The Top 5 Business Litigation Mistakes

October 2004
By Steven Susser

In my experience with complex business litigation, I have seen my clients make some brilliant business litigation decisions, and I have seen some less than brilliant decisions. Some are critical and can spell the difference between success and failure.

In particular, I have repeatedly seen the same five business litigation mistakes:

1. They Choose The Wrong Lawyer

It is important to choose the lawyer who can best persuade a judge and jury that you are right. You need a business trial specialist — someone who is comfortable trying business cases before a jury with a record of success — not a "subject matter specialist." If the case is a patent issue, don't turn to a patent lawyer. (If you ran a financially troubled rocking chair company, you would not look for a rocking chair expert — you would engage a turnaround specialist.) In litigation, you want a litigation specialist. Find a business trial lawyer who knows how to break down complicated fact patterns to their essence and present the case to the judge or jury simply and forcefully. Do not choose a lawyer simply because he or she works with the lawyer who drafted your contract. Look for someone who specializes in taking business matters to trial. Even if you settle before trial, your settlement will be more favorable if your lawyer is well suited to take your case to the jury. Your lawyer is your weapon. Choose that weapon wisely.

2. They Pay Too Much

It is difficult to find a lawyer who will consider flexible fee arrangements for business litigation, but they are out there. Business litigators typically bill their clients by the hour. But there are occasions when a lawyer should be willing to accept some of the risk of the engagement in exchange for a potentially greater reward. This is where contingent fee and other arrangements come in. Under a contingent fee arrangement, the lawyer will typically take a percentage of the recovery as his or her fee and will only charge the client for costs. In the context of business litigation, the percentage can vary depending on a variety of circumstances, such as the amount at issue, the risks involved, the amount of a retainer, and the expected duration of the case. Although contingent fees are normally associated with work for

a plaintiff, there is no reason why a defendant cannot also negotiate a flexible fee arrangement. For example, the lawyer and client could agree to an inverse contingent arrangement in which the percentage of the fee is based on the damages avoided by the defendant. You should explore fee options with your business trial lawyer rather than simply accepting the "time and materials" approach.

3. They Agree To Arbitration

It is generally wise to avoid arbitration. Arbitration is often more expensive and time consuming than a jury trial, and there is no guarantee that the decision reached will be more thoughtful and considered than that reached by a jury. Remember, whether a case is decided by one judge, three arbitrators, or six jurors, they are just people looking at a new fact situation and trying to do "the right thing." Moreover, jurors are less likely to approach your case with preconceived ideas of how things should be from a legal standpoint. And juries do try hard to reach the right result. Also, judges have incentives to move cases quickly through the court system; arbitrators do not. Unless you have to, choose a jury trial over arbitration in almost every situation. You often have the option of switching to arbitration at a later stage of the proceeding.

4. They Don't Put It In Writing

There is a critical period between the beginning of a dispute and the filing of the complaint. During this time, you should become an aggressive letter writer as soon as you see a storm brewing. You must clearly and forcefully state your position and rebut your opponent's position in writing before a complaint is filed. Generally, your opponent will not be as conscientious as you about documenting matters and, when you engage in a battle of documents down the road, you will have an advantage. In these letters, avoid the tendency to make concessions such as, "Although I might have been wrong to have waited so long to tell you of the defective parts, I never thought those parts were acceptable." This urge to take some responsibility may seem fair but will ring hollow when your letter is presented as Trial Exhibit 1.

5. They Don't Make The First Move

You and your business adversary have been trading threats for some time. You both know that litigation will be a reality unless one of you backs down. What are you waiting for? Most business litigation involves a claim and a counterclaim. Each party is both a plaintiff and a defendant. Party A claims that the parts are defective and wants its money back, and Party B responds that the parts are good and wants all its invoices paid. It does make a difference who is the first to file a lawsuit. You will be listed on the court pleadings as a plaintiff, you will be perceived as the aggrieved party, and your attorney will be the first to address the jury if your case goes to trial. By filing first, you will be preserving your important position as "the plaintiff."

Steven Susser, a shareholder of Young & Susser, P.C., based in Southfield, MI, specializes in complex business litigation. He can be reached at 248-353-8620 or via e-mail at susser@youngpc.com.