

## **Three Clues to Finding a Silver Lining Within The Cloud of Civil Litigation Defense:**

### **Why Being Sued Can Be a Good Thing**

From the smallest of sole proprietorships to the biggest of corporate conglomerates, no business reacts positively to being named as a defendant in a civil lawsuit. Those that have previously experienced such a scenario know the stress that accompanies the dubious distinction of being a defendant within our country's judicial system. As any defense attorney will tell you, from the filing of the complaint to the rendering of the verdict (and beyond as well), civil litigation is often times an emotionally draining, expensive process that challenges even the strongest-willed and calloused of us all. Yet those people who claim that nothing good comes with the defense of a lawsuit are not correct.

Being sued can be a good thing.

You did not misread the last sentence.

Believe it or not, being sued can be a good thing.

Indeed, there are many examples of defendants and defense attorneys who have utilized creative thinking and business acumen to make sure that a position many find so distasteful and upsetting is neutered by the exploitation of positives that can be found by any defendant – if one knows the clues to their existence.

#### **Clue #1: Perception is Reality**

First and foremost, in business (as in life) the old adage is true: perception is reality. The public's perception of a company largely defines the company's identity and its level of success. Unfortunately, one common misperception prevalent amongst business defendants is that if potential clients or customers become aware of allegations made against a company, business will be lost, regardless of whether those allegations are ever proven true. Yet those same defendants are unable point to a single statistic or personal experience that supports such rationale.

Modern business clients are drastically different than those that existed decades ago, in their level of both sophistication and skepticism. It is this difference that debunks the "bad press" myth. Before, being sued led to the public's assumption that the defendant was guilty. Today, the public turns a calloused eye to litigation, having been subject to a barrage of news stories in recent years confirming the flaws in our system of civil justice, and the availability of the process to anyone with paper and a pen.

You, the reader, are a perfect example. You are involved in business, but you patronize others as well. Think of the most successful companies in today's marketplace whose profit margins you have helped increase. Best Buy, Microsoft, Time-Warner ... they have all been sued, and many times over. Do their profits suffer? Does our patronage? What message was sent when Microsoft was forced to defend itself against one of the largest antitrust lawsuits in history? Did we stop buying their products because of it, or did we become more *aware* of the company's position in the marketplace?

If there's one lesson we can learn from modern-day celebrities, it is this: no press is bad press. Even the most vile and untrue allegations provide the business owner with a golden opportunity to market itself and connect (or re-connect) with a large client base. It is a delicate task to be sure, but a business concerned about the tarnishing of its image when named as a defendant gets the golden opportunity to communicate with its customer base and, hopefully, arouse the hopeless feelings within that base that were described in the opening paragraphs of this article. Business should view litigation as a celebrity would, and attempt to turn that "press" into positive notoriety. Think Hugh Grant, not Britney Spears.

Most recently, Apple founder and CEO Steve Jobs did just that – and before any litigation was ever filed against his company. When it experienced numerous problems associated with the simultaneous rollout of its iPhone 3G and MobileMe products earlier this year, Mr. Jobs seized the opportunity to re-connect with his market, and to reach out to new sources of revenue. His public mea culpa, while not a complete success in terms of Apple's image, was one step in a long line of public relations wins for Mr. Jobs, all of which have helped Apple grow leaps and bounds over the last decade. Your company, if sued, can follow that lead – it can create market awareness and simultaneously network with its existing and potential client base in a new and appealing way to many of today's consumers and clients.

### **Clue #2: Send A Message**

A business can also, if circumstances permit, use its defense of litigation to send a powerful message (for lack of a better phrase) to its employees, competitors, and others. How many times have we heard stories of disgruntled employees suing their employers based upon completely unfounded allegations? Those defendants that allow themselves to be consumed by the potential negative consequences of such litigation do not realize what should be obvious – none of those unfounded cases above would ever have come to light had those employer-defendants not challenged the often-sordid claims made against them.

When those various companies were vindicated by a trier of fact, a message was sent to the outside world, once again reinforcing Clue #1. By defending itself against certain types of allegations, a business defendant sends a message to the outside world that it is strong enough to fight the good fight, sophisticated enough to anticipate success, and smart enough to know that quick settlement, no matter how confidential, leads to more of the same. Numerous examples abound of employers who pay thousands of dollars to independent contractors and employees crying foul to settle cases in a manner that makes the most short-term economic sense. Yet, many examples also exist in which business owners realized that quick settlements begat quick settlements, and often-times prove more costly than the alternative.

That alternative – a strong defense and equally strong message that similar unfounded claims will not be tolerated – not only makes the most economic sense for a company's long-term bottom line in many cases, but it also gives the business owner a greater foundation of legal knowledge and experience upon which he can fortify his company against similar allegations in the future. It is the

shrewdest of clients that take this approach to being named as defendants, because they are the only ones that have the foresight and wisdom needed to understand that going through the process itself can be a benefit to a business even if the company loses the case at the end of the day. Another old adage comes to mind here: “What doesn’t kill us only makes us stronger.”

### **Clue #3: Opportunity Lives Outside the Box**

Most parties involved in litigated business disputes find themselves at one point or another in settlement discussions. In a typical mediation, the parties will first argue their best case to a neutral and each other. After being split into separate rooms, the neutral (such as a retired judge or private attorney) who will shuttle back and forth between rooms explaining why the parties do not have as strong a case as they thought, or why the case will be “held hostage” by attorneys fees if taken to trial. As business disputes typically involve monetary damages, rationales are chosen by the parties for the amounts they should receive or pay, and the mediator does his best to help them find a common middle ground.

It would behoove the business that finds itself as the defendant in this scenario to think outside the box, and to look for non-monetary solutions to the problem. These defendants will find themselves very surprised at not only how much non-monetary concessions are worth to certain plaintiffs, but how settlements can be structured that provide benefits to both sides. Examples of such alternative settlement tools include the following, a non-comprehensive list limited in any given case by the relevant facts at issue and the parties’ creativity: (1) apologies; (2) reference, commendation or referral letters; (3) mutually agreeable public statements; (4) confidentiality agreements; (5) re-employment or the formation of a new business agreement; (6) action in the plaintiff’s name (such as a charitable donation); and (7) assistance in establishing professional relationships with (and resulting profits from) third-parties. All of these solutions (and many others) are available to the defendant business at any time in litigation, and when discussed with counsel and formulated properly, can result in an outcome that proves to be more positive than if the business had never been sued in the first place.

It would be foolish to suggest that one should intentionally subject itself to civil litigation. Yet it would be just as foolish to suggest that no good at all can be derived from such an ordeal. Should any business find its name in the caption of a pleading filed with the Court, following the clues set forth above and reminding itself that defending itself within civil litigation can be a good thing, is the best method to ensure that the negatives assumptions associated with litigation by the uninitiated are avoided and debunked.