

LEGAL STRATEGIES

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“We’ve Been Sued!” How To Minimize The Costs Of Litigation

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Nobody thinks that they will be sued when they start operating a business. Many people just assume that, because they are honest and forthright, and conduct their business in a proper way, they can insulate themselves from lawsuits.

Unfortunately, in today’s environment, being exposed to lawsuits is a risk that we all take, no matter how carefully we conduct ourselves.

Often, when a company gets sued, its owners or officers did not anticipate it, and they go immediately into panic mode. The first question is, “how much will this cost me?” Sometimes the real question they are asking is, how much will it cost if the company loses the lawsuit, and sometimes it’s how much will it cost to litigate and win the lawsuit. The numbers can be daunting. Many lawsuits are ultimately settled, but even when they are settled cheaply, the cost of defending them can be expensive. However, they do not need to mean the end of the business.

If you are sued, it is essential to have an



attorney who understands insurance coverage and who can read your policy, in order to make sure that the company covers the costs of defending the lawsuit. California law is very clear: An insurance company must cover an insured’s defense of the lawsuit if there is even a

“potential for coverage” based on the wording of a Complaint. This is true, even if there is no coverage ultimately for the liability. Failure to do so is usually considered bad faith, and can subject the insurance company

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to punitive damages for failure to defend its insured. A competent attorney can make sure that the insurance company pays for the attorneys' fees and costs of defense, especially in these "mixed" types of cases.

A good example of how important it is to find the right attorney can be seen in a real-world example of a recent lawsuit brought to our firm. The company was sued primarily for alleged fraud. That case, claiming approximately \$3 million in damages, was brought to us after three separate attorneys had told the company that there was no chance of obtaining insurance coverage for the defense. The company was on its last legs and considered shutting its doors permanently. However, there was a single sentence in the 23-page Complaint that alleged negligence – a claim that was covered by the company's insurance. It took us three years to resolve the case, but we were able to obtain insurance coverage for the defense of the case and, because of that, the company is thriving today.

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One thing that can ease the burden of defending a lawsuit is to obtain (and keep in good standing) a liability insurance policy. Such a policy covers things such as liability for lawsuits, and, even more importantly, the cost of paying for a lawsuit. Costs in a lawsuit involve a number of things, including court fees (which have become substantial over the past few years in an era of ever-rising state budget shortfalls), costs of lawyers, costs of expert witnesses, costs of travel in connection

with preparing for the lawsuit, and similar things.

Such policies are not often at the top of a businessperson's list when it comes to financial planning. But they should be. A single lawsuit can be financially devastating, even if you win, because the cost of attorneys' fees, expert fees and court costs in a bitterly fought suit can consume a good part of a company's profits for the quarter – or even longer. But, with the right liability policy, the company is insulated against the majority of such costs.

Although a liability policy will not cover everything that is alleged in a lawsuit, it can cover a lot. For example, some policies will cover employment issues, such as where an employee claims that he or she was discriminated against, or was improperly terminated.

Generally, a company should have what is known as a "Commercial General Liability" policy, which will cover many types of claims. It is also good to have "Employment Practices Liability Insurance" to cover employment claims, and for a corporation to have an "Officers' and Directors' Liability" policy to cover claims that a company's officers and directors did not act properly. If the company owns or manages property, a "Property Liability" policy will protect against someone who is injured on that property, and claims that the company is responsible for whatever caused the injury.

Most Commercial General Liability policies will cover general claims for negligence, and many cover claims of defamation (claims of slander or libel – or claims that untrue things were said about someone that injured his or her reputation, or exposed him or her to ridicule). Insurance policies will not cover

claims of intentional conduct or fraud – claims such as one that the company defrauded someone into entering into a contract, or that someone for whom the company is responsible assaulted the Plaintiff. But often, a lawsuit contains more than a single claim.

For example, it is not at all uncommon for a Complaint to allege that someone assaulted a plaintiff, or in the alternative, that the person acted so carelessly as to injure the plaintiff. In the construction context, a Complaint will often allege a breach of contract, but will also allege that the contractor performed work negligently, causing construction defects. These kinds of cases will often result in coverage for the attorneys’ fees and costs of defending a case, while the insurance company will “reserve its rights” to claim that it is not responsible for liability if the company loses.

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The time to check your insurance coverage is now – not later, when you are sued. Once a lawsuit is filed against you or your company, it will be too late to obtain coverage for that lawsuit. However, if you just consider the cost of insurance as one of the expenses of doing business, you can calculate it into your overhead, and be comfortable when you are sued that you have already factored the costs of the lawsuit into the costs of business. Then, your business can continue operating profitably while your attorney deals with making sure you win the lawsuit.

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