

AVOIDING LITIGATION: SOME BASIC CONSIDERATIONS FOR SMALL BUSINESS OWNERS

Litigation attorneys love to go to court. We enjoy the intellectual challenges of writing briefs and making arguments. For clients, however, the experience is never enjoyable. For the business owner, litigation means time, stress and money that could be better spent growing the business. One of the most important considerations for all business owners is avoiding litigation, and, where going to court is unavoidable, proceeding with the best chance to win and be reimbursed for costs and attorney fees. From having dealt with many deals gone sour, I would offer the following pointers. These may seem quite basic, but are often ignored in the crush of handling the never-ending task of growing an enterprise¹.

First, avoid handshake deals like the plague! It would be nice if most contractual agreements could be “gentlemen’s agreements.” Unfortunately, the commercial world is simply too complicated and unpredictable to rely on an oral agreement, even where all parties mean well. Too often, we see deals wind up in court because both parties thought they had an understanding. When dealing with independent contractors such as vendors, wholesalers, construction contractors and service providers, a written contract is always preferable. Although the law of contracts is complex, most transactions do not require a “phone book” memorandum of agreement.

What follows are a number of considerations that any business owner should give careful thought to before meeting with his or her attorney to draft a contract or review one that has been presented by another party. By giving careful consideration to these areas, one can assist their attorney in negotiating and drafting an agreement that should keep them out of court, and, if worst comes to worst, gives them the best chance to obtain a favorable result. Also, an organized, prepared client usually spends less on attorney fees.

First, just what is it that you are contracting for? This would seem to be very basic, but is often a fertile area for problems. If you are contracting for services, what are the exact nature and scope of those services? Who will perform these services? When are they to be performed? By thinking about these things and getting them into an agreement, you can eliminate any confusion over what is expected of a service provider. Just as important, you can make clear what will not be done. Situations may arise where a contractor performs work that you did not believe to be part of the agreement, then claims additional compensation.

Second, what and when will you pay for the services or products? This is another basic area, but one fraught with potential problems. Is it a flat payment? Is the total amount dependant on hours worked or some other factor? If the total is not a fixed amount, are limits set? Is the price dependant on costs of materials subject to change? When are payments due? Can you get out of making payments if certain services have not been performed? These are but a few of the things that savvy business owners will consider before sitting down with their attorney.

¹ This article does not deal with employment contracts for full time employees.

One area that many do not consider is allocation of risk. Bad weather, volatile market conditions, and local politics are only a few of the things that can prevent a deal from being completed. The question then arises as to whether something that prevents performance – or makes it impractical – excuses a party from the agreement. Business owners are in the best position to anticipate the sorts of occurrences in a given enterprise that can throw a wrench into the performance of a contract. It is vitally important to let your attorney know what these may be and how you want to deal with these risks.

Another overlooked area is what happens when one party fails to perform or breaches an agreement. Many people assume that if they sue for breach of contract and win, the court will automatically make the other side pay their attorney fees. However, this is not the case as general matter of law. The general rule in our court system is that parties bear their own attorney fees. One way to overcome this is to include a provision for attorney fees to the non-breaching party. An enforceable attorney fee provision may not only help you recover your fees when you prevail in litigation, it may dissuade the other party from breaking the agreement, as they might have to pay more in attorney fees than in damages. Also, you may wish to include provisions for “penalties” or reduction in payments for unsatisfactory or lacking performance.

Finally, what do you do when you tell someone that you want to review things with your attorney and they tell you that “you don’t need a lawyer,” or pressures you to “get the deal done now, because lawyers will just bog things down”? If anyone attempts to persuade you not to review a transaction with your attorney before jumping in, you should seriously question whether that person is someone you want to do business with. Remember that attorney fees for transactions are almost always far less than for litigation.

The foregoing considerations are just a few of the things that business owners, particularly small business owners, should consider. Avoiding legal battles is often a matter of careful planning and foresight. Think about what you really need, be organized and “get it in writing.” This will help you to avoid time and expense on unnecessary disputes and allow you to focus on growing your business. If you have any questions about commercial transactions or litigation, do not hesitate to call our office at 1-877-LAW-2555 to schedule a consultation.

Lawrence C. Kress, Esq.
Scaringi & Scaringi, P.C.