Don't Be a Pyrrhus – 5 Steps To Help Avoid Making Your Litigation Victory a Loss

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In 279 B.C., King Pyrrhus of Epirus defeated the Roman army at the Battle of Asculum. King Pyrrus was not thrilled about the big win for Team Epirus. The victory was very costly – King Pyrrhus lost most of his army and many of his commanders. So great were the poor king's casualties that he declared, "If we are victorious in one more battle with the Romans, we shall be utterly ruined." If only Pyrrhus had taken some time to assess the risks before picking a fight with the Romans, the term "Pyrrhic Victory" might have an altogether different meaning for us today.

While history has forever fixed the meaning of "Pyrrhic Victory," companies with legal claims need not repeat the king's error. Instead, they must resist the urge to pounce on their adversaries with litigation simply because there seems to be a clear path to victory on liability. Liability, of course, is only half the battle.

When conducting an initial case assessment, litigators and in-house counsel tend to focus largely on issues of liability. Even after a case is filed, damages issues are often given secondary importance, and sometimes are substantively considered for the first time when drafting the last few interrogatories or the last page of a Rule 30(b)(6) deposition notice. Such complacency can lead to perhaps the worst result in the world of litigation for a plaintiff—a win on liability with an award of zero damages (with a litigation bill from your attorney as a consolation prize).

The next time your company has what you think is a slam-dunk case, take a deep breath. Before you file, take some time to analyze your company's damages, and then lay the groundwork for proving them.

1. **Objectively assess whether the company actually has been harmed.**

   This sounds simple, but analyze whether and how the company has been harmed. All too often, actions that appear to be outrageous or inexcusable do little, if any, actual damage to the company. For example, if an employee takes a position with another company in blatant violation of his non-competition covenant, consider whether the company is actually losing sales as a result and whether you will be able to prove it at trial. Consult with managers and other business people within the organization. Ask them about the employee, his or her real value to the company, and whether they believe the employee's departure is really a problem.

   Your pre-suit damages analysis may lead you to unexpected conclusions. For instance, you might find that an easy claim to prove from a liability standpoint is going to be incredibly difficult to prove from a damages perspective. This could lead you to conclude that filing a Pyrrhic lawsuit is not in the company's best interest. At the very least, the lessons you learn from this initial analysis can help weed-out low-value claims, focus your discovery efforts, and otherwise streamline your case.

2. **Consult with a damages expert before you file.**

   In many cases, litigants do not consult with a damages expert until long after the complaint is filed. Aside from creating unnecessary time pressure, delaying a discussion with a

damages expert can lead to missed opportunities. Unless the size or nature of the case makes it impossible to justify the expense, consider engaging an expert to do a pre-suit assessment of your company's damages. The expert will be able to help identify damages theories and the information and evidence needed to support them. A damages expert also will be able to identify weaknesses with your claims and plan for them in advance. Plus, you are more likely to get an objective opinion from an expert before a case is filed, when the company and outside counsel are not under the pressure of expert disclosure and report deadlines.

If you are in-house counsel or manage the company's litigation, you understand the importance of managing the expectations of senior management. Consulting a damages expert before filing can give you the tools you need to combat a perception that a particular claim is likely to lead to a windfall damages award. It can also help you make the case that a claim viewed by senior management as not worth pursuing might actually have real value.

3. Identify and consult with witnesses.

When a new dispute arises, it is usually easy enough to identify the key players on your side. These are the folks on the front lines of the problem who have first-hand knowledge of the breach, the bad actor's conduct, etc. Often overlooked are the folks on the back-end of the business. Your best assets in proving damages could very well be accounting staff and others who may have no knowledge of the underlying facts, but who have first-hand knowledge of the ways in which the breach or other conduct in question affects the company's finances. They also are likely to have superior knowledge on the systems the company uses and the documents and files that you will need to preserve and present at trial to prove damages. Make contact with these key members of the business early on and explain their importance to the case.

4. Evaluate your adversary's ability to pay.

Perhaps it's wrong to say that the worst result in litigation is a finding of liability with an award of zero damages. In fact, the worst result may be a win on liability and damages against a party who has absolutely no ability to pay a judgment. You've spent thousands pursuing a judgment you can't collect. Like King Pyhrrus, you can't afford many wins like that.

Even if your path to liability and damages seems clear, take the time to thoroughly investigate your adversary. In most cases, the financial standing of your adversary will be obvious, one way or another. When the situation is less obvious, spend the time and money to investigate. While the effort and expense here will naturally vary according to the case, there are a variety of options, ranging from ordering a simple Dunn & Bradstreet report to hiring a private investigator.

5. Mitigate your damages.

The law imposes upon plaintiffs a duty to use reasonable care and diligence to minimize their damages. Before filing suit, determine what, if anything, your company has done to mitigate its damages. If nothing has been done, at least there is a chance that the failure can be addressed long before the other party raises the issue as a defense in litigation. The key here is to be proactive.

You also should review any relevant contractual language that might explicitly identify the non-breaching party's mitigation duties. And, look for contract language that might relieve the company of any duty to mitigate. As an example, many commercial leases contain clauses that provide that a landlord has no duty to attempt to lease premises abandoned by a tenant.

Damages issues should be at the forefront of your pre-litigation planning and strategy. No case can be won without proving liability, but forgetting about damages can make your litigation victories only Pyrrhic.

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