

The Trial Lawyer

A MAGAZINE FOR TRIAL LAWYERS & A VOICE FOR JUSTICE

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COMMERCIAL LITIGATION AS A “HEDGE”

Against the Business and Political Risks of Mass Tort and Personal Injury Practice

WE, AS TRIAL LAWYERS,

HAVE A BIG, RED TARGET ON OUR CHESTS. Nothing riles up the right-wing base like stories about “greedy” trial lawyers and “frivolous” lawsuits. Conversely, nothing excites the right-wing fringe that claims to hate government regulation and restriction of the marketplace, than more government regulation and restriction on lawyers and personal injury/mass tort lawsuits. The bad news for us is that these right-wing groups are politically active and intent on doing away with the civil justice system as we know it.

One glaring example of the right wing’s intentions was H.R. 5. Fortunately, H.R. 5 never became law in the 2012 Congressional session. Had it passed, H.R. 5 would have established a nationwide cap on both compensatory and punitive damages for all medical malpractice cases — regardless of the severity of the injuries or the egregiousness of the wrongful conduct. It also would have been the first step in capping all PI and tort cases through national legislation. Combine that spectre with numerous state bills being introduced and laws being passed around the country attempting to substantially limit contingent fee agreements that lawyers and their clients substantially (by the way, why is it again that no one is calling for the big firm defense counsel’s fees to be limited in the same way?) We don’t know when — or where — these so-called “tort reforms” will become law, or where these attacks will lead. But for today’s trial lawyer to ignore the very real risk that someday, in some way, they will succeed would be foolish, and frankly, bad business.

As any experienced investor and businessperson will tell you, while risk is good, taking *too much* risk is a bad thing. Sticking your head in the sand and wishing that risk will go away is even worse. One way to offset risk in the marketplace is a ‘hedge’ — an investment or business position taken to offset potential losses/gains that may be incurred by a companion investment or practice. One ‘hedge’ against these risks that Burg Simpson has engaged in successfully over the past decade is expanding our commercial litigation practice.

WHY COMMERCIAL LITIGATION?

1. Commercial Litigation, unlike Mass Tort, Class Action or PI, is far less likely to go away — or to be severely limited by tight caps on damages or contingent fees - overnight. While right-wing conservatives are quick to limit access to the courts by those they perceive as “others” (PI and mass tort victims, for example), they will fight to maintain access to the courts for themselves. Commercial cases are not their main target. As such, this area remains one where the risk of significant changes in the law or caps on damages or attorney fee agreements remains low.

2. Commercial Litigation Creates the Right Combination of Cash Flow and Potential Upside to Offset Political Downside Risks. One option commercial litigation provides that PI and mass tort cases do not, is the ability to generate regular cash flow. We have been successful working with clients on hybrid fee models that either cap the hourly fees at a certain amount (with an agreed reduced contingent fee on top). This has been a real win-win for budget-conscious businesses and individuals. It also creates a motivational tool, as both lawyer and client have skin in the game (as both sides have an incentive for efficient success).

3. The Traditional “Big Firm” Business Model is Pricing Itself Out of the Market for Good Plaintiff Cases. The Big Firm model of billing out a half-dozen lawyers hourly on commercial cases is dying. Clients simply aren’t as willing to pay on this outdated fee model any more if they don’t believe they have to, and Big Firms are not structured in a way where they can take on any contingent fee risk. This is where having the ability to take commercial cases on a hybrid fee (mixed or capped hourly fee plus contingent fee) basis makes you both the “best buy” to provide for these services.

4. Commercial Litigation is filled with Solid, Growing Areas of Practice for the Future that are Supported by Both Political Parties. From securities, to business disputes, to dozens of other practice areas, commercial litigation is filled with opportunities that are much less susceptible to tort reform. One excellent example is *Qui Tam* litigation. This is a growing area of commercial practice. As government resources are cut back, and fraud on the taxpayers becomes a bigger issue, both Democrats and Republicans agree that strengthening *Qui Tam* laws to replenish government funds in ways other than raising taxes or cutting benefits is a good thing. These types of cases appeal to both sides of the aisle, and opportunities in these areas will continue to grow in the future.

Law firms cannot exist today without a vigilant focus on business and the bottom line. We cannot continue to champion justice for consumers and victims if we can’t keep the doors open and the lights on. It is really that simple — if more money is going out than coming in, our ability to be the voice against the powerful and corrupt will be silenced. Therefore, in today’s political climate, law firms must be dynamic, and ‘hedge’ against the big risk that fighting for the rights of the injured pose. Commercial litigation is not only a smart ‘hedge’ against these risks for us, but has also shown to be a valuable long-term asset to our business model.

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