

Managing Bet the Company Cases

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I. Introduction (5 minutes)

Sometimes the very existence of the company is at stake. Regardless of the original size, claims can quickly become high-profile, supercharged crisis events that force companies to seriously contemplate whether the business has a future. Unfortunately, “bet the company” matters are becoming more frequent and can come from many directions. Events as wide-ranging as data privacy and security breaches, natural disasters, catastrophic events, social justice issues, personal injuries and loss of life, product liability, class actions, shareholder litigation, or governmental/regulatory scrutiny can all lead to unexpected threats and, ultimately, uncertainty about whether a company can survive.

Not all bet the company cases are evident from the start. Some cases can begin as a routine matter. A personal injury lawsuit is filed, but only turns into a potential bet the company exposure when there is an allegation that the company wrongfully failed to settle and, instead, acted in bad faith; or a single product liability law suit is unsuccessfully defended, and the company suddenly finds itself facing multiple class action lawsuits or mass tort claims involving hundreds-or thousands of similar injury claims. Unfortunately, more and more frequently, the potential for bet the company exposure is clear from the moment an incident occurs. When it happens not only do you need a good team; you need a good plan.

II. Preparing for a Crisis (10 minutes)

Even before a bad company situation arises you should have a response team in place. The team members must be able to act quickly and thoughtfully. The team should be able to identify the most significant immediate risks and prioritize the necessary immediate actions. The composition of such a team will vary but usually should include legal and senior stakeholders that can address immediate concerns such as safety and security, business continuity, regulatory issues, and communication-both internal and external.

Outside counsel or other external experts and consultants may also be needed. For example a significant event may require outside counsel to quickly assist with regulatory notifications or responses. Outside experts may be required to eliminate or contain a hazard or collect and preserve forensic evidence. A public relations or social media specialist may be needed to assist because the incident is, or likely, could “go viral” on social media. Knowing who you need to call versus spending time searching for someone to assist can make all the difference. Having the right people in place is key to making informed and proactive decisions.

III. Crisis Response: (15 minutes)

- Communication is Critical
 - Moving through a crisis is multi-faceted; understanding who is doing what and why it’s necessary is crucial in maintaining swift, strategic, and efficient decision making when the stakes are raised.
- Board involvement/communication
 - Boards should be kept in the loop – if this kind of crisis has not occurred in a while – they may need historical reminders / education, especially if industry specific.
- Employees
 - Reminder to employees re communications can be discoverable
 - Keep tabs on employees – make sure they are staying mentally sharp – crisis can take a toll
- Press/Media
 - Announcements External
 - Announcements Internal
 - News Coverage

- Social Media Engagement
 - Knowing what to say, when to say it, and how to handle negative comments.
 - Impact of trending/cancellation efforts
- Regulatory/Governmental agencies
 - This area requires technical knowledge and an ability to work with and alongside governmental/regulatory employees
 - Depending on the incident and agency, you may lose control of the investigation
- Investors
 - Short and long term investors are interested in the impact/potential impact.
- Insurers
 - Several layers of insurance may be involved; ensuring proper notifications are sent early can help prevent insurance coverage disputes later on.
- Legal
 - Legal can and should play an integral role in connecting the various business departments to drive alignment and enable efficient and strategic decision making.
 - Legal can be “the connector” by collection and analysis of information

IV. Defending a Bet the Company Case: (15 minutes)

- Documents and evidence
 - Copying an attorney to an email does not necessarily protect the communication (Recent Google case)
- Time and effort
 - Several employees can go into crisis mode but a reminder that rest and stepping away is crucial in maintaining proper mindset.
- Financial resources
 - nuclear verdict vs event
- Outside non-legal resources
 - Consultants
 - Public relations
 - Experts
 - Other third parties
- Outside counsel/Defense Team
- Legal Strategy
- ADR/Early Resolution
 - Can the matter be resolved quickly?
 - Should it / does early resolution come at a premium?
 - What does leadership/the board want?
 - Will early resolution set a negative precedent?
 - Is adverse party a customer? A “frequent flyer”?
- Recovery, rebuilding, and takeaways
 - Analysis after the event requires looking back in order to chart path forward
 - What can we do to improve our chances of avoiding this in the future?
 - Opportunities to rebound from existential moments

V. Conclusion (3 minutes)

Even when a company survives a bet the company threat, there can be long lasting damage to the company's structure and reputation. Threats can shake up leadership, create scrutiny and doubt around the company's strategic plan, and create tension throughout the organization. Such high stakes litigation can leave unprepared businesses with few choices. Bet the company cases are not routine litigation and require different strategies and analysis. Companies must be aware that they can happen and identify steps to avoid their occurrence and/or mitigate the impact. Recognition and planning are vital to minimize the risk that a bet the company case will occur and to successfully manage through it when it happens.

VI. Questions (2 minutes)