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1225 Franklin Ave. - Ste. 325 - Garden City, NY 11530 - Tel.: 516-620-9716 - www.weinreblaw.com

In This Issue:

Litigation: A Big Deal for Small Business

In this quarter's newsletter, Elan E. Weinreb, Esq., Managing Member of The Weinreb Law Firm, PLLC, discusses the steps that small businesses can take to: (i) avoid litigation in the first place; and (ii) efficiently and effectively handle litigation when it simply cannot be avoided.

"An Ounce of Prevention . . ." - How to Avoid Litigation

I have been fortunate (or some might say unfortunate) enough to have had the honor and privilege of practicing civil litigation in the State of New York for over a decade. A significant portion of my experience has come from representing large corporations in various disputes—titans of industry that have millions of dollars to spend on attorneys' fees and which have no problem with spending several years (or even decades) in court, so long as they prevail at the end of the day.

Small businesses (and certainly individual litigants) are rarely—if ever—in the same boat as these corporate juggernauts. For them, litigation is more often than not a nightmare that cannot end soon enough. Furthermore, the costs of litigation for such small businesses can vastly outweigh what (if anything) they hope to achieve via use of the judicial system such that courtroom victories become de facto defeats—what are often referred to as "Pyrrhic victories."

"The phrase *Pyrrhic victory* is named after Greek King Pyrrhus of Epirus, whose army suffered irreplaceable casualties in defeating the Romans at Heraclea" *circa* 280 B.C.E. Plutarch, a Greek historian, poignantly describes the aftermath of Heraclea:

"The armies separated; and, it is said, Pyrrhus replied to one that gave him joy of his victory that *one more such victory would utterly undo him*."

— Wikipedia, *"Pyrrhic victory"*, http://en.wikipedia.org/wiki/Pyrrhic_victory

"An Ounce of Prevention . . ." *cont. from Page 1*

It thus comes as no surprise that the very notion of litigation is anything but welcome to most small businesses.

Fortunately, it is also the case that small businesses can take concrete steps to avoid litigation in the first place. These include the following:

- **Document, Retain, and Rest Assured -** The existence of documentary evidence is a key factor in determining which party (if any) should prevail in litigation. To this end, there's a "documentary evidence" defense found in New York's Civil Practice Law and Rules that can bring about the early termination of cases, *see generally* CPLR § 3211(a)(1), as well as an accelerated judgment procedure for certain cases that involves the use of documentary evidence. *See generally* CPLR § 3213.

  The lesson here for the small business owner: **DOCUMENT ANY AND ALL** business transactions (including those involving employees) and then **RETAIN** such documentation (if not in hardcopy, then digitally/on computer (and backed up)) for a period of at least ten (10) years. If this is done, when an irrational customer, vendor with a vendetta, disgruntled employee, or other potential adversary threatens suit based upon your business' transactions, you will be prepared to fight back early and hard by having the business' attorney draft a letter attaching relevant documentary evidence corresponding to such transactions and supporting the business' position. Such letters have the potential to prevent litigation entirely.

- **Strictly Adhere to the Provisions of Business Operating Documents -** I've seen the best of friends become the worst of enemies because of hard times affecting their small business and usually at the point in time where the business' dissolution is either on the horizon or underway. One party inevitably brandishes a partnership agreement, operating agreement, shareholders' agreement, or some other similar form of document pertaining to the business' operations. He or she then loudly proclaims, "Aha! Paragraph 'X' clearly states that I'm entitled to [WHATEVER POSITION HE OR SHE IS TAKING]." The other party then loudly proclaims, "What are you talking about?! The last time this issue came up, we agreed that we were not going to follow the document you're waving about wildly, and we ended up not following it! Now, we're in the same situation, and you're trying to cheat me!"

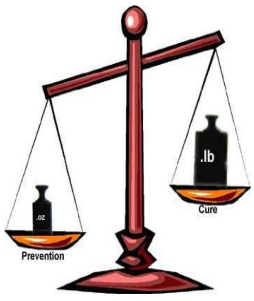
  Only the parties' attorneys ultimately benefit from such strife.

"An Ounce of Prevention . . ." *cont. from Page 2*

The lesson here for small business owners: follow—**and do NOT deviate from**—your business' operating documents as they are written unless such deviations are in writing, discussed with the business' attorney **before** they occur, and meet any other requirements for deviations/amendments that may be found in the operating documents such as calling a special meeting.

- **Ensure Success with Insurance -** My torts teacher in law school would tell us that we do not need to go very far to find litigation. Rather, litigation is everywhere; like the air we breathe, the prospect of it surrounds us 24/7. It is around us when we eat ("Waiter! I found a roach in my soup!"), breathe ("The air in here smells rancid…. Wait! Are we near the old dumping ground?"), walk on the street ("Watch out for that piano!!!!"), purchase goods ("I want a refund; the 72-inch HDTV you sold me doesn't work!"), and even when we pass on ("Are you telling me that she doesn't have a plot in this cemetery?! Read the #@!@! contract!"). There are just some times when—like death and taxes—litigation is inevitable and unavoidable, no matter what you do.

  The lesson here for small business owners: it is for these times that a comprehensive general liability (CGL) policy that includes business interruption insurance, professional liability insurance, umbrella insurance, and other types of insurance specific to your particular business can be extremely useful, if not economically life-saving. Often, the policies establishing insurance coverage impose upon insurers a "duty to defend" against claims, meaning that if, Heaven forbid, your business is sued, you will not have to scramble to find an attorney to help you. Also, if coverage for the business is adequate and a sound defense is presented, it may be the case that your appointed attorney will convince the business' adversary to settle in advance of him, her, or it commencing litigation.



In conclusion, the old saying that "an ounce of prevention is worth a pound of cure" is certainly true when it comes to litigation. By documenting transactions, following business operating documents without deviation, and maintaining comprehensive and adequate types and levels of insurance, small business owners can take concrete steps to avoid litigation or at least minimize their exposure as much as possible.

Don't "Win the Battle But Lose the War" - Efficient and Effective Litigation Preparation

As discussed above, sometimes, litigation is simply unavoidable. In these circumstances, small business owners are placed in a most unenviable position of having to effectively take on another job, namely assisting in the prosecution and/or defense of claims involving the business. This is because the business' attorney is often not personally involved with the transactions, operations, or occurrences that are the subject of the litigation and thus requires owner assistance in preparing for it. Furthermore, even if the business' attorney was or is personally involved, he or she usually does not have the same close level of involvement that you or other owners of the business have had with its transactions, operations, or occurrences. There's no way around it: as an owner, you're going to have to be involved in the litigation if you want to have any chance of prevailing.

Fortunately, just as small business owners can take concrete steps to avoid litigation, they can take concrete steps to efficiently and effectively prepare for litigation. These include the following:

- **Preserve, Preserve, Preserve -** As soon as the litigation is reasonably anticipated, steps to preserve all information even remotely relevant to the litigation—including, but not limited to electronically-stored information on computers, tablets, and smartphones—should be taken, and any automatic deletion policies or procedures that are in place should be suspended until the litigation is resolved.

Avoid the temptation to "win the battle but lose the war" here by destroying, altering, or otherwise concealing information, as this illegal misconduct will almost certainly result in severe—even legally fatal—consequences later on in the litigation in the form of sanctions (a/k/a penalties). This article is not the place to discuss these sanctions, related law pertinent to the loss or destruction of evidence (what is also known as "spoliation of evidence"), or the specific steps involved in the preservation of data (what is also known as "litigation hold compliance"), but this much can be stated succinctly: If you or anyone involved in the business' operations have any doubt as to preservation obligations, consult the business' attorney **immediately**, and err on the side of preservation.

Don't "Win the Battle . . ." *cont. from Page 4*

- **Ascertain Ultimate Objectives Early -** There's a saying that my third grade teacher was often fond of repeating: "Failing to prepare, we prepare to fail; succeeding in preparation, we prepare to succeed." Without a clear, distinct ultimate objective or set of objectives in mind at the start of litigation (i.e., "Win! That's all I care about and all that's important to the business!"), it's all too easy to "win the battle and lose the war." The business' attorney will simply do everything within the bounds of the law to achieve gains that are really losses in disguise.

  For example, assume that your small business is the seller plaintiff in a breach of contract case that is suing the defendant buyer business due to its failure, as evidenced by a bounced check, to pay for certain goods on time. If the case is brought as a plain vanilla breach of contract action, there is a strong likelihood that your business' attorney can speed things along via a "fast track" accelerated judgment statute mentioned earlier, CPLR § 3213.

  However, you do not instruct your business' attorney to proceed with using CPLR § 3213 because the case involves Cheatem Daily—the defendant's President and person ultimately responsible for the failure of payment (and thus the entire litigation). Cheatem has a reputation for being a detestable, unscrupulous person, but more importantly, because he misrepresented certain facts that led your business to enter into the contract in the first place, you want him to pay dearly for his dishonesty.

  Consequently, you instruct your business' attorney to assert various claims against the defendant business based in fraud and to assert claims against Cheatem Daily personally based upon a theory of piercing the corporate veil. The lawsuit is filed.

  The contract with the defendant business had a value of forty thousand dollars ($40,000.00), the amount of the bounced check. With the fraud and veil piercing claims asserted, the potential total recovery for the case stands at four million dollars ($4,000,000.00).

  Somewhat surprisingly, the defendant business does not mount a defense at all. Rather, it defaults, and your business' attorney proceeds to obtain a default judgment against it. However, once this default judgment is entered, the defendant business proceeds to file for bankruptcy because it only had one-hundred thousand dollars ($100,000.00) in available capital to satisfy its debts.

Don't "Win the Battle . . ." *cont. from Page 5*

Meanwhile, the case against Cheatem continues. He files counterclaims and a motion for sanctions for asserting an allegedly bogus veil piercing claim. As the legal fees charged by your business' attorney continue to mount without a dime having yet been realized, he comes to you and says, "You know, maybe Cheatem's attorney was right. She said to me that if we had just stuck to recovering the amount of the bounced check and abandoned the other claims, Cheatem probably would have settled this case. Now, however, he wants to make you pay . . . ."

Congratulations on winning the battle and losing the war.

The lesson to be learned here: had a clear, focused objective such as "recover the amount of the check or whatever you can on settlement as quickly as possible and terminate this litigation" been conveyed to your business' attorney, the war would have been won, and your business would have been better off. **Determine exactly what the business is to achieve via the litigation** (this is the true definition of "winning") **as early as possible** and stick to achieving that objective or set of objectives. Succeed in preparing, and prepare to succeed.

- **Practice Defensive Pessimism -** Litigation is unpredictable such that the only guarantee in litigation is that there are no guarantees. However, owners of small businesses can adopt a psychological approach towards litigation that I have found effective in managing its inherent unpredictability and the anxiety that often comes along with it: defensive pessimism. (*See* http://en.wikipedia.org/wiki/Defensive_pessimism).

This approach also steers one away from seeking short-term gains over long-term gains and thus safeguards against "winning the battle but losing the war."

In a nutshell, defensive pessimists prepare for the worst with the aim of realizing the best. They realize that there is no such thing as a "slam dunk" in litigation and that more often than not, both attorneys' fees and incurred expenses will exceed budgets or projections, especially when major litigation events such as motions and depositions are involved.

Don't "Win the Battle . . ." *cont. from Page 6*

Perhaps most importantly, defensive pessimists envision unfavorable consequences—both short-term and long-term—and plan on how to avoid or cope with them **in advance**. By doing so, they attain a high level of resiliency—the ability to get up even before they are knocked down—which is not only useful but sometimes essential during the inevitable stormy moments that are inherent in practically any litigation.

This is not to say that strategic optimism ("think good, and all will be good")—the flipside of defensive pessimism—does not have any place in litigation. It certainly does and can be used effectively—sometimes even in conjunction with defensive pessimism—in a variety of circumstances (particularly in witness preparation). However, if a small business owner does not have a predefined mindset going into litigation, the anticipatory aspects of defensive pessimism spur mental preparation, which in turn spurs efficiency and effectiveness in litigation. As such, defensive pessimism is a good "default" mindset for the small business owner who finds himself or herself involved in unavoidable litigation, especially in a case where he or she is an inexperienced litigant.

In conclusion, the diligent and consistent preservation of information, recognition of litigation objectives early on in litigation, and use of defensive pessimism all serve to promote efficient and effective litigation preparation when litigation is unavoidable. These strategies—especially when combined with clear and frequent communication with litigation counsel—can make the complicated and time-consuming process of litigation preparation more manageable for small business owners and increase the probability of them winning both battle and war.