

## Understanding Civil Litigation Checks in the Employment Screening Process

*By Thomas C. Lawson, CFE, CII  
APSCREEN CEO, Founder*

By now we are all aware of what the standard background check components are including criminal conviction checks, driving histories, credit reports, referencing, drug testing and more. Yet there exists a little-used component begging to be understood – the efficacy of civil litigation histories for employment screening purposes.

Civil litigation histories are typically misunderstood. Unlike criminal conviction records, driver's license checks, or employment credit reports, civil litigation histories are comprised of civil lawsuits that may involve a candidate, but are extremely hard to identify because of the lack of normal identifiers contained in other available modules such as date of birth, address, social security number as well as physical description.

### **What is a Civil Lawsuit?**

A civil lawsuit is basically a matter between two parties wherein one party alleges wrongdoing against another party. These matters can take the form of anything you can think of from dog bites, to car accidents or evictions, to recovery of money loaned to and individual party as well as wrongful death claims.

Unfortunately a civil lawsuit is typically between parties who know each other and thus no platform has been established to delineate one party from another to anyone looking in. Often a civil lawsuit becomes a dispute resolution technique when other methods are unsuccessful.

Since civil disputes are between specific parties and not actually matters involving or effecting public policy (except class-action lawsuits), these disputes are kept only between the interested parties even though they are matters of public record. It is up to the decision maker looking into these filings to discern whether or not any civil lawsuit(s) discovered are potentially of interest within the hiring process.

### **A Condensed History of Civil Litigation Checks**

In the past the decision to investigate civil litigation histories originated with banking institutions who wanted to determine if a party that they intended to lend money to was litigious and thus exposed their loans to potential risk by attachment of funds by an opposing party to the borrower.

At just about the same time in history, the legal community determined that this research was very important to attorneys who sought to determine the "litigation posture" of either a prospective client or an opponent. The concept has evolved into being a very effective tool in the performance of **Due Diligence** studies across the spectrum of business-related matters, including acquisition, sale of a business, public-debt financing, taking an entity public, as well as the screening of employment candidates and/or those who would be otherwise associated with

Since the beginning, ‘**suit searches**’ as they are referred to in the public record research industry, the problem of subject identification has been a researcher’s greatest challenge to try to explain to a client why it cannot be determined that a particular lawsuit attributes to their subject.

Notwithstanding these facts, the lack of available identifiers in civil litigation files has contributed to increased cost and confusion as to the applicability of a discovered lawsuit bearing a similar or exact name to a subject in question. In this era of intense privacy legislation, that particular challenge has become vastly more formidable with the Gramm-Leach Bliley Act, the Fair and Accurate Credit Transactions Act, and numerous other statutes which have forced jurisdictions into removing identifiers from the public records over the past few years.

### **Understanding the Costs Involved**

It is for this reason that the cost of a legitimate suit search is broken into two parts:

1. First is the index search which identifies all suits attributable to the name searched, and,
2. Second the file review and/or retrieval which authorizes a researcher to look at the file and attempt to determine if it applies to the subject. Salient items are copied which can identify the nature of the case, who the parties are and the status and/or outcome of the matter. The industry term for this second phase is known as “pulling cover, prayer, docket and disposition.”

Part one is usually billed on a per unit basis and part two is typically billed on either a per unit basis (where the jurisdiction’s prospective copy costs are predictable) or, as in the case of many of the major metropolitan jurisdictions, on an hourly basis due to the obvious lack of control a researcher has in:

- ✓ identifying the case
- ✓ requesting the clerk to locate the case
- ✓ time to wait for the retrieval of the case, and
- ✓ time to review the case each of the components of which can be substantial.

For example: In the Federal Archives system, usually a minimum of two visits is required. The first is to make an appointment with the records clerk in order to determine and obtain a case’s accession number, and, at that time, the file retrieval process is started and within a prescribed period of time (sometimes up to two weeks) a re-visit is required to actually see the file!

Obviously, the research industry learned a long time ago that the time costs of metropolitan research must be borne by the client, otherwise the researcher would go broke!

Also critical in understanding civil litigation checks is the concept of time which is broken down as follows:

- ✓ Index Searches are usually fast because they are available on the internet, or through other proprietary private methods and sources.

Remember to always get an index date from the index researched so that you will know how current the search is.

- ✓ Private databases rarely provide this because for the most part, the information is outdated and is not the most current information available as would be available at the clerk's counter.
- ✓ A hand-search, as with a criminal index search, takes usually 1 to 2 days, dependent upon the location and limitations of the jurisdiction. The retrieval and review process is what takes the time, as with criminal convictions, because this part is not automated and has to be completed by hand by a public-employee clerk, and/or in jurisdictions where the public is still allowed to view the records, the vendor/researcher hired to do the search..

If a case is archived, expect delays just on the retrieval part of the process of up to two weeks. If the case is not archived, the speed depends on if the file is in the ready section of the clerk's office, or scheduled to go to archives, which can delay retrieval up to one week. This is consistently true in cases where criminal matters not yet and/or fully adjudicated are banished to the archives unit of a particular jurisdiction and is a constant source of irritation to HR managers for example who must wait for the jurisdiction to respond.

After that, it's up to the researcher how fast they can review the case, copy the necessary parts, and/or determine the applicability to the subject. Most researchers are very adept at making determinations using several factors including their gut feeling, as to whether a case belongs to your subject of interest. As a general rule, good researchers will copy more cases that appear to be attributed to your subject rather than less in order to error on the side of caution. With common names, however, sometimes the task is overwhelming and you might be notified that there are too many cases to research.

### **Understanding the Risks of Civil Litigation Histories in Recruitment**

In the employment setting, civil cases pose a multitude of potential risks for a decision maker – not the least of which rests with making a wrong decision to employ based upon case information not actually attributable to the candidate. This is why most legitimate employment screening firms advise their clients against civil histories, unless there exists enough budget to thoroughly determine which discovered cases actually apply to the candidate. Sometimes there is no ultimate way to determine applicability of a particular case and the candidate must be interviewed again in order to provide information as to whether or not the case(s) discovered applies to them..

One of the widest abuses of civil litigation histories is in the area of seeking cases filed against former employers for worker's compensation claims that are rejected by insurance carriers and the ensuing litigation is filed.

Many employers feel that if an individual was rejected by a carrier, or that the claim was 'short paid' by the carrier, that just the existence of one lawsuit reflects negatively on the candidate. As with any worker's comp history, before any decision is made, each case should be researched thoroughly, and the candidate should be interviewed

several times in order to determine if they are a potential troublemaker or in fact had a legitimate claim, that was mishandled.

Workers Comp litigation is usually pursued because of the validity of a particular claim, rather than a frivolous attempt to use the courts to perfect a less than legitimate claim. Historically we have viewed Worker's Comp litigation discoveries as an almost validation of the legitimacy of a claim, and thus advise our clients to use that in a more positive light – meaning the candidate had a strong enough claim to fight for it rather than simply filing frivolous lawsuits. Of course *more* than one claim does attest to the potentially accident prone nature of a particular candidate (especially if his/her claims are legitimate) and could spell a death knell for candidacy as an innocent person who might regularly be involved in automobile accidents that are not his/her fault might have trouble getting car insurance.

All in all, it is always advised that worker's compensation issues be omitted from any employment decision process because of the obvious volatility of this history as well as the subjectivity of the facts and outcome. The only real exception to this rule is the existence of multiple lawsuits for worker's compensation claims against former employers, which is the only legitimate basis I know of after 27 years in the employment screening business with thousands of clients served, that may be used to eliminate candidacy. It is important to remember, however, the even if it is clear cut that the candidate poses a potential litigation risk, there will be a potential plaintiff's counsel out there who will question the decision maker on the witness stand about how the worker's compensation lawsuit history affected job performance. So if you plan to use this tool, you need to be aware of the potential repercussions in that regard.

### **What can you effectively use a litigation history for?**

The answer relies primarily on the gut feeling of the decision maker.

Areas of *specific applicability* include for example complaints against employees in a fiduciary capacity who usurped corporate opportunity for personal gain and where no criminal file was pursued by a jurisdiction for whatever reason.

Another area where civil litigation can be used is when we screen employees for a property management company and discover an eviction history with prior residences or other same-type employers. This has a direct corollary and provides at least the basis for further review of the matter(s) with the candidate so that the interviewer can make a gut determination as to the veracity or potential litigation bias of the candidate.

As with the use of specifically applicable conviction histories in determining the job-worthiness of a candidate (for example stealing from the till cannot be used to avoid hiring an asphalt worker), such is the caveat in the use of civil litigation histories. However, the magnification used to scrutinize the decision maker who uses this tool will be vastly more intense than with the use of for example, the criminal conviction tool, because of the obviousness of the ramifications of generally hiring a convicted felon versus someone who was involved in a lawsuit.

In summary, while civil litigation checks do provide a wonderful window into the litigation attitudes of a prospective employee, the **effective** use of them depends on many factors:

1. Willingness on the part of the end user to thoroughly identify whether or not a case attributes to the candidate. This can get expensive with common names in multiple jurisdictions.
2. Understanding that the word “*delay*” is the order of the day in determining the ultimate civil litigation history of the candidate, and that true and thorough research of civil litigation histories is expensive and can outstrip the cost of standard employment screening several times.
3. Understanding that not all matters litigated have any bearing on a candidates’ abilities or prowess on the job, and that even the use of a discovered and validated civil case(s) will subject the user to incredible scrutiny – more so than the use of a conviction history or other tools.
4. In many cases identity cannot be determined by the information in the public record where the case is attributable to the candidate and the decision maker should avoid falling into the rut of laziness which is very alluring to HR managers when the term delay is used. They should simply look at the index data, which is not a determinant of a candidate’s litigation history, it is only a list of same or similar names identified to be involved in matters brought before that court.

With the multitude of good screening tools available in the employment screening world, civil litigation checks should be used wisely, obtained through competent research firms that understand what is involved in searching and retrieving civil cases. Firms that are members of the National Public Record Research Association, Public Record Retrievers Network, and/or National Association of Professional Background Screeners are usually qualified to conduct this more sophisticated type of research.

Ultimately civil litigation histories as a screening tool should be used in the context of managerial strategies to determine life suitability to a culture versus job suitability to a candidate.

*Thomas C. Lawson CFE, CII is the CEO and Founder of APSCREEN, the nation’s oldest, continuously operated Factual Employment Screening firm, based in Rancho Santa Margarita, CA . Mr. Lawson was the first Court-Certified Expert Witness on Negligent Hiring from the Improper Employment Screening perspective and also testifies on other HR matters. Published credits include Fraud Magazine (Editorial Review Board Member), Business Week, LA Times, ABC’s American Agenda, CBS Syndicated Talk Radio, NBC’s EXTRA!, and KNX News Radio, to name a few. Mr. Lawson is a proud member of SHRM, PIHRA, ASIS, ACFE (Life), CII, WAD, WIN, NPRRA, and is a founding member of both PRRN and NAPBS. Mr. Lawson can be contacted at (949)646-4003.*