Avoiding and Managing US Business Litigation Risks:

A Comprehensive Guide for Business Owners and the Attorneys Who Advise Them

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Executive summary

Why are companies so frequently sued in the United States, and how might these business litigation liabilities be avoided through preventative measures and more effectively managed? This book answers those two weighty questions. The central premise of the work is that many costly and protracted lawsuits in the US are traceable to unforced errors companies make time and again. By better understanding the sources of commercial litigation, preventive steps can be implemented, reducing these risks.

The author draws on two decades of experience defending companies throughout the US in almost every conceivable type of commercial litigation. He applies a "lessons-learned" approach from these experiences, to examine how corporate defendants can avoid claims by developing and enhancing their litigation risk profile. Each company's litigation profile must be tailored to its business model, which involves spotting particular vulnerabilities. To assist the reader in accomplishing this task, the author begins the book with a framework for identifying the primary litigation risks – the "Five Cs" of commercial litigation.

1. Lawsuits related to corporate governance failures

These lawsuits include claims by shareholders, partners, and LLC members, collectively referred to as the "constituents" of the business. The legal doctrines that underlie corporate governance lawsuits are explained – how courts apply the concept of fiduciary duties, how direct and derivative suits proceed, and circumstances in which a court will allow claimants to pierce the corporate veil. That discussion is then followed by a practical list of ten sources of corporate governance claims and a discussion of how these lawsuits can be reduced.

2. Lawsuits related to contract disputes

Contract claims are the most common type of commercial litigation and overlap with other categories of claims. The book discusses how common contractual terms play out in litigation, how courts interpret and enforce

provisions, or set aside contract terms because of public policy and other considerations. A chapter explains the six questions addressed in every commercial contract claim followed by a chapter outlining strategies to address risks of litigation from a contracting counterparty.

3. Lawsuits related to customer claims

Customers – both commercial counterparties and consumers – present a broad range of potential lawsuits. Businesses that sell products or provide services to consumers are vulnerable to class actions, which aggregate small damage claims, creating a multi-million dollar liability. Business-to-business transactions can spawn breach of warranty claims. Customers sustaining injuries to property or persons bring product liability lawsuits. Several checklists and strategies are outlined to address these litigation risks from customers.

4. Lawsuits from competitors

The book next discusses the eight distinct categories of claims brought by competitors, those with a pecuniary motivation to bog the company down in protracted litigation. Competitor lawsuits – whether for interference, misappropriation of trade secrets or unfair competition – present heightened risks, including the possibility that proprietary information will be disclosed to a competitor in the litigation.

5. Lawsuits associated with "crewmembers" – employee claims

The fifth and final of the five Cs is the most common – lawsuits brought by the "crewmembers" – the employees in the company. These plaintiffs benefit from robust statutory protections and legal doctrines that expand each year. This chapter lists 22 of the most common employee claims and provides practical ideas on how to reduce the number of lawsuits filed by employees as well as claims for renegade employees who engage in tortious and other wrongful conducted imputing liability to the company.

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The scope and these litigation risks is broad and some of the underlying legal concepts are complex. But the author breaks down each topic with an accessible discussion of the legal principles using standard jury instructions, accessible language and colorful case studies, all illustrating how these issues play out in the courtrooms of America.

At the conclusion of each topic covered, the reader will have an understanding of how the legal theory is traceable to some failure or malfeasance that invited the claim. By the conclusion of the survey of the five Cs of litigation risks, the reader will gain valuable insights for developing checklists of potential claims, re-examining compliance efforts, scrutinizing key contract provisions and developing other policies and strategies to reduce litigation claims.

The final three chapters of the book pivot from litigation avoidance to litigation management. After a lawsuit is filed, the company must engage in several steps to control costs, manage outside counsel and prepare for discovery, mediation, and eventually a trial or arbitration. Understanding the litigation process is essential to surviving the ordeal by defeating the claim or resolving it through settlement.

The premise here is that just as litigation risks are overlooked, corporate defendants often compound the problems of litigation by not understanding and managing the litigation process. Litigation mismanagement results in cases that should be settled being tried and cases that should be tried being settled on unfavorable terms. This part of the book de-mystifies the litigation process and provides a user-friendly guide for those facing this foreboding ordeal.

The book is written for a diverse audience. The primary intended audience is attorneys who may find it useful as desk-reference for quickly accessing relevant information and issue-spotting for their clients. But the book will also interest any person – lawyer or non-lawyer – whose responsibilities include managing US litigation risks. These persons include those in venture capital, CFOs and other members of management, risk management and compliance professionals, and entrepreneurs seeking to implement best practices as they launch a start-up.

Whether as an initial overview of the subject matter or a useful desk-reference, *Avoiding and Managing US Business Litigation Risks* is an invaluable resource for individuals tasked with addressing this challenging topic.

Introduction

This book is written based on a sobering truth: one of the most formidable barriers to launching and leading a successful company is the ever-present risk of business litigation. Many savvy entrepreneurs watch in dismay each year as their otherwise successful enterprise is damaged or even destroyed due to unforeseen litigation.

Lawsuits plague not just nascent start-ups and "mom-and-pop" businesses. Fortune 500 companies and midsize businesses allocate increasing chunks of their operating budgets to managing and settling a variety of claims brought by plaintiffs. The sources of these claims range from disgruntled employees to disappointed consumers, vigilant shareholders and litigious competitors.

Sometimes the lawsuit comes out of the blue, like an unexpected tornado, leveling the company in a short period of time and sending it into bankruptcy or dissolution. Other companies face a series of smaller recurring claims such as employment lawsuits that, while less sensational and dramatic, hit the bottom line each month, pilfering away profits from stakeholders.

Litigation costs can be astronomical. Besides the litigation expense that most people immediately think of – battalions of trial lawyers performing never-ending tasks at handsome hourly rates – there are hidden costs. The ongoing distraction of litigation diverts the time and focus of executives and members of the management team whose attention should be on more profitable endeavors. Instead of concentrating on a strategic plan for the next quarter of growth and expansion, key employees are forced to spend time preparing for a deposition or reviewing emails and other voluminous documents for production to an adversary, perhaps the company's chief competitor.

There are further intangible costs of business litigation. The first conflict sometimes breeds secondary crises. As the instinct of self-pres-

the ball that triggered the claim. The ripple effects of either quiet or noisy departures can continue for months or even years.

And then there is the bad press, which may be even more devastating than the lawsuit itself. Customers, competitors, and the general public may read, tweet and re-tweet stories detailing sensational charges and claims about the product, service, or executive. When the truth is revealed months later after the company is vindicated by the lawsuit's dismissal, no one knows or cares how the story ended.

Principles of preventive medicine applicable to commercial litigation avoidance

For over two decades, my commercial litigation practice has provided the opportunity to defend hundreds of corporations against a diverse array of lawsuits. This front row seat has afforded me insight into some of the calamities and travails that come with defending against lawsuits and how those clients may have avoided litigation in the first place, or at least had an easier path through the ordeal.

It is not uncommon for facts to emerge during litigation revealing an unforced error that led to the claim. Sometimes this mistake is readily apparent. But in some instances, answering the "Why did we get sued?" question requires a great deal of thought and analysis. It takes even more insight and understanding to fully consider practical steps or safeguards that might be implemented to avoid similar claims in the future or make defense of such claims infinitely easier.

In counseling clients and speaking on this topic to in-house lawyers, it has been striking how few companies seriously undertake this practice of litigation avoidance and prevention. Apart from sexual harassment and corporate governance training, and perhaps a visit from an insurance representative or a workplace safety consultant, many companies do little more than whistle past the graveyard of litigation risks.

The thesis of this book is that companies can take many preventive measures to mitigate against litigation risks. As daunting as this endeavor may seem given the varied risks from hundreds of types of claims, litigation risk management is achievable through strategic planning and consideration of how claims frequently arise.

Reduced to its essence, the concept is relatively straightforward. Litigation risk management requires converging two spheres of knowledge and information: (1) how the ever-evolving legal and regulatory landscape triggers a variety of claims and lawsuits; and (2) the day-to-day realities of the business plan. The company's management

team presumably has the second component covered. My objective in this book is to provide insights relating to the first.

The starting point in this process is an assessment of the enterprise's litigation vulnerabilities. What are the litigation risks inherent in your business model? How can you – whether an owner or stakeholder, in-house counsel, outside counsel, or another loss prevention professional – be proactive in identifying and avoiding these risks? What types of claims are being asserted against competitors or similarly-situated players in your industry?

While some readers may find it useful to read each chapter in order, there are portions that will be more applicable to particular types of businesses than others. The section on proactive product liability prevention will not apply to financial institutions and real estate developers. Other chapters – such as chapter four, on how to understand breach of contract lawsuits – relate to virtually all businesses because almost every company enters contracts on a near-daily basis, triggering the possibility if not probability of a breach of contract claim at some point in time.

For those sections applicable to your business model, understand that what is summarized in the pages that follow is only the beginning. Consider these ideas as merely a prompt to prime the pump for further analysis and strategic thinking. Space does not permit an exhaustive discussion of every consumer protection statute and other source of litigation. Just as preventive medicine cannot be summarized in a single book or 20-minute visit with your healthcare provider, a serious effort to minimize and eliminate litigation risks requires a long-term commitment to the concept, lots of thought and reflection, and ultimately the dedication of sufficient time and resources.

Effective management of business litigation

To further extend the healthcare analogy, it is an unfortunate reality that even those who go to their physicians for routine check-ups, exercise regularly, and choose healthy foods are occasionally stricken with an illness. Similarly, all the litigation risk management measures in the world will not ensure that your company will not see the inside of a courtroom. For many companies, litigation is inevitable given the number of employees on the payroll, the volume and complexity of their business model, and whether they sell to consumers.

For those who have never experienced this ordeal first-hand, the world of litigation is filled with unknowns and mysteries. Movies and television dramas are poor guideposts for navigating the strange and intimidating world of high-stakes litigation. The unexpected hassles,

burdens, and intrusions are reflected in familiar refrains I hear from clients on a daily basis:

"They really can't get those documents, can they?"

"We don't have to give them the last known contact information for that ex-employee we fired last year, do we?"

"The trial is really going to take that many days and involve this incredible number of witnesses?"

Whether you routinely manage a bevy of litigation and other legal claims brought against your business or have enjoyed the good fortune of avoiding courthouses and arbitration venues up to this point, managing litigation after an action has been filed presents a daunting challenge. The second part of this book provides a realistic and practical guide equipping you to deal with the unique challenges that litigation brings.

Some of the topics explored in this section include:

- The basic sequencing of litigation, from the filing of the lawsuit through settlement, trial, or arbitration;
- The lawyers: your own counsel and opposing counsel, who may seem equally demanding and intrusive throughout the ordeal;
- The adverse parties causing these headaches (former partners, shareholders, competitors, suppliers, employees or customers);
- The mediators who will attempt to negotiate a settlement and may be viewed as unreasonable by urging that you pay an exorbitant sum to dispose of a frivolous claim; and
- The judges, juries, and arbitrators who will resolve the dispute.

The objective in this section is to answer several questions typically asked by those in the trenches managing and overseeing litigation – often a CFO or other executive with no formal legal training:

- What are the most important things to think about early in the litigation process?
- How can we make this entire process less expensive and onerous, particularly for the business units and key personnel on whose performance we are depending to make next quarter's projections?
- What can we expect in terms of key decisions, time commitments and other resources?

- How can we make sure the depositions are not disasters that increase the likelihood of an adverse result for the company?
- What are we going to do about that disgruntled ex-employee who was deeply involved in the customer dispute that is now the centerpiece of litigation?

A business owner or other executive's ability to make informed decisions about litigation, anticipating and preparing for the financial and time commitments called for in the ordeal, can save hundreds of thousands of dollars from the time the lawsuit is filed until it is resolved. Informed decisions made by management early in the process may even determine whether the company weathers the storm. These concepts are covered in the second part of the book.

A California emphasis

Although this book is written for businesses all over the world, there is an apparent emphasis on California statutes, cases and practices. There are a few reasons for this, the first of which is rooted in a practical reality – I have practiced in this state for most of my legal career and California law is a familiar reference point. But apart from my own familiarity with commercial litigation in the Golden State, it happens to be one of the most popular locations for businesses. Although accounting for just 12 percent of the US population, one in five companies on the New York Stock Exchange and NASDAQ is based in California.[1]

The reach of California litigation is significant. Not surprisingly, the most populous state has the largest market of consumers who buy products and services from all over the world. Even for those companies that have no physical presence here, it is not uncommon to face litigation originating in California. Well over 70 percent of my litigation work spanning over two decades has been defending out-of-state clients sued in California on matters ranging from small customer disputes to class action lawsuits. In-house lawyers who track their litigation expenses often discover that, while California may represent a small percentage of their company's sales, it represents a disproportionate allocation of its litigation budget. It is difficult to avoid California litigation once a company sells products or services to businesses and consumers in the state. As the Eagles sang of that mythical destination, Hotel California, "You can check out any time you like, but you can never leave".

Besides the sheer size of the market that makes it almost impossible to operate a significant business or other enterprise insulated

from California regulations, its consumer- and employee-friendly laws increase the likelihood that a business will be sued in California. With few exceptions such as medical malpractice claims, our body of statutes, regulations and case law are more favorable to consumers, employees and shareholders than those of almost any other jurisdiction.

For each of these reasons, it is a prudent approach to consider the liabilities arising from California as a benchmark of best practices in litigation avoidance. It is an oversimplification to say that, if your business practices conform to California law, compliance is achieved in the other 49 states and international jurisdictions. But being aware of litigation risks lurking in the Golden State is a good starting point.

A litigator's unique perspective

In the pages that follow, we will touch on dozens of topics of substantive law, ranging from corporate transactions to intellectual property. I seek to address these areas not from the perspective of a transactional or regulatory lawyer delving into the intricacies of codes and technical requirements, but instead by approaching each topic with insights gained from my experience in the trenches as a commercial litigator.

That litigation perspective focuses in large part on how a plaintiff's attorney views these substantive areas of the law as an opportunity for a significant settlement or verdict. If I have accomplished my objectives in this book, the reader will have a better understanding of how these issues emerge in lawsuits and this insight will spur the thought processes that lead to effective loss-prevention measures.

To the extent that this book contains substantive expertise, it is a product of what I have learned over the years from a few hundred talented colleagues at my law firm, both through my litigation practice and in writing this book. If being a partner at a large international law firm has taught me anything, it is how much I do not know about the vast and ever-evolving legal landscape. My colleagues' specialties and skill-sets range from knowing how to patent a new drug to understanding the labyrinth of SEC regulations, how to take a company public or navigate the complexities of the brave new world of cryptocurrency transactions. It is a privilege to collaborate with these talented lawyers on litigation ranging from real estate disputes to shareholder lawsuits.

That experience and exposure to diverse practice areas is reflected in this work. I am grateful to those colleagues at my firm who have made this book possible by providing their expertise in reviewing and commenting on selected chapters applicable to their respective practices. Their names and areas of expertise are indicated in the acknowledgments.

Assumptions and audiences

Albert Einstein said, "Everything should be made as simple as possible, but no simpler". The legal landscape in general and commercial litigation in particular are becoming more complex each day. Regulations are cumbersome e-discovery multiplies complexities. Rules designed to streamline the process sometimes seem to do the opposite.

These complexities are unpacked in this work for a diverse audience with varying levels of sophistication and knowledge of business litigation. The potential audience and uses range from the following:

- A CFO of a small private corporation tasked with managing litigation who would like to focus more on preventing litigation than just approving litigation counsel's invoices and authorizing an endless stream of claim settlements.
- An entrepreneur or one in the venture capital space will find these concepts relevant in considering a new business or acquisition of an existing business and ensuring that entities, affiliates and investors are insulated to the extent possible from potential liabilities.
- Attorneys acting in an in-house role and those in private practice are accustomed to the role of issue spotting. They may find it useful to supplement their understanding of risk mitigation by thinking through some of the new and emerging liabilities and how risks are assessed and categorized in this work.

Because readers have varying degrees of familiarity with the legal concepts discussed, parts of the book may seem either too technical or too rudimentary. To the extent possible, I attempt to break down complex concepts into concise explanations understandable to a layperson, supplemented by illustrations and metaphors. For the seasoned lawyer seeking to take a deeper dive into a particular subject, citations to regulations, statutes, cases and other authorities are provided in the endnotes.

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I am fond of saying that, like the village undertaker, commercial litigators are invariably called upon to ply their craft only in the wake of the most unpleasant circumstances. In contrast to transactional lawyers, whose work may result in popping champagne bottles to celebrate the issuance of an important patent or the completion of a game-changing acquisition, something bad has invariably happened in the days or

weeks before a client's urgent call to a trial lawyer. A key business relationship has soured, an employee has bolted with valuable trade secrets, a summons and complaint have just been served, or some other crisis is afoot.

Although I enjoy the challenge and comradery that comes from working with clients to assess the damage and attempt to find a solution to the problem, there is a special joy that comes in advising clients on how they might avoid these problems in the first instance. To that end, this book is written to provide thoughts and a few modest nuggets of wisdom to perhaps prevent a catastrophe, or, if that fails, help you weather the storm so you can get back to doing what you do best – run a successful business.

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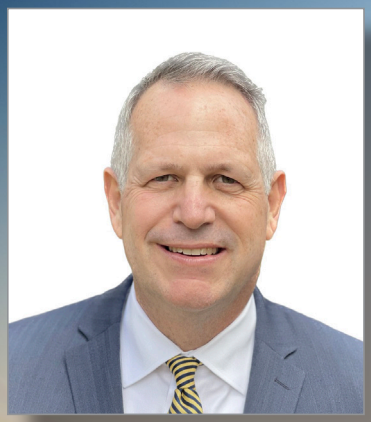

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SharkCast is a twice-monthly podcast that tackles the question of why companies are so frequently sued in U.S. courts and explores ways to mitigate and navigate these lawsuits. Hosted by Kent Schmidt, the podcast provides insights from guests on practical guidance for assessing litigation risks and managing the litigation process.

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