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The Whys and Wherefores of Commercial Litigation

Decision Rules for Litigation
Including Discussions
of
"The Reality Check," "The Money In, Money Out Fallacy,"
"The Follow the Money Rule," "Metaphysical Market Forces," and the Axiom
"Maximum Benefit Requires Maximum Input"

By Donald W. Hudspeth

Litigation is tough. Next to the serious illness of oneself or a family member, it can be the most expensive, arduous and time-consuming problem one faces in a life time. Still, in spite of its difficulty, there are times when a person or company may have little choice but to sue because the actions of another are, or could be, so damaging. In this article we consider why business owners wind up in commercial litigation.

I. Money, Power, Family and Friendship

Many disputes leading to commercial litigation are fights over money and power. Frequently business disputes involve family members or friends. We often hear from our clients some variation of "We're family, old friends, classmates; I was best man at his wedding, etc., so (I appreciate your work, but) we don't need a bunch of rules in a written agreement. I trust my sister, brother, best friend, etc. and am sure we could work out any problems between us." This approach between family members and friends seems intuitively correct, but it's not. To the contrary, personal relationships, especially inter-family relationships, may complicate business relationships and make the parties more likely, not less, to want and need formal dispute resolution. Family members and friends tend to react to business issues between them based on their relationship history (i.e., baggage) and not just to the problem at hand. One sister may still remember that the other hit her with a hair brush when they were kids. Frankly, it often works better when the business owners are not friends or family because business issues can usually be solved by money, sometimes power, but family issues may involve personal, even psychological issues. For example, we have a house sale being delayed because the sister does not like her brother's treatment of her son who was mowing the brother's lawn. This personal issue has nothing to do with the business property, but the business relationship is dysfunctional because of it.[1]

[1] For an extreme example: On April 16, 2015, an apparent business dispute among family members led to a quadruple murder and suicide in Phoenix. One purpose of law and the justice system, including the rules of Civil Procedure for commercial litigation, is to replace self-help revenge or vigilantism with regulated legal process and remedies.

A. "Partnership Disputes" and "Business Divorce"

A major type of business dispute is a dispute among the owners. This kind of dispute is often called a "partnership dispute" or "business divorce." For instance, in a corporate squeeze out a partner[2] or group of partners will attempt to expel the affected partner because, among other reasons: (i) they know the business is becoming valuable and do not want to share the wealth; (ii) the "partner" is not pulling his weight; (iii) they just do not like the partner and want to be rid of him; or (iv) the business just cannot support all of its owners.[3]

But, the purpose of this article is not to list or describe the reasons why, or situations in which, commercial litigation arises, but, first, to discuss rules or criteria one may use to decide whether or not to proceed with commercial litigation and, second, the underlying "market forces" or incentives which propel litigation.

B. The "Money In, Money Out Fallacy"

The reasons for the "business divorce" are not always malicious. Sometimes they are just practical. A common mistake by business start-up owners is what I call the "Money In, Money Out Fallacy." Often, there is so much uncertainty about, and focus on, getting the business started that the owners will (wrongly) assume that if they can get the funds to get started, then the business will generate the income to support them. This may be true in the long run, but as the economist John Maynard Keynes said "In the long run we're all dead." The working assumption of "money in implies money out" ignores or does not account for the fact that startup companies tend to consume mass amounts of capital, and do not typically throw off cash for a period of years. As a result we have the common result in start-ups of "somebody stays and somebody goes." It is just the reality of the situation.

C. "Acting Out"

But, often, a business divorce is a hostile takeover. A partner or group of partners will, among other things, seize control of the website, domain name, phones or bank account. I call these hostile acts "Acting Out." As a result of this Acting Out, the affected party could lose not only the future value of his investment and investment of time and money, but also dividends or distributions, salary and means of livelihood. The question then becomes "How should the affected party respond in this type of situation?" Does he sue or walk away?

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[2] "Partner "in this case and in the trade includes corporate shareholders and LLC members.

[3] The case may also be driven by an innate moral sensibility, sense of justice, and the belief that those who violate basic ethical principles should get their "just deserts." Adam Smith, who wrote the book, The Wealth of Nations, upon which in part our capitalist system is based, espoused this principle.

II. The "Decision Rules"

When considering our course of action in response to a partnership dispute or other litigation matter, we ask clients to apply or consider three principles to evaluate their course of action:

A. Adequate Funding

Litigation is expensive; thus "Rule 1" is: A client must have adequate funding. The first question we ask in considering litigation is: "Does the client—the would-be Plaintiff (or Defendant)—have the money to fund a lawsuit?" The "Plaintiff" in a lawsuit has both the burden of proof and burden to move the case along. The Plaintiff is the "hunter;" the "Defendant" is the "hare." One defense tactic is to be reactive only; that is to force the Plaintiff to "hunt." A common tactic of the wealthier party, Plaintiff or Defendant, is the attempt to bury the adverse party in legal work and attorneys fees. Lawsuits are like prize fights in the sense that one should not "get in the ring" unless one can go at least "three rounds," i.e. survive the opening rounds of threats and "lawyer bull walrusing."A party who enters into litigation without adequate funds may wind up in worse shape that he was before.

1. The "Process"

Typically, the parties begin with directly opposing views of how the case should turn out. (I call this the "Paradigm" of each party). Proceeding from countervailing Paradigms to work up the case, exchange demand and response letters, argue back and forth, perhaps to file initial and subsequent pleadings, and engage in the legal process until the parties reach the point of settlement or decide to continue with full scale litigation is what I call the "Process." As used here "Process" does not mean the legal process as a complete series of actions in litigation from beginning to end, but the countervailing and adverse actions of the parties until a point of "Equilibrium," as defined and discussed below, is reached.

a. "The Angry Ex-Wife Strategem"

In the partnership dispute alluded to above one group of "partners" may believe the affected party is weak, not carrying his weight or dishonest. The affected party will deny the allegations and may reply: "Even if what you said were true you do not get my interest for free. You need to buy me out. If you don't buy me out, then I will exercise my ownership right to be actively involved. In fact I (will) want to be more involved than ever in reviewing the books and records, calling and attending meetings and participating in the operations and management of the company." (This is what I call the "Angry Ex-Wife or Spouse Strategy"). More than just about anything the

remaining partners want the affected party to be gone. This strategy imposes a "cost" on their Acting Out.

b. "The Free Ride Effect"

Alternatively, the affected party may continue: "Remember, I am still an owner, and you have a fiduciary duty to be honest and loyal to me and to run the company according to the Business Judgment Rule. I will benefit from and do appreciate your efforts to increase the value of the company, my ownership interest, and dividends or distributions to me while I am away." (I call this the "Free Ride Effect."). The parties Acting Out hate the fact that the person they are trying to exclude still has the right to dividends and distributions and to the increase in the value of the company. In fact, the excluded partner may be in a better position than they are because he does not have to work to receive distributions or increase in company value, while the remaining partners may be working long hours, doing without pay, loaning money to the company, etc.

Together the Angry Ex-Wife and Free Ride strategies are like Chinese water torture to the remaining partners. The remaining partners may try to run the company so that after expenses, including monies to them or spent for their benefit, no distributions or increase in the fair market value of the company actually occur. But, it is difficult to run a successful company without making a profit and still satisfy the Business Judgment Rule,[4] and the law protects minority owners by imposing a fiduciary duty[5] on the remaining partners. This firm has had cases where our client, by employing these strategems and nothing else, achieved a buy out after a period of months.

2.Defendants' Need for Adequate Funding

Just as a Plaintiff must have adequate funds, likewise, the Defendant must also. If the party Acting Out, here the "Defendant," does not have sufficient funds to defend its actions against a Plaintiff who does have adequate funds to prosecute the action, then the Defendant will have little choice but to settle quickly (and probably was ill-advised to begin Acting Out in the first place).

[4] Under the Business Judgment Rule, a court will not second guess the decisions of company management so as long as the decisions are made (1) in good faith, i.e. honestly and with fair dealing, (2) with the care that a reasonably prudent person would use, and (3) with the reasonable belief that they are acting in the best interests of the corporation. The converse of this is that management actions that do not meet these criteria are subject to claims of personal liability.

[5] A fiduciary duty is the highest standard of loyalty at law. It requires one to act solely for the benefit of another -- here the company and the other partners, including the excluded partner -- and not just for oneself. Another term for breach of fiduciary duty is "self-dealing."

3. The "Reality Check"

If the estimated amount needed for the Process is, say, $10,000, and the client does not have $10,000, then the decision is pretty well made. The client cannot afford a lawsuit. It is like surgery or pharmaceuticals; you either have the money for the operation or drug-treatment or you don't. If you don't, then that's the end of the analysis. I call this initial sum the "Reality Check." This "Reality Check" applies to both Plaintiff and Defendant.

4. The "Legal Savings Account."

The need for the Reality Check is one reason why a having a savings account for legal purposes is so important. My father had a small town appliance and hardware store for 40 years and to my knowledge he never sued anyone nor did anyone sue him. Times have changed. Now, if you ask how they plan to succeed in life, some people will answer "by winning the lottery or a lawsuit." These customers or competitors are predatory and want the business to make a mistake. They are looking for an excuse to sue.

Many times having the hypothetical amount of, say, $10,000 or more set aside for a "legal rainy day" can mean the difference between success and failure in business. This "legal savings account" provides funds to hire legal counsel to enforce agreements, deal with government agencies, and to bring or defend legal claims. $10,000, of course, would not cover the complete cost of litigation, but it might cover all or most of the initial Process. And, if one does not use the funds for legal purposes, the account can become a savings account for retirement.

5. "*Don't Play the Other Man's Game."*

Often the party Acting Out does so out of what I call "legal ignorance." Here, "ignorance" does not mean stupid. To the contrary, business owners are virtually always exceptionally bright or outstanding in some way. Rather, "ignorance" means lack of knowledge, of being "unaware of the legal and financial consequences of their actions." The party does not realize the significance of the serious legal claims which may be brought against them and the compensatory and punitive damages which may be awarded on these claims. In our partnership dispute example the legal claims against the parties Acting Out include (in some states) breach of fiduciary duty, conversion (civil theft), civil conspiracy, civil aiding and abetting, etc.

The principle here is to do or expand from what you know. Just as a lawyer probably has no background in software design and manufacture, a tech expert probably has limited knowledge of law and experience in the legal Process. In that case for the tech expert to play the lawyer's game is "suicidal."

6. Strategy, Pre-Litigation Planning and Stage Management

Another form of "legal ignorance" is being oblivious to the importance of strategy, pre-litigation planning and "stage management." Strategy in litigation is always important, perhaps particularly so when the client is the weaker party. Our firm represented a new business owner who had been the top designer for his former employer. The designer had not signed an employment or other agreement which prevented him from having a competing business or from doing business with customers of the old firm who chose to follow him. But, knowing that having this designer as a competitor could hurt them badly, the former employer filed suit and applied for an emergency temporary restraining order ("TRO") and injunctive relief to bar the designer from using any designs in his portfolio created during his employment and from even referring to names of the clients for which he had done the work. As a designer's portfolio is an essential part of doing business, a negative outcome in the suit would in effect put the designer out of business.

All of this happened before the client hired our firm. Facing claims of arguable merit and not having the $10,000 or more one needs to even get started in the emergency TRO proceedings,[6] the client had no choice but to make the best deal he could. As a result the designer surrendered rights to intellectual property, clients and territory he might have kept with a better strategic position.

The client could have handled this situation better by having the firm counsel and help him *before* and after his departure from the company. This Strategy, Pre-Litigation Planning and "Stage Management" would have included:

First, educating the client on the likelihood of litigation with his former employer, taking into account the harm his leaving could cause the company and the Follow the Money Rule, discussed herein;

Second, counseling him on the "right way" to leave and to avoid what (to a lawyer) would be obvious mistakes (e.g., announcements are okay, but advertising pitches may not be). The right legal advice can make the opposing party's case much more difficult;

Third, discussing, perhaps, the timing of departure, e.g., whether and when he could satisfy Rule 1's requirement of Adequate Funding; and

Fourth, preparing him for the Process by discussing the principles of Pre-Litigation "Stage Management:" "Stage Management" is based on the premise that each case has a story as told by the party.

[6] Unlike a normal suit for damages, which can take more or less a year to complete, one must be in court to defend a TRO Application within a few weeks.

In a way, litigation is the battle of the stories as they would be presented at trial where the best and most believable story will win. The objective, then, throughout the case, is to get as many facts as possible in support of one's own story, and to prevent or reduce the number of facts which support the opponent's story. (I refer to this battle of fact accumulation as each party's "yellow pad.")

Once legal counsel is hired, often the attorney will coach the client to engage only in communications designed to elicit certain responses and otherwise not to communicate at all with the other side, witnesses or parties of interest. Attorneys are masters at asking the under-inclusive question, the answer to which may be truthful as far as it goes, but does not tell the full story. Also, attorneys ask "box car" questions which assume facts not in evidence, perhaps facts that are not even true, or which add conclusions or interpretations which are not how the client would state, explain and present his case.

The firm has had cases where the client has been "staged managed" by selective questioning and communications so effectively by the other side that by the time the client walked in the door the case was almost unwinnable. To prevent this, once we know "the game is afoot,"[7] we will advise our client not to answer, send or engage in any communication with the adverse party, or any knowledgeable or interested party, without prior approval and input from the firm.

7. Pride Comes before a Fall[8]

A party Acting Out is often over-confident. Not realizing his legal ignorance the party assumes that because he is smart and knowledgeable in his business, that he will be smart and knowledgeable in the business legal dispute. This doesn't follow. A brilliant business person may know much less than he thinks he does about the law and legal process. Not only does the protagonist look foolish, but his over-confidence, on top of legal ignorance, is a recipe for disaster. In one case the opposing party quoted partnership law *to our firm's attorneys* in support of a completely indefensible position. After the party hired legal counsel just before a court hearing, the first thing his lawyer had to say was to retract his client's arguments and concede our position. The firm has brought down many "hotshots" over the years, whose fall was all the greater due to their over-confidence.

B. <u>The Cost-Benefit Analysis</u>.

If the client satisfies Rule 1, i.e. has adequate funds, then Rule 2 is that the case must appear to have a positive Benefit to Cost Ratio. The client would do well to evaluate whether the case is a "good investment" of time and money. The primary component of "Cost" is attorneys'

[7] From Shakespeare's King Henry V. 'Before the game is afoot, thou still let'st slip. Arthur Canon Doyle "The Adventure of the Abbey Grange" when Holmes tells Watson: "Come, Watson, come! The game is afoot."
[8] Book of Proverbs 16:19: "Pride goeth before destruction; a haughty spirit before a fall."

fees, but particularly as the Process[9] continues, "Cost" also includes downside risks, and one's beliefs about the merits of the respective claims or defenses. The "Benefit" is the amount or value at stake for the plaintiff and the defendant.

1. For the Plaintiff.

For example, if the amount or value of the Benefit in question, i.e. the "Value" (in our example, the value of the partnership interest) is $100,000, then the question is: Does it make sense to incur the Cost to recover or protect the Value? If the Cost for the Process is $10,000 and the Value is $100,000 then the Cost-Benefit ratio makes sense and Rule 2 is satisfied.

2. For the Defendant.

Likewise, if the party Acting Out owns or controls the victim's $100,000 in Value, then the question is: "Is it worth it to pay the assumed $10,000 in Cost to keep the $100,000 Value?" Typically, yes.

a. Defendant's Incentives

(i) Incentive for Misconduct.

One cause of, or incentive for, litigation is that the party Acting Out, often the "Defendant" will typically keep the benefit of Acting Out, here the assumed $100,000 Value, and perhaps continue to act out by taking other adverse actions against the Plaintiff, until the actual or perceived Cost outweighs the Benefit. I liken this to the thief driving down the road with your furniture; he will keep going until someone stops him or until he knows he is going to be caught.

(ii) Incentive to Cure.

Only when the Defendant experiences or faces imminent Cost does the Defendant have reason and incentive to reverse course to return the Value to the Plaintiff and cease adverse activity. Defendant's experience of this Cost is typically caused by the legal Process. Thus, to create this incentive for the Defendant to cure, the Plaintiff will attempt to educate and cause the Defendant to recognize the Cost of the Defendant's actions as soon as possible in the legal Process.

b. Defendant's Advantage; Plaintiff's Disadvantage - The "Triple Whammy:"

The Defendant's Advantages and Plaintiff's Disadvantages in the Process are:

[9] As discussed above, for purposes of this article "Process" means the initial case workup, demand and response letters, legal bantering between the plaintiff's and defendant's attorneys, perhaps initial filings and on-going litigation. It does not mean the entire lawsuit from beginning to end. If "Equilibrium," as discussed herein, is not reached during this Process, then the question is whether Rule 1 and Rule 2 (and Rule 3) are satisfied if the case goes forward.

(i) Defendant has and controls the Value, so the Defendant has less to lose because part of the "Cost" in question is the Plaintiff's Value.

(ii) If that Value is money or the generation of money, as in the takeover and control of the business, the Defendant may use the Plaintiff's money to defend, and in contrast,

(iii) Plaintiff has lost and seeks to recover the Value, so must have and draw upon other funds to pay for the Process of recovery.

Many times the Plaintiff has his cash, income and net worth invested and tied up in the business, which the Defendant now controls, and may have no other significant amount or source of funds. Because of this relatively common disadvantage in partnership disputes, breach of contract and collection cases often the Plaintiff simply cannot satisfy Rule 1—Adequate Funding. This is the "triple whammy" caused by the Defendant's Acting Out: the loss to the Plaintiff of the Value in question, the Defendant's use of the Value to defend any legal action, and the Plaintiff's need for other funds to pursue recovery.

3. The Follow the Money Rule

Decision Rules 1 and 2 together comprise what I call the "Follow the Money Rule." Even as expensive as attorneys and litigation are, if the Value at stake is greater than the Cost to proceed or defend, and if one has the money (Rule 1), then it is a "good investment" to proceed.

a. ***Incentives Underlying Litigation***

(i) Positive. As long as the anticipated attorneys' fees, other costs and pain, i.e., Costs, to a party, are less than the upside gain–here, the assumed initial Costs[10] of $10,000 applied against a Value of $100,000–then the party has incentive to begin and continue legal process. This is a major reason why people hire lawyers and we have lawsuits.

(ii) Negative. However, as is true in some cases, one might need to spend $5,000 to get or keep $5,000 in value, then, even if one has the money, one might think twice before "investing" it in the litigation. Some other use of the money may be a better investment.[11]

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[10] At the beginning each party believes its position is correct, so the costs of anticipated loss have not yet begun to accrue. At this juncture then, "Costs" consists mainly of attorneys' fees. As the Process continues "Costs" = attorneys fees, costs and other expenses plus actual or perceived imminent downside risk and damages.

[11] A perhaps inaccurate, and to a statistician perhaps even laughable, rule of thumb I sometimes consider is: Likelihood of success percentage (%) times (X) money ($) = maximum attorneys fees to spend on case. For example, sometimes I can estimate the odds of success as 60/40, i.e. 60%. If the value, as assumed to be here, is $100,000, then 60% X $100,000 equal $60,000 as a maximum amount to be spent on attorneys' fees. Note, in absolute terms, if the value is $100,000 then attorneys' fees and expenses in an amount up to $99,999 would be

Please notice, under these Decision Rules money for the lawsuit is considered an "investment" and evaluated as, and compared to, other investments of time and money.

4. "Market Forces."

If the cost-benefit numbers work, (i.e., the Value is sufficiently greater than the cost), and if one has the money to fund or defend the litigation (Rule 1), then one is almost "trapped in the incentive to sue;" that is, the "Market Forces" for gain over loss virtually compel the Plaintiff to seek recovery of, and the Defendant to seek to keep, the Value in question.[12]

5. Equilibrium

The Process of legal dispute ends and settlement may occur, when equilibrium is reached. Equilibrium is reached when the above-described "Market Forces" offset each other. This occurs when the gain for the party Acting Out is, or is threatened to be, offset and consumed by its Cost in attorneys' fees and actual or imminent loss on the merits to, and recovery by, the Plaintiff.

Typically, the point of equilibrium will be some amount or value that is less than the Value in question, here assumed to be $100,000. Often the party Acting Out will need to pay for or pay back part of the $100,000 Value. The Plaintiff will receive that amount in settlement and in lieu of going to trial. As said, other things being equal,[13] this equilibrium is a function of the relative "Cost" i.e. attorneys' fees and the perceived merits of the claims and defenses.

(i) Avoiding False Expectations: Maximum Benefit Requires Maximum Input

It is not unusual for a client to hesitate about beginning a Process with a probable cost of $5,000 or more when the case has a Value of $40,000 or more. This hesitation is not necessarily by clients who do not have the money. Some of these clients can satisfy Decision Rule 1; they have adequate funds. The problem seems to be a false assumption that the act of hiring a lawyer in and of itself, or perhaps of having the lawyer work up the case and draft a demand letter is going to solve the problem. To exaggerate to make a point: The party who has and is enjoying the benefit of having your Value is not going to release that, say $100,000 in Value in response to a $2,500 case work up and demand letter. This

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defensible. But my formula weights the amount to be spent by the likelihood of recovery, so is more conservative. The questionable assumption here is that one can know the "success percentage," and of course we cannot really know that, but we can have "feelings" about the case and the clients usually ask about that, so appreciate the exercise. One may apply this "formula" at any time during the litigation to see where one is then.

[12] This compelling "market force" to seek gain and avoid loss seems to be a metaphysical property of the human psyche if not the universe itself.

[13] We are not considering, for example, the quality of legal representation, convenience of forum and other potential influences.

idea is wrong as to both time and money. The Process just doesn't work that way. The parties will Follow the Money Rule and act accordingly until Equilibrium is reached.

Another way of saying this is: "Maximum Benefit requires Maximum Input." If a party wants to recover the full $100,000 in Value, then he will need to continue in the case until he wins the case on the merits by trial or summary judgment. Proportionate gains require proportionate time and expense. Realizing this may cause one to evaluate the Process in terms of its time, expense and affect on quality of life.

C. Ramifications Of Not Proceeding With Legal Action

Rule 3: Ask "What happens if I do not pursue legal action?" In evaluating his course of action the client should consider the following:

1. Not Knowing and Regret versus Quality of Life

Sometimes the client is not sure, or has doubts, about beginning the Process. On the one hand the client may be concerned that if he does nothing, then he will never know what could have been achieved by the Process ("Not Knowing"), and will later and "forever" regret the decision not to have done anything in response to the other party's misconduct ("Regret"). In that case, we ask the client to consider how he might feel about a decision not to proceed after a period of years, say 5 years or even 10 years. If, in thinking about the future, the client is concerned about Not Knowing or Regret, we might propose that the firm draft a demand letter to the offending party. There is some expense but usually little downside to working up the case and writing this demand letter, and, it has some advantages:

One advantage is that usually the recipient will take the demand letter to an attorney. As discussed above, often the parties Acting Out (in our example the business partners) do so out of "legal ignorance," by which I mean they do not know the legal significance and consequences of their actions. The advantage to us, then, of sending a demand letter is that it may get an attorney involved on the other side. And, as discussed in my article "Now Let Us Praise Opposing Counsel,"[14] while the Defendant may not respect the arguments or heed the warnings posited by Plaintiff or Plaintiff's legal counsel, he will usually listen to his own attorney. Thus, it can be Defendant's own attorney who can stop the Acting Out. At the same time, if the Defendant's attorney knows the area of law well, the attorneys may resolve the issues early.

[14] Copy available on the firm website Blog at azbuslaw.com or by request to the firm.

Though counter-intuitive, sometimes, the better the opposing attorney, the better the chance of early resolution.[15]

A second advantage of working up the case and sending a demand letter is that there are almost always facts our client does not know, facts the client has not told us, or instances in which the client has not realized the legal significance of important facts. These unknown or unappreciated facts may be revealed in the course of preparing the demand and receiving the response. The case work-up, letter, response, on-going and follow up consultations with the client serve to greatly diminish the fact and feeling of Not Knowing. The client may feel more or less inclined to pursue the Process after the demand letter and response, but in any case has done something to assuage or prevent that nagging sense of Not Knowing and Regret that could be caused by just walking away. The nagging "What If" has been sated.

2. Walking Away

In some cases, even where Decision Rules 1 and 2 are satisfied, regardless of the Value at stake and without regard to the apparent merits of the legal claims, the aggrieved party will decide just to take no action, i.e. "Walk Away." This may occur in the consultation when a client learns the time and trauma, *sturm und drang* (storm and stress) of the Process, i.e. the effect on quality of life ("Quality of Life").

The example of walking away I remember most is where the clients were a couple, quite elderly, and not in good health. The wife was not very mobile or active and the husband was in chemotherapy with the outcome of this treatment uncertain. In our initial consultation we discussed their case. It seemed to be strong under Decision Rules 1 and 2. We also discussed Decision Rule 3 and the stress of litigation and its affect on everyday life. Upon learning about and considering the *sturm und drang* of litigation, i.e. the effect on Quality of Life, the couple decided not to go forward. The potential negative implications on their personal life outweighed benefit they could gain by the Process to recover the Value in question. For them Quality of Life trumped Not Knowing and Regret; the Value lost was a "sunk cost."[16] They decided not to have

[15] This firm represented a CFO squeezed out by a local semi-conductor company. We were able to settle the dispute in about ten days because the parties were motivated and the attorneys knew the area of law so did not waste time on weak arguments.

[16] A "sunk cost" is a cost that has already been incurred and may not be recovered. It is rare that amounts already invested are not considered in making decisions about a project. But, logically, sunk costs should not be considered in making decisions going forward. Decisions about the future should be made on their own merits. This is the difference between real world behavior and pure economic theory. It is difficult to act as a rational, "economic being." I remember a recent comment by a prominent economist on EconTalk, a business news program available on Stitcher. Essentially what he said was "What we get from the pretty, impressive economic charts and graphs we prepare and study in Economics is how to prepare pretty, impressive charts and graphs. Their value in the real world is limited because they do not allow for what Adam Smith (perhaps the founder of modern capitalism) in his book The Theory of Moral Sentiments called "moral sentiments."

the firm pursue recovery of the lost Value, not even to the extent of writing a demand letter. They Walked Away. That may have been wise. In any case, I do not blame them.

III. Conclusion

Commercial litigation often begins with a party Acting Out. Often the party Acting Out, here the Defendant, does not realize the legal consequences of his conduct. Time spent in legal consultation, pre-litigation planning and management is well spent to optimize the time and manner of actions taken.

The party affected by the Acting Out, here the Plaintiff, must decide whether to begin legal Process against the Defendant. That decision can be a function of three Decision Rules: Adequate Funding, Cost-Benefit Ratio and Quality Of Life. "Market forces" underlying the Follow the Money Rule practically impel the parties to engage in legal Process to recover or retain the Value in dispute.

In commercial litigation the Plaintiff may have an initial disadvantage. The party Acting Out may have or control the Value belonging to or sought by the affected party and use Plaintiff's own money to pay for the defense. In that case the Plaintiff must have access to other funds to begin the Process. And, the Plaintiff has the burden to prosecute the case.

In contrast the party Acting Out may have less downside risk. If the Value includes money, Defendant's worst case outcome may be to pay or repay part of the Value to Plaintiff plus attorneys' fees for the Process. If the actual or anticipated total amount to be (re)paid, plus attorneys' fees, is less than the Value, then Defendant has few economic impediments to Acting Out or for settlement. Only after the Defendant begins to incur or anticipate significant Costs which equal or exceed the Value, does the Defendant have any logical reason to "come to the table." Worse, often the Defendant's actions so weaken the affected party that it cannot satisfy the first Rule of litigation: Having Adequate Funds.

However, on the upside, the Plaintiff may receive a damages award, perhaps punitive damages equal to several times the original Value, and be ordered to pay the Plaintiff's attorneys fee after having had to pay the fees of his own attorney. These factors cause Cost, as defined herein, to accrue against Defendant faster than to Plaintiff.

Of course the merits of the action are important – and considered here as part of the Cost – but even if Plaintiff (or Defendant) has Adequate Funds and the Cost-Benefit ratio is favorable, the impact of the Process on his Quality of Life may be more than he willing to bear. The purpose of these Decision Rules is not to encourage litigation, but, perhaps, to help explain why people sue, and to provide a means to evaluate, whether to engage in the Process at all.