

BLJ: The business side of litigation



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Buffalo attorney John Horn says, "Nobody wants to think about litigation unless they absolutely have to."

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When John Horn, a partner at Harter Secrest & Emery LLP, started out as a litigator decades ago, he had a difficult time talking with prospective clients about litigation.

"It was always kind of a tough sell," he said. "I had a hard time talking about it because it's a little like talking with people about cemetery plots: Nobody wants to think about litigation unless they absolutely have to."

Over the years, he has tried to think of litigation in different terms.

"Everybody who is in business longer than a couple of years experiences litigation," he said. "Typically they don't have a great experience with it but they come to see it as a cost of doing business."

To that end, Horn said he developed an appreciation of how litigation can help drive strategy for a company. It requires management to ask hard questions of itself on the future. If a company is sued, for instance, it will be forced to take a look at what's happening in regard to the lawsuit.

"You need to do that in a detached and dispassionate way as possible," he said. "Oftentimes that's very difficult at the outset of litigation because an individual or an entity that's been sued typically takes it personally."

That's understandable, according to Horn. But as soon as possible, the company must assess how the litigation fits into business operations.

"It may be in a very one-off way," he said. "If

it's just an engagement with a new vendor that just didn't work out right and has nothing to do with your ongoing business operations or a particular product or patent, it's just a one-off piece of litigation."

Conversely, if the lawsuit deals with the "heart" of business operations, such as a patent or core product, the suit could prompt the business to consider how to do business better in order to avoid future litigation.

"The litigation can be a very cathartic process for a business, particularly if it's the sort of thing that may repeat or has repeated," he said.

But if the lawsuit is similar to previous ones in recent years, it's time to look at what can be done differently, Horn said.

"Because litigation requires you to ask and answer hard questions, it can be very important in terms of driving your business, ideally in a better direction going forward," he said.

Litigation also can be used to help a person or business achieve goals, Horn said. That includes a deterrent effect – for example, if an employee is leaving with trade secrets or a company's proprietary information.

"Taking action in the form of litigation, or the threat of litigation, is going to be important not only to remedy the wrong the individual poses or has caused," he said, "but also as a deterrent to other employees within your company who might think that kind of behavior is acceptable."

Achieving strategic objectives can be done using litigation. Horn cited a case involving Dr. Bronner's Magic Soaps, a family-owned, organic cosmetics company.

In a case brought in 2008, Dr. Bronner's sued

13 cosmetic companies for falsely advertising that they were "organic" on their labels. The suit claimed that the falsely advertised products hurt sales at Dr. Bronner's and "unfair business practices" were used.

The case was dismissed four years later, with the court ruling that the suit should have been brought against the U.S. Department of Agriculture. Despite the dismissal of the lawsuit, most of the companies eventually settled with Dr. Bronner's. At the time, President David Bronner said his company received "95 percent of what we were looking for."

While the suit was spurred by companies misrepresenting their products to the general public, "it played a very important strategic role for the company," Horn said. "It took competitors right out of the game."

It didn't matter that the case was dismissed, he added.

There are lots of ways in which litigation can be used as a tool to level a playing field or make a statement internally or externally," he said.

Early on in litigation, it's important to ask a company what a "win would look like," Horn said. That could be taking a case all the way to trial or, most often, clients are looking for answers that will enable them to do more business.

The flip side of that is "what toll is litigation going to take on your company," he said, adding that it's important to assess the potential rewards as well as the risks associated with initiating litigation or continuing to defend litigation.

"The risks are not limited to the cost of

litigation itself," he said.

For instance, hard costs such as paying an attorney are overshadowed by soft costs including business disruption or having key executives wrapped up in litigation. Another cost is possible hits to a company's reputation due to the litigation.

"Especially if the company is accused of doing something that ran contrary to the interests of either the general public, health and the environment or their customers," he said. "The reputational costs of litigation can be significant."

Assessing the possible outcome of litigation can be difficult. Horn said it's important to consult people who can bring a dispassionate view to the case early on in litigation. That may include the company's in-house or outside counsel, who know the company well.

"Let's step back and look at what's best for the company here," he said. "What's important? What's the must have? What's the nice to have and what's the absolutely cannot have? What are those things?"

While he enjoys trying cases, he said that doesn't mean it's always going to bring the best outcome for the client. Litigation is different from other business activities, mainly in that there is another side trying to prevent the business from achieving certain goals.

"With litigation, you're talking about an almost zero-sum game," he said. "If you succeed, the other side fails and vice-versa. You have to think about litigation as a multi-level chess game. There are consequences that don't have anything to do with the courtroom."