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Winning by Losing: How to Try the Losing Case for Appeal

Winning by Losing: How to Try the Losing Case for Appeal

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Why We Try Losing Cases

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Though it seems to make no practical sense, there are reasons why a business enterprise would and should try a case that it knows it will lose. The object of the game is sometimes not prevailing at the trial court level, but at the appellate level. Since the path to the appellate court is through the trial court, cases must be tried where the enterprise understands its probability of success is extremely low.

Should the losing case actually be won at trial, typically, all the better. However, given sophistication of both the inside and outside counsel relative to the types of cases where an enterprise is facing considerable risk in losing the trial, the typical game plan is to strategize and determine the course of action to take during the course of trial that will place the enterprise in the best position to appeal the trial court result.

Some of the reasons that a business enterprise may elect to try a case that it understands and is prepared to lose are: to effect policy change; because the matter has national or regional implications; to protect or defend the core assets of the enterprise; to set the tone and determine options in pattern cases; to affect and attempt to limit punitive damages; or to develop appellate case law associated with the particular area or aspect of the law.

Some these rationales overlap. Many have common themes and are the result of a national presence and the ability of the plaintiff's bar to forum shop; not only the state or county to commence the litigation, but whether to use state or federal courts.

Policy

Policy determinations of various regulatory agencies have considerable effect on how an enterprise operates an existing business operation, and the acquisition or sale of those operations. At times, a business enterprise will look at an operational aspect of its overall enterprise, determine that certain adjustments can be made to provide additional profitability or allow for that division's expansion and growth. However, certain policies established by regulatory agencies may impede the ability for the expansion and growth or functional change that the enterprise desires to accomplish. It may be necessary for the enterprise to determine a path of adjustment to the policy which can be best affected through courts. If a trial courts is more likely to allow the policy to remain to in effect, then there will be the need to obtain appellate review. The enterprise, understanding these issues, may determine that the best course of action is to try the case, knowing the case will be lost, to get to the appellate court to effectuate change. Sometimes the issue is to gain admission to the court with the more sympathetic ear relative to the issue. Possibly the enterprise must gain assistance from the appellate court to address issues that have remained outstanding or are in conflict in other jurisdictions.

National/Regional Implications

Sometimes the national or regional implications of the matter require that the enterprise undertake the trial, having a fairly good idea of the outcome, in order to get to the appellate court. This comes about from a variety of sources and rationales. Sometimes the need to simply address the fact that the trial judge assigned to the case is far too sympathetic to the Plaintiffs, and if avenues for objections and recusal are not available, there is a need to get through trial in order to obtain appropriate review, for which the appellate court is the only viable avenue.

Examples of cases with national or regional implication include *Merck Vioxx* litigation and the various settlements that have resulted. Another example is Walmart's class action employment litigation which has been vastly scaled back after the class action certification issue was ultimately raised to the U.S. Supreme Court.

In those instances, the business enterprises have been able to condense the ultimate number of participants, reduce the exposure and then, as in the *Vioxx* case, begin the process of appropriate settlement, or as in the case of the Walmart class action issue, condense the case from a national litigation matter to one of a specific region.

Pattern Cases

Similar to cases of national and/or regional importance, are pattern cases. In the instance of the Walmart employment class action litigation, now that the matter has been condensed to a California action, one can envision Walmart reviewing various options in determining whether or not the case ought to be tried in order to deal with the potential for those former members of the putative class who may be waiting in the wings, watching for results and fall out from the class action in California to determine whether they may have viable alternative litigation avenues. By trying the matter, even in the face of potential loss at the trial level, it is possible that others who otherwise might contemplate similar actions on a state by state or region by region basis, may be dissuaded from filing such litigation since there is the likelihood that, in this case, Walmart might decide that it would try that case as well. (As an outsider to the Walmart class action litigation, I have no insight as to what Walmart is or is not contemplating, what it may or may not do, nor am I privy to any specific information associated with what any of the parties, Walmart or putative Plaintiffs might be contemplating.)

Other examples of pattern cases include current litigation going on in Nevada with regard to propofol, an anesthetic used in a variety of settings, and the tobacco litigation.

Both Teva Pharmaceuticals and Baxter Healthcare have been involved in several actions associated with the use of propofol. The actions are similar in nature, and the defendants have been fighting the various pieces of litigation. In part, it appears that the reason for continued litigation of these matters is that the defendants (Teva Parmecuticals and Baxter Healthcare) are looking to the appellate court for assistance in applying what they believe are the appropriate standards and law in those cases.

When faced with the possibility that a case will simply perpetuate itself with the same firm or another firm utilizing effectively the same pleadings, it becomes imperative for the target enterprises to determine the best course of defense for each case not only in its individual standing, but as a whole. In many instances, it is the strategy to take the case through the trial level, knowing that the outcome will predictably be a loss in order to get to the appellate court and allow the appellate court to appropriately "guide" the trial court into application of case law, statutes and regulations or a review of those in order to effectuate appropriate remedies to the claims.

Protecting and/or Defending Core Assets of the Enterprise

In some instances, cases become the "bet the company" matters where, regardless of what the potential or even known outcome will be at the trial level, it becomes imperative to try the case in order to get to the appellate court for appropriate guidance, limitations, application of appropriate tests and procedures in order for the corporation to survive.

Additionally, the same thought process and rationale goes into the decisions to defend a matter or bring a lawsuit to essentially keep the enterprise alive. Patent cases are good candidates, especially with start-ups. Competition in the market may look at attacks on a patent portfolio as the best means to deal with the new entrant, or even a mainstay. When assessing the possible results, it may be necessary to deal with the anticipated loss at trial to get to the ultimate protector, the appellate bench.

Punitive Damages

In many instances Plaintiffs ask for punitive damages. Many times the punitive damages are so excessive in comparison to the compensatory damages that the business enterprise needs to appeal the application of punitive damages. In some instances, it is predictable that punitive damages will be far greater than the compensable damages that might be awarded. When looking at various statutory schemes (e.g. *California Business and Professions Code §17200 et seq. - California's Unfair Competition Statutes)* it is possible to realize that the overarching issue for Plaintiffs is the application of punitive damages or some statutory scheme that provides for a multiplication of the damages times a set multiplier. In many cases it's clear that the compensatory damage award will occur, and the real question will be the outcome of the punitive damage award. Rather than the settling the matter, it may be prudent for the business enterprise to dispute and try the matter, putting into the appellate court's hands the issue of punitive damages in order to cap expectations of other putative Plaintiffs or realign the expectations of the Plaintiffs in the particular matter.

Appellate Case Law Development

In some instances it is necessary to try a case where the enterprise understands it will lose in order to get to the appellate court level in anticipation that the appellate court for which the particular case will end up may be more sympathetic to the arguments of the enterprise.

There may be the anticipation of conflicts among the trial courts that an appellate needs to address. There may be existing appellate decisions favorable in a different jurisdiction that the enterprise desires to transport to the current jurisdiction. Appellate cases may be old and with new circumstance, it is time for the courts re-evaluate precedence and change caselaw, or at least give it a try. In some instances there may be very little caselaw and the only way for an enterprise to take a true look at the future viability of a product, service or course of action it for it to be tested with the appellate courts.