

Business of Law

Show Me the Money: Making Sure Winning Lawsuits Pay Off

BNA Snapshot

- Lawyers must evaluate whether employers can afford to pay if they lose
- Bankruptcy courts present both challenges and advantages



By Gayle Cinquegrani

Lawyers who represent workers must consider a potential case's legal merit as well as an employer's ability to pay up if the worker wins in court.

"Plaintiffs' lawyers are always concerned with the financial aspects of the case," Michael Sweeney, an attorney with Getman, Sweeney & Dunn in New Paltz, N.Y., told Bloomberg BNA April 3. "We're trying to recover as much as we can for our client. Almost everyone we sue says they can't afford to pay the judgment."

Before filing the case, "do a little digging on the company," Rebekah L. Bailey, a partner at Nichols Kaster in Minneapolis, said at a National Employment Lawyers Association conference March 31. She recommended researching the company's credit and the 10(K) forms filed by publicly traded companies with the Securities and Exchange Commission.

An employment lawyer can assess the finances of a company involved in a potential lawsuit by checking whether landlords or vendors are suing it for non-payment and whether its stocks and bonds are trading at low prices, Matthew Dundon, a principal at Dundon Advisers, told Bloomberg BNA April 3. Dundon Advisers values distressed debt for law firms and creditors.

If workers' paychecks have been late, that could indicate the employer is having financial trouble, Dundon added. Lawyers also could consider whether the potential defendant's industry is experiencing a downturn, such as the one many mall-based retailers now face, he said.

Look at Company Office on Google Maps

Sometimes helpful information is only a few clicks away. Sweeney said he searches on Google Maps for a picture of the company headquarters. When he learned that a home health aide company was operating out of a bodega, he figured it lacked assets and decided not to sue.

The Fair Labor Standards Act has "a low threshold for owners and officers," so Bailey suggested adding as many defendants as possible. "You're spreading your risk when you bring more defendants into your case," he said.

If an employer pressures a worker to settle for a low amount by claiming lack of assets, the worker's lawyer should insist on seeing the employer's financial information and hire a finance professional to interpret it, Sweeney said. If an employer seems to lack financial resources, "maybe we could get them to sign a binding agreement to change practices" as part of the settlement, he said.

Some employers try to use their financial problems as a bargaining chip. "It's very common for a defendant to say I don't have a lot of money, settle for what I can afford to pay," Dundon said. "The big risk is if you settle, and they file for bankruptcy," the worker will be able to recover only a percentage of the settlement amount.

Bankruptcy judges decide how to distribute a debtor's assets when they're insufficient to satisfy all claims, so many creditors

receive only a fraction of the amount they're owed. If a company files for bankruptcy less than 90 days after agreeing to a settlement, and the settlement amount is higher than the creditor would have received after the company filed for bankruptcy, the bankruptcy court could make the creditor return the excess despite the settlement agreement.

Don't Settle for Too Little

"If you have to choose, you much prefer to have a settlement or a judgment going in to a bankruptcy," Dundon said. "You give them a meaningful discount to get the settlement," but "there's a happy medium," he said. If a case has a \$10 million value, a lawyer may find it wise to settle for \$5 million but not for \$2 million, he said.

These sorts of considerations confront employment lawyers "moderately frequently," Dundon said.

An employment lawyer must decide "is it worthwhile pursuing the claim in bankruptcy at all" because "the payout could be so small," Sweeney said. A lawyer must consider "What are the expenses?" he said.

One of the expenses for the employment lawyer could be hiring a bankruptcy lawyer. "Bankruptcy can be overwhelming," Bailey said. "It can be invaluable to have co-counsel."

Even if bankruptcy court presents challenges to employment lawyers, it has the advantage of speed. "Employment actions take years" in regular courts, but bankruptcy proceedings move much faster, Dundon said. A bankruptcy court could resolve the underlying employment claim, or the parties could let the original court resolve the employment lawsuit and then bring that judgment to the bankruptcy court.

"You don't want to end up in bankruptcy, but it's not the end of the world," Sweeney said at the March 31 conference.

Bailey, Sweeney and Dundon all spoke at the NELA conference March 31. Sweeney and Dundon also spoke by telephone with Bloomberg BNA.

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