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Civil LITIGATION

A business approach to business litigation

Some business disputes prove to be so intractable, or cause or threaten such severe economic injury, that they require legal action. In many instances, a lawsuit is the continuation, in a different forum, of an existing business dispute that the parties could not resolve by compromise. Although less than 5 percent of all civil lawsuits are decided by a trial, there is no guarantee that a client will be able to force its adversary to settle on favorable terms by merely commencing a lawsuit. Therefore, a client electing business litigation should plan to go all the way to trial, and have a clear understanding of the risks and rewards of doing so.

By THOMAS F. KNAB
Daily Record Columnist

The best lawyers counsel their clients on the high transaction costs inherent in resolving business disputes through litigation. At the same time, the client must understand that her litigation expenses constitute an investment made with the expectation that she will receive a reasonable return on that investment in the form of damages. In the absence of a contract or statute providing that the prevailing party shall recover its attorneys' fees from the losing party, the client has to bear her own legal expenses.

Consider this hypothetical with a fairly common fact pattern: The client sells its customer specialized metal fabricating equipment for $3.5 million; the customer has paid $2.5 million by the time the equipment is delivered; however, upon delivery, the customer claims that the equipment does not work properly, refuses to pay the contract balance, and demands that the client refund the $2.5 million already paid; the client insists that the equipment meets contract specifications and that the customer is operating the equipment improperly; and efforts to resolve the impasse by negotiations are unsuccessful, because neither side is willing to compromise its position.

In this scenario, the client will never get its $1 million unless it sues for it. However, even if the client prevails at trial and is awarded $1 million in damages (and along the way defeats the customer's inevitable counterclaims for $2.5 million and other damages), the client will not "net" $1 million after factoring in the cost of litigation.

Therefore, before suing the customer, the client must analyze whether the anticipated return on its investment in a lawsuit will justify the expected cost of litigation. Once sued, the customer must do a mirror-image analysis: how much would it cost us to settle now; how much will it cost us to defend this lawsuit; and if we spend that money, by how much might we reduce our exposure to damages?

These are not easy analyses. Not all facts are known at the outset of a case. Litigation procedures can be complicated and confusing. If they haven't been through business litigation before, even sophisticated business people sometimes feel that the lawyers are speaking a foreign language when explaining legal strategies and developments in the case. The lawyer's preparation of a written litigation plan with the foreseeable legal expenses estimated on a task-by-task basis can go a long way to help a client understand what is going on in her lawsuit, and why.

It also helps when the client has an understanding of the fundamentals of civil litigation: it is an adversarial process; a party must disclose all relevant evidence to the adverse party; all relief must be formally requested from a court through trial, or by written application (motion); a party must prove its entitlement to any requested relief, and the adverse party can and will oppose that request; and a court will hear both sides' arguments and review both sides' evidence before making a decision.

A major generator of legal expense and client angst in a business case is the discovery process. "Discovery" is the evidence-gathering stage of a lawsuit, which includes both "paper discovery" and pretrial examinations of witnesses. In paper discovery, the parties serve each other with notices requesting documents and information relevant to the claims and defenses asserted in the lawsuit. In a business case, thousands, and perhaps tens of thousands, of pages are disclosed, and the parties also are often required to provide written responses to detailed written questions (interrogatories).

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A client will need to devote substantial resources and employee time to prepare documents for disclosure and responses to interrogatories, and to analyze the documents and information disclosed by the adverse party. Moreover, a client will often balk at disclosing documents or information requested by the adverse party due to the expense or burden involved, or because the requests seek confidential information. Although lawyers are required to make good faith efforts to resolve any discovery disputes before requesting court intervention, those disputes are often decided by the court by a motion to compel (made by the party seeking discovery), or by a motion for a protective order (made by the party opposing discovery). In most cases, once all paper discovery is completed, the parties conduct examinations before trial of the other side's witnesses, and, as necessary, of non-party witnesses, under oath and recorded by a court stenographer.

Of course, parties are free to settle their dispute at any time during a lawsuit, and many business cases settle as legal expenses rise and the relative merits of the parties' positions come into focus. Certainly by the end of discovery, both sides are fully aware of the strengths and weaknesses of their respective cases, and are, theoretically, ready for trial.

Cooler heads often prevail at this point, as the parties face the reality that if they do not voluntarily settle their dispute, they will lose control of the decision-making process and their respective fates will be decided by third parties with no stake in, and no experience with, the dispute: a judge or jury. However, a client may well make the business decision to incur the additional (and high) cost of a trial with the informed belief that the potential benefits outweigh the risks, and that those risks are preferable to the certainty of an unfavorable settlement.

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