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HOW TO BE A PLAINTIFF

STEPHEN L. ASCHER

The author discusses the tactics and trade-offs that banks and other financial institutions should consider when they initiate litigation, instead of defending it.

"Plaintiffs' lawyers" are sometimes derided as an inferior species by defense lawyers and their clientele. But prosecuting a lawsuit effectively and efficiently requires tremendous skill and judgment. Plaintiffs must develop evidence and mold it into a winnable claim that will justify the time and expense of bringing the case.

Since financial institutions defend claims much more often than they assert them, they may have little experience with tactics and trade-offs that are second nature to plaintiffs. As habitual defendants, banks and other companies are usually accustomed to playing defense, which includes the time-honored weapons of attrition and delay. Even the most sophisticated financial institutions are often powerfully conditioned to make time-consuming and expensive litigation decisions that can be counterproductive when acting as a plaintiff.

When companies have affirmative claims to bring, they should recognize that the tactics they typically employ may not be the best way to seek damages from counterparties, to sue on failed investments, or to claim insur-

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ance coverage. For these and other affirmative claims, companies must consider the mindset of a sophisticated plaintiffs' lawyer.

DIFFERENT PERSPECTIVES

Plaintiffs and defendants have very different perspectives on litigation. Since the plaintiff usually has the burden of proof, its primary goal should be to develop persuasive, substantive evidence. Even the preponderance of the evidence standard, which governs most civil claims, puts the onus squarely on the plaintiff. Anyone who has ever represented a defendant in a strict liability claim — where the defendant can prevail only if it carries its burden to prove an affirmative defense — can attest to that. By contrast, defendants' primary goal is defensive and passive: to prevent the plaintiff from developing meaningful evidence.

To make matters harder on plaintiffs, they can lose the case at the beginning (on a motion to dismiss), in the middle (on a motion for summary judgment), or at the end (after trial). Failing the test at any stage is disastrous. By contrast, the defendant generally cannot lose until the end of the case, after trial, or in rare circumstances on summary judgment. As a result, the plaintiff typically wants to fight a short war with few battles — the defendant naturally wants the reverse.

On top of all that, plaintiffs have a different cost-benefit analysis than defendants. A defendant considering a worst-case scenario must assume that it could lose even relatively weak claims, pay damages on less supported theories, and, in appropriate cases, pay punitive damages. For a plaintiff, a similarly conservative approach is to assume it will win only the strongest claims under the most supportable damages theories, discounted for the possibility of losing. When you apply these divergent approaches to a typical case, the plaintiff's valuation of a case may well be a fraction of the defendant's — meaning that the plaintiff should devote far less resources to bringing the claim than the defendant should consume fighting it.

All these factors make the typical defendant far more interested in drawing out the time and expense of a litigation than the typical plaintiff. This is not to deny that defense lawyers litigate on the merits, skillfully and to great effect. Or that plaintiffs' lawyers sometimes engage in tactics intended to increase the defendants' costs (without incurring too much of their own). But for the most part, defense lawyers and plaintiffs' lawyers have dramatically different mindsets.

INVESTIGATING "OUTSIDE THE BOX"

These differences come into play even before a complaint is filed: While defense lawyers typically leap into action only after their client is served with the complaint (or a demand for payment), plaintiffs often do their most important work before filing: A plaintiff needs to conduct a factual investigation to determine what claims it has, to develop a good-faith basis for asserting those claims, and to evaluate their strength.

Since this fact-gathering process occurs outside the discovery process, it entails creative lawyering that is not part of the typical defense arsenal. For example, sometimes third-party witnesses, including even former employees of a prospective adversary, will be surprisingly willing to talk to outside lawyers. Even if these witnesses will not memorialize their statements, the information they provide could be crucial for framing the claims. A plaintiffs' lawyer may also be able to unearth information by using private investigators, by exploring public sources, or by talking to other lawyers off-the-record. Every scenario offers its own opportunities for the resourceful plaintiffs' lawyer to investigate "outside the box" — informed, of course, by a vigilant attention to the relevant ethical considerations.

Although plaintiffs' lawyers and lawyers with a prosecutorial or criminal law background use these investigative techniques regularly, civil defense lawyers generally do their fact-gathering within the framework of the relevant rules of civil procedure. When considering whether to assert a claim, consult your lawyer to discuss how you can investigate the facts outside the discovery process.

GOING OUT ON A LIMB

After conducting a sufficient factual investigation, a plaintiff's lawyer must analyze the strength of the claims, the likely damages, and its settlement value. All these points must be covered to help the client determine whether the claim is worth asserting.

Of course, defense lawyers continuously evaluate claims to determine whether and when to settle (or try) them. But the plaintiff's lawyer's evaluation is different. Initiating a lawsuit is fighting a war of choice. Since the company has made an affirmative decision to file, the pressure to win is great — perhaps greater than in the typical defense case.

Before filing a complaint, every client would like to know that she is very likely to recover more than enough to have made the lawsuit worthwhile, and has a fair chance to recover far more than that minimal return. In a perfect world, a complaint will contain at least one strong claim that gives the plaintiff a strong possibility of securing at least a minimally acceptable recovery, as well as several more aggressive claims or damage theories.

When deciding whether to file a case, ask your lawyer to explain what claim is strongest, what she expects to recover on it, and what it will cost to get to that result. While no lawyer wants to be pinned down with binding predictions on these inherently unpredictable matters, a client should not choose to embark on a major litigation without receiving meaningful answers to these questions. Plaintiffs' lawyers must be willing to go out on a limb to provide this information — with, of course, the appropriate caveats.

THE PLEADINGS

The plaintiff and the defendant stand in very different positions at the pleading stage as well. Since the plaintiff's claims will be seriously tested at the motion to dismiss stage, and the plaintiff's cost-benefit analysis is generally stricter than the defendant's, the plaintiff must make difficult judgments about what claims are worth pursuing with its limited resources.

Pursuing creative and aggressive claims is surely a powerful instrument in the plaintiffs' toolbox. For example, it is sometimes tempting to insert a fraud claim in a breach of contract case, a civil RICO claim in a fraud case, or a piercing the corporate veil theory in a case against a corporation. In appropriate circumstances, each of these additional claims can give the plaintiff more leverage and a greater possible recovery.

An effective plaintiff, however, has to decide whether asserting more aggressive claims is worth the time and cost of the additional motion practice or — if the claims survive that motion practice — the incremental discovery. The fact is, a fraud claim is vastly more difficult to prove than a breach of contract claim. Even if the plaintiff can allege a misrepresentation or omission with particularity, a sophisticated institution cannot easily prove reasonable reliance on a fraud — and even if it can, the discovery on that issue can be extremely extensive and expensive. Civil RICO claims virtually never succeed and have minimal settlement leverage as a result — but generally involve considerable motion practice, the preparation of detailed "RICO statements," and the expansion of discovery into several technical issues. Attempts to pierce the corporate veil can similarly take on a life of their own, independent of the merits. These are just a few recurring examples of trade-offs that plaintiffs make in every case.

Since defendants are often happy to litigate tangential or difficult issues as part of a war of attrition strategy — after all, defense lawyers often assert every possible affirmative defense and every conceivable counterclaim — a habitual defense lawyer who makes a rare foray on to the plaintiffs' side may be predisposed to take on some or all of these burdens.

But plaintiffs should not automatically pursue every possible claim. When reviewing a draft complaint, ask your lawyer to explain each claim and how it fits into the overall litigation strategy. Assert a claim only if it adds real value compared to the cost of pursuing it.

DON'T TAKE THE BAIT

The discovery process may be the biggest dividing point between the plaintiff and the defendant. Since plaintiffs generally have the burden of proof, they must relentless pursue every avenue that has a meaningful chance of yielding important evidence. You never know which one will yield the smoking gun. And in pursuing these avenues, a skilled plaintiffs' lawyer must use creativity to consider different ways of proving the same fact, and a trial lawyer's judgment to ensure that the evidence will be admissible. A plaintiff must have a credible threat of trying the case.

While a plaintiffs' lawyer must tenaciously try to develop proof, she must also bring judgment to bear on the discovery process. To keep expenses under control, plaintiffs' lawyers sometimes have to make judgments, earlier in the litigation than defense lawyers, not to pursue every offensive avenue, or litigate every defensive one.

For example, while defendants often notice numerous depositions of plaintiffs and third-party witnesses, the cost-conscious plaintiff may stop taking depositions on a particular topic once it has obtained favorable testimony on that topic from one or two authoritative witnesses. Similarly, the plaintiff may decide that she has adequately proven negligence or fraudulent intent on one theory, obviating discovery on a less promising or less persuasive theory.

"Defensive" issues are sometimes the truest test of the plaintiff's lawyer's judgment. For example, if the defendant challenges the plaintiff's privilege designations, the plaintiff has to decide whether to litigate the issue. Defense lawyers typically defend the privilege to the death, and with good reason. The production of privileged documents could yield crucial admissions, embarrass the company, and have a cascade of unintended consequences in other matters.

For a plaintiff, however, defending borderline privileged documents may not be worth the time and expense. If the documents are not particularly relevant or damaging, and if the production can be made without leading to a broader waiver, then it may be advisable not to litigate the matter. Sometimes a plaintiff can reduce the cost of litigation simply by refusing to take the bait.

Similarly, defendants often assert counterclaims in order to provide a negotiating point in settlement discussions. While it may be tempting for the plaintiff to defend the counterclaims aggressively, that stance may signal weakness instead of strength. If the counterclaims are a stretch, the plaintiff may be better off refraining from motion practice that would give them more credence than they deserve. Once again, don't take the bait.

The bottom line is: While plaintiffs' lawyers must be aggressive and focused, they should not necessarily fight for every document, depose every witness, or make every motion. If your claim proceeds to discovery, ask your lawyer to list the elements of each of your claims, explain how she intends to prove those elements, and prioritize those methods of proof. The plaintiffs' lawyer must have a plan for developing the necessary evidence without incurring expenditures that will overwhelm the likely recovery.

PLAYING BOTH SIDES OF THE FENCE

Understanding the differences between plaintiffs' and defendants' tactics becomes even more important when a financial institution finds itself defending and asserting claims arising out of the same event or events. In this era of large-scale financial scandals, where that scenario is all too common, make sure you have a legal team that can defend your interests vigorously, while at the same time taking proper account of your potential claims. Litigators with experience on both sides of the docket may be best-equipped to optimize your litigation results.