

## **How to Protect Yourself in a Lawsuit**

By Robert Mintz, JD

I've been getting more calls than usual from clients who want to discuss litigation strategy for potential lawsuits they are considering filing, usually against a business associate or insurance company. I've written extensively about the risks of getting sued and being a defendant in a lawsuit (<http://rjmintz.com/Chapter3.pdf>), but equally dangerous is what can happen when you sue someone as the plaintiff in a case. What types of risks will you face and how can you avoid a potential disaster?

### **Who pays the legal fees?**

When considering a lawsuit, your first step should always be a rigorous analysis of the amount of the potential judgment versus the likely legal fees and costs. In a case where your lawyer is charging only a contingent fee, this economic analysis is less a concern for you than it is for your attorney. Since your lawyer is financing the case with his or her money and time and it's not costing you anything, the downside risk appears limited and any recovery is theoretically profitable.

If you are paying your lawyer on an hourly basis, the economics of the case are radically different. Now you really need to know in advance what the legal fees and costs will be, the likelihood and amount of a potential award, and what your chances are of actually collecting that judgment. The problem is that none of these variables can be estimated with any degree of accuracy; there is no way to know how large the legal fees and costs will ultimately be because so much depends on what the defendant and his or her attorney may do. How many motions, hearings, objections, and delays will there be? If the defendant is well funded, a range of tactics will be designed and applied against you in an attempt to make you spend so much money that financially you just can't continue.

### **The counterpunch**

These issues are well illustrated in the case of a physician group that was owed \$600,000 by an insurer. The legal issues were seemingly clear: the physicians performed the services and the insurance company kept delaying payment. The two sides fought and negotiated for months, but the doctors got nowhere and finally decided to file a lawsuit. Their attorney estimated their legal fees would be about \$50,000. The contract with the insurer provided that the losing party in litigation would have to pay the winner's costs. On its face the analysis was simple: spend \$50,000 or less to collect \$600,000.

Although each partner in the group was financially well off, and the group itself had a substantial reserve, the legal fees and costs quickly ballooned as the insurance company fought back with a barrage of discovery motions, refusals to comply, and endless court hearings and postponements. After six months, the doctors had invested nearly \$300,000 and there was no end in sight. If they won the case they would recover these fees, but who knew how long that would take? They wondered whether they should keep fighting and running up the costs, or whether they should cut their losses and try to settle.

The physicians' lawyer argued that they were into the case too deeply to get out at that point. He felt that he would be able to obtain a favorable settlement and get everything resolved within a short time. Lawyers paid on an hourly basis are typically optimistic--right up until the day of trial.

Instead of a settlement and an end to the litigation, what the doctors got was a big surprise when the defendant insurance company filed a \$5 million counterclaim against the medical group and each of the physicians personally for fraud and breach of contract for amounts previously paid to the group by the insurer. That tactic is known as a "counterpunch" and it's used by every experienced trial attorney whenever possible to hit back hard against the plaintiff by raising the stakes and dramatically increasing his or her risk of loss. When a doctor or lawyer files a lawsuit to collect unpaid fees from a patient or client, the typical counterpunch is a malpractice claim by the defendant. Generally, this tactic is successful unless the opponent has nerves of steel, is extremely confident of success, and has ample funds to continue the battle. At this point, the group and the physicians were put at risk for far more than just their legal fees. Defending and possibly losing the counterclaim could be financially devastating since they could each be liable for all or a portion of the total judgment ([www.rjmintz.com/general-partnerships.html](http://www.rjmintz.com/general-partnerships.html)).

Shortly after they were served with the counterclaim, the doctors in the group asked to speak with me to discuss asset protection strategies for their personal assets. Whether asset protection can be effective at this point in the proceedings is certainly questionable ([www.rjmintz.com/pdf/Article-MDNetGuideNovember2007-WhenIsItTooLate.pdf](http://www.rjmintz.com/pdf/Article-MDNetGuideNovember2007-WhenIsItTooLate.pdf)). And as of now, the two cases are still going on and the legal fees and costs paid by the doctors on the collection case and the defense of the fraud charges far exceeds any award they can possibly recover.

### **When your attorney messes up**

In addition to uncontrolled legal fees and the risks of a counterpunch, another serious issue for any plaintiff is the liability that can arise from the actions of your attorney. If your attorney screws up, you could be on the hook for the damages.

Sometimes an attorney will name everyone in sight as a defendant, hoping to prove negligence later, based on what is learned in subsequent discovery. However, if your attorney names someone as a defendant without a sufficient legal basis, that defendant can sue you for malicious prosecution if he wins the case or is dismissed from the lawsuit.

One case I saw involved a lawsuit against a small, privately held corporation. Although his suit was against the corporation, the plaintiff's lawyer named the individual officers and the principal owners as defendants, too. Although owners can be held personally responsible for the acts of the corporation under a theory of "piercing the corporate veil," if all the corporate formalities are not followed at the time the individual defendants were named, the plaintiff's attorney will have no evidence to support that claim (<http://rjmintz.com/Chapter4.pdf>). In trial, the plaintiff not only lost the case against the

corporation and the individual defendants, but the individuals then sued the lawyer and the plaintiff for malicious prosecution. Now there were more legal fees and finally a jury verdict against the original plaintiff for more than \$300,000.

### **How to protect yourself**

Once you initiate a lawsuit there is no way to predict what will happen. That's why it is always a dangerous business decision. Uncontrolled risk plus an incalculable expected return is certainly a potential recipe for financial disaster. So what should you do if someone owes you money? How can you pursue a case for damages you've suffered?

Before proceeding with a case, make sure that your legal fees and costs--your investment in the case--are limited to an amount that makes sense relative to the expected recovery. You will be able to do that if your attorney agrees to handle the case for a contingent fee or a total fixed fee. Either of these arrangements shifts the risk from you to your attorney. Although he or she may not want the risk either, particularly in a fixed fee case, he or she is in a much better position than you are to judge and accommodate the risks. In exchange for a fixed fee, your attorney may want to charge more as compensation for bearing these risks, but that's a reasonable solution. If your attorney won't take the case for a contingent or a fixed fee, or even some combination, find another attorney or else forget about the lawsuit. If no attorney can calculate the costs in advance and is willing to bear the risks then chances are that your case is a bad investment for you, too.

Finally, once you have controlled the legal fees, try to limit your risk of loss from a counterclaim or other unexpected reversals. Think of a lawsuit as a business venture where you risk not only your investment in the case but also your personal assets and savings. Before any lawsuit is initiated, review your asset protection options to see if your home and other savings can be protected from potential loss. These strategies certainly won't guarantee a successful outcome to your case, but hopefully you can avoid some of the traps and unexpected pitfalls that inhabit the dangerous landscape of lawyers and litigation.

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