A LOSE-LOSE SITUATION

When Fixture Manufacturers and Retailers Meet in Court

by Duane Van Horn

Weigh the cost of going to court carefully. The damages can be more than you could ever dream. Litigation between a fixture company and a retailer is a lose-lose situation. Do everything in your power to avoid litigation.

Imagine this: It's 2:30 a.m. You've tossed and turned for an hour and can't get back to sleep.

Your company's best account manager has a deposition scheduled early today with the attorneys representing what was once your best retail account. The deposition will last all day and may prove pivotal in the success of your lawsuit to get the last $400,000 the retailer owes you on a $1.6 million order.

The attorneys for the defense will probe into every corner of your operation. Your manager will be so nervous that his stomach will stay in knots. His ability to do his job has been challenged, a challenge he's faced every day for the past 12 months since the suit was filed. And now he finally gets to let out all his anger at you and your client for putting him through this stress.

He will be sworn to tell the truth. Can you, your business, your employees, your family, and your other clients take the strain?

THE DEPOSITION

As the deposition continues, the defense attorneys will ask questions about your management style, your ability to communicate accurately, and how well or poorly you document your projects. They will ask about your personality and your relationship with employees on the floor.

Of course, your attorney is also present during the questioning. His job is to limit the range of questioning and to turn negatives into positives as he builds his case for you during the lengthy discovery phase of the suit. He will be able to ask your employee questions after the defendant's lawyers are done, but they will be primarily for clarification, with an eye toward how a jury will hear the evidence.

The day after the deposition, your account manager calls in sick. The deposition lasted eight hours and he's "wasted." He's also angry—with you and with the process. He's deeply disturbed that anyone would question his ability to do his job to the highest of standards. But most importantly, he's hurt that the retailer he worked so hard to please is questioning his honesty and integrity. The very core values he and your company hold dear have been challenged. Can he get over the impact on his life and work? Yes, but it will take some time, and his value to the manufacturing team may well suffer.

DISCOVERY COSTS BIG BUCKS

Is the process worth it—in monetary terms, intangibles, and damage to your operation? Of course, each case is different, unique to the manufacturer and the client involved. However, there are some broad similarities, or consequences, in the execution (pun intended) of litigation and tort

law. Consider them well before filing a lawsuit against a deep-pocketed retailer.

One of the first questions to ask is, what is the monetary cost? Most likely, the total will outstrip your highest guess. Attorney fees can range from $150 to $575 per hour. The paralegal you will work with often will bill at approximately $50 to $110 per hour, depending on where the law office is based.

Phone calls will cost you a minimum of one quarter of an hour's time, but more likely a half hour or more. Every contact you have with the law firm will be documented and billed. Law firms have better software for tracking their time and efforts than the store fixture manufacturing industry has ever thought about. (We could take some pointers in this area.)

You will not only be billed monthly for the time you spend with your solicitor, but you also will pay for the time he or she spends with the guys on the other side. This will often amount to much more than the time your lawyer spends with you. What you'll be paying for is the exchange of documents and motions involved with the discovery phase of the case. This is where the plaintiff and defendant are required to share with each other (in theory) all they know about the case and the issues involved.

The bottom line: You'll pay dearly for the discovery phase. It will last longer than you or your attorney estimated. It's the longest and most trying phase of the case. In my opinion, it's where the case is really won or lost: All the cards for both sides (again, in theory) are played face up on the table, and the best hand wins.

THE TRIAL

The case will only go to trial if the two personalities on each side can't reach a reasonable settlement. In the end, money is what it will be about—who has the deepest pockets to cover the cost of litigation, and who has the most to win or lose should a jury find in favor of the opposition.

I mention personalities because often one of the sides involved will begin to take the issues to heart. Then it becomes personal, and money becomes secondary. Attorneys love when this happens, because reasonable men become unreasonable, and that means more money for the team of lawyers in the middle with nothing to lose.

But let's say the nice fixture guy wins. Well, the retailer can appeal. Many retailers have a large law firm on retainer, and the store fixture firm may be overmatched. The process can and usually does get ugly and expensive. In the end, both sides will spend a lot of money and then meet in the middle to settle out of court.

How much time does a typical case take? Less than a year is unusual. If everyone cooperates and the issues are not too complicated, a case could play out in less than two years. There are many variables, and each case will follow its own unique twists and turns. Don't expect a quick and speedy trial, à la Perry Mason. These matters will play out in civil, not criminal, court.

In one case, yet to come to trial, the incidents and facts involved took place more than eight years ago. The case is still in the discovery

phase. When discovery takes place so long after the events in question, depositions become filled with "I can't remember," files get misplaced, and computer hard drives get overwritten. Granted, this may represent a worst-case scenario, but who's to say it can't happen to you?

Another matter to consider is whether the case will be tried in a local court or in a federal court, which may not be in a nearby city. A determining factor can be which party has "the right of venue." Always try to get a home field advantage in legal matters, if for no other reason than to save money and time.

PREVENTIVE MEASURES

What can be done to prevent litigation between a manufacturer and a retailer? Nothing can ensure 100 percent protection. But two areas certainly stand out and should get your attention. The first and most important is the contracts and purchase orders used to do business. The second is having a solid arbitration agreement in place.

What's in your contracts or in the purchase orders you were issued will go a long way toward determining how successful you will be in avoiding litigation. If you ever have the misfortune to become a litigant, you'll learn the hard way the importance of having solid legal agreements. It's much easier and less expensive for you or your attorney to do your homework up front and deflect your exposure to litigation altogether. NASFM's "Contract Clauses Manual" is a good starting point; it highlights the areas of contention that can arise.

Marc Supcoff, an attorney practicing construction law in New York, offers this caveat: "In my experience, clients often neglect to have an attorney review new construction contracts before they are signed. As a result, the attorney often does not see the contract until after a significant problem has already happened on the project." What would help the most, he adds, is "building stronger construction contracts" *before* there's a problem.

Even if you have great contracts, having a proven binding arbitration or mediation agreement in place is like having a second insurance policy. While there are variations on this theme, the goal is to create a format that greatly simplifies the settlement of seriously contentious differences that would otherwise end in litigation. Arbitration offers many benefits. Legal rights are not superseded. And should arbitration fail and the case end up in court anyway, the discovery phase will be much simpler and faster.

RETURN TO THE NIGHTMARE

In our hypothetical case, the store fixture manufacturer endured 26 months of motions, counter motions, depositions, and wasted days and nights, and then got a judgment for $220,000 and ownership of the unwanted inventory. His legal fees cost him $76,000. He will never be able to measure the cost of lost production, a scarred reputation, and a major client lost.

Weigh the cost of going to court carefully. The damages can be more than you could ever dream. Litigation between a fixture company and a retailer is a lose-lose situation. Have an experienced attorney review your contracts and purchase orders—and do not fail to use them. Think about including arbitration in your game plan. And finally, do everything in your power to avoid litigation.

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NASFM Magazine is the official publication of NASFM, the retail environments association. Published six times a year, it is the only magazine aimed at decision makers in the retail environments industry, which includes store fixture suppliers, retail design firms, suppliers of visual merchandising products, and suppliers of materials and equipment. *NASFM Magazine* features insightful coverage of industry-specific issues and events on topics including manufacturing and materials, management, marketing and sales, technology, finance, and human resources.

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