$1.50 VOL. 36 NO. 34 www.ocbj.com AUGUST 26-SEPTEMBER 1, 2013

ORANGE COUNTY BUSINESS JOURNAL

Arming Your Trial Lawyer

Your key agreements and communications should reflect strategic use of rights, duties, burdens of proof and presumptions

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Trial lawyers work/dwell in a world of evidence, and its relationship to rights, duties, burdens and presumptions. These key concepts in the hands of experienced counsel shape the course of a litigation, and most importantly, the final result. Yet, the trial lawyer's perspective on these concepts often does not make its way into the agreements and documents that are the most important pieces of evidence in a litigation. By the time we see the writings, the playing field is set. We are given the writings and then must build the best case for our client. But this need not be. Consultation with your trial lawyer as part of the drafting process may allow the client to significantly increase leverage and help reduce discovery and research costs if litigation results.

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Rights and Duties

Trial lawyers search the evidence for their clients' rights and duties. Rights and duties create leverage and leverage is critically important in litigation, particularly to drive a dispute to pre-trial settlement or to position the issues for trial. The manner in which rights and duties are expressed may have a significant impact on this leverage and the cost of proving the client's case, particularly in cases where injunctive relief may be available, such as those involving proprietary rights or confidential information.

Burdens of Proof

Typically, plaintiffs have the burden of proof on claims, while defendants have the burden of proof on affirmative defenses. Consider how infrequently the burden of proof is addressed in a transactional document, or imbedded in the strategy developed for a key communication. Strategic use of burdens of proof in key writings may shift the cost of proving critical facts to the opposing party, thus creating leverage.

Presumptions

The rules of evidence contain presumptions, including conclusive presumptions that trial lawyers use to direct the burdens of proving claims and defenses. Nothing prevents a contract from including express presumptions that may conclusively establish a fact or impose on the client's adversary the burden of disproving the presumed fact, thereby shifting some of the cost of proving key facts to the adversary.

Confidentiality Agreements

Information considered to be a trade secret, confidential or proprietary may be a client's most important business asset. Sharing it may expose the client to serious, crippling risks. A trial lawyer charged with protecting the client's most important information needs as many tools as reasonably possible. If asked to review the Confidentiality Agreement (that may be Exhibit 1 to the client's TRO application), the experienced intellectual property trial lawyer may recommend the agreement expressly provide that the recipient have both a contractual and fiduciary duty. Because it is not uncommon for confidentiality agreements to track language in the Uniform Trade Secret Act in describing the type of information that will not be considered trade secret or confidential, the trial lawyer may also recommend that the confidentiality agreement state that all information provided by the client is presumed to be confidential, and that the recipient has the burden to prove the information is in fact not confidential. Putting the onus on the recipient to prove a legitimate basis for any disclosure or use outside the scope of the agreement creates leverage for the client at the injunction stage and at trial.

"Standard" Terms and Conditions

An invoice for the sale of a good should contain the seller's desired terms of sale. If an issue is not covered, the UCC should control. But as an experienced commercial trial lawyer knows, the UCC does not necessarily provide the desired degree of leverage or efficiency in litigation against the buyer. These goals are achieved by eliminating issues of fact that involve discovery and trial. For example, a commercial trial lawyer asked to review the client's invoice for litigation issues may recommend that specific times for rejection of goods, or for revocation of acceptance, should be specified because the UCC standards for rejection and revocation involve questions of fact that often preclude summary adjudication and are expensive to prove.

Asset Purchase Agreements

Resolution of claims involving earn-out provisions may involve expensive litigation over the scope of the buyer's duty to realize revenue and profits from the acquired assets. Counsel with experience litigating earn-out provisions may recommend specific language to define the duty and the presumptions affecting proof of compliance with that duty. This may transform the buyer's duty to prove breach into a seller's duty to prove performance, thereby providing the buyer leverage in settlement negotiations, and a stronger position in a trial or arbitration.

Limited Liability Operating Agreements

State law, particularly Delaware law, affords great latitude in the terms and conditions that may be included in an operating agreement. Disputes among LLC members, or involving LLC managers, are often fact-intensive and not susceptible to summary judgment, and hence, are expensive. Trial counsel may recommend greater detail in the expression of duties, and in some instances, may recommend burdens of proof the manager must satisfy to explain conduct. Even when the rights and obligations are stated in detail, the process for resolving disputes may not fully anticipate the disruption caused by such disputes. Injunctive relief may be available, but is frequently expensive to obtain, and may not effectively minimize the disruption. To help address this issue, trial counsel may recommend that the operating agreement set forth specific duties for managers and both burdens of proof and presumptions for certain conduct, as well as specific criteria for a court to consider in fashioning injunctive relief.

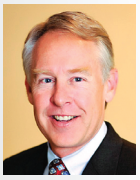
Arbitration Agreements

Arbitration can be speedy and relatively inexpensive, or it can be protracted and excessively expensive, depending on a number of factors, including the arbitral forum and the body of applicable arbitration law. Counsel experienced with arbitrations through JAMS, AAA and other arbitration providers may recommend a particular provider to obtain the best "pool" of potential arbitrators for the types of claims that may be subject to arbitration. Arbitration counsel are aware that the rules and procedures of these providers may differ in significant respects, including the procedures used to manage cases and the availability of certain remedies for misconduct in the arbitration. Counsel may recommend a specific provider to better control the pace and complexity of the arbitration, to obtain certain remedies, and to reduce costs. Whether a particular claim is subject to arbitration often depends on whether Federal or state arbitration law applies. For example, Federal arbitration law may allow the client to pull certain claims into arbitration that otherwise would be reserved to litigation in state court. By specifying the applicable arbitration law, the client may avoid costly litigation concerning whether a specific claim must be arbitrated and minimize the potential risk that some claims are arbitrated while other claims proceed simultaneously in court, or remain stayed pending completion of the arbitration.

Conclusion

These examples are based on actual disputes that could have been resolved more quickly at a significantly lower cost had certain rights and duties, burdens of proof and presumptions been incorporated into the written evidence to assist trial counsel. We welcome pre-dispute collaboration with our clients during drafting of key corporate transactional documents and communications.

Mark Frazier



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