

## **BUSINESS TORTS / COMMERCIAL LITIGATION: EFFECTIVE TRIAL TECHNIQUES**

### **I. Introduction**

There has been a marked increase in tort litigation filed both in Federal and State Courts by corporations and other business entities. The types of claims that are being litigated still include, to a limited extent, actions brought under the Federal Antitrust Statutes and other similar federal laws. We are seeing a significant increase, however, in the utilization of state law claims such as interference with business relations or contractual rights, business fraud, and the like. These claims are usually filed in separate lawsuits in State Court, but may also be included in federal actions as pendent state claims.

Perhaps the best example of the trend toward the predominance of state law claims, as opposed to federal claims, is the case of Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 109 S.Ct. 2909 (1989). In Kelco, the Plaintiff sued for anti-competitive conduct that drove the company out of business. This claim supplemented the federal action brought under the Sherman Act and was included as a pendent state claim. Interestingly enough, the Kelco jury awarded \$51,000.00 under the antitrust action (before trebling) and \$6,051,000.00 under the state law claim. There are numerous other cases where the pendent state claim resulted in a large verdict while the federal claim was relatively small in comparison.

The tremendous growth in business tort litigation over the past several years can be attributed to a number of factors. Perhaps, the greatest influence has been the poor performance of the overall economy and the resulting difficulties to businesses and their owners. The dismal economic performance has adversely affected the lending industry, the real estate market, and other segments of the business world and has made them targets of unhappy customers, investors, competitors, employees, and others who have suffered losses. To state that the business world has changed dramatically over the past fifteen years, insofar as suing each other is concerned, is an understatement of overwhelming proportions. In our firm, we find that we are consulted on an increasingly frequent basis by business owners and others in the business world who have been damaged because of some type of illegal business conduct or activity. Those potential Plaintiffs, who ordinarily have blindly supported such causes as tort reform and "Republicanism," generally may become the most

vicious of claimants and perhaps the hardest to satisfy.

Before any lawyer sets out to handle a case in the general field of commercial litigation, he or she must be willing to commit significant resources to the case. The typical commercial case of a complex nature will be a drain of tremendous amounts in manpower and firm resources. A complex case will not be resolved quickly nor easily. For example, one can count on protracted discovery which will include tremendous volumes of documents in most cases. There will always be numerous depositions to be taken. Many of these will be out-of-state and generally quite lengthy.

We find that it is helpful to assign commercial litigation to the same lawyers on a recurring basis rather than spreading the cases out among all members of the firm. It is difficult to develop any real expertise in this field unless you have handled a number of similar cases. In order to adequately handle and protect a client's interests in a complex business tort case, you must have some experience and a great deal of support.

The following cases will appear on a recurring basis if a commercial litigation practice is developed by your firm: interference with business relations, interference with contractual relations, unfair competition, misappropriation of trade secrets, and business or commercial fraud in various and sundry forms. I have found that regardless of how the claim is labeled, you will find some fraudulent act or omission if you are diligent in your search.

There will also be statutory claims such as violations of the antitrust, patent, trademark, and copyright laws, RICO laws, and the Federal Trade Commission Act laws.

The Plaintiff's lawyer should also become familiar with all of the state causes of action created by specific statutes. These can be utilized from time to time in the field of commercial litigation. Remember, however, that many of the statutes (upon which your case must depend) have been drafted and pushed through the Alabama Legislature by special interest groups. This may mean that the state statute is virtually "toothless." For example, the recoverable damages may be limited to a pitifully small amount. As a result, in most instances, you will be depending largely upon case law for relief.

## **II. Screening of Cases**

You probably have suspected by now that commercial cases should be screened very carefully. If so, you are entirely correct. If you have serious doubts about the case, for any reason, do not take it. Never accept at face value what you are told by the client in the initial interview. Check the story out before blindly launching a frontal attack on some unsuspecting target. A thorough screening process will pay great dividends and save you even greater problems. Finally, even with what appears to be a tremendous case, if you are not willing (or able) to commit the necessary resources to the case, do not take it. In that situation, you might consider seeking assistance from other law firms who regularly handle such cases.

## **III. Use of Experts**

It will be necessary to employ and use experts such as accountants, economists, and other specialists in the field of interest in your case. You may also utilize a non-litigation business lawyer to assist you during the evaluation and planning stages of your case. You may find that it is more economical to have complex issues initially researched by a competent business lawyer rather than undertaking the task in-house. This person can also educate you on the business complexities of your claim. Select a specialist and utilize his or her talents and do it early.

Experts should be utilized at every stage of the case preparation. Certainly, your experts should be selected very early in the process. It may also be necessary to bring in others as the case develops.

It is a mistake to simply bring the expert in for his or her deposition and then later for trial and nothing more. These people, if qualified and carefully selected, can be of great assistance to the Plaintiff's lawyer in the overall case preparation. The extra cost of early utilization will usually pay great dividends down the road. Give the selection of experts the attention this aspect of your case deserves and make it a high priority in your planning.

#### **IV. Discovery**

The discovery aspect of your case preparation will dictate what you will accomplish at trial. It is vital to a good result. As in many other areas of litigation, such as products liability, discovery is extremely important in the commercial case.

You should utilize written discovery as well as oral depositions. It is helpful to first obtain preliminary and basic information by way of interrogatories and an initial request for production of documents and records. After these responses are received and evaluated, you can then proceed with your other discovery.

Requests for production of documents must be carefully planned and drafted. There will usually be several sets of such requests. The documents involved in a complicated commercial case will never be small in number and will, in most instances, fill a good-sized room. The documents you will depend upon will include those of your client as well as those received from your discovery efforts.

You should collect your own client's records before starting discovery. You must become thoroughly familiar with these records and documents at the outset of your case. Involve your client and your experts in planning discovery and drafting document requests. You must have a good understanding of your own documents and your client's theory of the case before you can fully comprehend what you are receiving from the Defendant.

You will spend a great deal of time preparing motions to compel and attending numerous hearings in your efforts to get adequate responses to your discovery requests. Do not be lax or timid in your efforts. More importantly, do not trust the Defendant to either fairly, accurately, or completely respond. This is why you must have expert assistance during discovery.

Develop a system so that prompt retrieval of the Defendant's documents can be facilitated after receipt. This also applies to your own client's records. Simply having the documents available is not enough. You will have wasted a great deal of time and effort in obtaining and examining documents if you cannot use them effectively at trial. Computerization of documents is becoming more commonplace and can be of great benefit to you and your support staff prior to and at trial.

Do not undertake depositions before you are ready for this phase of the case

preparation. First, you must obtain the Defendant's documents and answers to your initial interrogatories. Then you must allocate sufficient time in which to examine and analyze everything received. All of this should occur before starting with depositions. While it is tempting to delegate the taking of depositions to associates, you should restrict the urge in cases of this sort. The lawyers who will be trying the case should handle all discoveries from start to finish. Develop a plan for deposing the Defendant's officers and employees and then carry out your plan. Depositions of experts should logically follow and be the last phase of discovery.

## **V. Pretrial Hearing**

A pretrial hearing is absolutely necessary in the complex commercial case. Never agree with your opponent to dispense with the necessity of having a pretrial hearing and resulting order. If your trial judge does not require a pretrial conference, request one yourself. You should insist on the Defendant being specific as to each defense and contention in the pretrial order. Obtain as many agreements and stipulations as to pertinent facts as possible and include them in the order. This will assist you at trial and later with your appellate record.

## **VI. Motions in Limine**

The motion in limine can be used by the Plaintiff's lawyer in many ways. Not only can this type motion be used to keep out irrelevant information, it can also obtain a pretrial ruling on the admissibility of certain types of evidence. There will be many rulings during the course of the trial. Eliminate as many as possible at this stage. But the same time, be careful not to allow the case to be tried by the motion in limine. There are some things that have to be fully developed at trial.

## **VII. Trial of the Case**

### **A. Voir dire examinations of the jury**

A thorough examination of prospective jurors is another essential element. The information sought will be similar to that sought in other cases. In this type case, however, you will need to solicit information relating to business backgrounds and prior training and education of jurors. For example, you would not want a person who is a trained accountant (who is working in another field) on your jury. The same would be true of a person with a legal background.

### **B. Opening statement**

The same principles apply to opening statements in a business or commercial case as those applying to any other tort case. Develop a theme and stick to it. Make your first impression a good one.

Regardless of the methods, techniques, and tactics employed, it is absolutely essential for the Plaintiff's lawyer to get the client's message across in such a manner so that the jury will understand fully what the case is all about. The opening statement is somewhat different in commercial cases. The damages aspect may be less appealing than is usually the case. The amount of loss in the commercial case will generally be large, but the client will not be likely to invoke as much sympathy as the personally injured client. For this very reason, at this stage, I find it absolutely necessary to emphasize the liability features of the case, as well as the damages.

It is also my personal belief that most jurors choose sides to a large extent during the lawyers' opening statements. In most commercial cases, the greed of the Defendant will have manifested itself in some type conduct that may well "smell" like fraud. You surely want the jury to know about this type conduct as early as possible.

The combination of clear-cut liability and substantial damages, properly presented in word pictures during an opening statement, will condition the jury to later be receptive to evidence that justifies the type verdict required to adequately compensate your business Plaintiff and, when applicable, to punish the Defendant.

At the end of the opening statement, each juror must know at the very least that your client has suffered a tremendous wrong at the hands of the Defendant, and as a result has been damaged greatly. When you finish, each juror should have a good feeling for the client and his case. At that stage, they should want to hear more.

Since the case will involve unusual and complex matters, the jury should be educated at the outset on any necessary terminology involved, as well as any difficult or intricate substantive issues, which the jury at some point in the trial, will be asked to understand and eventually use in their deliberations. This "educating" should be done in ordinary layman's terms and must be interpreted by the jurors as a helping hand rather than a lecture.

### **C. Order of witnesses**

Evidence must be presented in a logical sequence. The most difficult task is to make your evidence interesting as well as informative. Make every effort to simplify and shorten the trial. You must have a concise, orderly, and smooth flow of evidence presented to the jury.

I have been told by jurors after a lengthy trial that they became bored and disinterested due to the length of the trial and the monotony of the evidence which consisted largely of business records. For this reason, the Plaintiff's lawyer must make the case as simple and easy to comprehend as possible. He or she must also find ways to keep the collective interest of the jury at a high level throughout the trial. At the very least, the interest level should be increased at critical points.

Many of the commercial cases involve a significant degree of fraudulent conduct. Greed and plain old corruption will oftentimes reveal its ugly head. It may not be as difficult as you might think to prove an evil motive on the part of your Defendant. The ineptness of some government regulators oftentimes will encourage the regulated business to cheat and steal. Human nature will also accomplish the very same thing. This combination likely fostered the recent Savings and Loan debacle and resulted in tremendous gains to the evil-doers and equally large losses to the victims.

#### **D. Calling of adverse witnesses**

I am a firm believer in calling officers and employees of the Defendant as adverse witnesses. In many instances, this is the only way to develop your case. Do not be afraid to call adverse witnesses. Try it and I predict you will like the results more times than not.

#### **E. Establish bad conduct early in the case**

It is advisable to let your jurors know about the Defendant's bad conduct at the outset. This will set the tone of your case and will usually develop the theme. This is accomplished during your opening statement and through your first witnesses. Jurors do not like to see that the Plaintiff has been taken advantage of by the Defendant. Take advantage of this strategy as early as possible to gain the advantage.

#### **F. Use of Demonstrative Evidence**

Demonstrative evidence should be utilized extensively. Such things as charts, graphs, photographs, blow-ups of records and other items can be used most effectively during your trial. Since many commercial cases are somewhat lengthy and dull, it is helpful to give your jurors all of the help that you can. Not only will you keep their attention, you will also educate them during the course of the trial. Jurors tend to remember what they can see and observe.

A great deal of thought must be put into how the evidence will be presented at trial. Tremendous amounts of planning must go into this phase of the trial. While the order of witnesses is critical for a proper and logical presentation of the case, the insertion of your demonstrative evidence must also be well planned and smooth. It is somewhat like directing a play on stage before a live audience. Consequently there must be a sensible approach to what is being attempted.

## **G. Damages**

### **1. Compensatory**

Much of this evidence will fall in the dull category. This does not, however, lessen its importance. Accordingly, you must present enough evidence on damages to make out your case. The damages will usually be of an economic nature and thus capable of being computed with some accuracy. The proper use of experts will enhance your compensatory damages. Demonstrative evidence will help your jurors to remember and use what they have heard and seen.

### **2. Punitive**

In most cases, you will be dealing with an intentional tort. Therefore, punitive damages are generally recoverable. Because of Tort Reform, you should be given great latitude in presenting evidence of improper conduct. A case involving punitive damages must be tried as one in which the Defendant deserves to be punished. In most cases, you can make this a mission for the jury to undertake and accomplish.

## **H. Closing arguments**

The Plaintiff's lawyer may have a more difficult job in business or commercial cases as compared to many other cases. At this stage of a lengthy trial, it is necessary to tie everything together so that the jury will accept your contentions, adapt them to the evidence and the Court's charge, and then return a favorable verdict. You will have a relatively short time to present your argument. For this reason, do not waste valuable time. The same principles relating to most closing arguments also apply to these cases. You should have started preparing your closing argument the minute the case presents itself in your office.

It is also necessary to answer your opponent's closing argument. Anticipate what will be said, but also be ready to respond to something that you have not foreseen.

## **VIII. Conclusion**

I predict that the "business tort" cases will be the wave of the 90's. I cannot foresee the business community slowing down its utilization of the courts to redress perceived wrongs. Traditional torts will be the primary vehicle employed. Verdicts and settlements will be large due to the nature of the beast. Gear up or stay out. It is that simple.