

Plaintiff Lawyers in Demand for Corporate Commercial Cases

Abstract: Corporations are retaining plaintiff law firms to pursue their cases and hiring them on a contingency basis. The change in attitude by corporate America has opened a new avenue to lucrative fees for plaintiff lawyers.

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There's a new kind of client that is hiring plaintiff lawyers for high-stakes litigation: major corporations that are filing affirmative cases against other corporations. The trend helps trial lawyers avoid the limits of tort reform and the bane of their practice: the client with a one-time case.

"It sounds like heresy from everything you hear about plaintiff lawyers, but they are a great asset for corporate America," said Michael V. Ward, General Counsel of ACCO Brands Corporation in Lincolnshire, IL. "I've never used a plaintiff's firm and lost."

He was part of a program at the recent national convention of the Association of Corporate Counsel -- the in-house bar association. The panel discussion was entitled, "Keep Your Friends Close – Hold Your Enemies Closer."

Attitudes have changed

Corporations are turning away from the big, traditional, hourly-billing law firms as their fees approach \$750 to \$1,000 per hour. "Corporate America turning to plaintiff lawyers because of cost containment and the success they have in the courtroom. They save you money, they save you time and they get you to resolution quickly," Ward said.

Companies also like to hire plaintiff lawyers to show that they really mean to try a case. "You can discover what your enemy fears most by observing the means he uses to frighten you," said Jodie L. Kelley, VP & Deputy General Counsel, Fannie Mae, the nation's largest home mortgage company.

A decade ago, plaintiff trial lawyers were considered the enemy by corporations and businesses, and nothing more than "ambulance chasers" and worse. The thought of hiring one to represent a large company was considered heresy.

Recently, however, attitudes have changed and corporations have increasingly turned to Plaintiff trial lawyers to represent them on a contingency basis in "bet the company litigation."

Ordinarily, businesses are the best target client for lawyers, because businesses have recurring litigation. Many plaintiff lawyers have deliberately avoided working for corporations, believing the stereotype that defense lawyers are all evil. Accordingly, plaintiff lawyers have targeted

consumers with severe injuries as their best clients. However, the problem is that when an individual's case concludes, so does the client relationship. As a result plaintiff lawyers have had to take a large volume of low-damages cases, just to keep their cash flow going. Meanwhile, the recoveries the lawyers can get in personal injury and medical malpractice cases have been capped by tort reform laws.

Times have changed. Plaintiff lawyers are taking cases for corporations that are suing to protect their technology and intellectual property, or to respond to gold-diggers who file nuisance lawsuits against corporations. "Plaintiff lawyers very useful in patent cases, because patent juries are inclined to award high damages," said Michael B. Keating, a partner at Foley Hoag in Boston.

Transforming into a commercial litigator

According to plaintiff lawyer Michael J. Avenatti, a partner with three-lawyer Eagan O'Malley & Avenatti in Newport Beach, CA, it's an opportunity to become a commercial litigator. Among the selling points for plaintiff lawyers are that they:

- Actually have trial experience and thus threats of trial are real.
- Know their way around the courthouse and a trial.
- Are able to take complicated issues and explain them to lay jurors.
- Do not require that a "real trial lawyer" be brought in during the eleventh hour to actually try the case at a considerable additional cost.
- Are less likely to have conflicts.
- Are less likely to have competing interests (i.e. pre-existing relationships in the same industry).
- Are less likely to be concerned about upsetting the establishment and more likely to relish the role of fierce advocate.

Avenatti left his firm Greene Broillet & Wheeler in November, after he won a major settlement against celebrity Paris Hilton in a \$10 million libel lawsuit filed by another socialite. Rather than just represent individuals, Avenatti markets his firm as "business contingency lawyers" (see <http://www.lawyers.com/California/Newport-Beach/Eagan,-OMalley-and-Avenatti,-LLP-232547-f.html>)

The fee arrangements are lucrative. A company will determine a set number for their exposure to liability – say \$20 million. The plaintiff lawyer will take reduced percentage from the typical 30% to 40% of the settlement or verdict. He will add a "kicker" at the end – so that if the company saves \$5 million from their pre-set liability number, the lawyer will get a 10% kicker of \$500,000 in fees.

"Companies should incentivize their counsel, so that if there's a success, the counsel will share in that," Avenatti said. "Contingency or hourly fee basis can make sense for a corporation. Nothing focuses the mind of a lawyer than having skin in the game and being a partner with your client."

“The cases we get involved in are not cases where the outcome is certain or near-certain. Our cases have a significant amount of money at stake and the company wants to share the risk. Otherwise they would not be coming to us. Otherwise they would be going to a traditional hourly firm.” Avenatti said.

There is additional money to be made if there is a cross complaint filed by a defendant corporation or an appeal filed.

Sometimes, plaintiff lawyers even agree to bill by the hour. “They kind of like it,” said Kelley, the deputy GC of Fannie Mae. Avenatti added, “An hourly arrangement makes more sense where a case has limited value, or the outcome is all but certain, or where there is an existing relationship.”

Suing larger companies

There are examples of companies using plaintiff’s lawyers.

- A Florida personal injury lawyer represented billionaire Ronald Perelman in his recent \$1.4 billion win in a securities fraud case against investment bank Morgan Stanley.
- Targus Group International used three plaintiff law firms, including a solo practitioner, in a well-publicized auditing malpractice lawsuit against KPMG, LLP.

Suing another large or larger company can be prohibitively expensive for a company that must resort to an hourly fee arrangement. In many cases, a contingency fee arrangement is the only structure that allows a company to go “toe to toe” with another deep, or deeper, pocket,” said Ward, the GC of ACCO Brands.

Plaintiff lawyers can also help corporations from becoming a target. “We have built relationships with the plaintiff bar, and it means we can resolve a dispute with a phone call. Using plaintiff’s lawyers engenders trust with the plaintiff’s bar and makes future resolutions easier,” she said.

Kelley said that Fannie Mae has used plaintiff lawyers for defense litigation. “This is something we’ve done pretty effectively,” she said, citing a housing discrimination case and a Sarbanes-Oxley whistleblower case. “Plaintiff counsel helped me understand how the other side thinks, the weakness of my situation, and how plaintiff’s bar would think about this case,” she said.

“Hiring plaintiff lawyers demonstrates that you will try the case. People develop a reputation for taking a case to the mat over and over again. If we believe that we’re right, we will litigate it. In certain types of cases we will not settle. Getting that message across that’s believable is a challenge. When you bring in plaintiff’s counsel, it’s saying we’ll go to the mat on the case and the other side takes notice. You’re sending a message.”