Litigating with the Government: A Different Kind of Plaintiff

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Effectively defending a client from an attack by the government requires an understanding of how the government's priorities differ from those of a commercial litigant and then building your case around that understanding.

Although no two lawsuits are the same, commercial litigation tends to involve a familiar set of metrics that dictate a case's ultimate resolution. Principal among those metrics are (i) the amount of liability exposure or potential recovery; (ii) the probability of that exposure or recovery materializing based on the strength of the parties' claims and defenses; and (iii) the anticipated cost of litigating the case to the next decision point (*e.g.*, motion to dismiss, summary judgment, trial, or appeal). Setting precedent and "sending a message" are typically secondary or tertiary concerns—for both sides.

As a consequence, pushing a case towards a favorable result typically involves litigating to change those exposure, probability, and cost metrics in your client's favor in a *particular* case. Litigators focus their attention on those claims and defenses that have the greatest exposure or upside and, on the defense side, attempt—through research, discovery, and motion practice—to defeat them as efficiently as possible. The standard applied by the court to reject a claim is of marginal significance so long as it gets dismissed. And if the cost of challenging a particular claim is greater than the probable liability flowing from the claim, efficient litigation dictates that legal resources be more effectively spent elsewhere. The same analysis applies on the other side of the "v." Plaintiff's counsel wants to see a claim succeed, and the measuring stick for success matters far less than meeting it, whatever it is. Claims that have little potential for meaningful upside (or the ability to alter favorably the optics of the case) do not warrant a significant litigation investment.

Litigation with the government is different. Precedent and sending messages to regulated industries can be far more important to a government agency than the economic reality of a single case. After all, enforcement actions are typically designed, not just to obtain an isolated recovery, but to eliminate activities the government deems undesirable or to alter industry practices. Precisely where a court sets the liability bar can have significant ramifications in dozens (or hundreds) of other cases. And if the cost of litigating a particular claim is sufficient to deter an industry practice, then imposing those litigation costs on the defense makes sense for the government even if the likely recovery is not particularly great. At the very least, the cost *to* the government of pursuing a particular claim (in furtherance of precedent and publicity) matters far less than it does to the typical commercial litigant. Solid wins are worthwhile even if achieved at great, and disproportionate, expense.

What does that teach commercial litigators about how to more effectively do battle with the government? At least two things:

1. *Aggressively litigate the standard.* Recognizing the importance of precedent to the government, litigators should be prepared to fight relaxed liability standards or shortcuts in proof, even when those standards may have marginal difference in a *particular* case. Especially when the government is pursuing new initiatives or testing the contours of relatively undeveloped statutes or regulations, the specter of a judicial decision framing the liability inquiry in an unhelpful way (e.g., defining the level of culpability as willful blindness versus gross

negligence) is a powerful one. Advancing a strong, well-reasoned argument that the standard of liability should be higher—even when those differences may be unlikely to alter the outcome of the relevant dispute—can prod the government to considering a favorable resolution before that unhelpful precedent is set.

2. *Stridently protect your client from unreasonable discovery costs.* In most business disputes, the prospect of mutually assured destruction—or at least significant cost—in discovery tempers both sides' aggression. And even when the discovery burden is more one-sided, one litigant (usually the plaintiff) has *some* incentive to avoid creating an unwieldy data dump by casting an especially wide discovery net. The government is not bound by the same practical calculus, especially when its objective may be to set useful precedent or garner publicity. Thus, litigators need to guard the boundaries of discovery articulated in the recently refined Federal Rules of Civil Procedure, which focus not *just* on "the importance of the issues at stake in the action" (which the government will invariably see as great), but also on "the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Because courts exist to resolve particular controversies, not to advance the agenda of another branch of government, far-reaching discovery that is motivated by broader agency goals should be reined in when it has the potential to inflict disproportionate pain on a private defendant.

Government enforcement actions are on the rise and show no signs of abating. While that reality is unfortunate, understanding the differences between traditional commercial lawsuits and litigation with the government is a key first step in ably protecting a company or individual's resources from a different species of plaintiff.

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