

Thinking Like Plaintiffs About Revenue-Enhancing Litigation

In-house counsel spend so much of their time trying to stave off lawsuits and extricating their companies from messy litigation that they rarely view litigation as a means of enhancing the corporation's revenue or maximizing shareholder value. In-house legal departments traditionally have

JAMES MORSCH

viewed litigation as a money-losing proposition. Even if the company is successful in avoiding an adverse result in litigation, the experience of litigating is generally a negative one for a corporation: money and, more importantly, valuable time of the company's business people is expended on the litigation, attention is diverted away from the company's business, and the only measure of success for in-house counsel is whether less money is lost on the litigation than was anticipated.

But a small and increasingly noticeable subset of in-house counsel are learning that litigation can be a revenue-enhancing opportunity. Whether it be actions as an opt-out plaintiff in class action litigation, insurance recovery actions, or other lawsuits aimed at bringing money into the corporation, many in-house counsel are actively seeking out lawsuits to bring as plaintiffs. For years, every department or division of a corporation - save one, the legal department - has been under pressure to contribute profits to the business. With the success some companies have had pursuing opt-out antitrust claims, many executives are now asking why their legal department cannot generate revenue by bringing lawsuits on behalf of the company.

How can I make my legal department profitable?

Saying it would be nice if the company's in-house counsel brought revenue-enhancing litigation and actu-

ally doing it are two different things. Many in-house counsel are, after all, not accustomed to thinking like plaintiffs. Their jobs are largely reactive. A business unit has run into a snag with a customer, and in-house counsel is called in to clean up the mess. The company is named in a lawsuit, and it is inside counsel's job to organize and mount a defense to the claim. Rarely, is the legal department asked to go out and find litigation the corporation could initiate. In the first instance, therefore, the corporation's lawyers must be taught to think of their jobs differently and trained to start thinking about litigation as a means to serve the company's objectives rather than as an obstacle to those goals.

Changing the mindset of inside counsel is only the first step, however. Inside counsel need to invest the necessary time and effort to identify viable revenue-enhancing opportunities for the company. Non-lawyers are most likely to receive the first notice that something is afoot in their business that might give rise to a valuable claim. Whether it is a government investigation into a competitor, the failure of an insurer, or a class action notice, the business people that deal with these issues on a day-to-day basis, rather than the company's legal department, most likely will hear about the development first. Business people usually are not as well equipped as inside counsel to understand the legal ramifications of what they have heard, however. If companies are to maximize their chances of taking advantage of revenue-enhancing opportunities, they must adopt procedures to insure that information is passed along to in-house counsel.

For their part, legal departments must educate themselves on the types of claims that the company could bring as plaintiffs. Obvious candidates are "opt-out" cases, where the company is a member of a putative class action, private rights of action for violations

of the country's laws, and unfair competition and trade claims. Undoubtedly, there are additional claims companies could bring depending on the type of business they operate and the markets they serve. Subscribing to class action and other law reporters and actively monitoring the trade press undoubtedly are good ideas for in-house counsel who have been tasked with finding revenue-enhancing litigation. Something else to consider is to invite the company's outside lawyers and even lawyers who have sued the company in the past to brainstorm with inside counsel about cases the company could bring as a plaintiff. While this may seem like a radical idea, the fact of the matter is that many large corporations are coming to the realization that the best way to spot revenue-enhancing opportunities is to go to those lawyers who have successfully sued them in the past and have some basic understanding of their businesses.

Not All Cases Are Good Cases.

Inside counsel's job is not over when an opportunity is identified. While the case might have the potential to bring money into the corporation, unless there is a reasonable chance of success and a large enough upside to bringing the case, many corporations will balk when it comes time to go after a competitor, supplier or past or present business partner. And there is good reason for this: litigation, once initiated, tends to take on a life on its own. Costs must be strictly managed; attorneys fees somehow accounted for in the form of a contingency fee or other form of alternative fee arrangement; and, most importantly, the litigation cannot be permitted to distract the company's employees from the real business of the corporation. Litigation also can be very destructive if the corporation decides to sue a current business partner or an existing competitor. Inside counsel who ignore the possibility that bringing litigation may damage the company's business while focusing solely on the potential revenue that can be obtained in such cases are, at the end of the day, not going to be in their jobs. Those that spot opportunities and convince their in-house clients that the company can pursue a claim as a plaintiff without endangering the corporation's business, by contrast, are going to be heroes.

Undoubtedly, those companies on the lookout for

revenue-enhancing litigation will turn down more opportunities than they are presented with. Legal departments will identify cases whose merits do not warrant making an investment or whose upsides in terms of revenue are too small to justify litigation. The key is to approach these type of cases as pure business propositions. Hire counsel with experience as plaintiffs to advise inside counsel on the merits and demerits of bringing the case. Negotiate a fee with outside counsel that makes them "put their money where their mouth is." Agree in advance with the business people who are most likely to be impacted by the litigation as to how the litigation will be conducted so as to minimize the chances of it spilling over into the corporation's business. Set objectives for the litigation so that expectations inside the corporation are in line with reality. And perhaps most importantly, make sure the corporation's business units understand in advance their stake in the litigation and its outcome.

As one client said to me, "It's nice to be a plaintiff every once in a while." That is easier said than done, of course. But when inside counsel manages to spot an opportunity that ends up bringing in revenue to the corporation, he or she may be seen as a positive contributor to the corporation's bottom line for the first time in counsel's career. The key is to start thinking like a plaintiff, sooner rather than later.

James A. Morsch is a partner at Butler Rubin Saltarelli & Boyd LLP, a Chicago litigation boutique. He concentrates his practice in counseling companies and litigating antitrust and other competition law matters and regularly advises clients on distribution issues. The views expressed in this article are personal to the author.