

Business Decisions for Business Litigation

By Frank A. Ray

When the management of a business feels that the company has been done wrong and declares, "I'll see you in court," the same people in management need to step back and assess litigation as a business undertaking.

And that undertaking becomes a line item that will evolve as a moving target.

Economic evaluation of this potentially volatile line item entails more than looking at the forecasted gross amount of recovery of dollars from a settlement or judgment. Numerous economic variables impact the net effect of recoupment of a claimed loss through a civil lawsuit. Leadership of the business should view filing of litigation as nothing less than an entrepreneurial enterprise.

Before filing a commercial lawsuit, management should challenge legal counsel to determine probabilities of prevailing on proof of liability. Filing a case that qualifies as a loser from the outset does no favors to advance any business interest. To assess whether claims are probable winners, management should not singularly rely on personnel within the company who were directly engaged in the failed transaction at issue. Those personnel have "ownership" with respect to the transaction. That ownership often skews the factual descriptions of exchanges between or among individuals who drove the transaction that gave rise to the claim.

With all due respect to the legal profession, many trial lawyers begin with enthusiastic, but myopic, endorsements of allegations pleaded in a complaint. Any competent lawyer would decline to file and advance a lawsuit destined for a lousy result. Before filing suit, management should invite experienced trial lawyers to collaborate in evaluation of exposures created by filing suit. Would filing of a commercial dispute trigger filing of a meritorious counterclaim by the adversary?

Before initiation of a lawsuit, careful and complete collection of hard copies of documents and electronic transmissions exchanged between and among individuals representing all sides to a claim should ideally be accumulated and examined. A business that launches into litigation without thor-

ough and thoughtful assessment of the risks and benefits of litigation omits to engage in the same kind of analysis that any responsible businessperson would undertake in deal making. While commercial litigants cannot anticipate every turn in the road during litigation, conscientious pre-suit assessment of the merits of claims and defenses should help to craft a business plan for the litigation.

If projected monetary recovery on a claim justifies the cost, pre-suit focus groups often can reveal strengths and weaknesses in a case that seasoned lawyers and sophisticated businesspeople might totally miss. Such a process is equivalent to an entrepreneur's market research.

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To secure meaningful information from pre-suit focus groups, the business should consider hiring a professional third-party research organization to recruit and shepherd proper composition of the focus groups. Will a jury decide the factual issues in the case? If so, what will be the jurisdiction for the case: state or federal court (and in what location)? Answers to these questions help determine the demographics for a pre-suit focus group. Jury verdict research normally best informs based on results in the applicable jurisdiction.

If management and legal counsel determine that claims probably will succeed through litigation, the overriding business question becomes: Is it worth it? Beyond analysis of proof of liability, assessment of costs vs. benefits drives a determination whether meritorious claims probably will produce a meritorious financial result.

In commercial cases dictated by formulaic economic claims or "add-em-up" economic damages, management and legal

counsel probably can readily assess the monetary range for a projected verdict. Yet, the red pen unavoidably finds its way into the financial calculus for evaluation of the business of a lawsuit. Deductions from the line item for litigation include the following:

- Deployment of people within the business who participate in the litigation.
- Internal dedication of electronic business equipment to identify and recover documentation relative to claims and defenses of the case.
- Consultation with necessary expert witnesses.
- Fees for stenographic court reporters and videographers for depositions.
- Electronic organization, storage and transfer of documents for ultimate digital display in court.
- Travel for business personnel and lawyers to conduct depositions and meet with key witnesses and designated experts.
- Allocation of space within the business property for storage and organization of originals and copies of documents.
- Tax obligations created by recovery of money in a settlement or judgment.
- Legal fees and expenses.

Experienced and cynical trial lawyers often lament that Murphy's Law routinely applies to litigation. "If anything can possibly go wrong, it will." Application of Murphy's Law to litigation probably represents hyperbole. By the same token, given the variables that apply to the cost of litigation, one can readily appreciate that a litigation line item can explode with dollars in the expense column.

The ownership and leadership of businesses who explore filing a commercial lawsuit to try to right a wrong best serve their businesses by making business decisions about business litigation. ♦

Frank A. Ray is a partner with the law firm of Chester Willcox & Saxbe. He can be reached at (614) 221-4000 or fray@cwslaw.com.

