ASSOCIATION OF BUSINESS TRIAL LAWYERS

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WHAT?! BUSINESS CASES ON CONTINGENCY?

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As a lawyer at a plaintiff's firm, my friends and colleagues are often surprised to learn that we do business litigation. They are even more surprised when they find out that we do our cases for businesses on a contingency fee. While our firm is somewhat unique in this regard, representing businesses on a contingency fee has been both professionally and financially rewarding. We have had the pleasure of representing real-estate development firms, tech start-ups, toy innovators, large hospitals, entertainment writers and producers, and even insurance companies as plaintiffs on a variety of different matters. These cases present unique challenges and opportunities for plaintiffs' firms and require creative, "outside-the-box" strategy and thinking. This article examines some highlights and practice pointers for lawyers who litigate business cases on contingency.

Why some businesses seek lawyers on a contingency fee

First Question: Why would a business ever want to hire a lawyer to litigate its case on a contingency-fee basis? There are as many reasons as to why a business may want to choose a contingency fee law firm as there are different kinds of businesses. For example, a business may seek out a firm that has had past success on a particular kind of case in a situation that is similar to its own, and the firm just happens to be a contingency fee firm. That happens more than one might think.

At the end of the day, one point is obvious: the decisionmakers for the business know they must obtain the best possible representation that is feasibly within their means to give the business the best potential outcome for success. For example, a business may be a start-up and may have limited funding for litigation. It may be close to, or in excess of, its litigation budget for the year. It may be in a poor financial situation because of the damages it suffered due to the conduct of the opposing party. Whatever the case may be, sometimes it simply makes the most financial sense for a business to enter an attorney-client relationship on a contingency-fee basis. In dire cases, a contingency law firm may be the only option for a business that has been severely wronged and has no other choice. A contingency fee lawyer may be a business's last chance for survival.

Types of business cases for a contingency fee lawyer

As all members of our organization know, no two business cases are ever the same. However, most of the business cases handled by our firm have involved one or more of the causes of action identified in the paragraphs below. A brief refresher is also included for each cause of action, although deeper research will be necessary for each individual case. Reminder: It is important to keep in mind that a plaintiff may allege alternative, and even inconsistent, theories in a complaint. (*Adams v. Paul* (1995) 11 Cal.4th 583, 593 ["a party may plead in the alternative and may make inconsistent allegations"]; see also *Rader Co. v. Stone* (1986) 178 Cal. App.3d 10, 29.) "Tolerance for such pleading rests on the principle that uncertainty as to factual details or their legal significance should not force a pleader to gamble on a single formulation of his claim if the facts ultimately found by the court, though diverging from those the pleader might have considered most likely, still entitle [the plaintiff] to relief." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858 , 886.)

Breach of Contract: A cause of action for breach of contract requires the pleading of a contract, plaintiff's performance or excuse for failure to perform, defendant's breach, and damage to plaintiff resulting therefrom. (4 Witkin, California Procedure (4th ed. 1997) Pleading, § 476,

p. 570; see *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457 , 1489.) "The manifestation of assent to a contractual provision may be 'wholly or partly by written or spoken words or by other acts or by failure to act.'" (*Merced County Sheriff's Employee's Assn. v. County of Merced* (1987) 188 Cal.App.3d 662 , 670, quoting Rest.2d Contracts, § 19.)

Breach of the Implied Covenant of Good Faith and Fair Dealing: "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658.)

Intentional Misrepresentation: The necessary elements for intentional misrepresentation are: (1) that defendant represented to plaintiff that a fact was true; (2) that defendant's representation was false; (3) that defendant knew the representation was false when he/she/it made it, or that he/she/it made the representation recklessly and without regard for its truth; (4) that defendant intended that plaintiff rely on the representation; (5) that plaintiff reasonably relied on defendant's representation; (6) that plaintiff was harmed; and (7) that plaintiff's reliance on defendant's representation was a substantial factor in causing his/her harm. (CACI 1900; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974; *Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816.)

Negligent Misrepresentation: The necessary elements for negligent misrepresentation are the same as intentional misrepresentation with the exception of the third element: (3) that although defendant may have honestly believed that the representation was true, defendant had no reasonable grounds for believing the representation was true when it was made. (CACI 1903; see *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407-408; *SI 59 LLC v. Variel Warner Ventures, LLC* (2018) 29 Cal.App.5th 146, 154.)

Tortious Interference with Prospective Economic Advantage / Contract: "The tort of interference with prospective economic advantage protects the same interest in stable economic relationships as does the tort of interference with contract, though interference with prospective advantage does not require proof of a legally binding contract. The chief practical distinction between interference with contract and interference with prospective economic advantage is that a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.)

Breach of Implied-in-Fact Contract: This cause of action may be applicable to idea-theft cases. The elements for a cause of action for breach of an implied contract are as follows: (1) the plaintiff prepared the work; (2) the plaintiff disclosed the work to the offeree for sale; (3) under all circumstances attending disclosure it can be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered (i.e., the offeree must have the opportunity to reject the attempted disclosure if the conditions were unacceptable); and (4) the reasonable value of the work. (*Faris v. Enberg* (1979) 97 Cal.App.3d 309, 318; *Desny v. Wilder* (1956) 46 Cal.2d 715, 741-743; *Minniear v. Tors* (1968) 266 Cal.App.2d 495, 500 ["[I]t is understood in the industry that when a showing is made, the offeror shall be paid for any ideas or material used therein"].)

Breach of Fiduciary Duty: A fiduciary relationship is "any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent . . . ." (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29.)

Rescission of Contract: Given some of the limitations and restrictions that a contract may impose as set forth below in the next section of this article, it may be advantageous for a business client to rescind the contract if the evidence warrants rescission. Under Civil Code section 1689(b), grounds for rescission include but are not limited to mistake, fraud, duress, and/or undue influence.

Evaluating business cases on a contingency fee

Case choice and evaluation are critical to the survival of any law firm that operates on a contingency fee basis. The contingency plaintiff's firm that takes on frivolous cases will soon be heading to bankruptcy. Indeed, the contingency fee system encourages contingency fee law firms to weed out bad cases and accept only those believed to be viable. This is especially true in business cases, which typically require more time, labor, expert analysis, expense, staff, and law and motion work than, for example, a straightforward auto-accident injury case.

Accordingly, the following criteria are important factors to consider when deciding whether to take a business case on contingency: (1) ***age and success of the business***; (2) ***nature and extent of damages*** ("'Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where . . . it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits . . . or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled.'" *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 774-775, internal citations omitted, first ellipses in original); (3) ***estimated costs versus estimated recovery***; (4) ***contractual limitations*** (such as arbitration, venue, choice of law, or liquidated damages); (5) ***issues relating to potential cross-complaints***; (6) ***potential conflicts***; (7) ***staffing the case*** (since the case is likely be document intensive, the plaintiff's firm must ensure it has the appropriate support staff and resources available); and (8) ***statute of limitations issues.***

Also, who will be the face of the business when the case goes to trial? Who will be your person or persons most qualified when the Person Most Qualified request is made? Will the jury be able to relate to him or her? Will they be able to convey the damages that the business has suffered in an effective and impactful way? Is this a person who you want to represent on a contingency fee basis?

Finally, and perhaps most importantly, go with your gut. If it feels like the right thing to do, go for it. If something doesn't feel right, decline the case.

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