

LEGAL STRATEGIES



A Legal Newsletter from Steven I. Hochfelsen



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Is There No Justice?



Lawsuits are becoming an increasingly common fact of life in American society. Some people file lawsuits expecting to become rich because of some minor injury, and the people sued are forced to spend a lot of money and time defending them. The story of the woman who got "burned by a cup of coffee" at a well-known fast food restaurant is bandied about in the media as an example of the excesses of our judicial system. (What the media do not mention is that the woman sustained numerous third-degree burns and underwent several skin-graft operations, spending weeks in the hospital as a result of the incident. Then the judge significantly reduced the amount of the jury's award at the end of trial.) These stories encourage more people to file frivolous lawsuits with unrealistic dollar signs in their eyes, and the attorneys who take them often do so in volume, expecting to get a quick settlement without too much work. Many such lawsuits are referred to as "nuisance suits," where it would cost more in time and attorneys' fees to defend them than it would to pay a settlement and make them go away.

Furthermore, such nuisance suits are not found only in cases where a person is injured. There are nuisance suits in connection with business dealings, as well. One party to a contract sues because s/he made a bad deal, and doesn't want to go through with it. More often, the words on the contract did not really say what s/he meant. But s/he agreed to it, and the only choice is to go through with a losing proposition, or to sue. Hence, a lawsuit. Sometimes, a lawsuit will claim that a contract was broken when in fact the parties never entered into one in the first place.

"But that isn't fair, and it isn't right," is the expected response of any rational person. The response is found in the words of the immortal John F. Kennedy: "Whoever said life was fair?"

The truth is, there is some fairness in the court system. If pursued to the end, the frivolous lawsuits usually will get dismissed or the persons bringing them will usually lose. But most lawsuits are never pursued to the end. Many are settled after a lot of time and money has been invested in fighting them. Executives and employees have to spend days in depositions, taking time away from work and subjected to questioning by lawyers about matters with which they have no patience. They have to spend hours wading through documents to give to the other side and responding under oath to written questions, called "interrogatories." Sometimes they go through the entire process, only to see the case settle "on the courthouse steps" on the day of trial. They then become frustrated with the system, seeing it as a waste of time and resources.

It is essential to have an attorney who knows the ins and outs of the litigation process

A lot of the discontent with our court system stems from parties to a lawsuit being misinformed. They approach litigation with the belief that, because they are right, they will win. After all, their case is going through the "justice system," so they expect to receive "justice."

The fact is, in the United States, we do not have a "justice system." We have a dispute resolution system. Our court system encourages the parties to resolve their disputes without going to trial. One of the ways it does this is by making the process of going through a lawsuit so onerous and expensive that only those parties who cannot resolve their disputes in any other way will go to trial. Another incentive to resolve a dispute without trial is the fact that the outcome of a trial is always uncertain until the final verdict is read and the damages are awarded. Finally, often the prevailing party cannot recoup his or her attorneys' fees, even after s/he wins, or the judge refuses to award the entire amount of those fees even though s/he is entitled to them.

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As a businessperson, recognizing this fact -- that our court system encourages the efficient resolution of disputes, rather than providing abstract "justice" -- can help you structure your approach to a lawsuit in several ways:

1. **You can recognize the cost of litigation as an inevitable cost of business**, and not a personal attack on you or your company. Often, cases go too far through the litigation process because egos get involved. Sometimes, it is worth fighting based on "the principle of the matter." Sometimes, if you take a step back, you may decide that the cost of fighting over principles is not worth the loss of productivity and loss of goodwill that may result. A good attorney will act as a counselor, as well as an advocate, and will try to help you view your case from a neutral perspective.

2. **You and your attorney can do a realistic "cost/benefit analysis" at the beginning of the lawsuit.** If you are the plaintiff, you can determine in real terms whether the costs of pursuing the action are worth what you are trying to achieve. If you are the defendant, you can

seek early on to determine what the plaintiff wants, and whether, in light of that demand, you should settle the case early, or defend it until you are in a better strategic position and attempt to settle later. You can also decide whether it is worth the cost of pursuing the action to trial. (In some cases, there are 20 or 30 others who are watching the outcome of the lawsuit to see if they will file their own lawsuits later. In these cases, you may prefer to set an example by fighting the case all the way through.) In any case, you will know what you are getting into at the beginning of the case, and this will be less frustrating for all concerned.

3. **You can conduct regular "litigation audits"** designed to minimize litigation by or against your company, or to maximize your company's advantage in a lawsuit. Many large companies have attorneys on staff, known as "in-house counsel," whose sole jobs are to review disputes before they get to the lawsuit stage. They can then preserve essential evidence, document the company's position, and attempt to resolve the dispute before it becomes a lawsuit. There is a new trend in the practice of law where independent attorneys perform the same functions on a part-time basis for smaller companies. These companies, who cannot afford to have full-time "in-house counsel," pay the attorneys a retainer fee for a specified number of hours of such service. These attorneys are jokingly referred to in the profession as "out-house counsel."

4. **You can pursue alternative dispute resolution strategies.** Once you view a lawsuit as a means of resolving disputes, rather than as a means of obtaining "justice," you might consider less costly options for resolving disputes, such as arbitration or mediation. While these options are not always fruitful or preferable to a lawsuit, in some cases they may be. Today's attorney should be knowledgeable about such alternative dispute resolution methods. Such an attorney can help guide you in determining your best chance at resolving your dispute.

5. **You can hire an attorney experienced in litigation.** It is essential to have an attorney who knows the ins and outs of the litigation process. Such an attorney can give you a pragmatic view of the time and effort likely to be involved in the process. He can also help you consider all of the factors relevant to determining your best course of action. Even more importantly, he knows the process and can minimize the time and effort you have to spend involved in the lawsuit.

These suggestions should help you understand the process a little better and simplify your approach to a lawsuit. While litigation is never easy, approaching it with the right attitude and with an experienced attorney can help you minimize its impact on your business -- and your life.

By Steven I. Hochfelsen