



MAKING LITIGATION PART OF YOUR COMPLIANCE TOOLBOX

David Esquivel
Bass Berry & Sims (Nashville, TN)
615.742.6285 | desquivel@bassberry.com

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No one wants to be sued. Paying lawyers to negotiate a deal adds value to the company, but defending a lawsuit is often viewed as a money pit with no upside. While plaintiffs and their counsel can count on statutory fee-shifting, the burden is often much higher for defendants to expect to get reimbursed for fees. Discovery is costly, especially in class action and other complex litigation. The best outcome in defending a lawsuit is often summary judgment, or maybe a favorable settlement, but it takes a lot of legal fees, and company time and resources, to get there.

It is possible, however, to get a return on investment from legal defense costs in a lawsuit. Defending a lawsuit doesn't have to be just a money pit. It can yield benefits with the right practices. This article examines three strategies to get the most out of your litigation defense dollars.

Use the defense of the lawsuit as a compliance audit.

In the area where I practice—consumer financial services—the laws and regulations can be tedious and hard to apply, particularly in the face of new technologies. Look no further than the Fair Credit Reporting Act (FCRA), which requires that disclosures about pulling credit reports on job applicants be contained in a document “that consists solely of the disclosure.”¹ A federal appeals court recently held that this requirement prohibits required, state-law disclosures from being on

the same page as the federal disclosures, even though the state-law disclosures are consistent with the FCRA disclosures.²

Form over substance? Sure, but that's often the world of financial services laws and regulations. With fee-shifting and the possibility of class action status, defending cases that involve “gotcha” claims for technical violations of consumer protections statutes can be expensive and frustrating. The defense of these cases, however, can be used as a tool to improve compliance with hard-to-pin-down legal requirements. Think of ways you can use the discovery process as a compliance audit.

The first benefit of this approach is that your audit is done under the umbrella of the attorney-client privilege. The company can be completely transparent with counsel, and counsel can deliver direct, written guidance and remediation without creating bad documents in subsequent litigation.

I have clients who employ non-lawyer consulting firms to conduct compliance and regulatory audits. These can be valuable tools, but have potential drawbacks in subsequent litigation when the results of the audit become potentially discoverable. Using the discovery process in a lawsuit as a compliance audit can deliver the benefits of a standalone compliance audit at a minimal additional cost, and without the drawbacks of the investigation and results potentially being used against you in future litigation.

Another benefit of using defense of the lawsuit as a compliance audit is the ability to better identify potential

¹ 15 U.S.C. § 1681b(b)(2)(A)

² *Gilberg v. California Check Cashing Stores, LLC*, 913 F.3d 1169 (9th Cir. 2019)

problem issues. Obviously, the lawsuit will identify compliance needs for the specific issue raised by the plaintiff's complaint. But the investigation and discovery related to that specific issue will often shed light on similar compliance questions. This is especially true for companies in highly regulated industries that are dealing with rapid changes in technology.

Use discovery to ask a lot of questions, not just about the specific claim at issue, but other potential problem areas. The discovery phase of a lawsuit often brings together a helpful set of eyes—business leaders, line-level employees, compliance personnel, in-house counsel, and outside counsel. Take advantage of the fact people are paying close attention to compliance and make the best use of it. Map questionable policies and procedures to legal and regulatory requirements, as you would in any compliance audit. Track these questions and make a remediation plan, as needed.

Make sure in-house lawyers are involved in the investigation and interviews.

In-house counsel are usually asked to weigh in on compliance issues on a rapid-fire basis brought to them by managers and other business leaders. Rarely do in-house lawyers have time to dig deeply into potential compliance problems, and they often have little contact with employees who make the day-to-day decisions that can result in litigation. When in-house lawyers treat the discovery process and defense of the lawsuit as a compliance tool, they have the chance to review closely the processes and procedures that may pose litigation risk and hear firsthand from company personnel who are on the frontlines of legal compliance.

When I meet with employees in the course of investigating defenses and preparing discovery, my in-house counsel is often also meeting these employees for the first time. Like me, they get to hear directly from people who are making decisions or putting into practice the policies that are at issue in the lawsuit. These conversations also tend to unearth similar or related compliance issues that could pose future litigation risk.

These meetings and interviews are often the first time that employees have direct access to counsel. This is an excellent opportunity for an in-house lawyer to get to know and build a relationship with someone who will be a good compliance troubleshooter in the future. It's also a chance for employees to hear directly from counsel not only about the issues raised in the lawsuit, but to understand what legal red flags to look out for when new questions arise or new products and technologies are

rolled out.

Use the lawsuit to strengthen the compliance function itself.

Most of my clients in the highly regulated financial services industry utilize a specialized compliance department. Compliance personnel are a valuable resource, not just to head off litigation or regulatory problems, but also to make the defense of a lawsuit more effective and efficient, particularly in responding to discovery. Involving the compliance department in the discovery process can benefit the defense of the lawsuit, but it also can help strengthen the compliance department itself.

One recent example was a lawsuit I defended for a financial services client against claims brought under the FCRA. In discovery, the plaintiff asked for the set of relevant company procedures going back several years. During that time period, the company's procedures had been modified and amended several times, and we were required to produce each of the different iterations of the procedures.

We asked the compliance department—which was the custodian for the company's procedures and responsible for reviewing and updating them—for the different versions of the procedure. Unfortunately, the compliance department's database did not maintain dates when procedures were updated and did not document the rationale for changes to procedures over time. That caused us to do a lot of additional work to determine when different procedures were in effect, as well as what changes were made over time and for what reasons.

As a result of that experience, the compliance department later invested in a different compliance platform that better tracked changes to procedures and the rationale for those changes, as well as building in required approvals from the business, compliance, and legal departments. By having the compliance department closely tied into the discovery process, the company was able to improve the compliance process itself. This not only improved the compliance function, but will result in more efficient and less costly discovery processes in the future.

Conclusion

Defending a lawsuit does not always have to be a wasted expense. In-house lawyers and outside counsel can work together to get a return on litigation dollars, and make the case to management and business leaders that there can be forward-looking value that comes from defending a lawsuit.



DAVID R. ESQUIVEL

Pro Bono Member

BASS BERRY & SIMS (Nashville, TN)

615.742.6285 | desquivel@bassberry.com

David Esquivel serves as the firm's Pro Bono Member. In that capacity, he devotes half his practice to leading teams in significant pro bono litigation and managing the firm's overall pro bono efforts.

David has long been active in pro bono and access-to-justice initiatives. He is a founding member of the firm's Pro Bono Committee and has served as chair since 2013. David previously served as chair of the Tennessee Bar Association's Access to Justice Committee and a member of the Tennessee Supreme Court's Access to Justice Commission. David has served as chair of the board of directors of the Tennessee Justice Center, Conexión Américas, and the Maddox Charitable Fund. He currently serves as chair of the board of directors of the Nashville Public Library Foundation.

In addition to his robust pro bono practice, David advises clients on investigations and litigation matters mainly in the financial services sector, with a particular emphasis on matters relating to the Fair Credit Reporting Act (FCRA), Fair Debt Collection Practices Act (FDCPA) and Telephone Consumer Protection Act (TCPA).

He provides counsel to nationwide consumer reporting agencies (CRAs) and furnishers of consumer data on how to ensure regulatory compliance under the ever-increasing demands of federal regulatory agencies. David settled the claims of 120,000 consumers on behalf of a CRA in a nationwide class action and successfully defended a CRA against a variety of FCRA claims tried to jury verdict. He regularly advises on FCRA compliance issues, handling investigations conducted by the Federal Trade Commission (FTC) and Consumer Financial Protection Bureau (CFPB), and representing clients in class action and individual litigation.

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Accolades

- Mid-South Super Lawyers (2011-2018); "Rising Star" (2010)
- Liberty Bell Award — Nashville Bar Association (2018)
- Leadership Council on Legal Diversity — Fellow (2014)
- Tennessee Bar Association — Harris A. Gilbert Pro Bono Attorney of the Year (2005)
- Tennessee Bar Foundation — Fellow
- Nashville Bar Association — Fellow

Education

- Duke University School of Law - J.D., 1997; Order of the Coif
- Duke University - B.A., 1992

