Business Decisions:

Early Resolution
vs.
Day Before Trial Settlements

LITIGATION CONFERENCES

National Lead Litigation Conference

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About the Presenters

- David F. Albright, Jr.
  - Once worked for what he refers to as “the insurance empire”
  - Zealously advocates for and represents Plaintiffs in lead cases
  - Tell us more about yourself, David!

- Kathleen Fawcett
  - Has worked diligently on behalf of Defendants in lawsuits alleging exposure to lead based paint as an attorney with McCarthy Wilson LLP since 2010
  - Tell us more about yourself, Kathleen!

A brief history of some pretty bad business decisions…

"Netflix CEO and co-founder Reed Hastings courted a deal with Blockbuster-chief John Antioco to purchase the then DVD-by-mail rental company for $50 million."

"Blockbuster wound up filing for bankruptcy a year later, in 2010, when it lost $1.1 billion. The company at the time was valued at around $24 million, while Netflix's worth rose to around $13 billion."

According to Forbes, Netflix is now valued at the market cap of $61.6 Billion as of May 2017.

Source: http://variety.com/2013/biz/news/epic-fail-how-blockbuster-could-have-owned-netflix-1200823443/

A brief history of some pretty bad business decisions…

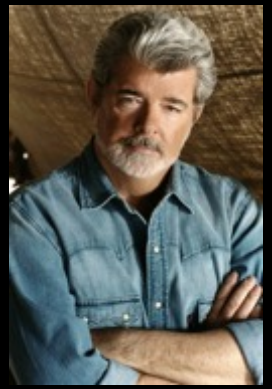
“Today, Google is valued at $180 billion, a bit more than the $750,000 it could've commanded from Internet portal Excite in 1999. At the time, Excite was a highly-trafficked search engine that was at the forefront of the dot-com boom. Google founders Larry Page and Sergey Brin, recognizing Excite's stature, attempted to sale their search engine for $1 million, eventually reducing their asking price by $250,000. Excite CEO George Bell refused. A few years later, his company was purchased by AskJeeves following a major decline in the value of its stock.”

Source: http://www.businessinsurance.org/10-worst-business-decisions-in-history/

A brief history of some pretty bad business decisions…

- “In 1977, the senior execs at 20th Century Fox made an astonishingly short-sighted decision. They signed over all product merchandising rights for *any and all Star Wars films* to George Lucas - in exchange for a mere $20,000 cut in Lucas' studio paycheck. The combined revenue from merchandising is estimated to have exceeded three billion dollars, and continues to grow annually, making it the most lucrative deal ever struck between an individual and a corporate studio in entertainment history. ”

- Source : https://www.forbes.com/sites/erikaandersen/2013/10/04/it-seemed-like-a-good-idea-at-the-time-7-of-the-worst-business-decisions-ever-made/#5badfdb23e80



So, how do you make the best "business decision" for your client in a lead case?

OF COURSE - BUSINESS DECISIONS MUST COINCIDE WITH YOUR CLIENTS' BEST INTEREST

- PLAINTIFF'S COUNSEL -- NEED TO BE ABLE TO JUSTIFY WHY YOU ARE TAKING LESS THAN THE AMOUNT YOU MIGHT GET AT TRIAL
- DEFENDANT'S COUNSEL – ADVOCATE FOR RESOLUTION OF THE CASE, RECOGNITION OF THE PROS AND CONS OF YOUR CASE, ACT WITHIN AUTHORITY GIVEN TO YOU BY RELEVANT CARRIER/CLIENT IF YOU WILL BE DOING NEGOTIATIONS

So, how do you make the best “business decision” for your client in a lead case?

EARLY RESOLUTION V. SETTLING ON THE COURT HOUSE STEPS OR PROCEEDING THROUGH TRIAL

Plaintiff’s Considerations

Defendant’s Considerations

Plaintiff's Considerations : Two Schools of Thought

PLAINTIFF GETS THE LARGEST GROSS IF YOU WAIT UNTIL THE LAST POSSIBLE MOMENT AND PREVAIL WITH A LARGE VERDICT --

- BUT HOW ABOUT CASE EXPENSES ?

PLAINTIFF GETS THE LARGEST NET IF EARLY RESOLUTION

- AFTER FACT DEPOSITIONS ?

- AFTER PLAINTIFF DAMAGES REPORTS RECEIVED ?

- BEFORE OR AFTER MEDICAL EXPERT DEPOSITION ?

Defendant's Consideration : Timing Issues

What information do you need to have to consider early resolution ?

Can Plaintiff make out a case of exposure at the subject property to overcome a summary judgment challenge?

- How will Plaintiff prove lead at the property? (Direct vs. Circumstantial)
- Has Plaintiff identified a known link to the property? What are Plaintiff's lead levels during relevant tenancy period vs. as a whole?
- Who will Plaintiff's fact witnesses be?
- What information do you have? Discovery responses? Depositions ? Photos? BCHD records? School records? Medical Records? Experts?
- Damages considerations ? IQ testing of Plaintiff? Non-economic damages forecast?
- Unique Considerations? Prior Related Cases?

To Take or Not to Take : Experts

<u>EXPERT DEPOSITIONS:</u>

IF DEFENSE TAKES THE DEPOSITION, IT KNOWS MORE ABOUT THE CASE V. POSSIBILITY THAT PLAINTIFF'S EXPERT WILL UNCOVER MORE GOLDEN NUGGETS

USE RECORDS TO CONFRONT EXPERTS AT DEPOSITION?

USE PRIOR TESTIMONY FROM OTHER CASES, OR SAVE FOR TRIAL?

DISCUSS WITH YOUR EXPERTS IN THE SAME DISCIPLINE IN ADVANCE?

DAVE NOTE: WHEN I USE TO DEFEND LEAD CASES, I TOOK NO EXPERT DEPOSITIONS – BECAUSE I DID NOT WANT TO TIP OFF THE PLAINTIFF AS TO MY LINE OF ATTACK

Practice Consideration: Fact Depositions and Errata Sheets

DEPOSITION: Maryland Rule 2-415 (d) Signature and Changes. Unless changes and signing are waived by the deponent and the parties, the officer shall submit the transcript to the deponent, accompanied by a notice in substantially the following form (Errata sheet)

"After you have read the transcript, sign it and, if you are making changes, attach to the transcript a separate correction sheet stating the changes and the reason why each change is being made."

Caution :

(j) Further Deposition Upon Substantive Changes to Transcript. If a correction sheet contains substantive changes, any party may serve notice of a further deposition of the deponent limited to the subject matter of the substantive changes made by the deponent unless the court, on motion of a party pursuant to Rule 2-403, enters a protective order precluding the further deposition.

The Path to Early Resolution
The Recipe - What to Do

What does Plaintiff's Counsel do?

- According to Dave – feed "the beast"
  - With as much information, as early as possible

- MUST BE ACCURATE – E.G., VISITATION PROPERTIES -- FREQUENCY AND DURATION

- Know your deadlines (expert deadlines, discovery deadlines, etc.) and relevant interested parties

- Present written demand to defense counsel

What does Defendant's Counsel do?

- Know the facts of your case – strengths and weaknesses
- Subpoena all records available to you and follow up regularly to receive records
- Review all information at your disposal (depositions, prior related cases, medical records, school records, discovery responses, tenancy records)
- Relay all demands
- Know your deadlines (pretrial conference, expert deadlines, third party deadlines)

MOTIVATING LAWYERS TOWARD EARLY ADR EFFORTS: CAN THE RIDER MAKE THE ELEPHANT MOVE?

By: Jeff Trueman

Many lawyers and businesses resort to costly and time-consuming litigation only to settle their disputes just before trial. This is true despite numerous reports that document large amounts of time, money, and opportunities are saved by managing conflict early. This author has personal experience in mediating litigated tort disputes. One case in particular makes the point clearly: at the outset of the lawsuit, the plaintiff's mother wanted to settle her child's claim for less than $100,000 but the main insurance carrier would not negotiate; less than four years later, after untold time and expenses for all concerned, the carrier settled for well over $1,000,000.

This is commonplace – albeit typically with a less extreme dollar differential. Some lawyers prefer early case assessments (ECA) in order to avert excessive, if not ridiculously wasteful, outcomes like the one just mentioned, but it depends on the type of dispute and the relationship lawyers have with their clients. For sure, some "frivolous" claims are assessed early and will not be resolved through ADR. Money does not flow from mere filings. Reputations have to be considered. In some cases, early ADR is not strategically advantageous because delays can create leverage that can save money. Sometimes the problem is getting the other side to be reasonable early in the life of the dispute. In addition, policy questions may need to be answered or a problem-solving approach to the dispute is not feasible or desired.

To be clear, litigation has a legitimate place on the spectrum of conflict management choices. But is extended discovery really necessary when a fair number of disputes fall into general categories and similar patterns? Not every case is so unusual that it requires independent medical examinations, expert opinions, and the like. Not every client wants to endure more risk and delay waiting for the conclusion of litigation. But in many cases, settlements are delayed because lawyers seem to trust trial events more than negotiation when it comes to generating movement toward resolution. Whether settlements can be reached in less time without sacrificing good results depends more on emotional fortitude and less on empirical data.

As Chip and Dan Heath describe in their book *Switch: How to Change Things When Change is Hard*, we are rational beings with a "Rider" that logically analyzes our surroundings. Our Rider tries to direct our emotional side, "the Elephant." Although we like to think our Rider is in control at all times, in truth, the Elephant is in charge much of the time. Data concerning the benefits of ECA and planned early dispute resolution (PEDR) may be appealing to the Rider, but if the Elephant is afraid of an unfamiliar process that might lead to bad outcomes, it will not move.

All this being said, rational people regularly make major life changes absent certainty of outcome. We change jobs, we get married and have kids, we move to new places, we invest in the stock market. We do this knowing that a bad outcome – failure – is possible. In fact, failure is a part of life we grow from and accept. But in our professional worlds, failure is not tolerated. Perceived failure, how one appears to others, is one of the foundations of what University of Missouri School of Law Professor John Lande calls "the prison of fear" that prohibits some lawyers from practicing in new ways. Fortunately, break-outs from the prison can, and do, occur. Break-outs happen when attorneys employ ECA and PEDR.

The Rider can motivate the Elephant toward ECA when the time is right. Approximately three to four months after notice of a dispute, the parties can briefly and thoroughly assess factual discrepancies, the relevant law, and the consequences of unexpected legal rulings. They can consider settlement options to achieve desired goals. Although they are bypassing traditional discovery, the parties and their counsel determine whether and when they are ready to explore settlement options. At bottom, there is little to lose, and much to be gained, with ECA.

The real potential for early resolution starts with a determination from lawyers to do business differently; to think about how cases tend to flow; to engage in meaningful settlement talks before the eve of trial; to interpret an invitation to negotiate as an opportunity that can produce a good result for the client rather than as a sign of weakness; and to fully appreciate the unpredictable nature of law suits regardless of how much subject matter and technical expertise is purchased by one side or another. As some lawyers have learned, they can gain from promoting innovation and cost-savings as value-added benefits to clients. In turn, clients may become Riders capable of motivating Elephants when they realize better results can be obtained in less time, and with less expense, through early ADR.

Some notes from Jeff Trueman

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After Settlement

- Release
- File stipulation of dismissal