identity, integrity, and the exact terms accepted. Additional consent and disclosure rules apply to required consumer records.

Modern online formation cases emphasize both notice and an unambiguous act of assent. See *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 75 to 80 (2d Cir. 2017). The cases examine the whole interface,

including clarity, font, placement, proximity to the action button, and whether the user’s act objectively communicated assent.

A database field that says “accepted” proves that the database contains the word “accepted.” Preserve the exact rendered terms, the interface image or source, the version identifier, timestamp, account or user identifier, affirmative action, device or access log where appropriate, change history, and an audit trail protected from ordinary alteration. Years later, a knowledgeable witness must be able to explain what the user saw and what the user did.

4. Forum, venue, jurisdiction, and real recovery

Know what the clause actually controls

Concept	Question	Contract function	Common mistake
Forum	Which court or tribunal?	Selects the adjudicative system and place.	Using “forum” when the parties mean venue.
Venue	Which county or district?	Selects the geographic place within a court system.	Assuming consent overrides a mandatory venue statute.
Personal jurisdiction	May this court bind this party?	Consent can often supply this authority.	Confusing party consent with subject matter power.
Subject matter jurisdiction	May this court hear this type of case?	Must come from constitution or statute.	Trying to create federal jurisdiction by contract.

A contract may supply consent to personal jurisdiction and may select a forum or venue, but it cannot manufacture federal subject matter jurisdiction. Diversity, federal question jurisdiction, removal, and state court jurisdiction must be analyzed independently. Likewise, a clause may be enforceable but still produce poor collection economics if assets are elsewhere.

Mandatory and permissive language

Words such as “may” ordinarily grant permission. Words such as “shall,” standing alone, may still be insufficient if the sentence requires consent to a court but does not exclude all others. In *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers*, 22 F.3d 51, 52 to 53 (2d Cir. 1994), a clause requiring disputes to “come within” a specified court’s jurisdiction was held permissive because it lacked language making that forum exclusive.

Use the concepts that matter: exclusive jurisdiction, exclusive venue, mandatory filing, consent, and waiver of objections. Identify the court system and geography precisely. “Courts of New York” can create a state versus federal question. If federal court is contemplated, subject matter jurisdiction must still exist. State law can affect interpretation and enforcement.

A valid federal forum selection clause receives substantial weight in a transfer analysis under 28 U.S.C. section 1404(a). *Atlantic Marine Construction Co. v. U.S. District Court*, 571 U.S. 49, 62 to 66 (2013). The clause does not make venue “wrong” under section 1391, and procedural treatment differs between federal and state systems.

Exclusive court clause: *Each party irrevocably submits to the exclusive jurisdiction of the state courts located in Suffolk County, New York, and, if federal subject matter jurisdiction exists, the United States District Court for the Eastern District of New York. An action arising from this Agreement shall be brought only in one of those courts. Each party waives any objection based on personal jurisdiction, venue, or forum non conveniens.*

Drafting choice. If the creditor wants a right to sue where the debtor or assets are located, say so expressly and test enforceability. An optional creditor forum may increase flexibility but can invite fairness, mutuality, or interpretation challenges under some state laws.

Consumer venue override

For a “debt collector” bringing a legal action on a consumer debt, the Fair Debt Collection Practices Act imposes venue rules that a contract cannot override. Except for an action to enforce an interest in real property, suit must be filed in the judicial district or similar legal entity where the consumer signed the contract or where the consumer resides when the action begins. 15 U.S.C. section 1692i. An action to enforce an interest in real property belongs where the property is located.

The rule applies to obligations incurred primarily for personal, family, or household purposes and to actors within the statute’s debt collector definition. It is not a general venue statute for every creditor or commercial account. State collection statutes may be broader. At intake, classify the debt from transaction evidence, not from a portfolio label.

Home venue compared with actual recovery

The cheapest place to obtain a judgment may not be the cheapest place to collect it. Before filing, compare service rules, witness travel, likely defenses, default procedures, local counsel cost, judgment life, interest, domestication, debtor exemptions, priority, and asset location. The Uniform Enforcement of Foreign Judgments Act simplifies interstate recognition in adopting states, but local registration steps, notice rules, stays, exemptions, and execution procedure still control.

A federal money judgment may be registered in another federal district under 28 U.S.C. section 1963 after finality, and earlier for good cause in appropriate circumstances. Federal post judgment interest is governed by 28 U.S.C. section 1961. Neither provision creates assets. A prefiling asset map remains part of forum analysis.

5. Arbitration as a collection tool

Price the case before invoking the clause

Arbitration can offer expertise, scheduling flexibility, privacy, and a less formal process. It can also require substantial filing and neutral fees, restrict discovery, sharply limit review, and add a court proceeding before anyone can execute on the award. For collection work, the question is brutally simple: after paying to obtain, confirm, and enforce the award, what is left to collect?

Run the numbers for the actual account. Consider the claim size, whether the debtor will default or fight, the number of parties, discovery needs, emergency relief, witness location, fee allocation, small claims eligibility, the court that can confirm the award, the debtor’s assets, and the probability of collecting anything. A \$35,000 claim can look perfectly healthy until provider charges, neutral time, counsel fees, confirmation, and enforcement are placed beside a thin asset profile. Then the math performs the legal analysis for you.

An arbitration clause may be fully enforceable and still be a terrible collection clause. “Arbitration is faster and cheaper” is not analysis. Sometimes it is. Sometimes the creditor has simply agreed to finance a private lawsuit before learning that the debtor has no reachable assets.

Published provider charges as of September 4, 2026

Provider	Published administrative structure	Important exclusions and drafting point
AAA Commercial	Claim based initial and final fees under the current commercial schedule. Use the official fee calculator when the demand is prepared.	Arbitrator compensation and expenses are separate. Rules and schedules change.
JAMS	\$2,500 filing fee for two parties; \$4,000 for three or more; \$2,500 counterclaim fee; 13 percent case management fee on professional fees.	The neutral sets an individual hourly rate. These figures replace the older amounts shown in the slide deck.

The filing charge is merely the cover charge. Neutral time, hearing facilities, experts, discovery vendors, counsel, travel, motion practice, award preparation, and confirmation may all be separate. A prevailing party fee clause may shift some expense, but only if it is enforceable, broad enough, and supported by proof of reasonableness. Of course, fee shifting is especially comforting when the losing party has no money.

Write the whole clause

A clause stating only that disputes “shall be arbitrated” leaves nearly every useful question unanswered: provider, rules, seat, governing law, number and qualifications of neutrals, method of selection, discovery, dispositive motions, hearing format, confidentiality, interim relief, fee allocation, small claims, consolidation, confirmation, and survival. Incorporating provider rules fills some gaps. It does not excuse the drafter from reading those rules or understanding how they interact with the Federal Arbitration Act and state law.

Arbitrability also depends on which agreement controls. In *Coinbase, Inc. v. Suski*, 602 U.S. 143, 147 to 150 (2024), the Supreme Court held that a court decides which contract governs when one agreement sends disputes to arbitration and a later agreement contains a conflicting forum clause. A clear supersession and precedence rule is therefore part of arbitration drafting.

Commercial arbitration specimen: *Any dispute arising out of or relating to this Agreement, including formation, breach, termination, and the scope of this clause, shall be resolved by one arbitrator administered by [AAA or JAMS] under its commercial arbitration rules in effect when the demand is filed. The legal seat shall be [city, state]. The Federal Arbitration Act governs the arbitration provision; [state] law governs the remaining contract without regard to conflicts rules. The arbitrator may grant any remedy a court could grant under this Agreement and may award recoverable fees and costs. Judgment may be entered on the award in any court with jurisdiction. Either party may seek temporary relief from a court to preserve assets or the status quo without waiving arbitration. Claims within the jurisdictional limit of an identified small claims court may be brought there. This clause survives termination and assignment.*

The specimen is a starting point, not a national form. Consumer and employment arbitration require separate treatment, including provider minimum standards and state or federal restrictions. A one sided election or creditor only court carveout should be examined for mutuality and unconscionability under the governing law.

Confirmation, stay, and limited review

The Federal Arbitration Act makes written arbitration agreements in transactions involving commerce enforceable, subject to generally applicable contract defenses. 9 U.S.C. section 2. When a party requests a stay under section 3, the court must stay the case rather than dismiss it. *Smith v. Spizzirri*, 601 U.S. 472, 475 to 478 (2024). A party can waive arbitration through litigation conduct without an arbitration specific prejudice requirement. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417 to 419 (2022).

An award does not itself authorize a marshal or sheriff to levy. A party ordinarily seeks a judgment through confirmation. Draft express consent to entry of judgment. Sections 9 through 12 address confirmation, vacatur, modification, and timing. Judicial review is narrow, and the statutory vacatur and modification grounds cannot be expanded by contract under the Federal Arbitration Act. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 to 590 (2008).

The Federal Arbitration Act does not itself create federal subject matter jurisdiction. *Badgerow v. Walters*, 596 U.S. 1, 4 to 5 (2022), rejects use of the “look through” approach for confirmation and vacatur petitions under sections 9 and 10. The confirming court must have an independent jurisdictional basis. The collection plan should identify that court before the demand is filed.

Before filing: *If an award issues tomorrow, where will it be confirmed, what deadline applies, and where are the assets? If the file cannot answer all three, the clause is not finished. Neither is counsel.*

6. Money terms that can be calculated

Money terms should produce one number without requiring a deposition to discover what the drafter meant. “Net 30,” “statutory interest,” and “all fees included” do not accomplish that remarkable feat.

Start the payment clock

- ☐ Identify the event that starts the period: shipment, delivery, acceptance, invoice date, invoice receipt, or portal posting.
- ☐ State whether the period uses calendar days or business days and address weekends and holidays.
- ☐ Require prompt, specific disputes and payment of all undisputed amounts.
- ☐ Identify invoice requirements, credits, setoff rights, currency, taxes, and payment method.

Payment timing: *Buyer shall pay each undisputed invoice within 30 calendar days after Buyer receives an invoice that identifies the accepted goods or services, applicable purchase order, quantities, unit prices, taxes, credits, and payment instructions. Buyer shall give a specific written dispute notice within 15 days after receipt and shall timely pay all undisputed amounts. Failure to dispute within 15 days does not waive a claim that could not reasonably have been discovered during that period.*

Interest, late fees, and statutory rates

“Interest at the statutory rate” can mean prejudgment interest, post judgment interest, or a contract rate supplied by statute. Name the rate, whether it is simple or compound, the accrual date, the balance to which it applies, and what happens after judgment. State law may impose usury, licensing, disclosure, consumer, or penalty limits. Calling a charge a “late fee” does not prevent a court from treating it as interest or an unenforceable penalty. Labels are helpful. Law is more helpful.

Federal post judgment interest is governed by 28 U.S.C. section 1961 and is tied to the weekly average one year constant maturity Treasury yield for the calendar week preceding judgment. State judgments use state rules, which vary widely. A contract rate may or may not continue after judgment depending on clause language and state law. Do not assume the highest stated percentage will survive merger into judgment.

Interest clause: *An undisputed amount not paid when due accrues simple interest from the due date until paid at the lesser of 1.0 percent per month or the maximum lawful rate. Payments are applied first as required by law, then to recoverable costs, accrued interest, and principal. Any post judgment rate is determined by the law governing the judgment unless that law permits and this clause clearly preserves the contract rate.*

Attorneys' fees and collection costs

Under the American rule, each side ordinarily bears its own attorneys' fees unless a statute, rule, or enforceable contract provides otherwise. State courts often construe contractual fee provisions strictly. In New York, unmistakably clear language is important, particularly when an indemnity clause is invoked for first party litigation. *Sage Systems, Inc. v. Liss*, 39 N.Y.3d 27, 30 to 32 (2022).

- ☐ Identify whether recoverable expenses include attorneys' fees, arbitration, appeals, bankruptcy proceedings, judgment registration, and post judgment enforcement.
- ☐ Require reasonableness and state who determines the prevailing party and amount.
- ☐ Check whether creditor only treatment is enforceable under the governing law.

Enforcement expenses: *To the extent permitted by law, the party that prevails on a claim to enforce this Agreement may recover its reasonable attorneys' fees agreed upon to be no less than 33 1/3% and documented litigation or arbitration costs, including fees reasonably incurred on appeal, in bankruptcy proceedings concerning the obligation, in confirming an award, in registering a judgment, and in post judgment discovery and execution. The tribunal determines the prevailing party and reasonable amount.*

Liquidated damages must reflect loss

A liquidated damages clause is more defensible when actual loss was difficult to estimate at formation and the amount is a reasonable forecast rather than a punishment. See *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 379 to 380 (2005), as one frequently cited formulation.

- ☐ Document the estimate when the agreement is signed.
- ☐ Define the breach that triggers the amount.
- ☐ Do not stack accelerated future payments, a large default charge, full actual damages, and specific performance unless the combined remedy can be defended.
- ☐ Remember that a savings clause does not turn a penalty into compensation.

7. Quality and performance terms

Adjectives are not standards

"Best efforts," "industry standard," "appropriate methods," "adequate training," and "standard warranty" sound meaningful while leaving the fact finder to supply the benchmark. Some law gives efforts language content, but the inquiry is usually contextual. In *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 613 to 615 (2d Cir. 1979), a best efforts obligation was measured in good faith against the promisor's capabilities and the agreement's commercial purpose. That inquiry requires evidence about alternatives, resources, incentives, and expectations. In other words, the adjective becomes discovery.

- ☐ State the required outcome, metric, baseline, measurement frequency, and permitted variance.
- ☐ Identify the reports or system records that prove performance.
- ☐ Name the issuing body, version, and effective date of any incorporated industry standard.
- ☐ State the warranty duration, conditions, remedy, exclusions, and interaction with any disclaimer or remedy limitation.

Service level: Provider shall acknowledge a severity one incident within 30 minutes, begin continuous remediation within 60 minutes, and restore the service or provide a documented workaround within four hours, measured from the incident ticket timestamp. Planned maintenance under Section 8 and outages caused solely by Customer systems are excluded. Provider shall deliver a monthly report generated from the ticketing system. Three missed restoration targets in a rolling 90 day period constitute a material breach subject to the cure process below.

Materials, methods, and training

- ☐ Define “necessary materials” instead of waiting for each side to develop its own definition after the breach.
- ☐ List owner furnished and supplier furnished materials and define who bears shortages, substitutions, storage, damage, and price changes.
- ☐ Identify required methods, permitted alternatives, approval rights, safety rules, and the record that proves compliance.
- ☐ Define training by course, credential, hours, renewal period, experience, or demonstrated competency, and identify who maintains the roster.
- ☐ State whether nonconforming performance must be corrected, credited, reperformed, or treated as material breach.

Approval and discretion

“Upon approval” does not identify who approves, what criteria apply, when the decision is due, whether silence is approval, or whether approval may be withheld for any reason. Even a grant of sole discretion can be constrained by the express bargain and the implied covenant of good faith under governing law. See 111 West 57th Investment LLC v. 111 W57 Mezz Investor LLC, 2026 N.Y. Slip Op. 03376

Approval process: Customer shall approve or reject each deliverable within ten business days after receipt. A rejection must identify the unmet acceptance criterion in Schedule A with reasonable detail. If Customer does not respond within that period, the deliverable is deemed accepted. Approval does not waive a latent defect that could not reasonably have been discovered during review.

8. Remedies, scope, and termination

State what happens after breach

A private contract does not create a public sanction merely by using the word “sanction.” “Subject to penalties,” “appropriate action,” “necessary corrections,” and “equitable resolution” say almost nothing about what happens next. The clause must identify the trigger, notice, cure, available relief, limitations, and survival. Otherwise the parties have purchased ambiguity at full price.

- ☐ Coordinate withholding, reperformance, repair, replacement, service credits, indemnity, cover damages, acceleration, termination, setoff, security, and guaranty rights.
- ☐ State whether remedies are cumulative or alternative.
- ☐ Confirm that the limitation of liability does not quietly eliminate the remedy the contract supposedly grants.

Notice and cure clause: *For a curable material breach, the nonbreaching party shall give written notice describing the breach. The breaching party has ten business days to cure a payment breach and 30 days to cure another breach, provided it begins cure within ten days and proceeds diligently. If cure fails, the nonbreaching party may terminate the affected order and recover remedies available under the Agreement and governing law, subject to the stated liability limits. Rights that cannot coexist are alternative, not cumulative.*

Define the scope words that allocate risk

“Small business” has no universal private contract meaning. The Small Business Administration uses industry specific size standards, usually based on receipts or employees and including affiliates. 13 C.F.R. section 121.201. A private agreement may need a different definition, such as revenue, employees, ownership, or a named regulatory classification. State laws can use still other thresholds.

“Sensitive,” “confidential,” and “secure information” should be defined by data category, source, markings, and exclusions. Address compelled disclosure, residual knowledge if relevant, security controls, incident notice, return or destruction, and survival. If regulated personal information is involved, a generic confidentiality clause is not a substitute for the applicable privacy and security requirements.

“Risk transfers on delivery” is circular until delivery is defined. For sales of goods, Uniform Commercial Code sections 2-401 and 2-509 distinguish title from risk of loss and supply default rules that depend on shipment terms, carrier delivery, merchant status, and the form of the transaction. State the delivery point, shipment term, exact Incoterms version if used, title transfer, risk transfer, inspection, acceptance, and insurance responsibility separately.

Risk allocation: *Delivery occurs when the goods are unloaded at Buyer’s facility at [address] under DPU, Incoterms 2020. Risk of loss transfers on completed unloading. Title transfers only after Seller receives payment in full, to the extent permitted by law. Buyer has five business days after delivery to inspect for patent nonconformity. Risk transfer does not constitute acceptance and does not limit warranty rights.*

Say how the relationship ends

- ☐ Define cause instead of leaving “for cause” to the imagination.
- ☐ Distinguish breach, insolvency, illegality, prolonged force majeure, and convenience.
- ☐ State the notice and cure periods.
- ☐ Address work in progress, accepted goods, final invoices, deposits, credits, returned property, transition help, accrued payment rights, and survival.
- ☐ State whether termination affects one order or the entire relationship.

Termination for cause: *Either party may terminate an affected order for an uncured material breach under the notice and cure procedure. Either party may terminate immediately for an unauthorized assignment, illegality that prevents performance, or an insolvency event to the extent enforceable. Termination does not affect accrued payment obligations, accepted deliverables, confidentiality, ownership, dispute resolution, or other provisions stated to survive.*

Termination for convenience: *Customer may terminate an order for convenience on 30 days’ written notice. Customer shall pay for conforming goods delivered, accepted services performed through the effective date, and documented noncancelable commitments authorized in the order. The stated payment is the exclusive charge for convenience termination and is not a penalty.*

9. Before filing suit

Contract approval checklist

- ☐ Confirm exact legal names, entity types, jurisdictions, addresses, identifiers, assumed names, and signatory authority.
- ☐ Separate entity signatures from personal guaranties and identify consideration, scope, cap, duration, and amendment treatment.
- ☐ Identify the controlling document, all incorporated materials, order of precedence, and the only permitted amendment method.
- ☐ State payment trigger, dispute procedure, interest, recoverable costs, remedy limits, and post termination payment duties.
- ☐ Draft forum, governing law, service, jury waiver where lawful, and arbitration provisions as a coordinated system.
- ☐ Define delivery, acceptance, title, risk of loss, performance metrics, approval criteria, defaults, cure, remedies, and survival.
- ☐ Design electronic assent and retention before launch. Test what the system will be able to prove three years later.
- ☐ Apply consumer, privacy, licensing, regulatory, usury, and state specific rules to the actual transaction.

Placement and assignment checklist

1. Create a one page claim map identifying claimant, defendants, guarantors, amount, controlling terms, forum, limitations date, and known assets.
2. Reconcile the ledger to the demand amount. Explain every fee, credit, payment, reversal, and interest calculation.
3. Attach formation evidence, amendments, invoices, delivery or performance proof, acceptance records, and material communications.
4. For an assigned account, attach each transfer instrument and account level schedule, plus reconciliation and record incorporation evidence.
5. Identify the records witness and confirm availability, knowledge, and certification options before filing.
6. Classify the obligation as commercial or consumer from transaction evidence and apply the correct venue and collection rules.
7. Evaluate arbitration cost, provider requirements, court jurisdiction for confirmation, and award enforcement.
8. Map assets, liens, exemptions, priority, bankruptcy risk, domestication, and expected net recovery.

Common prefiling defenses and remedies

Likely defense	What creates it	What to do before filing
Lack of standing	Missing entity history or transfer link	Obtain formation, merger, agency, and assignment records before suit.
Wrong defendant	Trade name, incomplete name, or unclear capacity	Verify public filings, assumed names, signature blocks, and guaranty.

Likely defense	What creates it	What to do before filing
No meeting of the minds	Conflicting agreements or missing version	Build a chronology and apply the stated order of precedence.
Balance not proven	Missing ledger or records foundation	Reconcile every component and identify the records witness.
Improper forum	Vague clause or overlooked mandatory statute	Analyze forum, venue, jurisdiction, and consumer rules separately.
Judgment cannot be collected	No asset or enforcement analysis	Identify assets, exemptions, registration steps, and expected recovery.

Have the hard conversation before filing

The client and collection lawyer should resolve proof defects before the complaint fixes the theory of the case. Produce a reproducible claim amount, an exhibit set, a witness plan, a forum analysis, and an enforcement plan. If a missing record cannot be recovered, price the risk, narrow the claim, seek a business resolution, or decline the suit. Finding the problem in summary judgment papers is not a new problem. It is merely the same problem, now urgent and expensive.