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WINNING STRATEGIES FOR RESOLVING CONSUMER COMPLAINTS

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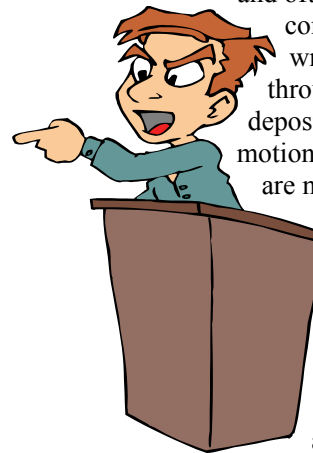
Congratulations, you have been working (or accepted a position) as in-house counsel with a small, medium or large company. Your supervisor tells you to handle several pending disputes with consumers/customers, and to expect more of these cases. This article offers some perspective and strategy to effectively handle these types of recurring matters, and not let discouraging rulings drive you crazy.

CHALLENGES IN DEFENDING YOUR COMPANY

Big and Rich vs Little and Poor. No matter the size of your company, many judges and juries will perceive the dispute as being between a company with considerable resources against a relatively poor, underrepresented (or pro per) individual.

Defendants Lose More Often. Statistically, defendants lose more court cases than plaintiffs.

Trial Court Bias. Many trial courts tend to favor individuals over a company, especially when the individual is the plaintiff. In my experience, state courts and bankruptcy courts tend to favor individuals more than federal district courts.



"Hands-Off" Client. Many clients give the matter to the company lawyer and do not want to be bothered with follow-up. You are expected to "take no prisoners" and win; without settling or agreeing to pay anything.

"Did Nothing Wrong" Client. Your client tells and shows you what s/he feels is important and often asserts the company did nothing wrong. However, through discovery, depositions and pretrial motions, you learn the facts are not as strong as the client told you. In addition, many courts are more likely to accept unsubstantiated allegations from an individual plaintiff, and require your company to provide better evidence to challenge plaintiff's allegations.

"No Gratitude" Client. In the cases you win, the client may express little thanks. After all, the client feels you merely confirmed the company did nothing wrong.

EFFECTIVE STRATEGIES

Even though the cards may be stacked against you and your company in many consumer



disputes, there are things you can do to increase your chances for a more favorable result or resolution of the matter, and sleep better at night. As always, there are times when the general guidelines below may not apply to a particular case.

Get Involved Early in the Dispute. One of the best ways to minimize a company's potential exposure is for you to counsel the company on trying to develop helpful facts at the outset of the dispute, well before litigation begins. I'm not suggesting form response letters to customers which are difficult to understand — something many companies do. Rather, you want there to be written/e-mail communications between your company's contact person and the consumer, to demonstrate that your client responded timely and thoughtfully with a customized response. In many cases, the company's communication should end with an offer that costs the company very little

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(e.g., a discount coupon or apology), even when the response states the company did nothing wrong. Ideally, your company ends up with a helpful email string or series of written communications that you can present in the court case or arbitration, if the consumer decides to commence litigation. However, if your company's response contains nothing more than a detailed explanation of why the company is not at fault, the communications will not be very helpful in subsequent litigation, especially in a jury case. In fact, the plaintiff may use the company's written communications effectively against your company, in litigation.

Try to Settle Before and During Litigation.

Even if your company has a policy to fight what

it feels are bogus claims, our job as counsel includes the obligation to warn clients that litigation is unpredictable, expensive and time consuming (even if the facts are as strong as the client thinks they are), and to advise that if the company can settle before litigation begins (on reasonable terms), that result often is far better. Some lawyers feel that by recommending settlement they appear weak. I disagree, but recognize the politics of standing tall behind a company's policy to fight bogus claims. There will always be aggressive plaintiffs and counsel who reject

reasonable pre- and post-litigation settlement offers, but your company may be pleasantly surprised at how many disputes can be settled confidentially and at little expense, if handled properly.

Investigate Alternative Jurisdiction and Venue.

Chances are plaintiff filed the lawsuit in the county and court that s/he felt was most favorable to obtain relief against your company. Your company has every right to pursue more favorable alternative places, courts and judges to adjudicate the dispute. You should look into at least five alternatives:

(a) whether the dispute may be subject to optional or mandatory arbitration or mediation; (b) whether a lawsuit filed in state court may be removed to federal court; (c) whether you have any grounds to disqualify the judge, based upon the judge's personal knowledge of disputed facts, prior service as a lawyer in the matter or in any other proceeding involving the same issues, bias, a financial interest in the dispute or in a party, or other grounds; (d) whether you may seek to transfer venue based upon either a contractual clause or other grounds to assert another court has exclusive or concurrent jurisdiction, or is a more appropriate venue; and (e) if none of (a)-(d) is available or desirable and the lawsuit is filed in state court, whether you should file a preemptory challenge and request the case be assigned to a different judge. It is important to research the assigned judge immediately and solicit opinions about the judge from others in your legal department and outside counsel.

Avoid "Gorilla" Appearance In Court. Be prepared for plaintiff's counsel to portray you and your company as big, mean and inhuman in the litigation, and to get personal regarding what you and your company did and did not do. Do not take the bait, retaliate or stoop to that level, even though you may feel justified to do so. Most judges will notice this type of unprofessional conduct and not tolerate it from company counsel, even though plaintiff and/or plaintiff's counsel may act inappropriately and continue with this strategy, because it can be effective for a plaintiff. More importantly, by acting professionally and treating plaintiff and plaintiff's counsel with respect (even when they may not deserve it), you will build credibility with the judge and jury, and thereby increase your chances of success. Based upon representing companies in litigation matters for the past 28 years, I am convinced that killing a plaintiff and her ruthless counsel with kindness and professionalism will often produce better results (and less aggravation) for company counsel. It may even cause plaintiff's counsel to be more professional, if s/he realizes the other strategy is not working.

Make Your Company Appear Compassionate and Human. People make mistakes, including company employees. With the benefit of hindsight, in many cases company counsel will have several opportunities during litigation to admit company

mistakes to the court and opposing counsel. Many companies and defense counsel feel such admissions should be avoided at all cost. I disagree. Often, company counsel can admit company mistakes that nevertheless do not support the drastic relief plaintiff seeks. To defend a company as blameless in the face of contrary evidence will hurt (maybe destroy) your credibility. To admit company mistakes, then show the mistakes caused little harm to plaintiff, is a more credible and effective strategy.

Involve Management In Litigation. Some company counsel are excited when management tells them to handle a dispute on their own. Be wary and careful. I prefer to have management make all major strategic decisions during litigation (after giving management choices and advising what I feel is the best way to proceed, and why), and approve all material settlement terms, for at least four reasons. First, it is our job to counsel management, and their job to decide how to proceed. Second, it prevents management from blaming their counsel for key strategic decisions that with hindsight prove unsuccessful or costly. Third, it reminds management about what you previously warned: that litigation is time consuming and requires continuing decisions from management. Fourth, it may cause management to consider settling other consumer disputes much earlier, even before litigation begins.

Allow Reasonable Discovery. Many companies resist voluntarily producing relevant documents and otherwise cooperating with plaintiff's discovery requests. In my opinion, there is no better way to undermine your and your company's credibility with a judge or jury, than to have them think you hid key damaging documents or gave misleading discovery responses. Of course your company has legitimate concerns about protecting confidential information and preventing plaintiff's fishing expeditions, but what makes headlines almost every day is a plaintiff's last minute discovery of damaging documents (often e-mails), that the defendant failed to produce voluntarily. If confidentiality is the concern, use confidentiality agreements, seal the documents by court order, or use other means to let plaintiff see them, but not abuse them. If the discovery request is overbroad, err on the side of producing and seek to limit plaintiff's discovery only when truly necessary. I would much rather have plaintiff's counsel complain the company produced too many documents, than too few.

Mediate Effectively. While I agree that in many cases the company's written mediation brief should deny liability, it is important that the company be prepared to offer something of value to plaintiff at the mediation. Otherwise, why waste the time? I am a mediator and have been pleasantly surprised by the frequency of successful mediation, even when the litigants did not want to attend. But each time, both parties realized a mediocre settlement was better than continuing to litigate. Again, the toughest task for company counsel is to convince management they should give an

undeserving plaintiff anything. But many times, the litigation becomes very expensive and time consuming after unsuccessful mediation, especially during trial preparation. If you have retained outside counsel, consider having company counsel take the lead (along with management), in handling the settlement negotiations and mediation.

Earn The Judge's Respect. Most judges will give proper and represented consumer plaintiffs great leeway (and rule against your company), in many pre-trial matters. Likewise, many judges will give the benefit of the doubt to lawyers who regularly appear in that judge's court. However, if you can earn the judge's respect during the pre-trial process, you stand a much better chance of prevailing at trial. You earn that respect by being professional (even helpful) to opposing counsel, pointing out the judge's mistakes in your client's favor, admitting company mistakes, exercising restraint in criticizing plaintiff or plaintiff's counsel, and doing other things that many litigators do not do.

Appeal Adverse Rulings. Unfortunately, often a company defendant must appeal adverse trial court rulings to obtain a more favorable result. In my experience, appellate courts are not as sympathetic to consumer plaintiffs. Be sure to follow the appellate rules and procedures to avoid premature dismissal of your appeal.

ANOTHER CONSIDERATION

More companies are pursuing relief as the plaintiff in court cases and using company counsel to obtain insurance coverage, prevent third parties (companies and consumers) from stealing or infringing upon company assets (employees, ideas, products, patents, etc.), collecting amounts due, and seeking other relief. You may enjoy the benefits of representing your company as a plaintiff in these types of matters, and receive more appreciation from management in becoming a potential source of revenue, rather than merely a necessary expense in defense litigation. It's also more fun to win (if a matter cannot be resolved or settled before litigation), and plaintiffs tend to win more often. ♣



Gary Torrell is a partner of Valensi Rose with 28 years of litigation and transactional experience in lending, real estate and debtor-creditor matters, contracts and a variety of commercial disputes. He has spent 20 years as a partner and associate at national and regional law firms and eight years as in-house general counsel and senior counsel for public and privately-held companies based in Southern California. GFT@VRMLAW.COM

In-house Lawyers' Reception



Wednesday, June 22nd
6 — 8 p.m.

ESPN Zone — LA Live!

Hosted beer, wine & hors d'oeuvres
Invite a fellow in-house attorney

SPACE IS LIMITED—REGISTER NOW!!!

Enjoy this informal networking event at ESPN Zone for in-house counsel, featuring beer, wine and hors d'oeuvres, hosted by the senior in-house counsel from the Corporate Law Departments Section of the Los Angeles County Bar Association.

Enjoy the company of fellow in-house counsel while surrounded by large screen televisions and interactive games, and network with some of the top in-house lawyers in LA County.

To register, please call the Los Angeles County Bar Association Member Services Department at (213) 896-6560

From the Chair

By: *Michael Cowan*
TelePacific Communications

Dear Fellow Corporate Counselors:

I have never been particularly bothered by lawyer jokes. But the other day I was listening to a Bluegrass station and a song came on with the lyric “May There Be No Lawyers in Heaven.” To make it worse, it turns out that the singer-songwriter, Charlie Sizemore, is apparently a practicing attorney. Do we really think that little of ourselves?

I for one am proud of the contributions of lawyers to a civil society, and I am proud of what our LACBA Corporate Law Departments Section does. We put on numerous continuing education courses, including our Roundtables for in-house attorneys only, so that in-house attorneys can best help their companies do business and drive our economy in the most efficient manner. Some of our continuing education programs are done in a setting that is particularly conducive to building collegiality among our members. An example is the Annual Seminar we had this past September in Temecula.

We also honor an outstanding in-house counsel each year, in an event that highlights the contributions the honoree has made not only to the legal community but to the general community. This year’s Outstanding Corporate Counsel Award dinner in March was a great success. Over 500 people attended, from companies and law firms throughout Southern California. The keynote speech by Frederick Huntsberry, the Chief Operating Officer of Paramount Pictures, emphasized the need to fight intellectual property piracy, especially as we live and work in a region in which the film and record industries are critical components. Mr. Huntsberry also introduced our honoree, Rebecca Prentice, the General Counsel of Paramount Pictures. The devotion of both Paramount and Ms. Prentice to the cause of

education was underscored by the centerpieces contributed by Paramount: Backpacks and school supplies to be provided to homeless children.

In addition to that contribution, with the funds raised at the event we donated a scholarship to a deserving local law student, we made a donation to Ms.



Prentice’s law school (Cornell), and we will be making contributions to various pro bono projects sponsored by LACBA, including The AIDS Legal Services Project, the Domestic Violence Project, the Center for Civic Mediation (formerly DRS), and the Immigration Legal Assistance Project. Hopefully those efforts will get some of us into Heaven, despite the song to the contrary.

So it is with feeling that I say it has been a privilege to serve as Chair of the Section, and I want to thank and acknowledge the support and hard work of the members of our Executive Committee. I also congratulate our new officers - L. Michael Russell (Chair), Elliot Shirwo (Vice Chair), Debbie Feinerman (Secretary), and Larry Michlovich (Treasurer). I wish them all the best as they continue in our fine tradition.

With warmest regards,

Michael Cowan

2010-11 Chair, Corporate Law Departments Section
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Calendar of Events



In-house Lawyer's Reception

ESPN Zone — LA Live!

Wednesday, June 22nd

6 — 8 p.m.

Hosted beer, wine & hors d'oeuvres

Bring a fellow in-house attorney

(see page 4 for details)

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Welcome New Members

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Har-Bro

John Bonino

Steven Brancato

Steve Brenner

Sophia Shaw-Hue Chao

Sabrina Cohan

David Coher
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Ryan Dibble

David Ducar
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