

Being a Plaintiff isn't Bad; it's Different

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When I was a young lawyer I heard a crusty old GC proclaim that HIS company would never be a plaintiff. Nettlesome, meritless suits will make you feel that way. This statement was as absurd 25 years ago as it is today. Many business problems can be and are worked out without resort to litigation; but not all of them. Sometimes suing a business partner is the only effective solution. That said; larger organizations are more comfortable as a defendant than as a plaintiff. Why?

In a series of posts over the next few weeks I will explore the differences between being a plaintiff and a defendant. Maybe some answers will emerge.

1. Being a Plaintiff is Always Optional

It seems obvious once you think about it, but it is the key to most of what is different between being a plaintiff and being a defendant. When someone sues your organization doing nothing is not an option. Even giving up takes effort. In contrast, as an organization with a claim which might be brought, you can always choose not to bring it, even if failure to bring the action dooms your organization.

Being a Plaintiff takes action. The larger the organization the harder it is to spur action. **Lesson one:** To be a plaintiff someone needs to stick their neck out, advocate for it, and pay for it.

2. All Litigation is Risky, but Plaintiff's Cases are the Most Risky

Anyone who tells you they can predict the outcome of litigation is lying to you. Experienced and knowledgeable lawyers will make more accurate predictions than other people, but nobody bats 1.000.

As a Defendant this uncertainty drives settlements. As Plaintiff it drives businesses crazy. Someone must advocate for a project that is uncertain and commit part of their budget for it. This alone kills many cases.

Marketing can fail. Products can fail. Business people are familiar with and comfortable with these risks and take them every day. Litigation risks are unfamiliar and even small risks seem daunting. **Lesson two:** Here is where good lawyers distinguish themselves. A good lawyer can help you assess the risks

accurately.

3. Cost / Benefit v. Cost of Doing Business.

Here's another glimpse of the obvious, lawsuits are expensive. Because it's not optional being a defendant, defending lawsuits is a cost of doing business. A plaintiff's case, because it is optional, isn't good business unless the cost of maintaining the action is justified by reasonably expected results. At the highest level this requires three inputs: 1) What is the likely result, 2) What are the likely legal costs to achieve that result, and 3) What will the organization gain from the litigation. Neither client nor lawyer can assess these factors alone. **Lesson three:** Doing an accurate cost / benefit analysis of litigation requires the lawyer and client to work together.

4. Being a Plaintiff is Hard Work.

Being a plaintiff takes more work especially in the early stages. The penalty for not working on litigation is that you lose. As a defendant that might be inevitable (or not). As a plaintiff if you are not going to work on the case, why file it? Furthermore, the plaintiff's advantage is it can (usually) take its time and file when its ready. The preparation time is a plaintiff's advantage; it's a bad idea to waste it. Defendants are more often taken by surprise when litigation hits. Preparation doesn't just cost money; in fact, it's usually not a big ticket item. Preparation takes client time. **Lesson four:** The hidden cost of litigation especially for a plaintiff is people time.

5. Get ahead and stay ahead.

If you have planned a plaintiff's case and done the preparation you need, you start a case ahead of the defendant. You can't let that lead evaporate. The temptation is to rest on your hard work. The reality is business litigation is hard work from start to finish. A good case won't stay good if you don't continue to invest in it. **Lesson five:** Like any business project, litigation requires follow-through.

6. Try 'em for Show, Settle 'em for Dough.

At a seminar I attended years ago, I overheard a young plaintiff's personal injury lawyer bragging that he liked to try cases. The older lawyer he was trying to impress looked at him and told him that you try cases for show and settle cases for dough. Said another way, a plaintiff's case is a business transaction from start to finish. When the defendant offers enough money to make the risk and cost of going forward a bad deal, it's time to settle. **Lesson six:** Winning a plaintiff's case is not about hitting the jackpot or changing the world. It's about completing a business deal at a profit.

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7. Intangibles Can Matter.

After all this talk about cold hard cash, intangibles deserve their due. Sometimes litigation is justified, at least in part, by factors that are not directly calculable in dollars and cents. If you routinely accept short shipments, off quality shipments, and/or other forms of abuse from your contractual partners, sooner or later the business world will discover that they can treat you poorly. You wouldn't hand out settlements to every employee that claimed they were improperly terminated; otherwise, every one of your terminating employees would claim some form of illegal action. Non-competes, customer lists, trade secrets, patents - there are any number of rights which may be worth defending even if the cash flow from litigation is not positive. Sometimes the rights are valuable enough to your business that the defense of the intangibles alone will justify the litigation; usually not. Often, however, intangible values are what tipped the scale in favor of litigating one claim and not another. **Lesson seven:** Litigation that fits in your overall business plan is more valuable than litigation simply for profit.

8. Lessons Learned.

If defending a case is a cost of doing business, prosecuting a case is a way of doing business. Being a defendant is often a result of poor business strategies. Being a plaintiff, is a business strategy in itself. Few businesses have litigation as a core activity, but that does not differentiate litigation from any other non-core activity that you outsource to a vendor (advertising, market research, insurance, pension management, etc.). Like these other important non-core activities, you must partner with a vendor that understands your business and works with you to achieve your common goals.

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