

MANAGING THE RISK OF LITIGATION: ACHIEVING THE BEST RESULTS TO PROTECT YOUR BUSINESS

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OVERVIEW

The risk of litigation is present with any business, but for those in the firearms industry, this risk is multiplied and poses a threat to continued operations and profitability. Even one's personal assets may be at risk. In addition to the possibility of ordinary commercial litigation over contracts, leases, employment claims and similar issues, firearms-related businesses also face the risk of tort claims arising from the advertising and sale of firearms and ammunition, even if those products are not defective and function as intended.

Participants in this seminar will learn how to identify and mitigate litigation risk specific to their businesses. This will include pre-litigation actions such as creating and implementing document retention policies, obtaining appropriate insurance coverage, arranging a suitable registered agent for service of process and having counsel identified to immediately advise on how to respond if a claim arises.

Participants will also learn how to correctly analyze language in contracts concerning arbitration, forum selection and choice of law so they can enter into agreements with their eyes open as to how disputes will be resolved.

Finally, participants will learn the essentials of how to respond to a lawsuit, including consulting with counsel, putting an insurance carrier on notice and preserving documents.

THE IMPORTANCE OF INSURANCE

Insurance is a tool to mitigate risk. However, spending money on insurance premiums for policies that don't cover the risk your business is most likely to face does nothing but create a false sense of security. In this seminar we will address the major types of business insurance, what each covers and some major pitfalls to watch for.

DOCUMENT RETENTION

When litigation happens, parties have a duty to search their documents, emails and other communications for materials relevant to the case in a process called discovery. Document discovery can be expensive, time consuming and distracting from doing business.

This can occur even if you aren't a party to a case and receive a third-party document subpoena. Failure to comply with these obligations can have serious consequences including fines or even losing the case by default. An important strategy for mitigating this risk is to create and implement a document retention policy, which is really a document destruction policy. Best practice is only to keep physical and electronic documents that you need or that you are required by law to maintain (e.g. 4473s). This policy will minimize the time and expense required to comply with discovery during litigation. The less material you have, the less you have to search through. We will address how to create the policy and how to stick to it over time.

REGISTERED AGENTS AND COUNSEL

If you do business as a corporation, LLC or similar business entity, you are required by law to appoint an agent to receive legal process on behalf of the business. This person or entity is responsible for receiving the papers and passing them on to you. It is critically important that your registered agent be available to receive papers and can reliably transfer them. Failure to respond to a suit can result in a loss by default.

Along those same lines, it is important to have a relationship with a lawyer who can review the papers and advise you of what they mean and what you need to do. This may not necessarily be the lawyer who ultimately defends you in the case, but you want your own lawyer to advise you at this step. This does not have to be expensive, as you will only have to pay the lawyer for the work performed.

ARBITRATION, CHOICE OF LAW AND FORUM SELECTION

Most contracts contain terms that set out how disputes will be resolved. This only applies to claims arising from the contracts, but it is very important to know when it applies. Some contracts require that disputes be settled in private arbitration. Courts will enforce such provisions and they may not be to your advantage. Importantly, there is very little room to appeal an arbitration decision. Contracts that don't require arbitration will generally set forth the location that any litigation must occur — and it may well be on the other side of the country in a forum you don't like. The contract will almost always set out which state's law applies to the dispute. We'll explain briefly how to understand these terms and what they mean.

WHAT TO DO WHEN YOU ARE SUED

If you get a demand letter that isn't yet an actual lawsuit, you should immediately run it by a lawyer. You may also have an obligation to report it to your insurance carrier. Your lawyer and/or insurer can then advise how to respond. You may want to try to negotiate before going to court — or not.

If you are sued and receive the papers, the clock is ticking. You typically have only 21 days from the time your agent was served with the papers to respond. A lawyer can help get an extension to respond and understand the level of risk the suit poses.

It is critical when you are sued to immediately give notice to your insurance carrier. Failure to do so can result in forfeiture of your insurance coverage.

CONCLUSION

We will explore these issues and more in our seminar on managing litigation risk. We can't put you through law school in one session, but we can help you appreciate some of the risks associated with litigation and provide tools to put your business in the best possible position.