

Why Can't Litigation Fix What's Broken?

Amundsen Davis Commercial Litigation Alert
September 1, 2017

Years ago I had a client in a cutthroat business. They sold a product which was a commodity consumed by businesses. Competition was on service and service could only be so good. His competitors were bona fide bad guys. Periodically, his competitors would tell his customers patently untrue information, typically that our client was about to file for bankruptcy. The client would invite me to lunch, proudly show me the letter and ask how soon we could sue for tortious interference. He already had the settlement money spent.

I'd ask: Did you lose any customers or orders? The answer was always no. He'd tell me a story about how he dropped everything, flew to some distant city, met with the client, and convinced them the letter was false. The result was often an additional order.

I'd deliver the bad news. He had no lawsuit. He was incredulous. How can they do this terrible thing, inconvenience him and not be liable? I would explain that if he'd lost that client, we'd have a lawsuit to talk about; unfortunately, he'd also be down a client and hurting on account of the lost revenue.

This whole scenario seems wrong to many business people. I hear: Can't bad guys be stopped? I get sued for frivolous things! This is real.

The bottom line for businesses is no injury equals no lawsuit. Forget personal injury lawsuits; even someone who has no permanent injury or simply fleeting pain has been injured. Trivial injuries may be overcompensated, but there was an injury.

Wasn't my client's emergency business trip damage? Maybe. Businesses are not judged like people. There is no business pain and suffering. Maybe the plane ticket and some ancillary expense would have qualified as damage. It was really a marketing trip and are you really going to sue over less than \$2500?

Bad acts that fortuitously don't cause harm are punished. Try discharging a firearm in a public place. You will be charged with a crime and the fact that no one got hurt will just lessen the penalty. The government is, within limits, allowed to punish conduct regardless of the injury it causes.

There is a ray of hope however. If a business is injured, but the injury is difficult to put a number on, an injunction (an order from the court directing a party to do or not do something) may be available. What if someone takes confidential

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information about a business' customers or uses a trademark that belongs to your business; even if the damage cannot be quantified an injunction may be available to make them stop. My client might have gotten an injunction against the competitor making false statements, and in some industries, like financial services or consumer goods, this is not uncommon. The expense did not make sense in his situation, however.

Litigation **can** fix what's broken; it's just that not everyone is empowered to fix every wrong and some wrongs are not cost effective to fix.

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