

# Lawsuits: Are Your Rates Vulnerable?



**T**he mediator returned to the defendant's room with the plaintiff's offer: "He wants an 18-year water supply agreement, you drop the 'three-to-one' ratio for minimum charges and give him \$250,000 in cash." The water board chairman blankly looked at his board. The board looked at the floor. The board's attorney hurriedly planned legal strategy. I calculated the rate effects the offer would cause. What is going on here?

This is a rural water district in Arizona with 500 connections and a \$300,000 annual budget, but it could be any rural water district or town, even your's. One of the district's larger customers, the owner of an RV park believes the water rates and fees he must pay are too high, so he sued the district. This is Arizona, mind you, not New York or L.A.

It turns out this RV park owner has money, and he's mad – a dangerous combination.

The new board wants to solve this problem. But, they can't just give the plaintiff everything he wants, or even much of what he wants, because that would hurt the other

## NOTES:

- ◆ In a lawsuit the plaintiff is the party suing someone.
- ◆ The defendant is the party being sued.
- ◆ Negotiation is when two parties talk directly to each other to settle a legal dispute.
- ◆ Mediation is when negotiation is facilitated in confidence by a third party (the mediator, generally a lawyer) who communicates offers, counter-offers and other information between the parties. The parties convene in separate rooms of the same building and do not talk directly to each other.
- ◆ Actual event details have been changed in this article to preserve the integrity of the lawsuit mediation process.
- ◆ Carl Brown, the author, is a rate analyst, not an attorney and offers no legal advice.

**Being sued is repugnant. But you need to think of it the same way you would think about being held up by an armed robber. By giving him your wallet you would hope to escape with everything else. If you fight him you may win, you may win but get injured, you may get injured and lose your wallet or you may lose your life. There is no pat answer – each situation is different.**

ratepayers. The board hired an attorney to defend them. The attorney hired me, a rate analyst, to figure out what rate structure is appropriate in this situation to help the district determine the rate effects of any settlement that they may agree to and to convince the plaintiff to accept those rates and settle the lawsuit.

The thing that landed the district in court seemed like a non-issue. They are charging one minimum charge for every three RV spots. That's because RV parks can draw lots of water at full occupancy, running up the capital cost of the system. The district has had this policy for several decades. The plaintiff bought into the system and has been paying these charges for more than ten years.

The basic idea behind these fees, and their cousins "equivalent dwelling units" and "equivalent residential units" is sound. How the district developed them is not. They did no math. The plaintiff knows this. As the mediator said when he brought in his settlement offer, this man feels like this suit is his "ticket to retire well."

The board considered the \$250,000 offer. I analyzed the numbers to put the offer into perspective. I told the district's board, "If the cash settlement and your attorney fees of \$25,000 so far were spread over five years and you dropped the three-to-one ratio fees, your system-wide average monthly bill would have to be \$9.17 higher. The eighteen-year contract is a long time to tie your hands. If you agreed to all these things it would probably enrage other ratepayers. Some might refuse to pay the extra fees. Some might sue." The person who coined the phrase, "between a rock and a hard place" was thinking of this situation.

After much deliberation, the board chairman gave me the board's counter-offer, "No cash and a ten-year supply agreement at the best available rates in the district." The mediator returned to the plaintiff's room.

Multiple minimum charges were this district's downfall. What other misstep might land a water system in court?

- ◆ Being anything short of courteous and professional to everyone when setting rates. The lawsuit will list some legal grievance, of course, but it's really because the plaintiff did not like the way the utility treated them or the customer did not trust the board or council.
- ◆ Violating the open meetings, open records law. This law gives ratepayers and citizens strong leverage to "keep an eye on you." This law is the weapon of choice for most disgruntled ratepayers.
- ◆ Buying or selling water or sewer service on a wholesale basis. The form of the agreement, especially the method by which future rates and fees will be set, is critical to success for the city or RWD and the customers.
- ◆ Having inclining (conservation) or declining block rates and picking a surcharge for each block for subjective rather than objective reasons. A case can be made for higher or lower rates for high volumes of use, but boards/councils must do the math and stay within reason to keep it defensible.
- ◆ Assessing excessively high or low minimum charges. Do the math.
- ◆ Assessing connection or impact fees that are excessively high or low. Building base load capacity and peaking capacity to serve water and sewer customers is very expensive these days. But to charge for it correctly, utilities must do some complex math, make some serious value judgments and explain it well.
- ◆ Increasing rates across the board to balance the budget. It's logical from the utility's point of view but at some point it becomes unfair enough to warrant someone filing a lawsuit.

There are many other ways that a water or wastewater system can land in court. The best way to prevent it, or to reduce the damage if it does happen, is to maintain good relations with customers and always set rates that the city or RWD can simply, logically and mathematically defend. Being right is a good thing, but utilities must go way beyond that. Earning and keeping ratepayers' trust is even more important. To learn more about how to accomplish these things, the "Ratepayer's Survival Guide" is available for free download at [www.gettinggreatrates.com](http://www.gettinggreatrates.com).

**Think it couldn't happen to you? Jackson County, Kansas Rural Water District 3 thought so, too. But, the town of Mayetta, a wholesale water customer of the district, took issue with a recent rate increase and filed suit. Fortunately, all parties eventually sought to resolve the dispute. The author analyzed where rates should be set. Before long everyone was back on the same rate setting page. Mayetta wasn't pleased about the resulting increase, of course. But, they understood how it was determined and everyone moved forward.**

After an hour, the mediator returned to the meeting with a counter-offer. The plaintiff, who was angry, had stated that he would not leave here today without an eighteen-year agreement and his attorney's fees to-date of \$39,000.

I recalculated the price tag and smiled this time as I told the group, "\$2.13 per month and this would end it."

The attorney for the district agreed and said that he thought he could talk the district's liability insurance carrier into paying part of those settlement costs so it should be even less than the \$2.13.



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Private-sector companies have the option of going out of business if they do not serve their customers well. This process is called “creative destruction.”

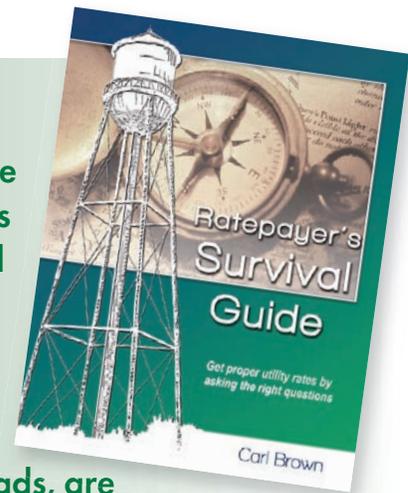
Public-sector companies like water and sewer services owned by cities and public districts are subject to creative destruction, too, but they should practice it with a twist. Customers don’t want to have their services stop so public systems need to create and recreate themselves without service interruption.

You have probably heard the analogy of building an airplane in-flight. In the private sector, landings, even crashes, are allowed if the plane can’t be built in-flight.

But in the public sector you not only have to build the plane in-flight, you have to continuously upgrade it to newer models, too. All the while your passengers get steamed because you are slow bringing their drinks. Some will even get upset enough to sue you over it.

One of the board members who had been quiet so far, stood up and passionately stated his position. He announced, “I did not come here today to pay this guy anything.” More discussion ensued before that board member walked out. Nearly seven hours into the mediation with no real progress, the mediator “recessed” the session. I asked both sides to consider how they could resolve this standoff in the coming days. Otherwise, the court date is set and the issue will be heard there very soon.

The “Ratepayer’s Survival Guide” and related resources, all free downloads, are available at [gettinggreatrates.com](http://gettinggreatrates.com)



### Will your system be sued?

Will your district or city be sued over rates and fees? Rates and fees must climb in response to rising costs, but that is only the tip of the iceberg. There are many other events playing out on the international, national and local scenes that make people feel they have little control. If some ratepayers do not believe they have control on the input side, they will pursue it through legal means. However, the chances of being sued will remain very slim if cities and RWDs handle rate calculations and rate setting well. Do that and almost all of the ratepayers will understand and be generally accepting of their rates. For those who are not so

**Let such a case go to trial and there will be one big loser, one even bigger loser – and no winners.**

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trusting of a utility’s good intentions for them, a good analysis is a good defense.

Finally, if your utility is sued, look into mediation. Let such a case go to trial and there will be one big loser, one even bigger loser – and no winners.

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