First considerations when a lawsuit is coming

Many business owners have experienced the unsettling feeling that comes when they discover they have been sued or threatened with a lawsuit. If you have not, then keep in mind that it could be just around the corner: Recent studies demonstrate that the question for most business owners is not *if*, but *when* they will be sued or threatened with a lawsuit.

Lane Molen

A lawsuit not only poses the obvious potential of financial liability, but can also cause significant ongoing expenses and distractions from day-to-day business operations. This can be particularly overwhelming for business owners with little experience handling lawsuits. As with any endeavor, how you begin will likely have a large impact on how you will end. Here are six ideas for you to consider when dealing with a lawsuit:

1. It is Important to Protect the Attorney-Client Privilege. A common mistake by those unfamiliar with the legal system upon receiving service of a lawsuit or a threat of litigation is to immediately discuss the threat with others. This is human nature when confronted with something unfamiliar and unexpected. The problem with doing so, however, is that communications, whether verbal or written, between you and others including those within your company could be obtained by the opposing party in a lawsuit. Meanwhile, discussions between you and your attorney are legally protected as private. Before talking to others about the threat, hire an attorney and discuss with him or her how you can best protect your private communications.

2. Consider Getting Legal Counsel Immediately. There are a number of reasons to act quickly in hiring an attorney. Perhaps the most important is to ensure you do not lose any rights or claims by missing an important deadline.

In addition, acting quickly can sometimes facilitate a less costly resolution. The sooner you hire an attorney, the sooner you can get advice concerning the possibility and desirability of working toward a resolution out of court. Sometimes you may have no choice but to fight, but finding a business solution to the dispute prior to the commencement of court action when possible is often more cost-effective.

3. Contact Your Insurance Carrier. It is quite important to notify your insurance broker/carrier of the claim or potential claim to obtain a determination whether your carrier will defend you against and ultimately cover the claim. If you have a broker, they will be able to put all potential carriers on notice of the claim. You may have more than one policy covering the matter. Your carrier may have a duty to defend you in the litigation and in such a case will likely have a say about who your attorney will be.

4. Preserve Documents. After a lawsuit is filed or threatened, you should be sure to preserve documents or other items related to the subject matter of the threat, and you likely will want to put a stop to any automatic document destruction/deletion programs. The law imposes upon parties to litigation the responsibility to preserve documents and other evidence, even if you view the items as insignificant or damaging. Parties that fail to preserve evidence may be subject to serious sanctions by the court for spoliation of evidence, including simply entering judgment against companies that intentionally destroy important evidence.

5. Prepare a Chronology of Relevant Events. Take time to sit down and write a chronology of events relevant to the claims being made against you. You may wish to prepare it as a letter to your hired attorney and label it as confidential communication. This chronology will assist your attorney in gaining an understanding of the issues that are presented and preparing a strategy to defend against the claim much quicker. It will also potentially save you fees because your attorney may not have to spend as much time investigating the matter.

6. Be Prepared to Talk Plainly About Fees. From the outset you should have candid conversations with your attorney about his or her fees and the potential litigation costs you are facing. Exact numbers will be impossible to predict at the early stages, but your attorney may be able to give you a ballpark range of what fighting a lawsuit could cost you. You should factor this into your strategy toward resolving the dispute with a business solution. Ask your attorney if it will be possible to recover attorney fees if you win. In the absence of a contract or a statute, the general rule is that each party pays its own fees and costs of litigation.

Lane Molen is an associate with Snell & Wilmer. His practice is concentrated in commercial litigation, involving real estate, natural resources, contract disputes and financial services issues. He represents clients of all sizes, including small businesses.

An employment lawyer's perspective on avoiding sleepless nights

There are an awful lot of things to worry about when you are a business leader, not the least of which is whether your company is in violation of various laws. From tax laws to securities laws to environmental laws to workplace laws to product liability, the legal compliance field is huge and ever-changing.

Elisabeth Blattner-Thompson

When it comes to employment-law compliance, however, you should be able to rest more easily if you take action in these four areas:

Figure out who your employees are. Many companies don't know who their employees are. By this I don't mean that you should do all the recruiting for your company so you have personally approved every hire. While that may make sense in very small businesses, by the time your company is of any size at all, recruitment likely is a task delegated to more than one competent person, and those recruiters often are not the owner, CEO or COO. Nor do I mean you must wander the workplace introducing yourself and having heart-to-heart conversations with everyone you meet. Although I am a true believer in such behavior and see both moral and business value in it, I am not talking about that sort of "appreciation" knowledge about your employees. I am referring to true legal knowledge. That is, who, legally, according to federal and Utah law, is your employee?

One of the most common and costly mistakes that I have seen business owners and executives make in my 23 years of employment-law practice is to assume that certain people who provide services to them are not, in fact, company employees. Companies often take a narrow and misguided view that anyone who is not receiving a W-2 is not their employee. Through this lens, companies readily hire "contractors" on a 1099 basis to provide various services, and then consider themselves free of further worry about taxes, overtime, benefits and discrimination laws.

The truth, however, is that no matter

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lost. The trustee or Chapter 11 debtor will have to prove the basic elements of their case, among them that the debtor was insolvent when the payment was made and that the payment enabled you to receive more than you would have if the debtor had been liquidated.Even if the trustee can prove all of these elements (and he or she usually can), there are a number of defenses that may let you off the hook, or at least lessen your exposure. For example, the trustee isn't entitled to recover the payment if it was made as part of a "contemporaneous exchange for value." The "ordinary course of business" is also a defense, so if the invoice terms are net 30 and the debtor has been paying you within 30 days, you're probably OK. Courts look at the course of dealings between the parties for this defense, but also look at typical conduct regarding the manner and timing of payment in the particular industry. Another defense is if your business provided value (goods or services) to the debtor after you received the challenged payment and you haven't yet been paid. There are a number of other technical defenses that you'll want to explore before responding to a preference demand or lawsuit.

It probably won't make you feel any better if you are the target of a preference demand or lawsuit, but the policy behind allowing recovery of preferences is to enable the bankruptcy estate to give equal treatment to similarly situated creditors. Bringing preferential payments back into the bankruptcy estate lets those funds be distributed to creditors according to the priorities of the bankruptcy code, at least that's the theory.

When dealing with a troubled business that owes you money, don't obsess over whether a bankruptcy trustee might be able to recover a payment from you if a bankruptcy is filed. It is possible there won't be a bankruptcy or that the trustee may not chase you. You may also have defenses. So if you are offered a payment, take the money!

• There Are Ways to Keep Certain Types of Fraud from Being Discharged in Bankruptcy. Scam artists and fraudsters often end up in bankruptcy. If fraud or certain other conduct was committed by an individual who filed bankruptcy, there may still be hope that you can keep the debt owed to you from being wiped away, or in bankruptcy lingo "discharged."

But you have to act fast. The deadline for filing a lawsuit asking the bankruptcy court to except a particular debt from discharge will be listed on the notice of the initial bankruptcy filing from the court. The deadline will be 60 days from the date first set for the first meeting of creditors, which will typically be approximately 3 months after the date the bankruptcy was filed.

The bankruptcy code excepts certain types of debts from discharge. Those include the following, provided that a creditor timely files and prevails on a lawsuit within the bankruptcy:

• Money, property, or services or an extension or renewal of credit obtained by use of a false written statement;

• Fraud or defalcation while acting as a fiduciary, embezzlement, or larceny;

• Willful and malicious injury caused by the debtor.

It is important to quickly evaluate whether you have such grounds to except a debt from discharge so you can decide whether it makes sense for you to file a lawsuit within the short statute of limitations. If you've been diligent but still need more time to investigate the facts, you can file a motion (before the deadline runs) asking the court to give you a little more time. Finally, creditors should think twice before filing a nondischargeability lawsuit on a consumer debt. A court can award attorney's fees against a creditor that brought a nondischargeability complaint on a consumer debt if its position was not substantially justified.

Douglas Payne is a Fabian Law attorney whose practice focuses on business bankruptcy and commercial litigation. He has over 25 years of experience protecting the interests of creditors and other parties in bankruptcy cases and has successfully represented a number of unsecured creditors' committees in complex bankruptcy cases. He can be reached at (801) 531-8900 or dpayne@fabianlaw.com.