

# Claims Against Corporate Attorneys on the Rise

By Anne E. Thar, Vice President and Corporate Counsel

Corporate attorneys have traditionally viewed themselves as above-average malpractice risks compared to their litigating colleagues. But corporate lawyers are revising their thinking in the face of a growing malpractice threat.

Several themes run through recent corporate malpractice claims. The most common is the business deal gone sour. In the past, corporate clients simply accepted the financial risks inherent in every business transaction. With alarming frequency, however, clients today are blaming poor business decisions on their attorneys. Even more disturbing, corporate attorneys are now being sued by non-client third parties for adverse financial results. In short, we're seeing an attempt to make corporate attorneys the guarantors of success for ventures in which they play a purely legal role.

Also, too many corporate attorneys mistakenly assume that "sophisticated" corporate clients appreciate all of the legal ramifications of their business decisions. For example, never assume that your client understands the tax implications of a transaction — clearly define the scope of your representation in an engagement letter, including whether you will provide tax advice.

Similarly, even the most routine purchase or sale of a business may raise environmental or hazardous waste issues. An engagement letter must clearly set forth who is responsible for identifying and resolving any environmental problems.

Several other trends are emerging from recent malpractice claims against corporate attorneys, including the following:

**Failure to obtain security/collateral.** Corporate malpractice claims often



***Transactional lawyers have their own set of malpractice pitfalls. Here's what you can do to protect yourself.***

include an allegation that the attorney failed either to perfect a security interest or to obtain collateral or personal guarantees to ensure payment of the purchase price. Never assume that your client has considered the security/collateral issue. If you have discussed it and your client has agreed to forego security, be sure to document that decision with a letter to the client, a memo to the file, or retention of all significant drafts of the purchase agreement.

**Failure to independently verify key information.** Corporate malpractice claims often allege that the attorney failed to verify vital information provided by third parties. For example, one attorney was sued by his seller/client for failing to verify the purchaser's corporate name, thus invali-

dating a security interest.

Another attorney was sued by a third party purchaser when he didn't verify that the client/seller had the right to option a parcel of land to the purchaser. The purchaser incurred big start-up costs in anticipation of the option. When the deal fell through because the option allegedly did not exist, the purchaser sued the seller's attorney on the theory that the lawyer knew that no option existed.

Corporate attorneys obviously cannot verify all information and representations made during the course of a transaction. Nonetheless, you should try to verify critical information, representations, and warranties or at least to obtain evidence or written assurances that others have conducted the proper investigation.

**Representing small, closely held businesses.** Lawyers who represent such businesses must be extremely careful to document whom they represent. Often, you believe you're representing the corporate entity while the shareholders or officers believe you're representing them as well. In other situations, you may represent only one of several majority stockholders.

The problem becomes even bigger when the other stockholders don't have independent counsel. The unrepresented stockholders may later allege that there was a conspiracy to defraud them by the represented stockholder and his or her attorney. You're especially vulnerable if you're wearing more than one hat, serving both as lawyer and as a director or officer or holding an equity interest in the company.

**Fee disputes.** An increasing number of corporate malpractice claims are countersuits to fee disputes. Most

---

transactional work is done on an hourly basis, and fees can escalate quickly as the transaction hits snags or becomes unexpectedly complex. Send detailed monthly billing statements to avoid shocking clients with one large bill at the close of the transaction. If a client falls behind, deal with the situation promptly.

**The importance of checklists.** Checklists are essential for every corporate attorney. They should include

not only your duties and responsibilities, but those of the client and other parties as well. Use checklists or outlines when drafting contracts and agreements — they can prevent you from omitting a key provision.

Give your client a copy of the checklist. This will keep the client informed and outline his or her duties. Don't forget that checklists should include post-closing actions, such as filing security interests. Make it an office policy not to

close a file until you have signed the bottom of the checklist, verifying that all items have been completed by the various parties to the transaction.

Start implementing these basic loss prevention procedures today. They will help prevent malpractice claims, of course, but they will also enhance your efficiency and ensure that your client receives a better legal product.