# *Every Case* is Unique, But Commercial Cases Are More So—Don't Ever Forget That

By Samuel C. Damren and Lisa A. Brown

## Introduction by Samuel C. Damren

Early in my first career as a prosecutor, I was given the file for an armed robbery case one morning and told I would be picking a jury that afternoon. It was to be my first jury trial, and in addition to suffering the frets typical of every young lawyer, I was concerned about having so little time to prepare. In our office lunchroom, one of the "old salts" told me not to worry. He said he had probably tried 50 armed robbery cases and they were all the same. Before I departed to pick the jury, another veteran took me aside and said he thought our colleague was just trying to give me a pep talk, and that I should ignore the advice. "I don't even think he believes it himself because if he did, he would have said that he'd tried one case 50 times."

As I discovered when I began my subsequent career as a commercial litigator 33 years ago, the view implicit in the second observation—that every case is unique—applies even more to commercial cases. This is not to say that other types of civil or criminal litigation are not equally demanding. However, even a modestly complex commercial case routinely presents an intricate combination of facts, law, and procedure as well as multiple constituents on each side with shifting perceptions, motives, and interests.

At its commencement, the truly complex commercial case is the litigation analog of a Charles Ives symphony:[1] the courtroom is the football field on which multiple bands are simultaneously performing, each marching in a different direction, at its own tempo, and playing a separate piece discordant with those of the other bands. The initial challenge for the commercial litigator in the face of this dissonance, disorder, and discontinuity is to identify sure-footed paths through it. But there the analogy breaks down. Unlike an Ives composition, the commercial case often requires a great deal of improvisation. Through creativity, forethought, and effort, however, possible paths can be identified both inside and outside the courtroom. Those opportunities can also be lost if the advocate and client lose focus, do not act before a window closes, or fail to follow the sequences necessary to arrive at a desired destination.

Other, more familiar, analogies have also been applied to describe commercial litigation. None is really a good fit. Is commercial litigation a game of chess as some observers claim? No, a chess analogy would require several games being played simultaneously and where moves in one game affect the outcome of another—for example, moving a rook to take a pawn on one board could result in checkmate in another.

What is commercial litigation then? My coauthor and colleague, Lisa Brown, and I address that issue in this short article. But we won't answer the question. It's the wrong question. There is no single template that adequately describes—and no single strategy for winning—commercial litigation. Each case is different. The practitioner who fails to appreciate the variable nature of commercial litigation will have lost the challenge it poses before he or she has even entered the fray.

## The constituents

Who are the potential direct and indirect stakeholders in a commercial case? A partial list might include the parties' management, directors, equity holders, lenders, customers, suppliers, regulators, insurers, competitors, and potential purchasers. Obviously, adverse parties have conflicting interests. But even constituents within each party rarely share exactly the same agenda. And, importantly, agendas change. To negotiate the shoals of a commercial case successfully, a practitioner must not only keep track of all these competing agendas and shifting winds but also anticipate future opportunities and dangers.

## Contract disputes and language

Contract disputes are at the center of almost every commercial case. The parties may disagree as to how a contract applies to particular circumstances. The contract may be the subject of an

interference claim, or one party may assert that a contract exists while the other party denies any agreement or claims the pertinent terms are ambiguous. To respond effectively to contract disputes, it is essential that the commercial litigator first understand the dynamics of the business negotiations that occurred before the contract was signed.

Experienced businesspeople know it is not possible to draft a contract that will foresee and address every future contingency. The form templates for many contracts repeatedly used in businesses such as retail and commercial leasing, lending, manufacturing supply, and acquisition can, as the result of years of experience and use, be very tightly drafted. But even these "strong" templates often contain supplemental or amendatory language setting forth differing arrangements on specific items. This supplemental and amendatory language sometimes fails to mesh fully with all the provisions of the strong template.

The more uncommon the situation, such as drafting nonsyndicated partnership, shareholder, or member agreements, the more likely it is that the parties will tailor heavily negotiated provisions to address their own idiosyncratic concerns. Other terms that objectively would appear to be equally important may only be addressed in cursory fashion. As a result, the end product can often appear imbalanced or not fully finished.

## FAST FACTS

An essential foundation for commercial litigators is to understand how business deals are negotiated and administered and how they mature. Every commercial case will be unique with respect to the constituents involved, the development of the contractual language at issue, the underlying motives, and perceptions driving the deal.

Negotiating contracts and making deals are at the heart of every business. To a businessperson, not being able to make a deal is bad for business. Of course, making a bad deal might be even worse and fully justifies the decision to end negotiations. But between these two possibilities lies the land of compromise. Compromises often involve the exchange of money, percentages, other business terms, and contract language. That is how deals are made.

When the compromise includes contract language, the end result generally involves three types of compromise. In the first category, one party puts aside its objections and accepts some of the language the other party favors in a particular part of the contract and trades it for other language or terms it favors elsewhere in the proposed agreement. The second type of compromise involves one party adding exceptions, provisos, and other conditions to certain provisions in the contract to limit the application of particular rights, remedies, or opportunities and make them less objectionable. The third type is to leave certain issues somewhat open instead of robustly addressing them. The hope in this latter instance is that these issues may never arise or, if they do, that the parties will work it out in the future, recognizing the risk that they might not.

Why do businesspeople make these types of compromises instead of negotiating every line of potential agreements to supposed perfection? There are a thousand reasons. The most sophisticated and experienced negotiator will tell you it comes down to balancing the benefits that the deal brings to the table against potential downsides at the point when further negotiation and refinement of contract terms may cause the deal to crater. Parties get to this point as a result of both external and internal pressures: another person might come along with a better offer, one of the negotiating parties might reassess the risks, or the tax benefits by closing before year end might be lost. Protracted negotiations inevitably cause one or both sides to question whether they really want to do business with the other. After all, constituents may wonder what kind of business partner can't be trusted to deal reasonably with a particular issue in the future instead of nailing down as many contingencies as possible right now. Recognizing these dynamics and identifying which may be in play are necessary initial steps in evaluating each commercial case.

### Motives and perceptions

Every commercial case is wrought with underlying currents and themes, i.e., the motives and perceptions behind the business deal. Motive and perception are key in commercial cases and something you need to understand—from all sides' perspectives—to handle your case effectively.

The constituencies in every business deal will inevitably view the deal differently in terms of motive and perception. Partner A in a business deal thinks the deal will result in certain benefits over time. Partner B thinks in a different fashion. The lender and other constituents may think in yet another fashion. Litigators often pay too little attention to these aspects of the business deal as it was formed and as it matures. Motive and perception are not always manifested within the "four corners" of a contract; yet they set the tempo whenever disputes arise between and among constituents.

Why do you need to understand the motives and perceptions in the business deal? Because these motives and perceptions can be critical in whipsawing an opponent in depositions or trial, convincing a judge on motions, and crafting successful settlements. Understanding these motives and perceptions will help you share your client's story with outside audiences, and this can be as effective as finding that key piece of controlling law or the proverbial "smoking gun."

Take the form contract, for example. Businesses that engaged in successful transactions in the past reuse those form contracts in anticipation of repeat success. The motive is to get the deal done, not to get bogged down in negotiating contract language over theoretical issues that might arise in a current deal but have not surfaced in the past. It's the old adage, "If it ain't broke, don't fix it." In some cases, reusing form contracts embodies a risk/utility assessment. The focus is on simplicity, low administration cost,

and efficiency in the vast majority of instances where no problems are expected to arise.

In Uniform Commercial Code battles over competing forms, each side may assume its form controls and never analyze the other party's form or its applicability. In this rush to make a deal, your client's motive is to be efficient and upfront. Your client may deal with many customers and cannot, in its view, work with thousands of different contracts for essentially the same business transactions. Your client's adversary may share the same motivation and approach, only he will assert that his form contract governs the parties' relationship. Ensuing litigation devolves into a contest over which form the litigators can use to shoehorn the facts most effectively. Outside the courtroom, the client needs to assess whether periodic litigation of this sort is just the cost of doing business or whether current business practices should be adjusted. You should weigh in on these discussions because your real value to your client as an advisor extends beyond the courtroom.

When the business relationship is longstanding but new issues develop in the parties' relationship or issues arise that the parties never contemplated during initial formation, a different orientation is required. At the onset, the commercial litigator needs to examine and compare several sources of information from each constituent's perspective: (1) the parties' respective motives and expectations going in to the relationship at formation; (2) how the contracts that document the deal addressed or failed to address these expectations; (3) how the business arrangement operated and satisfied or did not satisfy these motives, expectations, and contract terms to date; (4) what changed either over time or abruptly at some point in time to affect the business or the parties' respective motives and expectations; and (5) how the client wants things to end up. Every business deal has several different stories behind it, and they all interrelate. The bottom line is that you need to know your client's story and anticipate your opponent's from the very beginning.

## Looking around the corner

In commercial litigation more so than other cases, you must seize opportunities to "look around the corner" at facts and law in ways that are not always obvious. This skill can be the "X factor" in many cases, separating a good commercial litigator from an exceptional one. There is no seminar or text available to impart this ability. The best commercial litigators not only think many steps ahead on many levels, but creatively are able to identify the interplay among legal issues and factual scenarios that are lost on lawyers whose focus is narrow and conventional.

In commercial litigation, the pre-litigation state of a case is particularly ripe with opportunities to look around the corner. For example, there is often a flurry of activity, exchanges of letters, and face-to-face meetings taking place shortly before a constituent brings suit. It is crucial for commercial litigators to be involved with this pre-suit dance. One must recognize that every letter exchanged, every meeting held, and every action taken is an opportunity to identify and recognize issues, which will become the focus of tomorrow's history. That history will be studied in litigation. It also provides the constituents that engage counsel at the early stages of a potential dispute with the chance to frame those issues.

The ability to look around the corner is an acquired skill that can create new dimensions, plot twists, and other avenues that will benefit your client down the road. It is one reason you should urge clients to invest significantly in legal research and analysis in the early stages of a dispute rather than defer those expenses. Another reason for doing so is to identify the paths to success and failure as quickly as possible so the client is headed in the right direction as the pace of litigation picks up. Clients who make an early investment in legal research and a thorough analysis of risks and opportunities can quickly turn the table on adversaries that do not. Commercial litigators who master the skill of looking around the corner also better protect the client's overall business objectives by recognizing that what may seem like an ideal position to take in a dispute could have other adverse consequences outside the courtroom.

## Conclusion

The next time you are asked to handle a commercial case, first stop and think: Who are the constituents, how did this contract language come to be, what are the underlying motives and perceptions I need to understand, and how can I look around the corner past the obvious? Your answers to these questions will be different in every commercial case. And if you want to win, they are questions you must be willing and able to dig deep to answer. Every commercial case is unique—don't ever forget that. ■

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## ENDNOTE

1. Charles Ives (1874–1954) is regarded as America's greatest original composer. He was also an innovator in the insurance industry where he made significant contributions and prospered. See Gill, *Free Agent: Charles Ives' Dual Careers*, available at <http://www.contingenciesonline.com/contingenciesonline/20130708?pg=30#pg25> (accessed July 18, 2014).