The Seven Deadly Sins of Business Transactions

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Despite media hype about personal injury lawsuits, the fact is that businesses file four times as many lawsuits as individuals. To minimize the risk of getting sued, the smart businessperson conscientiously follows certain vital rules of behavior when engaging in any type of transaction with another business.

Why? Because if a conflict arises and a lawsuit is filed, it could end up in front of a jury. One thing is certain: Juries understand black-and-white issues, but they deliberate in living color. All human beings tend to think in terms of narratives and motives, so what may matter most to jurors in a business trial is the behavior of the characters involved.

Juries have an unerring eye for greed, honesty, common sense, betrayal, valor, courage and common courtesy. They also have a strong sense of right and wrong — often to disregard legal technicalities and side with the "good guys." With this in mind, below is a list of "Seven Deadly Sins" that if committed can land any business — even a utility contractor — in court and subject it to punitive damages.

Sin #1: Changing the Rules in the Middle of the Game

In the popular comic strip "Calvin and Hobbes," one recurring theme had Calvin set up a game, then continually change the rules. While it's funny in the comics, it's no joke in business. For example, my firm handled a case where the seller of a product set up a bidding deadline for potential buyers.

Our client made the highest bid (by far) and negotiated a contract. That's when the seller changed the rules, letting an eleventh-hour bidder come into the process and trump the client's bid. We didn't think it was fair and neither did the jury. It's simple playground etiquette: Once the ground rules for a transaction are set, follow them. Juries hold businesses accountable for following the rules — especially those they set in the first place.

Sin #2: Touting Company Values and Then Acting Differently

If you represent in advertising, on the Web or anywhere else that your company abides by certain standards, expect to be held to them in court. Case in point: On behalf of one client, our firm sued a company that posted a Code of Conduct on its Web site, one tenet of which stated, "It's simple — just do what your parents taught you."

This company entered into an agreement to sell assets to my client, but then secretly negotiated to sell the same assets to a higher bidder, intending to come back to the first deal if the second one fell through.

My cross-examination of one of its executives went like this: "You ask a girl to the prom, and you know she's really looking forward to it. Then, unexpectedly, the best-looking girl in class asks you to the prom. You can't be sure that the second girl won't back out at the last minute, so you decide you're going to keep both dates. You go pick up the good-looking girl first, then if she's not there, you take the other girl to the prom. Great plan, right? But, when you go home and tell your dad about your plan, what do you think he'll say?"

From the looks on the jurors' faces, I made my point. The moral of the story is, if you advertise values and standards, you have to live by them. People — including juries — will hold you to those standards.

Sin #3: Manipulating and Concealing Information

In a 2004 lawsuit in which an investor sued a brokerage house over a stock transaction, the production of electronic documents proved to be the pivotal issue in the case. The firm did produce 1,300 pages of e-mails, but tried to conceal another terabyte of pertinent e-mails — a gargantuan volume equal to one-twentieth of the entire contents in the Library of Congress.

When the attempt to conceal was discovered, the presiding judge entered a default judgment against the brokerage house on the issue of liability. The defendant's fate was sealed. The question was not whether it would be forced to pay the investor damages, but how much.

In the electronic age, businesses have to remember that with information being transmitted, stored, filed and copied with the touch of a button, you can't avoid a paper trail.

Sin #4: Making Money the Motive

In one of the most celebrated civil cases of all time, an oil company offered to buy all of the shares of one of its competitors. In a subsequent lawsuit, the jury found at the time of

the offer, the interested company already knew those shares were promised to a third competitor in an oral agreement. The jury found that the buyer intentionally interfered with the previous oral purchase agreement and awarded the third company $7 billion in actual damages and $3 billion in punitive damages.

On appeal, the buyer argued that punitive damages were inappropriate because its motive was to merely "secure an economic advantage." The court sided with the jury, saying the status as a competitor did not protect the buyer from obligations of legal fair play. In other words, "We did it for the money" is worthless as a defense.

Sin #5: Slanting the Process So It Screams "Unfair!"

Insurance companies are really bad about this. I had a client whose insurance agent mistakenly entered a fictitious address into the renewal policy of a long-time customer, a meat packing plant. When a hurricane wiped out $150,000 of the plant's inventory, the company wouldn't pay the claim since the inventory was listed as housed at the fictitious address. The company claimed it was the insured's responsibility to read and catch any mistakes in the policy. "Wrong," said the jury.

While policyholders should be expected to know generally what their coverage entitles them to, insurance companies cannot hold them accountable for watch-dogging policy language. The court agreed. (Evidence in the case showed even most businesses don't read insurance policies, and if they do, they don't understand them.)

A business that establishes a process — for entering into a contract, taking proposals, accepting bids, establishing rates, choosing vendors, etc. — must also hold itself appropriately accountable if the process is to be considered fair. Otherwise juries will cry foul.

Sin #6: Adding Insult to Injury

This sin accounts for a lot of lawsuits that otherwise might not have been filed. One client was told he had been cheated on a major business deal after being forced to cool his heels nearly 10 hours in a lawyer's office as part of the charade.

The insurance company refused to pay a client's undisputed losses until he capitulated on the $150,000 in dispute, effectively holding him for ransom. The first client won $48 million, including $12 million in punitive damages. The second ultimately cost the insurance company $600,000 in consequential damages and $1.6 million in punitive damages vs. what should have been a total claim of $210,000.

Setting up a situation where the other guy loses face, gives in to bullying or is forced to eat crow not only primes your company for a lawsuit, but gives juries a good excuse to avenge the underdog with a number followed by six zeros.

Sin #7: Forgetting about the Covenant of Good Faith and Fair Dealing

In just about every state, contract law contains an implied clause that every contract process is entered into in good faith. Juries rule on this point all the time: In business, not everything goes. What these examples illustrate is that businesses must treat each other fairly and ethically if they expect to stay out of the courtroom.

Quite simply, you can forget about hiding behind a defense that you followed the "letter of the law" if your business culture follows a pattern of violating the "spirit of the law." Juries can tell the difference.

My 30 years of civil trial experience has shown me that in the end, to those who sit in judgment, fair play and common courtesy matter most. And that's how smart businesses avoid lawsuits every day. ***UC***

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Contingency Fee-based Legal Option Levels Playing Field

What if a small business finds itself up against a giant? Fighting for your rights may sometimes seem prohibitively expensive.

More businesses are finding they can level the legal playing field and minimize the financial risk involved in filing a lawsuit by hiring trial or plaintiff's firms that operate on a contingency basis.

Following are some pros and cons:

Pros

Plaintiff's law is its own specialty. Plaintiff's firms have experience in discovery (obtaining documents, etc), jury selection, jury presentations and trial strategy. Law firms that don't routinely represent plaintiffs may not have these skills or the necessarily aggressive mindset.

Plaintiff's lawyers don't typically charge by the hour, but by the result. The firm will take a percentage of your court award should you win and nothing should you lose. (Arrangements vary, but the attorney is usually willing to advance costs for expenses such as expert witness fees.)

Cons

A plaintiff's firm will submit your case to a rigorous, even brutal, pre-retention review before committing its resources (often hundreds of thousands of dollars) to your case. If they don't think it's winnable, they won't take your case. (Either way, it's good information to have.)

When choosing a contingency fee law firm: 1) look for one with a successful track record in business litigation, 2) make sure the firm has the resources to aggressively pursue your case, and 3) ask yourself if you would still hire this firm if you had to pay them an hourly rate. If the answer to this last question is yes, you've made the right choice.