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10 Things You Should Know About Litigation

Today we present a primer on the world of litigation.

[1] TRUISMS: Let's start with a few truisms about most lawsuits: * Litigation—court cases, lawsuits, suits (they all mean the same)—can involve private companies or people against one another, called civil litigation, or a government against a company or person, called criminal or regulatory litigation. * The one suing is the plaintiff, the one sued is the defendant. * Lawsuits can be time-consuming and distracting. Packaging businesses who sue a non-paying customer, for example, often are frustrated to discover how much time and attention it eats up, even if successful. * And, if you win, it's not as satisfying as would be a punch in the opponent's nose. Which I don't recommend.

[2] PLAN FOR THIS, GET THAT: It's somewhat ironic that all a litigation lawyers' strategic planning and information-gathering are made with an eye toward how things would play out at a trial, but trials are actually rather rare. Most cases—over 90%—get settled, meaning the parties agree to a result before a trial, or are thrown out before trial by the judge for being somehow insufficient. Practice pointer: A settlement is, by definition, "out of court," so don't say "settle out of court," like they do on TV.

[3] BEFORE TRIAL: Before a trial, which can be before a jury or just a judge, the key activities are either discovery (such as asking the other party or outside witnesses for written documents or a deposition, which is oral testimony under oath in answer to questions), or motions (for example, asking the judge to throw the case out for overall inadequacy under the law.)

[4] ALL THOSE APPEALS! Most cases start in state or federal courts referred to as the trial court, and if you lose there, you can commonly appeal to the next highest, or appellate court, if you've got 'grounds.' Grounds might be, among others, that you think the trial judge kept out evidence they should not have, or explained the law incorrectly to the jury. If you lose again, you might have grounds to appeal to the highest court, usually called the Supreme Court. (Fun fact: New York State names its *lowest* court the "Supreme Court," and its top court the Court of Appeals. No idea why.)

[5] WHAT EXACTLY FOR? I recommend you always ask these two important questions about litigation you hear about:

A. What is the legal basis of the claim? Did the defendant, for example, breach (break) a contract, act negligently (failed to use reasonable care) and cause someone harm; steal a trade secret; or violate a state or federal law? And:

B. What remedy are they seeking? Usually money (often referred to as 'damages'). So for example, a corrugated package fails to properly hold the heavy appliance it was packaged in, breaks and falls on a consumer's foot, and the consumer sues the company that sold it for negligence, claiming the company didn't use reasonable care in designing or making the package, maybe because they didn't adhere to the industry standards for the package. The injured person might seek lost wages since they had to miss work, medical bills, and their pain and suffering.

When governments win cases, sometimes the remedy is a financial penalty, sometimes it's an injunction (order) preventing the company from selling or making a product, sometimes it's putting a person in jail. (More on injunctions later.) Sometimes NGOs sue federal agencies to force the agencies to make a decision, such as when an NGO sued to force FDA to decide whether to prohibit seven chemicals from being used in food as flavors.

[6] CLASS IT UP: Money damages are also usually the remedy in so-called 'class action' lawsuits, in which a representative consumer sues a company on behalf of the 'class' of consumers similarly affected, and the remedy is sometimes a small dollar amount refund or discount to all the consumers. Examples include cases against companies whose package labels allegedly misled consumers because they claim their food product is 'all natural,' but in fact contain synthetic ingredients, or companies whose beverage label claims their product is loaded with "veggies" when it is mostly fruit juice.

[7] INJUNCTIONS: As noted, sometimes the remedy sought in a case is an injunction, which is an order by the court for someone to stop doing something. An example is the closely watched Oregon lawsuit (more from *PW* at **pwgo.to/9264**) where the plaintiffs seek an order blocking the state's EPR law as a violation of the state constitution. A similar case is pending in California against that state's EPR law.

[8] PRELIMINARY INJUNCTIONS: Sometimes, injunctions are temporary, as a judge determines based on an early, basic outline of the facts that the plaintiff has a good shot at winning, so the judge orders, essentially, *keep everything as is while I figure this out*. For example, in July, a federal judge issued a preliminary injunction that prevented California from enforcing its SB 343 (informally called 'truth in labeling') law that tried to impose criteria for when packages could feature chasing arrows or similar symbols.

[9] STAY, JUST A LITTLE BIT LONGER: Sometimes, too, a case will be decided, by a judge's ruling or a jury verdict, but the judge 'stays' the decision while the case gets appealed. They do this to minimize the damage in case the appeals court decides the decision was incorrect.

[10] IN DEFENSE OF JUDGES: It's a disservice to federal judges—but media reports do it all the time—to mention which President nominated the judge when discussing a decision the judge made. Doing that zooms right past the quite reasonable benefit of the doubt any judge should start with, and instead assumes that every judge is a corrupt lackey. Few are. **PW**

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