We've been sued! Now what? A guide to handling business litigation

A 2010 litigation trends survey warns, "Companies Expect More Litigation." Federal statistics indicate that the number of employees suing employers rose 35% from 2007 to 2011. A study conducted for the U.S. Small Business Administration in 2005 found that on average 45,000 civil cases are filed nationwide against businesses each year involving 65,000 companies.

It is generally assumed that if you own a business long enough you will be sued. The more successful your business, the more likely your business will be sued. If your business has never been sued, what are you going to do when the first lawsuit arrives? If you are one of the many businesses that have previously been sued, what can you do next time to make the litigation process smoother?

Handle a lawsuit proactively

Whatever you do, don't ignore the lawsuit. It's not simply going to go away. A business that is sued and fails to respond to the lawsuit within 30 days can have a default judgment entered against it. The judgment might stay with the business for 20 years or more. It is the rare occasion in which failing to respond is the appropriate action.

Like any other roadblock faced in business, a lawsuit should be attacked head-on in an organized way that makes the most strategic sense for the business. Yes, litigation is unfortunately a part of business and should be approached and handled like all other business decisions.

The first step to take if your business is sued is to contact your attorney and insurance company. In North Carolina, a business entity such as a corporation or a limited-liability company cannot represent itself in state district court, state superior court or in federal court. A company can represent itself in small-claims court, where the jurisdictional limit of recovery for the plaintiff is $5,000.

Since a business served with a lawsuit has only 30 days to respond to the allegations, it is important to retain an attorney as soon as possible after receiving the complaint so there is sufficient time to begin developing a litigation strategy. If you do not have an attorney you should begin searching for one as soon as possible. If your claim is covered by insurance, your insurance company will likely retain an attorney for you.

Develop a strategic plan

A business and its attorney should promptly identify the key factual issues and applicable legal defenses that can be critical to the success of a defense. Similarly, business litigation is often complex and may involve multiple parties, some of which were not named in the original lawsuit. Identifying those additional parties and adding them to the lawsuit is easier to accomplish procedurally, and is more cost-effective, early in the litigation process.

A business must quickly identify key witnesses and all documents relevant to the matters at issue in the lawsuit. This includes identifying witnesses and documents that might be unfavorable to the business's position. It is impossible for a business or its attorney to properly assess the risks of litigation and the potential for an adverse judgment if all facts, good and bad, are not on the table. All too often after months of litigation and even during the last bit of preparation for key depositions or trial, an attorney will happen upon a key document for the first time and the business owner will say, "Oh, I just did not think that document was important, so I did not think I needed to give it to you." In a surprising number of instances, the documents actually help the business's defense. Even if documents are unfavorable to the business, the earlier those unfavorable documents are provided to the attorney, the better the chance that the attorney and the business will be

able to work together to limit the negative impact in litigation.

Preserve all relevant information

It has always been important to quickly identify and preserve relevant documents, whether favorable or unfavorable, during the early stages of litigation. Now that burden has become substantially greater. Historically, all relevant documents were maintained in hard copy somewhere in a file cabinet. It was just a matter of identifying the files and providing them to your attorney. Now, relevant documents may be located on different employees' computers, a company's main server, in back-up computer storage files, on cellphones, iPads and in voice-mail machines, or maybe in tweets, blogs, SMS texts or employee Facebook pages, or in the "cloud." The list goes on and on, but the point is that relevant documents are now stored electronically in many places and are less commonly stored in hard-copy format.

The federal courts have recognized the changed landscape of document storage for a number of years and have had electronic discovery rules, commonly referred to as e-discovery rules, in place since 2006 to govern the identification and preservation of electronically stored documents. North Carolina has now joined the federal courts, putting in place in October 2011 its own set of e-discovery rules that closely parallel the federal rules.

The e-discovery rules require that businesses preserve all electronically stored documents that might be relevant to issues in the litigation. Businesses have always been prohibited from intentionally destroying relevant documents, but the e-discovery rules require businesses to immediately cease the automatic deletion of all electronically stored documents and information — even if an established companywide document-retention policy is in place allowing automatic deletion of documents after a certain period of time. Federal courts have aggressively sanctioned businesses by imposing substantial fines and finding liability on key legal and factual issues in cases where businesses have unintentionally failed to stop automatic deletion of electronically stored documents and information.

The legal obligation to preserve electronically stored documents begins as soon as it is reasonable for the business to assume it might be involved in litigation. If your business terminates a contract with a key supplier because of the supplier's continued failure to make timely deliveries, the preservation obligation may begin on the date your business terminates the contract even if a lawsuit is not filed for several months. When a business terminates an employee and anticipates the employee is likely to bring a lawsuit for wrongful termination, discrimination or retaliation, the preservation obligation may begin on the date of termination. Businesses often need to begin work with their IT personnel or their IT hosting provider to put a plan in place to cease ordinary practices of deletion of electronically stored documents before a lawsuit is filed.

William S. Cherry III

William S. Cherry III is a partner at Manning Fulton & Skinner PA in Raleigh and represents clients in a variety of business litigation matters in state courts, federal courts and administrative agencies throughout North Carolina. A graduate of North Carolina State University and Campbell University School of Law, Will is recognized as a Rising Star by North Carolina Super Lawyers. He served two years as a U.S. Peace Corps volunteer in Nicaragua and is fluent in Spanish.

The key for businesses is to err on the side of preservation. It is advisable to have a plan and policy in place for the preservation of electronically stored documents, commonly referred to as a "litigation hold," in advance so that when the obligation arises, the business can proceed appropriately and efficiently.

Lawsuits are increasingly becoming an expected cost of doing business. When the lawsuit shows up on the doorstep of your business, stay calm; approach the lawsuit like any other hurdle faced in your business. With advance planning and quick and strategic action following the initiation of a lawsuit, a business can put itself in the best possible position to defend the suit, while minimizing disruption to daily operations.