

The Corporate Plaintiff

Presentation to Silicon Valley
Association of General Counsel

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- Topics of Discussion
 - Areas of Potential Recovery
 - Preparatory Steps To Be a Plaintiff
 - How to Litigate Like a Plaintiff

- Areas of Potential Recovery
 - Deals Gone Bad
 - Antitrust
 - Unfair Competition and Other Business Torts
 - Insurance Recoveries and Reinsurance Recoveries for Captive Insurers
 - International Trade
 - Government Contracts
 - Tax
 - Intellectual Property

- Deals Gone Bad
 - Recovery opportunities can arise out of failed business transactions; long-term vendor, supplier, and customer relationships; and circumstances where a relationship with a company is that of both competitor and business partner.
 - In pursuing these types of claims, we have been successful in helping clients such as PeopleSoft, Enron Creditors' Committee, NorthPoint, and California cities known as the Killer B's in the Orange County bankruptcy to recover billions of dollars in cash and value.

- Antitrust
 - Recovery opportunities typically arise out of findings by the U.S. Department of Justice and/or the European Commission of illegal cartel behavior, followed by the institution of civil class litigation.
 - We have assisted or are currently assisting clients to pursue the following antitrust recovery opportunities:
 - *In re Copper Antitrust Litigation*
 - *In re Diamonds Antitrust Litigation*
 - *In re DRAM Antitrust Litigation*
 - *In re Rubber Chemicals Antitrust Litigation*
 - *In re TFT-LCD Antitrust Litigation*
 - *In re CRT Antitrust Litigation*
 - Optical Disc Drives

- International Trade – Cost Reduction or Recovery
 - Businesses have sought greater efficiencies, lower costs, and increased market access around the world through global supply chains.
 - We have secured substantial recoveries for clients through, for example, duty refunds and prospective savings through protests filed with U.S. Customs and successful litigation against the agency in the U.S. Court of International Trade.

- Possible provisions to include in contracts:
 - Governing law
 - Exclusion of Foreign Trade Antitrust Improvements Act
 - Jurisdiction and venue
 - Arbitration
 - Expedited arbitration rules (e.g., AAA expedited rules)
 - Limitation on discovery
 - Limitation of liability
 - Attorneys' fees
 - Required steps before can initiate lawsuit
 - Different levels of business executives try to resolve dispute
 - Mediation
 - Appointment of private judge (e.g., Cal. Civ. Proc. Code § 638)

- Investigation of potential claims
 - Internal group or department
 - Audit by outside counsel or accountants
- Logistical considerations
 - Organize records and documents
 - Track purchases
 - Track contracts and their amendments
 - Organize transactional data in easily searchable and producible manner
 - Outside counsel
 - Selection of one or more counsel to act as plaintiff's lawyer
 - Hourly v. contingency basis

- Early Case Evaluation and Development
 - Should be done early and repeatedly revisited
 - Ideally before filing a lawsuit
 - Identify and interview key witnesses (or story tellers)
 - Identify ultimate goals
 - Early compromise at what level?
 - Maintain relationship?
 - Renegotiate relationship?
 - Extricate company from relationship?
 - Obtain significant recovery or judgment, even if trial is necessary?
 - Get buy-in and commitment from management and business people

- Develop Strategy and Tactics to Achieve Goals
 - Focus on various “settlement moments”
 - Pre-litigation
 - After early discovery (especially after depositions of key witnesses)
 - Before and after key motions (particularly summary judgment motions)
 - At the courthouse steps
 - During trial
 - But focus on ultimately getting to a jury
 - Look at jury instructions to develop facts
 - Draft a complaint to survive a motion to dismiss
 - Develop a case to defeat summary judgment

- Develop Strategy and Tactics to Achieve Goals (cont'd)
 - Focus on what is necessary, not everything
 - What claims?
 - Instead of five claims, two claims
 - More claims will simply lead to more motion practice
 - What evidence?
 - Focus on depositions of key witnesses, not every small player
 - Focus on documents you need, not entire universe of arguably relevant materials
 - What tasks?
 - Early depositions of key witnesses
 - Obtain and maintain trial date

- Develop Leverage
 - Make a persuasive and compelling case to develop leverage for favorable settlement or verdict
 - Convince defendant and court that case has merit and damages are real
 - Convince defendant that plaintiff will pursue the case through trial if necessary
 - Get and maintain a trial date – a plaintiff's best friend

- Develop and Tell a Plaintiff's Story
 - Identification of key witnesses and who will tell the story
 - Story will be told through witnesses. Ideally, a limited number of people (maybe even just one) should tell the entire story.
 - In a bet-the-company case, executives can make excellent witnesses. The court and jury will want to hear from them.
 - Witnesses have to be polite and professional, be firmly on your side, and be prepared to tell the story.

- Develop and Tell a Plaintiff's Story (cont'd)
 - Role of experts
 - Get experts early
 - Use experts to emphasize themes and legal points and to retell story by using evidence as basis for opinion
 - Can be used to beat summary judgment
 - Mock juries
 - Wise investment
 - Use in both jury and court cases – will learn what is persuasive and fair

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