Bloomberg Law Reports® Federal Practice

The Price of Victory: Controlling Costs in Small "Complex" Cases[1]

Article Contributed by: John S. Worden and P. Mark Mahoney, Schiff Hardin LLP

Conventional wisdom says that the difficulty of a case will bear a direct relationship to the dollar amounts at stake. However, achieving a result that is in the client's best interests in a small case (one with less than, say $300,000 at issue) in a "complex" area of the law (such as securities, environmental, commercial real estate, energy, toxic tort, intellectual property, etc.) can often be *more* difficult than achieving a desirable result in a much larger complex case.

The reason that litigating a small but complex case (SCC) can be more challenging is that the time spent on legal research, discovery, pretrial work-up and trial seldom in reality is offset by the value of a successful outcome. The goal, then, in a case involving lower damage claims, but nonetheless based in one of the so-called complex legal fields, is to achieve not only a favorable result (either on the merits or via settlement), but to do so at a cost that is still minimal compared to the smaller amount at issue. This can be accomplished but requires thought and commitment from the case's inception, and requires that the client become actively involved early on in the decision-making process.

Small v. Large

While the facts of the transaction in a larger case may sometimes (but not always) be more sophisticated and thus require more analysis, the same legal precedent often applies in both cases – it takes no less time to read the seminal cases in preparing a complaint or answer for a small case than it does to read those same cases in a matter of greater economic value.[2]

Similarly, while discovery usually needs to be more expansive in the larger case, seldom is it that the discovery costs bear a perfect relationship to the amount at issue. While more depositions may be necessary in a $10 million real estate dispute than are necessary in one with $100,000 at issue, it is unlikely that the larger case will need 100 times as many depositions. Further, it takes no less time to travel to court and wait for the court to call one's case in a $300,000 federal court environmental case than in a $10 million case based on the same legal theories.

Additionally, while clients may expect a several-hundred-thousand-dollar bill for attorneys' fees in a larger complex case, many assume that small cases can be litigated for a negligible amount of money. Explaining to a client who has just received a large bill in a SCC that securities, environmental, real estate, and commercial cases are more complicated than most, and require greater attorney analysis and involvement, offers little consolation.

The following steps to manage a SCC are therefore essential.

© 2009 Bloomberg Finance L.P. All rights reserved.
Originally published by Bloomberg Finance L.P in the Vol. 3, No. 34 edition of the Bloomberg Law Reports – Federal Practice. Reprinted with permission. The views expressed herein are those of the authors and do not represent those of Bloomberg Finance L.P. Bloomberg Law Reports® is a registered trademark and service mark of Bloomberg Finance L.P.

Draft a Detailed Budget First

Lawyers often draft budgets for their clients in larger, more expensive cases. Clients who anticipate having to pay several hundred thousand dollars in fees now usually demand a detailed estimate up front as to how much it will cost, and what tasks these fees will accomplish. However, seldom is more than a cursory ballpark estimate requested or given in a smaller business case ("Oh, this case shouldn't cost more than $20,000 or $30,000"). It is imperative that a very detailed budget be drafted at the outset of a smaller case.

Carefully drafting a budget in a small business case is crucial and the client should always be asked: Is it really in the client's best interest to file (or vigorously defend) the case in the first place? If the client (and the lawyer) knows up front that it will cost $40,000 to litigate to the merits a hotly contested $100,000 dispute (even if the client wins), then the client will be better able to determine whether the case is worth the risk at all.

The budget should be very detailed. It is not sufficient simply to estimate a lump sum for discovery or depositions. Rather, the proposed budget should set forth a specific cost for each particular step necessary to take the case through trial – who will be deposed, how many hours will each deposition take, how much preparation time is necessary, what written discovery is essential and how much time will each written request take, how many status or pretrial conferences will there be and how much will each cost, etc. Going into such detail may take a little extra time up front, but will educate the client on what to expect down the line.

Decide What Tasks are Really Worth Doing

The question does not have to be simply, "Is it economically feasible and advantageous to the client to prosecute (or vigorously defend) this SCC?" Rather, the question often should be, "How can one prosecute or defend a SCC in an economically feasible manner?" It does not have to be an all-or-nothing decision.

Assume that the initial budget calculation is that the case will cost $75,000 to take through trial. Assume further that the maximum recovery will be only $200,000, and thus the client decides that it is not worth the $75,000 investment for the possibility of a $200,000 recovery (or potentially recovering nothing). It does not follow, however, that the client's only option then is to walk away.

Instead, the client and the attorney should answer two further questions before deciding that the case is not worth filing: (1) Are there certain elements of the budget (such as redundant depositions) that can be eliminated, thus allowing the case to be prosecuted through trial for significantly less than $75,000; (2) Are there ways to resolve this case before trial (or even before filing a complaint) that will reduce the anticipated attorneys' fees estimate well below the $75,000 figure?

In a larger case, it is sometimes the norm to plow into discovery[3] and wait to see where the facts fall before attempting to decide where to go with the case. Unless one can predict beforehand that such an approach will achieve a better result – after subtracting the attorneys' fees that will be incurred – then the business-as-usual approach to discovery, etc., may not be in the client's best interest in the SCC.

© 2009 Bloomberg Finance L.P. All rights reserved.
Originally published by Bloomberg Finance L.P in the Vol. 3, No. 34 edition of the Bloomberg Law Reports – Federal Practice. Reprinted with permission. The views expressed herein are those of the authors and do not represent those of Bloomberg Finance L.P. Bloomberg Law Reports® is a registered trademark and service mark of Bloomberg Finance L.P.

Therefore, the lawyer and the client must on day one decide as precisely as is feasible what discovery, etc., is necessary to achieve the desired result.

Assemble a Lean Staffing Team

In a larger case, a team of multiple attorneys and paralegals is often required to litigate through trial. A SCC, by contrast, may be effectively managed by a partner overseeing a single associate. Further, while the client may have entrusted the case to a particular partner, expecting that partner to perform all the tasks required by a SCC may not be in the client's best interest. Even a junior associate can handle discovery issues and most court appearances at significant savings to the client.

Bill in Smaller Increments of Time

No matter who staffs the case, the lawyer and the client should consider billing in tenth-of-an-hour increments. Although many lawyers routinely bill in quarter-of-an-hour increments, it is easier to keep a SCC on budget by billing in smaller increments. Smaller billing increments provide the client with a more thorough understanding of the time required to complete each step of the litigation and an important tool to assess the accuracy of the initial budget. Moreover, billing in smaller increments helps eliminate the tendency of conscientious lawyers to write off the time spent on task taking less than fifteen minutes.

Involving the Client with Fee Issues Early Prevents Fee Disputes Later

Sometimes clients assume that if it costs X to try a $2 million case to verdict, then it must cost one-tenth of X to try a $200,000 case to verdict. Usually this is not true.[4] If the lawyer cannot explain why, for example, a particular deposition will help the case and why it is worth the cost involved, perhaps the deposition is not worth taking after all. While in larger cases it may be appropriate for the lawyer to run the show completely (some clients believe that that is why they hire lawyers), this is not appropriate in a SCC where the client will be asked to make tough choices regarding the case's future at various points in the litigation.

By making the client informed up front as to how much it will cost to litigate the case to each respective level (through the pleading stage, to a settlement conference, through trial, etc.), the client is better able to make the ultimate decision regarding how its money will be spent. If the client decides up front that spending $60,000 litigating a case through verdict in a $100,000 case is an appropriate use of its money, the client will not be shocked to receive and will be less inclined to dispute bills, and the lawyer need not feel any temptation to mark down any bill for services the client knowingly authorized.[5]

Stand Firm on Cost Decisions

An important corollary of deciding up front what costs are necessary is that the lawyer and client must be willing to stand by those decisions once the case gets going. It does little good to decide initially that the case can be prosecuted efficiently and effectively by taking only the deposition of the CEO, if the lawyer (or the client) decides midway through the case also to take the deposition of each director.

© 2009 Bloomberg Finance L.P. All rights reserved.
Originally published by Bloomberg Finance L.P in the Vol. 3, No. 34 edition of the Bloomberg Law Reports – Federal Practice. Reprinted with permission. The views expressed herein are those of the authors and do not represent those of Bloomberg Finance L.P. Bloomberg Law Reports® is a registered trademark and service mark of Bloomberg Finance L.P.

Though litigation is not always predictable, the lawyer and client both must learn to live by those presumably thoughtful decisions made at the outset – if you came to an informed conclusion on day one that each director need not be deposed, deciding otherwise four months (and $15,000 in fees) later may nullify the initial decision that the case could be efficiently litigated at all.

Be Ready and Able to Try the Case

Lawyers who are afraid to take a case to trial generally want to take every deposition of every possible witness. Pinning the witness down in deposition makes trial examination easier, there is no doubt. However, cases are tried all the time by confident lawyers without the benefit of having deposed every witness. The luxury of taking every deposition in an SCC, however, is outweighed by the associated costs. Accordingly, either be able to try the case without deposing all the witnesses, or join with a colleague who has the requisite experience.

Stay Out of Federal Court

Federal court is expensive. Rule 26 conferences, pre-trial disclosures, expert designations and many other tasks in federal court are much more expensive than in state court. If you are a plaintiff, file in state court. If you are the defendant, resist the knee-jerk temptation to remove under the old adage that "if the plaintiff does not want to be there, then I do." Federal courts are more expensive for *both* sides, plaintiffs and defendants.

Think about Binding Arbitration

Arbitration generally has streamlined discovery procedures which minimize the costs for an SCC. Similarly, the limited rights of appeal mean the case will be resolved conclusively once the arbitration award is rendered. However, arbitration is not always cheaper. Jurors are free, while arbitrators are not. Do the math at the outset to determine which would be better for your particular SCC.

Explore Settlement at the Earliest Possible Juncture

It is "amazing" how often SCCs ultimately will settle for amounts that bear little resemblance to the parties' substantive damage contentions, but rather are settled on cost of defense grounds. If clients realize up front the costs associated with a SCC, they may be more realistic about settling a case before expending any attorneys' fees. If a plaintiff can receive and a defendant can pay $120,000 to settle a $200,000 case without having expended appreciable amounts of attorneys' fees, they may both have profited greatly. Sometimes the worst thing that can happen to a client (and its lawyers who may not get paid in full) is to win a case of this size on the merits. However, some clients want to make a point or set precedent and are prepared to pay for that luxury.

Failure to consider settlement initially sometimes ensures that the case can never settle. After spending $50,000 in fees defending a $100,000 case up to the pretrial stage, the defendant may feel that the only way to justify the costs is to get a defense verdict, and will not put $70,000 on the table to settle a case when the settlement payment plus the attorneys' fees now will equal more than the defendant

© 2009 Bloomberg Finance L.P. All rights reserved.
Originally published by Bloomberg Finance L.P in the Vol. 3, No. 34 edition of the Bloomberg Law Reports – Federal Practice. Reprinted with permission. The views expressed herein are those of the authors and do not represent those of Bloomberg Finance L.P. Bloomberg Law Reports® is a registered trademark and service mark of Bloomberg Finance L.P.

would have had to pay if it had simply ignored the case from day one and been subjected to a $100,000 default judgment. Similarly, the plaintiff, who might have settled for $70,000 on day one, but who has since spent $50,000 in fees, now figures that it has come this far and will simply roll the dice.[6]

Keep a Lid on Costs

If the other side notices a deposition that turns out to be inconsequential, do not order a transcript. (You can always order one later, if necessary.) With experts, bear in mind that the economist who charges $300 an hour for the $1 million case will still charge $300 an hour when working on the $200,000 matter. As with attorneys' fees, costs in a small complex case will usually represent a larger percentage of the amount at issue than in a larger case, and it is these overhead costs that make it less likely that you will be able to stay on your budget and efficiently litigate the smaller matter.

Avoid Discovery Disputes

An "in your face" approach to discovery is almost never in the client's best interest in a smaller complex case. Agree up front with your opposing counsel to informally exchange documents. Ensure that your client understands that a timely and complete disclosure of documents is not only required, but will save money by avoiding future disputes. If documents arguably are privileged and/or irrelevant, do you really care? If so, fight that battle. If not, an SCC is not the time to fight discovery requests simply on principle or to make a point.

Get an Early Handle on Electronic Discovery

Even small companies involved in a SCC may have hundreds, or even thousands, of pages of e-mail and other documents stored electronically across multiple computers or back-up servers. An early understanding of the types of e-discovery a client may have and how it is stored is not only required in many courts, but will also save time and money as the case progresses. Similarly, understanding what documents your opponent may have stored electronically (and the most efficient way to find and review them) is critical to containing costs. There is rarely enough room in the budget of a SCC to spend unnecessary time wading through electronic files heedlessly requested by, or strategically "dumped" on, an unprepared or unsuspecting lawyer.

Consider the Cost and Prospects of Enforcing the Judgment

Sometimes businesses breach contracts or appear to misuse investors' funds because they simply are out of money (or never had any in the first place). A judgment that must be enforced against an entity with no assets is worthless. Finding assets of a company trying to hide them can also be futile. Invest initially in the investigatory research, computer searches, etc., necessary to determine whether the defendant has the assets to pay a judgment and if so, how easy it will be to seize those assets after obtaining the judgment (or through prejudgment attachment, if available).[7]

© 2009 Bloomberg Finance L.P. All rights reserved.
Originally published by Bloomberg Finance L.P in the Vol. 3, No. 34 edition of the Bloomberg Law Reports – Federal Practice. Reprinted with permission. The views expressed herein are those of the authors and do not represent those of Bloomberg Finance L.P. Bloomberg Law Reports® is a registered trademark and service mark of Bloomberg Finance L.P.

Conclusion

The current economic climate makes many clients especially reluctant to litigate a SCC – even when the client's claim or defense is particularly strong. However, with careful planning and intensive client involvement, a lawyer can achieve more than a Pyrrhic victory in an SCC. Providing such a strategic approach will eliminate the need to forego or settle a case based entirely on the cost of litigation and ultimately strengthen future lawyer-client relations.

John S. Worden is a partner in the San Francisco office of Schiff Hardin LLP. Mr. Worden is a trial lawyer.

P. Mark Mahoney is an associate in the San Francisco office of Schiff Hardin LLP. Mr. Mahoney focuses his trial practice on commercial and product liability litigation.

[1] "One more such victory . . . and we are undone." Pyrrhus, commenting after the costly battle at Asculum, quoted in Plutarch's *Parallel Lives.*

[2] Many clients, and even some attorneys, believe that litigating a $10 million case is five times as complicated as a $2 million case, and a $2 million case is 10 times as complicated as a $200,000 case. However, while $10 million is 50 times as much as $200,000, not every element of attorneys' fees and costs in the $200,000 business case will be 50 times less than those same costs in the larger case.

[3] In a larger case, it may be optimal to take the deposition of everyone involved simply out of an abundance of caution. This is not the best idea in a smaller case. Unless one can predict beforehand that a particular potential deponent's testimony is essential in proving a necessary point, the lawyer is doing his client a disservice by taking a deposition for which the client will have to pay but from which the case will not benefit in an appreciable manner.

[4] The client must understand from the outset that fees and costs in a SCC will eat up a much larger percentage of the amount at issue than would be true in a larger case. If the client contact is not a lawyer or not particularly experienced with the legal profession, the lawyer must explain the significance of the various items upon which the attorney will expend time and money.

[5] One of the reasons why it is important to get the client on-board from the earliest point is that it eliminates fee disputes or writing off attorney time later in the case. In a smaller case, conscientious lawyers tend to become more and more reluctant as the case progresses to send clients relatively large bills for even the most legitimate attorney time. Some lawyers are embarrassed to send their better clients a one-month bill for $10,000 in a $100,000 case, though they might never be reluctant to send such a bill in a larger case.

[6] Lawyers on both sides will be somewhat sheepish about recommending settlement after generating such proportionately high fee bills: "How can I recommend a settlement number that will now end up costing my client more than if it had simply at the outset paid 100 percent of the plaintiff's demand?" In other words, sometimes SCCs reach a point where they have to be tried, because no one can *afford* to settle them. This problem is sometimes exacerbated depending on the billing arrangement between the attorney on the other side and his client. For example, an attorney getting paid by the hour may be reluctant to recommend a reasonable settlement figure to his client where the attorney stands to gain substantially from further hourly billing should the case continue to go forward.

[7] The problem of enforcing a judgment against a potentially insolvent defendant is an even larger concern in a business case. If one gets a judgment against an individual in a personal injury case, the judgment survives for 10 years, during which time the defendant may get

© 2009 Bloomberg Finance L.P. All rights reserved.
Originally published by Bloomberg Finance L.P in the Vol. 3, No. 34 edition of the Bloomberg Law Reports – Federal Practice. Reprinted with permission. The views expressed herein are those of the authors and do not represent those of Bloomberg Finance L.P. Bloomberg Law Reports® is a registered trademark and service mark of Bloomberg Finance L.P.

back on her feet and ultimately amass attachable assets. An undercapitalized corporation shell with a judgment against it will never again have any assets, and piercing the corporation veil against the principals – assuming they have assets – is difficult and costly. Everything stated above about efficiently litigating the small complex case becomes moot if the fruit of that efficiency is an unenforceable judgment.

© 2009 Bloomberg Finance L.P. All rights reserved.
Originally published by Bloomberg Finance L.P in the Vol. 3, No. 34 edition of the Bloomberg Law Reports – Federal Practice. Reprinted with permission. The views expressed herein are those of the authors and do not represent those of Bloomberg Finance L.P. Bloomberg Law Reports® is a registered trademark and service mark of Bloomberg Finance L.P.