Featured in:
Massachusetts FAMILY BUSINESS SPRING 2017
Official magazine of the FBA

You Just Got Sued for the First Time. Now What?

By David B. Chaffin

Being sued is unnerving, particularly the first time it happens. And with good reason: Litigation can be expensive, inefficient and uncontrollable. But a big part of the stress is really just fear of the unknown. The purpose of this article is to make the unknown known. File it away as a stress reliever to be used if and when the process server appears.

While the rules vary from court system to court system, the litigation process is generally the same in all courts. It involves five main stages.

First Stage – Pleading

The plaintiff sues by filing a complaint that sets forth his claims. It will recite the facts and set out counts, claims for relief under legal theories (e.g., negligence). A demand for a jury trial usually is included. The defendant must respond to the complaint, usually with an answer that tracks the complaint, admitting, denying or denying knowledge as to each allegation of the complaint and asserting affirmative defenses. The answer can include counterclaims against the plaintiff and related claims against other parties. Rather than answering, where a complaint is defective on its face, the defendant can move to dismiss. Motions to dismiss are infrequently granted.

Second Stage – Discovery

After the pleading or motion to dismiss stage, the parties conduct discovery, the process by which the parties investigate one another's case and gather evidence. Discovery is supposed to be confined to the issues in dispute and not abused, but it probably is the part of litigation in which abuses of one sort or another most frequently occur. It all too frequently is an expensive, disruptive process, and it can take many months and sometimes years to complete.

There are multiple discovery mechanisms. Other parties' documents, including electronically stored information, can be obtained and/or inspected. Interrogatories – written questions that an opposing party must answer under oath – can be served. Depositions – examinations of witnesses under oath outside the court – can be conducted. Requests for admission – writings that compel an opponent to admit or deny specified facts – also can be served.

Third Stage – Dispositive Motion Practice

In most cases, one or more parties will move for summary judgment after discovery is completed. Such a motion essentially argues that, even viewing the evidence in the light most favorable to the

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non-moving party, the moving party is entitled to judgment in its favor. The moving party argues to the court that even if the court believes all of the valid evidence offered by the non-moving party, the moving party wins. Motions for summary judgment are granted more frequently than motions to dismiss.

Fourth Stage – Trial

Claims that survive summary judgment go to trial. Claims can be tried to a jury or the court (with the court essentially acting as a jury). A complete discussion of trials is beyond the scope of this article, but a few things are worth mentioning. First, the notion that juries often get things wrong is wrong. Juries are smart, and they try to do the right thing. If you're in the right and telling the truth, you shouldn't have anything to fear from the jury. A litigant who thinks he can pull a fast one on a jury is fooling only himself.

Second, a trial can and should be an enjoyable and rewarding experience. But the conditions must be right. Your case must have merit. It doesn't have to be a slam dunk, but it can't be a for sure loser. Further, you – and your trial counsel – must be prepared. Preparation is absolutely critical.

Third, if a trial is going or has gone badly and this comes as a surprise, someone has not done his or her job. It's your lawyer's job to continuously evaluate your case, to warn you that a fall may be coming, and to press for settlement. So, if you get to trial, brimming with confidence, only to have the ceiling collapse, it's your lawyer who is to blame.

Fifth Stage – Appeal

After a judge has dismissed a case on motion or after trial, a case may proceed to appeal. The appellate courts concern themselves mostly with issues of law, not fact. Thus, if a trial court misinterprets the law, reversal may occur, but an appellate court almost never will reverse a judge's or a jury's findings of fact.

First Things First

If you get sued, you should do five things immediately:

First, read the papers that have been served on you. If they include a motion for a preliminary injunction or any other document that seeks some sort of immediate action by the court, the lawsuit should be made your first priority. Failing to give immediate attention to the case can result in, for example, a freeze on bank accounts by default.

Second, refrain from calling your opponent. A common reaction is to pick up the phone to see if there's a way to make the case go away. This never works. Your opponent has gone to the trouble and expense of suing. He means business, and a mere phone call won't work. More importantly, what you say to your opponent can and will be used against you.

Third, tell your insurance broker about the lawsuit and instruct it to notify all insurers that might provide coverage for the lawsuit. Depending on the nature of the claim and the nature of your coverage, it may be that you have coverage not only for any eventual judgment against you or your business, but for the cost of defense.

Fourth, immediately advise everyone who may be in possession of any evidence that has any relevance to the claim against you, including email, not to destroy or delete any of it. Do this in writing. The destruction of evidence can result in sanctions.

Fifth, be careful what you write down, and tell everyone else to do the same. Anything you write down may end up being produced in discovery.

Counsel Selection

The importance of the choice of litigation counsel cannot be overstated: Cases can last years, and it is critical to find someone you would be okay working with for years.

Shop for your lawyer. Do not hire the first one whose name you happen to get from a relative or acquaintance, or the one you used for the closing on your house. Ask for recommendations. Do research. Interview candidates, and ask them about experience with cases like yours. This is information you are entitled to have, and if it is not provided, steer clear. Find out about trial experience. Hiring a lawyer who can't try a case is like hiring a carpenter whose only tool is a hammer. Ask yourself whether the lawyer is someone you would be okay spending time – maybe a lot – with.

Get clarity on rates and negotiate them, and ask about alternative billing arrangements. Hourly rates vary. A lot. Do a careful cost/benefit. Also, bear in mind that almost all lawyers will discount their standard rates. Lawyers compete to land cases, so you have leverage. Depending on the case, some sort of alternative billing arrangement, such as a reduced hourly rate or partial contingency agreement may be worth exploring. In short, do not accept the "sticker price."

Also, get a commitment on staffing. You and your lawyer should agree on who will work on your case. The shortest path to inflated bills is overstaffing. Prohibit your lead lawyer from involving others without your permission.

Tips/General Observations

The litigation process can be abused, and it can be very wasteful. But on the most important issue – Does the good guy win in the end? – the news is good: He usually does. Further, the process can be satisfying, if not downright enjoyable. Everyone likes to be vindicated, right?

But there are exceptions. Whether a lawsuit becomes a nightmare depends principally on the personality of the person behind it. Some folks fight for the sake of fighting or to prove a point or for ego gratification, and can convert a rational process into something that is anything but. With people like these, special tactics and considerations are required. ■

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