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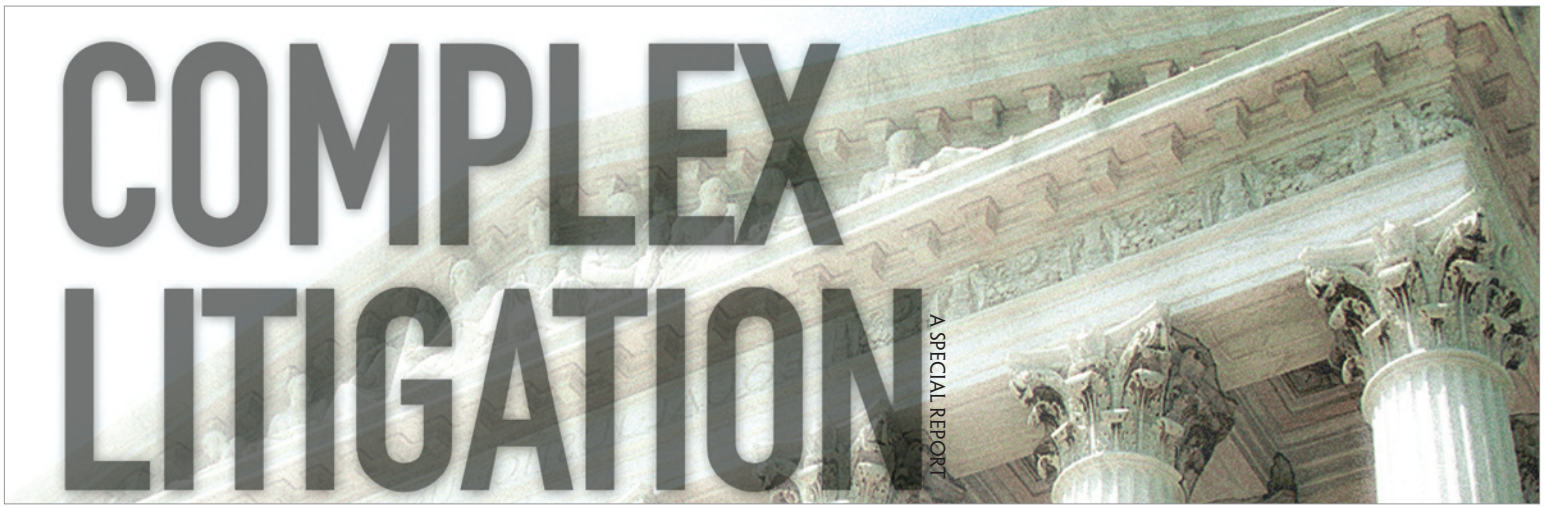

What is the settlement value?

Part of the expertise for which clients are paying is the ability to meaningfully evaluate the risks associated with a complex case.

BY TREY COX

Determining the settlement value of a high-stakes lawsuit can be one of the most complicated and uncertain tasks both inside and outside attorneys must undertake. Litigators can never know everything, but part of the expertise for which clients are paying is the ability to meaningfully evaluate the risks associated with litigation. Some cases are easier than others. Many companies, like drug manufacturers that experience a large volume of similar claims, develop a sophisticated mathematical valuation matrix based on variables like claims, injuries and jurisdiction.

Many cases are not subject to such an analysis, however. For example, what does a lawyer do when a client's major customer sues, claiming that the multimillion-dollar custom inventory management software system the company provided is a complete failure requiring rescission — or a patent troll crawls out of the piney woods of east Texas claiming a client's No. 1 selling product infringes on its patent? Theories for valuing a "one off" lawsuit come in many different shapes and sizes, but ultimately both outside counsel and in-house legal departments agree with the Under Armor commercial that job one is to "protect this house" — put the client in the best position to attack and reduce the settlement value of any "one off" litigation.

Evaluating a lawsuit can be likened to the early stage of a chess match. Every chess player will say that the first seven moves are critical. In the first seven moves lie the seed of ones' attack, which, if not done properly, can doom a player to defeat. An attorney's goal with these early moves is to mobilize his or her pieces to a proper offensive or defensive position. And the key is rapid mobilization.

For inside counsel, the first move is notifying the insurance carrier. No in-house counsel wants to be accused of waiting and prejudicing the insurance company's rights. Outside counsel's job is to ensure that insurance-notification box has been checked. Outside counsel should start with the assumption that no coverage exists, but review all potentially applicable insurance policies and make sure that the carrier is notified — even if it means drafting the notice letter for the client's signature. Next, outside counsel must help in-house counsel draft and send a litigation hold notice quickly. In light of recent cases such as *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004), and *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC*, No. 05 Civ. 9016 (SAS), 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010), a speedy and efficient litigation hold can prevent costly satellite litigation and sanctions arising from the document-collection and -production process.

Even if in-house staff don't have a great deal of knowledge relevant to the case, the company should issue a litigation hold as early as possible with the assumption that it can be supplemented later. Most of the time, the arrival of a lawsuit is not a surprise. For example, in commercial disputes, the legal departments already know about the "bad blood" between the involved parties. This

prior knowledge allows the team to hit the ground running as they begin a more thorough investigation.

CONTROL THE CENTER

People and the documents they created will be at the center of any lawsuit and control its outcome. There are two main things that counsel should be looking for when evaluating the players on their side of the board. First, they will want to identify the person who is the "internal cost-taker," responsible for the cost center that will bear any litigation and settlement cost. Even though the client is a corporation, there is a person within the corporation who is the ultimate stakeholder. Without that person, no final decision about litigation strategy or settlement valuation can be made.

Second, counsel should identify the people with knowledge. From there, they will want to identify a "champion" — a real, live person to be the face of the company and tell its story credibly and persuasively. Good and bad documents, facts and witnesses will always exist. Counsel must find the key witness who can tell the company's story — a narrator who can put the case in the best light possible. If there is someone who can be the face of the company, it makes a fundamental difference in the way the entire case goes and the way the trial is going to go in front of a jury.

Although the "best practices" for valuing a lawsuit are continually evolving, one clear mistake to guard against is "falling in love" with the case and losing one's objectivity. This can be a difficult balance to strike. On the one hand, the individuals from the company are people the in-house counsel sees in the cafeteria, on the elevator and at social events. The in-house attorneys are encouraged by the nature of their job to integrate with the various business units they advise. As a result, in-house counsel cannot help but become emotionally invested; it's very easy to sympathize and empathize with the client's emotion. It is the job of outside counsel to help in-house litigators remain objective and level-headed.

Invariably, the cost of the suit is one of the first questions outside counsel must address. How can one expect to conduct a cost-benefit analysis without knowing how much the case is going to cost? Generating a reliable budget can be difficult, given the many variables in litigation, such as the aggressiveness of the opposing counsel, the amount of discovery and the jurisdiction. But litigators never have all the information, even the day before trial. Although there may be numerous variables, outside counsel must provide a litigation budget. In-house counsel needs a budget against which to measure the costs and begin the case-valuation process.

Whether opposing counsel has an intimidating track record of success can be a red herring. Some veteran general counsel say that facing a plaintiffs' attorney with a string of highly publicized victories has little effect on their case valuation. Their point: All lawyers win some cases and lose some cases. Each litigation depends on making the most of the cards one has been dealt. As a result, the focus should be on the facts, the law and the jurisdiction, not the lawyers. Are the facts good or bad? Is the law in the jurisdiction favorable? If there are good facts and the law is favorable, there is lots of room to shut things down before trial.

Mock trials are a useful tool in the case-evaluation process. Some attorneys view a mock trial as an added benefit, but in today's high-stakes legal environment mock trials are necessary. Every matter with a serious chance of going to trial should be mock tried. The goal is twofold: to determine the value of the case and to make sure the messaging is clear and persuasive. It's a fascinating and painful process to watch eight people debate everything about a case, but it brings the litigator back down to earth and allows him or her to get a legitimate, even-handed view of the value and risk associated with a case.

The main objection to mock trials is their costs, but there are less expensive options. Informal focus groups early in the case can yield pure gold in terms of deposition strategies; they are much less expensive than a full-blown mock trial. For a nominal contribution to a local church, a legal team can spend three hours with 12 volunteers discussing the case's facts and issues. The demographics are generally pretty close to those of the jury pool, and the lawyers learn a lot about how jurors perceive the case. While it would be a mistake to bank on the real jury doing the same thing as mock jurors, mock trials and focus groups are an indicator of exposure and value.

KING SAFETY

In chess, the ultimate goal is to ensure the safety of the king. Similarly, in litigation, the goal is to make sure the company is not surprised by a major trial loss. Once outside counsel have valued the case, some methods are better than others for breaking the news (good or bad) to the client. They should sit down with the client — both business stakeholder and inside counsel — and set out what will be the most likely scenario. It is useful to preview conclusions with in-house counsel and enlist his or help to communicate this to the cost-taker. He or she can communicate clearly to his or her colleagues how much authority is needed for settlement.

Despite the variables in evaluating a lawsuit, having concrete initial action items is critical to the value and evaluation of a lawsuit. Admittedly, the valuation process is one part science and two parts art. But by following the basic steps outlined here, outside counsel will start off on the right foot and be in a position to "protect this house."

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