

COMMERCIAL REAL ESTATE

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THE TIME TO DECIDE

Commercial Litigation

A sage once said, “*The time to worry about where the ball will drop is before the wheel is spun*”. He was speaking about roulette, of course, but the wisdom of these words has much broader application. The point is, worry about the outcome before you place the bet, when you can still do something about it.

Commercial litigation, especially commercial real estate litigation, is in some respects like roulette. Once your lawsuit is filed, the wheel is spinning. Unlike roulette, you may still have a measure of control over the outcome — but you are in it until the ball drops.

In commercial litigation there is seldom an insurance company prepared to write a check. There is a substantial risk the case will proceed to trial. There is no guaranty you will collect anything — especially if payment of money is not the relief you seek. Consequently, there is very little chance your attorney will accept your commercial dispute on a contingent fee basis. A third of nothing is still nothing.

Lawyers handling commercial litigation are not your partners. Commercial litigators charge by the hours. Except in rare cases where you can negotiate a hybrid fee arrangement, you will assume the entire financial risk — not your lawyer. Your lawyer is serving as your paid professional advocate; a hired gun, so to speak.

As long as you are willing and able to pay your lawyer to apply his or her skill and training to your cause, your lawyer is bound to represent you with zeal and vigor. If you do not pay, you should expect your lawyer to stop work. The fact that the practice of law is a profession does not make it a charitable enterprise. It is both a profession and a business. There is no moral or ethical imperative for a lawyer to work without pay while advocating a commercial dispute. Commercial litigation is business litigation — and the business being advanced is yours.

I am not a big fan of commercial litigation. It is expensive for my clients and distracts them from their core business. It is in their core business where they make money. It is because of their core business that I am their lawyer. Still, if you are going to litigate, then commit to litigate. Do not file a lawsuit unless you intend to see it through and win.

If you know anything about law firm profitability, it may surprise you to hear me say I am not a huge fan of litigation. Lawsuits can be very profitable for lawyers. Lawsuits are labor intensive and can take on a life of their own. Huge legal fees can be run up in a hurry. If that is how you determine to spend your money then, by all means, call me. My law firm has an outstanding group of litigators. In commercial litigation we combine our transactional knowledge with litigation prowess and are unsurpassed. I just think you

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ought to make an informed and seriously calculated decision before you decide to spend your money in this way.

It is virtually impossible to predict with accuracy how much a lawsuit will cost. Typically, it will cost much more than you imagine. This is because, unlike a business or real estate transaction you can choose to walk away from if it ceases to make economic sense, lawsuits, once filed, are not so easy to escape. It's like choosing to dance with an 800 pound gorilla. As the joke goes, "When do you stop? When the gorilla decides to stop." Once you have filed a lawsuit, or have taken a position in a dispute that will lead to your adversary filing a lawsuit, you have reached the dance floor and may very well find yourself cheek to cheek with an 800 pound gorilla.

Don't get me wrong. There are times when litigation is necessary and appropriate. There are times when an adversary is so brazenly interfering with your business or trampling on your rights and interests that the benefits of litigation will far exceed your costs. There are times when litigation is your only reasonable choice.

In making the decision to proceed, however, understand the tangible and intangible costs. Attorneys' fees may run into tens of thousands of dollars, and in a complicated case perhaps even into the hundreds of thousands of dollars. The litigation may also distract you from your core business and subject you to significant emotional strain and sleepless nights. Do not underestimate these add-on intangible costs.

If you are going to litigate, be sure to hire a lawyer experienced in the type of litigation you intend to pursue. Litigation strategy is based on game theory. Each move you make must anticipate your adversary's next several moves. Your strategy and its implementation must be designed to win and be agile enough to adapt to changing circumstances if your adversary moves forward in an unanticipated way. Knowledge is power.

Part of what makes litigation emotionally draining is a lack of understanding about how the process works. It is not as mysterious as clients sometimes seem to believe.

The bones of litigation are this: You and your adversary are in disagreement. You are convinced your position is superior. Your adversary is convinced its position is superior. You are unable to reach a compromise that works for you both. Filing a lawsuit is a decision to let someone else decide.

The litigation process is a process of gathering useful information to support your position and to undermine your opponent's position. Your adversary is engaged in the same process. Some of this information is applicable law. Much of the information is supporting facts. Ultimately, you will each present your compiled information to an independent decision maker. A judge or jury will decide.

If you are going to litigate, the decision to do so should be based upon a sober determination of the benefits likely to be achieved, the costs of obtaining those benefits, and your likelihood of success. You may have the greatest case in the world; your lawyer may tell you it will be a "slam dunk"; but if it is going to cost you more than you reasonably expect to gain – measuring both tangible and intangible costs – at least consider the choice of not proceeding. The decision to proceed or not to proceed is yours. It is very much a business decision.

In making the decision to litigate, use the same skills of economic analysis you use to make real estate investment decisions. If you know it will cost you \$2,000,000 to develop and market a project, but your likely return is only \$1,500,000, would you proceed? If your disputed claim is for \$50,000 but it will cost

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you \$60,000 to \$100,000 to collect, should you proceed? The answer may depend upon other factors as well but, all else being equal, the rational economic choice is obvious.

Too often lawsuits are filed as an emotional response to a perceived slight rather than being based upon an objective determination that the lawsuit is in your best economic interest. Do not let elevated testosterone levels get in the way of making a rational economic decision. The lawsuit is likely to continue long after your passions have faded. By that time, you may be wrapped in the arms of that 800 pound gorilla. If you have not made the decision to litigate based upon legitimate and dispassionate commercial considerations, you may find that your only way out is to settle on highly unfavorable terms. This will not help you prosper.

A common mistake clients make is to assume that if a dispute is over only \$10,000 to \$50,000, the attorneys' fees for pursuing or defending the case will be proportionately less than if the lawsuit involved \$100,000 to \$1,000,000. This is not necessarily so. The amount of time it takes to prove your case has very little to do with the amount in dispute. The facts and issues, and the response of your adversary, determine the amount of time involved. Since commercial litigation is typically billed by the hour, more time means higher attorneys' fees regardless of the amount in dispute. This reality should be taken into consideration when deciding to file suit, and likewise when considering an offer of settlement.

Some protection may be provided by the documents if they provide for the successful party to recover attorneys' fees and costs from the unsuccessful party. But note: (i) you had better be sure you will be the successful party, or you may end up paying your adversary's attorneys' fees as well as your own; and (ii) you should consider whether a judgment against this particular defendant is likely to be collected. If the defendant is on the verge of bankruptcy, or otherwise insolvent, obtaining a judgment that includes all of your attorneys' fees will do you little good.

Remember. The commercial dispute forming the basis of your lawsuit is yours, not your attorney's. Your attorney's business is to represent you as your skilled professional advocate. Attorneys are bound to zealously advocate for your success, but they can not guaranty success and collection.

Deciding to file a lawsuit in a commercial dispute should be like deciding to get a kidney transplant. It should be a decision that is not entered into lightly, and should be made only if the benefits to be obtained are greater than the burdens the procedure will entail. If you decide on a new kidney and go under the knife, be prepared to see it through. If, after the procedure has begun and your kidney has been removed, you change your mind and decide against a transplant, your decision is a bit too late. The time to make that decision was before you got on the operating table.

I am not saying you should never file a lawsuit. Each circumstance merits its own evaluation. What I am saying is that the time to decide is *before* the suit is filed. Once filed, be prepared to do what must be done to win. It is too late to un-spin the wheel.

Thanks for listening,

Kymn