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Litigation Review

Asleep at the Switch: Why Clients Should be Active in Managing their Cases

By: Michael Gladstone, Director, Litigation Practice Group

Actions in litigation ought to be, and these days are, regularly tested by insurers, TPAs and direct hire corporate clients under a cost/benefit analysis. A proposed action or tactic must justify itself to be client approved. Not all pleas, motions or expert hires turn out as hoped, but there must be some prospect of substantive return on the lawyer, client and witness/consultant investment to warrant going forward. I recently observed an attorney in a protracted civil litigation matter take actions which neither I, nor any of my clients, would have approved. No beneficial result was achieved by the actions, except only an increase in attorney work for all involved in the case. As the behavior progressed over the life of the suit, I couldn't help but speculate that the affected party, a large, otherwise sophisticated national corporation, must be inattentive or utterly gullible, or both, where counsel's tactical recommendations were concerned. The only other explanation - knowing corporate approval of expensive and futile litigation tactics - runs counter to modern experience with corporations in non-existential litigation. Third parties acquainted with counsel's actions recognized the behavior and labeled it as rank file churning.

A few examples of what I experienced will make the point. At the beginning of the matter, counsel answered the plaintiff's Complaint with a counterclaim demanding sanctions under Virginia Code 8.01-272.1 for "bad faith" filing of the case. These allegations were repeated in a demurrer. Although the "bad faith" allegations were also repeated in subsequent pleadings, the sanctions motion was never brought to hearing. Apart from the dirty-tricks aspect of injecting and repeating sanctions demands in a case where none were warranted, the motion achieved nothing.

As for the demurrer, when it was scheduled for hearing, counsel tendered a consent

order overruling every point to avoid a hearing. Counsel also removed the case to federal court, a rule-of-thumb action of defendants where available. In this case, however, diversity removal was not available because the removing defendant was sued in its home state, an elementary and obvious bar to removal on diversity grounds. After numerous pleadings, the matter was remanded to state court by consent order, again, to avoid a hearing.

A plea in bar is a narrow, but powerful, defense tool when founded on a provable, dispositive fact that concludes all or part of a case. Its success hinges, however, on the movant's ability under Virginia discovery and evidentiary rules to prove a dispositive fact to carry the motion. Where an issue of fact exists as to the dispositive point, the motion is handily defeated by the opposing party's request for a jury on that point. Where a jury demand is already present, the plea effectively vanishes and becomes just another point at trial on motion to strike. This sequence is well recognized and renders a plea in bar toothless where the dispositive fact is in dispute. In the case under discussion, counsel filed and briefed a plea in bar, notwithstanding extensive detailed discovery from the other side demonstrating a solid issue of fact as to the dispositive fact. Indeed, it was filed with full awareness of the detailed evidence establishing the issue of fact. As expected, the issue of fact was raised, a jury demanded, and the plea in bar accomplished nothing. Opposing counsel's feigned surprise was incredible.

Hopefully these examples will serve as a reminder to parties that there remain counsel whose litigation advice requires particularly close cost/benefit analysis, and that active and knowledgeable involvement in your cases has its rewards in both sense for the case and avoidance of expensive tactics that achieve nothing.

Litigation Review is written by the attorneys of the Litigation Practice at McCandlish Holton. From offices in Richmond, and Metropolitan DC, our team offers trial attorneys with decades of experience practicing before state and federal courts in Virginia, Maryland, and the District of Columbia. For more information on our services, please visit us at www.lawmh.com

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