

All or nothing

How to handle a bet-the-company case **Interviewed by Matt McClellan**

At some point, you may be faced with a high-stakes lawsuit which could place your company's future in doubt.

It's difficult to treat that case like any other when it has the potential to destroy your business, but there is a path you should follow.

"Each case must be examined objectively on its merits to determine what effect an adverse outcome may have on your business," says Thomas W. Hill, a director at Kegler, Brown, Hill & Ritter.

Smart Business spoke with Hill about how to handle bet-the-company cases.

How do you know if you're facing a bet-the-company case?

The answer to that question depends upon the answer to a number of other questions.

First, what are the allegations and legal claims? How strong are they? What are the available defenses? Second, what are the damages sought or the relief sought? Third, what happens if you lose? Can the company pay a 'worst case' damages award? Will an adverse result impair or potentially cripple the company's ability to do business?

Failure to carefully analyze a lawsuit at the outset can result in disaster. It is very difficult for a company to answer those questions on its own without involving its legal counsel.

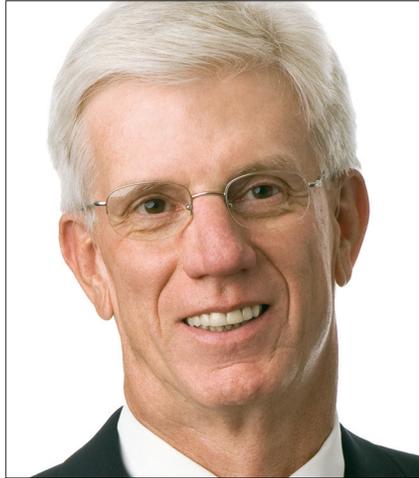
What should companies look for?

First, examine the merits of the claims and available defenses and make a realistic estimate of the potential damages that might be awarded should the company lose. If the case appears challenging and a realistic damages award could exceed the company's ability to pay, it's likely a bet-the-company case.

Second, some cases attack the core of the way a company conducts its business. In such a case, the amount of an adverse decision may not materially impact the company's balance sheet, but an adverse result could devastate or substantially impair the company's ability to continue its operations. That too would be a bet-the-company case.

Third, examine whether an adverse result may provoke 'copy-cat' lawsuits. A single case not seeking massive damages could, if lost, be the springboard for follow-on lawsuits by others with similar claims, the cumulative amount of which could destroy the company.

Also, examine the company's loan covenants and think about what impact an adverse judgment could have on the company's financing capabilities. If an adverse judgment



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would result in a violation of a company's loan covenants or destroy the company's financing capabilities, it is likely a bet-the-company case.

All these issues need to be examined early on and decisions must be preliminarily made. But those decisions are not necessarily final. Cases that may appear innocuous can turn ugly, and cases that appear challenging can take a dramatic turn for the better if properly handled. As my college basketball coach used to say, 'you have to keep your knees bent,' meaning stay flexible and be prepared to react quickly to changing circumstances.

What are the keys to winning a bet-the-company case?

The best way to win an argument is to begin by being right. So the first key is to carefully and thoroughly marshal the evidence and the law and then to present the evidence and argue the law in the courtroom in a way that makes it all seem effortless and self-evident.

Second, the company must make a conscious commitment to spend the time, effort and financial resources necessary to defend the case. The commitment of time is every bit as hard as the commitment of financial resources. Businesspeople are always busy. I worked a case a number of years ago in which the CEO had not spent the necessary time to prepare for his deposition. He gave answers

that he later regretted. At trial, he changed his answers and the inconsistencies did not serve him well in front of the jury.

Third, the company needs to be willing to participate in the effort to get at the truth. Trials are an exercise in microcosmic history, reconstructing past events in a very specific and limited context relevant to the claims and defenses in the case. The truth should win, and, although juries and judges can sometimes make mistakes, more often than not they get it right. It is a lot easier for them to get it right if the evidence is presented to them in a clear, logical, succinct and understandable way. The company also needs to understand that trials put witnesses under significant pressure, both in depositions and in front of a jury, where the outcome can have a great deal to do with either the plaintiff's or the defendant's fortunes. Every witness needs to be well-prepared on the facts and be prepared to be forthright, honest and as articulate as they are able in explaining in simple words exactly what happened. Spending the time necessary to prepare the witnesses to do those things maximizes the company's chance to win.

Fourth, the company has to have courage. If a case cannot reasonably be settled and the stakes are sufficiently high, the resulting trial places the company's fate in the hands of a third party (a judge or a jury). No one can be sure how that third party will receive the company's evidence and its arguments. The willingness and ability to persevere in the face of that uncertainty takes courage.

How can a company prepare for a bet-the-company case?

First, hire a very good, highly skilled business litigator with trial experience. Second, with that lawyer's assistance, preliminarily evaluate and periodically re-evaluate the case in a level-headed way. Third, if the company determines that its fate could ride on the outcome, a thorough and effective trial preparation plan needs to be developed and implemented effectively and skillfully, recognizing that the plan can change as the case proceeds.

Trials are challenging things. They become, for both the trial lawyer and the client, a quest for victory and in some cases a battle for the company's survival. No one can guarantee how the judge or jury is going to decide the case. But a well-prepared company aided by a skilled business litigator can maximize its chances of a favorable result. <<

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