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Expert Opinion: Litigation Strategy in a Slower Economy: What In-House Counsel Should Rethink Now."

By Rosanne Felicello (July 24, 2025)

In times of economic uncertainty, one budget line item to receive immediate scrutiny may be legal spend. After all, certain legal work may be delayed without any immediate consequences. But this is not true for all legal work that your company may be considering.

When it comes to litigation work, depending on the nature of the dispute, it may be financially prudent to aggressively pursue certain claims that may have greater relative value in financially uncertain times.

The challenge is determining how and when to allocate resources for litigation to maximize the value achieved for your company. What are the factors that you should consider as an in-house attorney?

1. Flexible fee arrangements

For one, you should consider if the outside law firm you are working with can provide fee arrangements other than hourly, such as fixed-fee billing or contingency fee arrangements.

These alternative billing arrangements may provide you with the flexibility to pursue claims that can bring value to the company without incurring significant expenses.

2. Analysis of claim value and litigation strategy

You should also consider whether your company has any high value claims that it can, and rightfully should, bring. In more stable times, a company may refrain from asserting claims out of fear of disrupting existing business relationships.

But with the flux in trade and geopolitical events, business relationships are changing and, in some cases, terminating altogether. The changing business environment merits a re-evaluation of what unasserted claims a company may have and whether to assert them.

In addition to the relative value of the specific claim, the strategy that you choose to employ to a particular legal issue may be more or less valuable. For example, what should you do if you have evidence that another company is infringing your company's intellectual property?

Should you engage a law firm that is willing to seek a resolution aggressively, or should you continue to send demand letters from your in-house team? While the latter approach may be less expensive in the short term, it could cost you more money in the end.

If you end up in litigation, you may not be able to obtain a preliminary injunction if you have not taken prompt action to stop the infringement through legal process.

Because what action you take initially can have long term consequences for how a dispute is finally resolved, each claim and strategy must be evaluated by experienced legal counsel so that you can determine their relative value.

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The analysis you do upfront may lead you to decide not to bring certain litigation (even litigation with high potential value) if the litigation process will be too costly. Before making the decision not to pursue any litigation because of cost, you should speak to an attorney experienced in the particular type of litigation.

There may be other steps your company can take, short of costly litigation, to protect its interests and delay or avoid the need to file a lawsuit. And instead of choosing not to pursue the litigation, you may be able to retain a law firm that is willing to assert claims on a hybrid fee basis, thereby making the claim economically viable.

Your company may find itself as a defendant, entangled in litigation as legal expenses increase. In that situation, you need to ensure that your attorney understands the burden of the litigation and how it weighs against the amount of the potential claim.

In most cases, a slow litigation process may wear down the plaintiff but at the cost of significant legal spend over lengthy periods of time. In other cases, early settlement may be the most efficient way to resolve a claim and avoid unnecessary legal spend.

You need to have legal counsel who understands and aligns with your interest in obtaining the most cost-effective outcome, which may not necessarily be the strategy that leads to the highest billable hours for your outside counsel.

3. Types of litigation that may increase during a downturn

Based on our prior experience, we know that certain types of legal disputes tend to increase in frequency during bad economic times.

For example, if a counterparty to a contract is unable to obtain the necessary funds to fulfill their end of the contract, it is likely that they will breach the contract. Rising interest rates can justify, in the mind of the counterparty, an “economic” breach.

The lack of access to cheap capital may also give rise to increased payment delays and disputes. Some counterparties may file for bankruptcy, giving rise to preference and voidable transfer claims and, in some circumstances, adversary proceedings. See [Adversary Proceedings in Bankruptcy: What to Expect and Why They Matter](#) for more information about adversary proceedings.

The incidence of “business divorce” also tends to increase as the economy worsens. When money is tight, every disagreement among business partners becomes more charged. It can lead not only to bruised egos but also to destruction of the underlying business.

And whenever bad economic times force companies to trim their employment, there is likely to be an increase in employment claims.

As in-house counsel, you should be on alert for these legal issues. There may be an opportunity to resolve some of these disputes before they escalate to litigation. You will have the best ability to do so if you are prepared for their potential in advance.

4. Motivation to settle / setting precedent

In-house counsel often face a dilemma when evaluating settlement strategy. On one hand, early settlement can sometimes be the most economically efficient means of resolving claims.

On the other hand, counsel follow settlement trends closely and settling early can, sometimes wrongly, be interpreted as “precedent” of a weak defendant who would rather settle than fight.

It is important to analyze each case and circumstance on its own terms, but also within the greater context of all litigation your company faces. There is no one-size-fits-all solution for dealing with legal disputes in times of uncertainty.

How to weigh these factors?

No matter if it is the best of economic times or the worst, the best way to develop a litigation strategy is to start at the end. That is, determine the optimal outcome at the outset and develop a step-by-step plan to achieve it.

To do this, you need to consider as many of the relevant documents and facts at the outset. You should consult with counsel who has relevant experience. You also need to have a thorough discussion with the business side of the company about its goals, both in the short and long term.

Rosanne Felicello *is the managing partner of Felicello Law PC*