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Litigation in a Changing World

What Business Owners Need to Know

February 1, 2021 By Jennifer Rachel Baumer — Comments

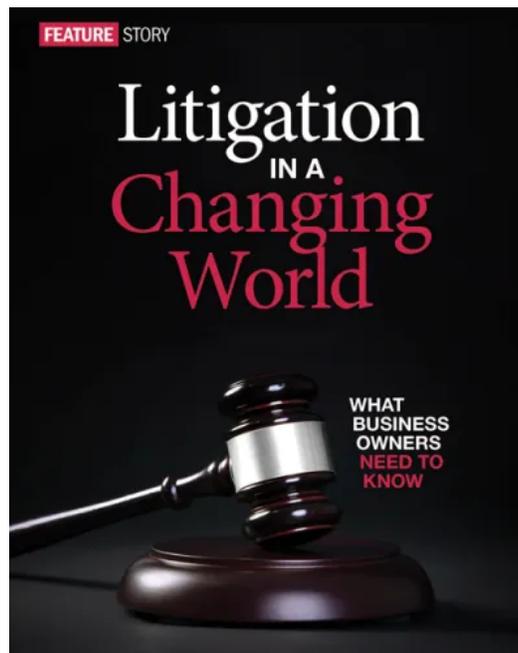


"I don't think there is such a thing as being safe from being sued," said Samuel Schwartz, principal, [Schwartz Law](#). "In today's environment, the bar to bring litigation is so low that to try to completely protect yourself from litigation as a business would likely be a waste of resources."

Best Practices

Maybe lawsuit-proof doesn't exist, but business owners can and should be proactive in protecting their businesses against litigation. At the most basic level, that means being mindful, keeping track of business operations and procedures, staying in compliance with contracts and having legal counsel vet new contracts, following industry regulations, and treating employees and clients decently.

"The first thing that leaps to mind is having the right insurance for your business," said Matthew Hippler, partner, [Holland & Hart](#). The right insurance for the business and industry is critical. That might be as simple as a retail store having proper liability insurance against slip and fall on the premises. Or it could include business interruption insurance for unforeseeable events like COVID-19.



“Anticipating things that may come up for a business in terms of when and how they might get sued, [reviewing] insurance options and working with an appropriate insurance broker to find what can help insulate your business is a good first step,” said Hippler.

Next up? Get it in writing. Whatever it is. Whether it's an online or brick and mortar business, the owner can protect it with up-to-date documentation of policies and procedures, vetted contracts, employee personnel files, complete transaction histories and invoice records – document everything.

“We live in a he said, she said world sometimes, when it comes to disputes,” said Hippler. Having details down in black and white helps in the event of disputes.

“One of the worst things that can happen to a business is a corporate divorce where the two partners are not getting along, and there's no governing documents in the company dictating how those disputes should be addressed,” said Patricia Lee, commercial litigator, [Hutchison & Steffen](#). Dividing up or selling the business is easier with the operating agreement, shareholder agreement, bylaws or other corporate documents in place.

Then document the documentation. Have a retention policy for emails, contracts, employee files and other electronic and hardcopy documents. In the day-to-day grind of business, it's easy to forget every communication is potential evidence if litigation happens.

Best practices include having a professional team that includes an attorney. It takes a while to build a working relationship with legal counsel, so the business owner understands how the lawyer works and the lawyer understands the business. A pre-established relationship means if an urgent legal matter arises Friday afternoon, the owner's not making cold calls to unfamiliar law firms.

Then consider having that lawyer vet new contracts, said Lee. Also, make sure risks are managed in-house. Don't have one person doing both accounts payable and receivable unless there's a mechanism in place to ensure there's no funny math – or embezzlement – going on.

Anticipating problems as well as benefits when entering into a contract and looking for potential disputes before they happen can help make sure those problems don't occur, said Jim Pisanelli, founder/ partner, [Pisanelli Bice](#).

But if things do go sideways, pick your battles. Litigation isn't always the best answer. “Business owners should step back and evaluate whether it makes sense to go down the path of litigation, because oftentimes it's a very lengthy process,” said Martin Little, attorney at law, [Howard & Howard](#). “In Nevada it can take two to three years to get to trial and obviously one side is going to be unhappy with the result and typically that side files an appeal and appeals in Nevada can last two to three years as well.”

“Maybe it's a dispute that somebody wants to pursue out of principle, but in this environment that we're in right now with the economy being in the state that it is, I think it's important for businesses to be mindful of where they want to spend their time and money,” said Hippler. If there's a dispute that's large enough to threaten to sink a company, maybe heading to court is necessary.

Last year, virtually no civil suits moved forward after March. With that in mind, cases with relatively small amounts of money in dispute, or where the business owner is just angry about a situation, might not be worth the time and money to pursue through a court system that's already at a standstill.

"All the downsides to litigation that otherwise exist have been exacerbated by the pandemic," said Pisanelli. "What it has done to the legal system, I don't think anyone can complain about that. Imagine being called in as a juror to sit and do your civic duty to resolve someone else's dispute but in performing that duty we're going to ask you to put your life at risk? That's not reasonable to ask of anybody." Criminal cases are being prioritized by judges, and it's possible very few civil cases will go to court in 2021.

Take an already slow court system, throw in a pandemic and the uncertainty of whether that case will go to court, and that's all the more reason businesspeople should find solutions other than litigation. Litigation shouldn't be at the top of the list.

Common Mistakes

Risks to business vary by industry. For businesses looking for guidance in following industry requirements and documenting transactions, both Little and Leif Reid, partner, [Lewis Roca](#), suggest professional industry associations.

"Most industry associations in Nevada have counsel, and periodic meetings where lawyers that represent these different industries and associations provide guidance," said Reid. "When you become a part of that group, you're able to get the advice of lawyers who are familiar with current law in that industry."

Documentation is critical, but it can't solve everything. It can't fix an actual misstep, purposeful or not.

"If you breach a contract and someone brings a lawsuit for that breach of contract, no amount of record keeping is going to protect you from that litigation," said Schwartz.

Breach of contract is not always intentional. Not following contract language to the letter or changing conditions of a contract without communicating with other parties to that contract can lead to breach. If there's a reason to deviate, said Hippler, contracts can be revised and amended, but that requires consent and agreement, preferably in writing between all parties.

Unintentional breaches have occurred due to pandemic disruptions of businesses. With businesses closing down or not needing office space because employees are working from home, a tenant without customers maybe can't pay rent, or a landlord without tenants can't pay mortgage. One or both may unintentionally breach a contract through no fault of their own.

Lawsuits aren't always filed from outside the company. A disgruntled employee bringing a lawsuit over a fight with an equally disgruntled employee can spell trouble if the business owner has failed to take action to resolve the issue before it reaches that point.

"Put procedures in place, document them, and maintain how you document them," said Schwartz. "Be proactive in terms of making sure employees are, as much as possible, healthy

and happy.”

Uncommon Defense

“One thing I see often in litigation from one party or another is that there’s a complaint, a breach has occurred, and no one talked, there were no communications between the contract parties,” said Schwartz. The tenant stopped talking to the landlord who came to the conclusion that litigation was warranted because there’s no rent and no communications forthcoming.

Litigation is one path; starting communications is another. But if at that point communicating doesn’t work, the party defending the suit needs to start looking at defenses. One unusual defense being used during the pandemic is Force Majeure, or Act of God. That means hurricanes, tsunamis – and pandemics. “Unforeseen or extraordinary events mean parties to a contract that’s been breached are not liable under the contract,” said Hippler.

“There’s a place where you’re seeing courts saying, ‘I’m not going to hold you responsible for this breach because there was nothing you could do,’” Schwartz said.

Another solution, business interruption insurance, existed before the pandemic, but now they’re being litigated to figure out who’s at risk. With businesses that have closed permanently, the question becomes, “Was it the insurance company’s risk and it now needs to pay the business owner for loss of business? Or does risk fall squarely into the lap of the small businessperson who’s left to fend for themselves?” said Pisanelli.

Impossibility of performance means there’s no way to perform under the contract. The law also recognizes impracticability of performance under a contract or frustration of purpose under the contract. “Maybe the whole purpose of the contract has now been frustrated, so the parties should be able to unwind the contract effectively,” said Hippler. “There’s been a lot of that, and I think there will continue to be.”

Headed to Court

One of the things the correct insurance policy does for a business is make certain if there is a lawsuit, there’s errors and omissions coverage and general liability in case someone gets hurt on the business premises. “Those sorts of things will give you a source of payment in the event that you get into trouble,” said Lee.

And if there is a lawsuit heading for court? What then? The first step is to review that insurance policy and note any reporting requirements. “Most policies say you have to make a claim within so many days of being notified of a potential action, and if you fail to do that, you may lose the right to tap into that insurance,” said Lee.

Once notified, the insurance carrier will hire counsel for the business, or in some cases, vet the business’s existing counsel. “Then you’re off to the races,” said Lee.

Sometimes the lawsuit isn’t coming at the business. Sometimes it’s coming from it.

“In our group we try to get the client to understand it’s not a bad business practice to think of litigation as an option of last resort rather than first resort,” said Pisanelli. Taking a business

dispute to court means taking a specialized issue in a specific industry and putting it in the hands of a judge and/or jury who have little or no experience in that field.

In that context, litigation doesn't make sense. Businesses need to balance their expectations of what they believe they're entitled to under an agreement with what they can live with, and weigh that against the cost, distraction and risk of litigation.

Alternatives to litigation include mediation (use of a neutral third party to settle the dispute) and arbitration (submitting to a private arbiter who decides the dispute or agreement). Both are currently popular as the backlog of civil cases in courts expands.

Mediation and arbitration aren't always the best alternative, said Reid. Sometimes they're not faster or less expensive, and arbitration agreements still have to be confirmed in court.

COVID Effects

As 2021 starts, most courthouses are still closed. Where they're open, it's via technology, which limits the ability to have a trial or evidentiary hearing, since the key component to both is the opportunity for the judge or jury to gage the truthfulness of witnesses and sufficiency of the evidence.

Some types of litigation are increasing. Cases dealing with allocation of risk regarding contracts in place before the pandemic are picking up because while Force Majeure has been in contracts forever, almost no contracts specifically detail the impact of a pandemic and government action in response to that pandemic and the impact on businesses. "Parties are left to look at the contract and figure out as best they can, with language that didn't anticipate this, who bears the risk," said Pisanelli.

Litigation is exploding in the convention business where space booked for events can't be used because of laws governing the size of gatherings. The question becomes does the facility lose the rental fee or does the organizer pay for empty space? So far, at least with the Las Vegas Convention and Visitors Authority, which Pisanelli Bice represents, facilities owners and event organizers are working together to find solutions.

Once courts open for business, Schwartz expects to see resumption of cases delayed by the pandemic, and the filing and prosecution of defaults that arose and weren't resolved in the interim, including evictions, both residential and commercial.

Employment lawyers are nonstop busy as employers seek clarity on rapidly changing guidelines regarding employees and workspaces. New laws passed in a special Legislative session summer 2020 created protections for businesses during the pandemic. Basic standards for social distancing, cleaning, how and where customers could enter the business were set.

"The important thing about those requirements is the Legislature made it clear that if businesses, when they reopen, are in compliance with those minimum standards, that they are free from any potential liability that could arise from the spread of the virus," said Reid.

Since March 2020 employer questions changed from, "Can I keep my business open and my employees safe?" to, "Can I require my employees to get vaccinated? How do I treat employees

who have been exposed to coronavirus and aren't sick?"

"As more people get laid off and find it hard to get jobs, I think we're going to see a rise in employment litigation," said Little. "As people get desperate, they may choose to pursue claims against their employers which, maybe if jobs were more plentiful, they may have just passed on."

Which makes documenting business policies and procedures all the more important. Litigation may be changing, but it's not going away.

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