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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Prevent Pro Se From Becoming A Problem Per Se

Law360, New York (June 28, 2013, 1:26 PM ET) -- For many companies, litigation is just one of the many costs of doing business. One increasingly common area of litigation is that involving pro se litigants, or individuals who are representing themselves.

Pro se is a Latin term meaning, "on one's own behalf." Although most pro se litigants lack a formal legal education, many have significant time to devote to the litigation, and some have experience from previous pro se litigation. Often, these litigants come up with creative and unique arguments that are challenging to defend. Most large companies inevitably will face some form of pro se litigation.

The scope of pro se litigation in the United States is surprisingly large. From September 2011 to September 2012, more than 75,000 federal cases were filed by pro se litigants, accounting for more than a quarter of all federal cases filed in that span.[1] And pro se litigants were responsible for 51 percent of appeals filed in federal court during the same period.[2] Many of these cases involve matters against other pro se individuals and involve domestic or bankruptcy issues. However, pro se litigation of all types is on the rise.

A number of factors have contributed to an increase in pro se litigation. As the costs of hiring an attorney increase, people have a greater incentive to "go it alone." Further, as jurisdictions adopt electronic filing and service, barriers that might otherwise discourage a pro se litigant disappear. Additionally, litigants can find examples of filings from other cases on the Internet, which tends to encourage "copycat" litigation.

These factors have increased the volume of pro se litigation, requiring companies to consider their practice and procedures for dealing with this litigation. The following is intended to be an overview of ideas that might help your company avoid long and costly litigation in pro se cases.

Upon Receiving a Pro Se Complaint

You should consider several things before answering a pro se complaint. The following considerations will help distinguish between lawsuits that are true threats and ones that should be dismissed with relative ease. This determination is critical to avoiding costly discovery where it is not necessary.

1) Filing and Service — Pro se litigants sometimes serve complaints without filing them. Needless to say, there is no need to respond to such complaints. Thus, counsel should first confirm that the complaint was filed properly.

Next, counsel should make sure the complaint was served properly. Pro se litigants are required to serve parties in compliance with the applicable rules of procedure, including timely service in a manner prescribed by law.[3] Pro se litigants often neglect the service requirement entirely. And so long as service is not attempted, there usually is no reason to respond to a complaint that has not been served.

Be cautious, however, because courts have been known to overlook defects in service when a defendant received actual notice of the suit and was otherwise unable to show prejudice from the manner of service.[4] Therefore, make sure you are familiar with the laws and practice of the relevant jurisdiction.

2) Failure to State a Claim — Assuming that the pro se litigant effects service, the next step is to review the claims for any obvious pleading defects. It must be noted that pro se plaintiffs are not held to the same standards as those with legal training. Most courts will interpret a pro se litigant's pleading "liberally" and will not dismiss the complaint for mere technical violations of rules.[5] In fact, some courts will go so far as to advise the pro se litigants of the defects in their pleadings and give them an opportunity to amend before dismissal.[6]

However, the U.S. Supreme Court has been clear in both Iqbal[7] and Twombly[8] that plaintiffs must meet minimum pleading requirements. Simply put, pro se litigants are not excused from understanding and complying with "the most basic pleading requirements."[9]

As always, make sure you are familiar with the law in the relevant jurisdiction, and make sure that all plaintiffs meet their burden of stating a claim. If the plaintiff fails to include sufficient information, counsel should consider filing a motion for a more definite statement that clearly articulates the deficiencies of the pro se complaint. The court may be receptive to such a motion, and it might increase the odds that the court grants a future motion to dismiss.

3) Wrongful Death Complaint — Not all companies face wrongful death litigation. Should your company encounter a pro se wrongful death case, however, such a case often can be dispatched with minimal cost.

First, a number of jurisdictions require that wrongful death claims be brought by the personal representative of the estate.[10] Often, wrongful death suits are filed by individuals who do not have standing to assert those claims. Such suits are subject to dismissal. Moreover, many courts prohibit pro se plaintiffs from bringing a wrongful death claim because the personal representative of an estate serves in a representative capacity. The right to proceed pro se is generally limited to individual claims. If a nonattorney attempts to bring claims on behalf of others, it violates rules against the unauthorized practice of the law.

Note that some jurisdictions will allow a pro se plaintiff to represent an estate where there are no creditors and the pro se plaintiff is the sole beneficiary of the estate.[11] In these situations, the courts view the estate as a legal fiction and allow the pro se litigants to represent themselves.[12] However, many jurisdictions have a complete bar on pro se litigants bringing such claims, and the reality is that many such claims are asserted today.[13] In these situations, counsel should seek dismissal of the entire case.

4) Class Action Claims — Although class action claims are often cause for concern, when brought by pro se plaintiffs, the class claims should be dismissed without much difficulty. For reasons courts consider "obvious and sensible," pro se plaintiffs are "not equipped by reason of training or experience" and therefore cannot take on the responsibility of litigating claims on behalf of others, even those similarly situated.[14] Or, as the Fourth Circuit has recognized, "the competence of a layman representing himself" does not permit him or her to "risk the rights of others."[15]

5) Section 1983 Claims — 42 U.S.C. § 1983 claims are brought frequently by pro se prisoners. Such claims require that a defendant, "acting under the color of state law," has deprived the plaintiff of a right under the Constitution or the laws of the United States.[16]

Companies regularly encounter litigation where pro se plaintiffs, particularly prisoners, bring Section 1983 claims against private entities. Private companies are not state actors and rarely, if ever, act while cloaked with state authority.[17] The common response to such claims should be a motion to dismiss for failure to state a claim, which generally proves to be successful.

Sometimes, a pro se plaintiff will assert claims that amount to a Section 1983 claim without specifically mentioning the statute. Because a private corporation usually should prevail in defending against Section 1983 claims, a defendant should attempt, to the extent appropriate, to construe a pro se litigant's complaint as alleging a Section 1983 claim.

6) Serial Filers — A number of pro se litigants, particularly prisoners, have been known to file multiple lawsuits. It is important to know the litigation history of a plaintiff that has filed suit against your company. For instance, some jurisdictions preclude specific litigants from receiving certain benefits if they previously have filed a number of frivolous lawsuits.[18]

Counsel should check the electronic case filing (ECF) dockets (or contact the clerk) to determine if a litigant has filed any prior suits, frivolous or otherwise, when a new pro se case comes in the door. Counsel should also check to see whether the plaintiff has filed similar or identical cases in other jurisdictions. Not only will this help determine whether the pro se litigation should be permitted to proceed in forma pauperis and if the plaintiff previously asserted these claims in another jurisdiction, but this research also provides insight into how well versed in the law the pro se litigant may be from prior experience.

7) Common Sense Affirmative Defenses — Pro se plaintiffs' claims often are subject to affirmative defenses that can be alleged in a motion to dismiss. The more commonly encountered problems are: statute of limitations (pro se litigants sometimes attach materials to their complaints that are helpful in proving a limitations issue); res judicata (pro se litigants occasionally refile previously dismissed claims, sometimes in multiple courts); lack of personal jurisdiction (pro se litigants frequently sue the wrong corporate entity); and lack of subject matter jurisdiction (pro se litigants sometimes file cases in federal courts without meeting the requirements of diversity or federal question jurisdiction).

In some jurisdictions, courts will consider affidavits providing the factual underpinnings for a motion to dismiss, so it is always worthwhile to check whether a well-drafted affidavit may help tip the balance in your company's favor.

8) Removal — It is a common assumption that federal courts are better venues for defendants to litigate their claims. And, as a general rule, this is largely true. Counsel should not simply assume this to be the case, however. For instance, some state courts are more willing to enforce procedural requirements, particularly service requirements, more strictly than federal courts. Thus, counsel should review every case individually to determine the issues in play and which court is most likely to be helpful to its cause.

Conclusion

Pro se litigation has been increasing, and it is important for companies to have action plans to address this unique and sometimes unusual litigation. By having a plan of attack, and by reviewing every complaint thoroughly upon receipt, companies can effectively and efficiently combat this litigation.

—By Michael L. Walden, David F. Northrip and Jason E. Oller, Shook Hardy & Bacon LLP

Michael Walden is a partner, and David Northrip and Jason Oller are associates in the firm's Kansas City, Mo., office.

[1] See Administrative Office of The United States Courts, Table C-13: Civil Pro Se and Non- Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2012, available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C13Sep12.pdf.

[2] See Administrative Office of The United States Courts, Judicial Business 2012: U.S. Courts of Appeals, available at http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-courts-of-appeals.aspx.

[3] See, e.g., DiCesare v. Stuart, 12 F.3d 973, (10th Cir. 1993) (holding that a pro se plaintiff was required to serve defendants in a timely manner as required by Fed. R. Civ. P. 4).

[4] See, e.g., Brin v. Kansas, 101 F. Supp. 2d 1343, 1347 (D. Kan. 2000) (finding that a pro se litigant who effected service by mail on the university, instead of to the governor or attorney general as required by law, was in substantial compliance with service statute).

[5] See Stanley v. Goodwin, 475 F. Supp. 2d 1026, 1032-33(D. Haw. 2006) (citing Haines v. Kerner, 404 U.S. 519, 520-21 (1972)).

[6] See id. (citing Fedrik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992)).

[7] Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

[8] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[9] American Ass'n of Natuopathic Physicians v. Hayhurst, 227 F.3d 1104, 107-08 (9th Cir. 2000).

[10] See, e.g., Va. Code Ann. § 8.01-50(B); Fla. Stat. § 768.20.

[11] See Guest v. Hansen, 603 F.3d 15, 21 (2d Cir. 2010).

[12] Id.

[13] See, e.g., Kone v. Wilson, 630 S.E. 2d 744, 746 (Va. 2006).

[14] Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532, 537 (E.D. Va. 2003).

[15] Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975).

[16] See West v. Atkins, 487 U.S. 42, 47 (1988).

[17] See Steading v. Thompson, 941 F.2d 498, 499 (7th Cir. 1991) (holding that private firms do not become state actors merely by selling products to government (citing Rendell-Baker v. Kohn, 457 U.S. 830, 840-41 (1982)).

[18] See, e.g., Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(g) (2011) (codifies three-strikes rule prohibiting in forma pauperis status for litigants with three frivolous dismissals while incarcerated).