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Corporate Law & Accountability Report™



IN-HOUSE COUNSEL

# Corporate Counsel Can Better Protect Their Companies By Being More Aggressive Litigators, Bass, Berry & Sims's Michael Dagley Says

*In the era of increasing cybersecurity and data breaches, it may be time for public companies to drop their defensive stances and become more plaintiff-oriented, suggests Michael Dagley, a Nashville, Tenn.-based partner in Bass, Berry & Sims PLC who has 34 years' experience in high-stakes corporate litigation.*

*Dagley, in a recent interview with Bloomberg BNA's Yin Wilczek, says that in certain contractual areas—such as software installation and implementation—companies may be missing a chance to assert their claims. In-house counsel, by adopting a more aggressive litigation stance, may be able to protect their companies' rights and at the same time maximize shareholder value, he says.*

*In the last five years, Dagley has won or settled eight multimillion-dollar contingency fee cases involving failed software implementation in health-care systems. In one of those cases, an arbitration panel in 2013 awarded Dagley's client—Trinity Medical Center based in Minot, N.D.—$102 million in damages on a defective patient-accounting software that cost $2 million.*

**BLOOMBERG BNA:** Are you seeing companies departing from their traditional defensive roles and becoming active litigants?

**Michael Dagley:** I have in certain limited arenas in the last 10 years or so. For example, we've seen active litigation in the intellectual property world, with IP companies, particularly, protecting their patents and intellectual properties. But what has surprised me is why companies and in-house legal departments are not more plaintiff-oriented. To put this into context, I think it's mostly because of the composition and mindset of in-house lawyers.

Most general counsel come from large, defense-oriented firms, and most of them were corporate lawyers, not trial lawyers. General counsel see their role as protecting their client, the corporation, from lawsuits. I have rarely seen in-house lawyers who are actually looking for opportunities to be plaintiffs. They're not thinking, "I need to be looking for opportunities where we may be able to assert legitimate claims and recover money for the company."

I always counsel my clients to be on the lookout for opportunities to turn the GC's office from a cost center to a profit center. And if you do that, you will be viewed in a totally different way by senior management.

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**BBNA:** But isn't litigation inherently unpredictable? Wouldn't public companies be sticking their necks out?

**Dagley:** I face that issue all the time with my clients. There are a couple of responses to that. First, if you have a really good claim, there is a great chance that you can resolve the matter without having to file a lawsuit—which means it would be confidential and there would be no publicity at all.

All but one of the cases I resolved for my clients occurred without filing a lawsuit or an arbitration claim. We approached the other party and made a very persuasive presentation on the front end to convince them that it's in their best interests to avoid litigation because they too want to avoid the publicity. The way I do this is to prepare a very detailed report with expert analysis,

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and then follow that up with a meeting where I make a presentation and walk the parties through the case.

I've found that to be very persuasive and successful. And you can always go the second step, which is mediation, and bring in a professional mediator to assist the parties. And that can be very effective, because if I can persuade the mediator that I have a very good claim, then the mediator can go to the defendants and say, ''You're going to lose. And I can resolve this case today for you for far less money, and you can avoid the publicity of a loss by settling this case today.''

The second point is that corporations can hire outside counsel who are experienced in complex corporate litigation and who are willing to take on the case on a contingency fee basis. In that way, there's no risk at all to the company. If the company recovers nothing, it pays nothing in legal fees.

**BBNA:** How can in-house counsel make the case to management that it's in the company's best interest to take an aggressive litigation stance?

**Dagley:** They can do it in terms of the management's fiduciary duty to shareholders. Everyone in the company has a duty to maximize shareholder value. If you have a claim that goes unasserted, you've just wasted an asset. If I were a shareholder, I'd want to know why the company didn't pursue the claim.

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**BBNA:** How about from the board's perspective? Have you seen a change in the board's position regarding active litigation?

**Dagley:** The boards of the hospitals that I've dealt with many times are more aggressive than senior management. The boards see their obligation as purely to shareholders. So if there is a claim, they want to make sure that claim is asserted. The problem is that sometimes senior management are in a defensive mindset because they're the ones who convinced the board to purchase the software.

Some of my cases were brought to me by the board, not by senior management. You're contacted by the chairman of the board or a board member who says, ''I'm very concerned. Our hospital has bought this software and it's not performing, and we need you to take a look at this.''

**BBNA:** Are boards becoming more aggressive?

**Dagley:** Yes, I think they're changing their stance in the wake of Dodd-Frank and other reforms since the recession. I think boards today have a better understanding of their role in corporate governance and what their fiduciary duties are to shareholders. And that if their company has been damaged, then they need to be vigilant, they need to be able to defend their actions to the shareholders.

If there's a claim out there, the board better be asking hard questions of senior management: How did this happen? Why did this happen? What do you intend to do about it? What are our remedies? Have you retained software experts? Do we have outside counsel who are experienced in this? I'd want answers—that's what I'd be saying if I were a board member.

**BBNA:** Are there some areas of the law in which it is easier for companies to adopt a more aggressive litigation stance?

**Dagley:** Where I've seen it work is with technology companies—they're much more aggressive about defending their assets. In that world, you have to go on the offensive—if people are infringing on your intellectual property, the only way to make them stop is to sue them or assert your claim in some way.

I'm also seeing health-care organizations become more aggressive, at least in my experience with software. If hospitals have been damaged by bad software, there now is an increased willingness to go after the vendors.

That said, it's a case-by-case analysis of whether a company has a good claim.

**BBNA:** Could cybersecurity be a potential new area where companies may be able to assert successful claims?

**Dagley:** I haven't had a case in this area, but yes, I can easily see a situation where a company has spent a lot of money installing security and it doesn't work and it's breached and the company suffers a lot of damage. That company then should be looking back to the vendor that sold them the software or security system for a remedy.

Much of course depends on the contract between the company and the vendor. Many vendors try to protect themselves from this kind of liability by eliminating consequential damages, so your only remedy against them under the contract is getting back the cost of the product.

That's something I run into all the time in software for hospitals. But we've been able to get around that in a very creative way, by looking at the consumer fraud laws of each state—in other words, not pursuing a breach of contract theory but by arguing that the vendor made misrepresentations in selling the product.

Using your example of cybersecurity, let's say, hypothetically, that the vendor makes a sales representation to the company and misrepresents the capability of the product, and they sign the contract and the contract provides for no consequential damages. But they're in a state that has strong consumer fraud statutes and many states provide that businesses, such as a hospital, can be a consumer. So then the company is protected by the state's consumer fraud statute, which can be very liberal. So we're able to go to the vendor and say, ''You think you're protected because your contract doesn't allow for consequential damages, but your contract is void because you misrepresented the product, and that's what induced the client to sign the contract.''

**BBNA:** In light of your experience, is there anything you would suggest that in-house counsel consider before signing a vendor contract?

**Dagley:** One thing we advise our clients is: don't just sign the contract that the vendor gives you. You should be negotiating protections on the front end for the company—in other words, make the vendor stand behind the product and ensure it will do all the things that

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they said it will. Also, if the product doesn't work the way it's supposed to, what are your remedies?

**BBNA:** What concrete protections would you recommend?

**Dagley:** One would be performance metrics. Vendors draft contracts that have no performance metrics, or the performance metrics are so low that they're meaningless. Companies often won't know that the performance metrics set out in the contract are so low that even if you have a terrible experience, the vendor hasn't actually breached the contract.

In order to ensure meaningful performance metrics, companies typically have to engage software experts who can say, ''The software needs to do A, B and C, and that needs to be in the contract.''

The other example I would give is on staffing. Every hospital I've represented has had the same experience—they worked with a team from the vendor to design and install the software, and then the software went live and they experienced a tremendous number of problems. By that time, the team from the vendor has gone on to the next implementation, and the vendor sends new people who are inexperienced and poorly trained, who don't know anything about the implementation, and who can't solve the problems.

So what should companies do at the front end? They should negotiate who the implementation team is going be, and their access to the team. In other words, if they experience problems after the software goes live, they will have access to the same technicians and employees who installed the system. Moreover, the vendor should promise to devote whatever resources are necessary to solve the problem.

So, the key is to negotiate at the front end what your resources are.

However, unless you have been through one or more failed software implementations, there really is no way in-house counsel can anticipate the types of problems that may arise. It's an area in which the vendor has tremendous advantage in the negotiating process.

So, in order to fully protect themselves at the front end, companies need legal experts who are experienced in the type of software installation at hand, who know what the issues are. In addition, they need software consultants and experts to help them choose the right vendor and to negotiate a fair contract.

**BBNA:** Do you have any takeaways or strategic advice for in-house counsel?

**Dagley:** The takeaway would be: don't see your role as corporate counsel as being purely defensive. Your role can be to watch for and identify viable claims for the company.

Once you identify a claim, you should have a strategy for pursuing that claim without incurring risks. That means looking for ways to resolve matters confidentially, looking for law firms willing to take matters on a contingency fee basis so that you can go to your senior management and say, ''We have a claim and it's valuable, and I think we can resolve this claim without publicity, and without incurring any exposure for legal fees.'' I think that's part of the role of in-house counsel. I see relatively few corporate counsel who seem to understand and grasp that as part of their job.

The strategic advice would be: corporate counsel must have a relationship with outside counsel who are experienced in knowing how to resolve plaintiffs' cases. I don't think many in-house counsel have that. That's one of the things we try to educate our clients about: if you have a potential claim, call us, let us review it. We'll tell you whether we think the claim has value, and if it does, we may be willing to take the case on a contingency fee basis.

But none of this is going to happen unless you pick up the phone and ask outside counsel about your options.