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Neil Gillespie
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RE: Analysis of Case and Recommendation

Dear Neil,

My thinking on how to recommend that you should proceed has matured as I have reviewed the extensive materials you provided as well as carefully considered the matter. I have spoken with both Mr. Bauer as well as Mr. Rodeems at this point. I have also performed an economic analysis of the case, which is represented by a spreadsheet and an attached letter explaining the spreadsheet's figures and assumptions. **Please review the economic analysis materials before proceeding to read this letter.**

Merits of the Case

There are two challenges facing this case. The first is the diminished probability of success on the merits from this point forward in the case. The second challenge is the small total or economic projected recovery, compared to the high investment which would be required to achieve a successful verdict.

The case at this point is not a clear winner. The basic facts of the case make the case appear strong such that *if it were to get in front of a jury*, prospects for success on the merits are similarly strong because of the egregious disparity in the split between the attorneys and the plaintiffs in the AMSCOT case, which appears facially unreasonable (as you put it, 90% of the recovery was paid to the attorneys). But there are problems with the case that both may preclude it surviving until trial and also may serve to diminish any potential recovery even if it is litigated to a successful verdict.

The first substantive problem with the case is the fundamental confusion as to whether there is a contract (which is not entirely clear because the copy attached to the complaint is not executed), or whether there is no contract and the claim lies purely in tort (i.e., fraud). The economic loss rule, as properly alleged by the Defendants, precludes a suit for fraud in a breach

of contract case on the same transaction. Of the two possible claims (contract or tort), the contractual claim is probably stronger because it will be more difficult to prove actual damages in tort (i.e. if there was no fee splitting agreement by contract, Defendants will argue that the Defendant's split was proper even if wrongfully documented). The contractual claim is also easier to prove than a claim founded in fraud. The problem with the contract claim is that punitive damages are generally precluded in breach of contract.[1]

Many of the actions of the Defendants appear to have been reprehensible. As one example, it appears that the Plaintiff's name was forged onto the bottom of the "Closing Statement." However, the legal significance of this act is limited to defeating the affirmative defense of waiver (i.e. the Plaintiff never "accepted" the closing statement because it is not really his signature). Forgery is a crime and this forgery may give rise to some criminal liability, but it is not a basis for additional damages. Further, this issue will have to be litigated along with the other alleged defenses, adding to the cost of the litigation.

Even if the issue of liability were found in Plaintiff's favor, the Defendants have yet more arguments about the amount of damages. They may be able to show by *quantum meruit* that they are entitled to a portion larger than the 40% allowed by the Bar's rules.[2] It is not difficult to imagine that more than $50,000 in attorneys fees and costs may have been expended in the case, as it apparently was litigated through appeal. The court may give weight to an equitable *quantum meruit* argument, given that Plaintiff is relying on equity to such an extent and because of the potential unclean hands defense.

Next, the Defendants have some defenses which are not trivial, both legal defenses as well as equitable appeals which may be made to a jury. First, the letter written by Plaintiff advising the AMSCOT defendant that the settlement he agreed to was too large might be successfully characterized by the Defendants as an admission by Plaintiff that the damages are smaller than Plaintiff claims. Next, because Plaintiff inartfully worded a communication regarding his intention to file bar grievances against the Defendants in the same communication wherein a settlement was discussed, the possibility exists that Defendants may be able to successfully characterize this as an extortive and improper attempt to force a settlement where none was otherwise merited. This particular defense might be used by a skillful advocate to turn a jury against the Plaintiff and make the Plaintiff out to be a "professional litigator" instead of a deserving victim. Finally, pre-settlement documents exist suggesting that the Plaintiff admits he would have been satisfied with a $1,000 settlement amount, which will be used by

[1] . Farnsworth, *Contracts*, § 12.3, at 157 (3d ed. 1999) ("Punitive damages should not be awarded for breach of contract because they will encourage performance when breach would be socially more desirable.").

[2] In cases where there is no contract or a breached contract, the court will frequently set aside the language of the contract and look to the actual value of the services provided as a guide to how much an attorney should be paid. This doctrine is known as *quantum meruit*, a Latin phrase meaning "as much as he has deserved".

Defendants to imply that Plaintiff, who actually received twice that amount, is improperly trying to "grab" a share of an award that was larger than he expected. Furthermore, it appears from these documents that Plaintiff had prior knowledge of the amount he might receive in settlement and did not object at that time. The Defendants will use this fact to question why Plaintiff only objected after the fact.

The issue of the projected recovery looms large and advocates strongly against continuing the litigation. Even if the Plaintiff could prove he was entitled to a 55% share of the cost-adjusted recovery, that share must be reduced by two-thirds (because it would have had to have been shared with the other two plaintiffs in that case), making the actual damages relatively small. This affects the potential recovery for punitive damages, as three times the relatively small actual damages is still small. To put these figures in context, it appears that the Plaintiff has already paid twice the actual damages in attorneys fees to date in the case and there is still essentially no complaint filed.[3] I have seen nothing in the pleadings filed to date which would provide a legal basis for the Plaintiff to recover his fees and costs, which will be governed by the American Rule.[4] Therefore, setting aside the fees expended to date as a sunk cost, the economic analysis looks only at the costs of going forward, which do not justify the investment to recover either the projected economic recovery amount or even the full potential recovery amount.

Finally, my opinion is just that – an opinion. Another attorney might have a different take or discover another cause of action that would provide a larger potential recovery justifying the investment. For example, Mr. Bauer is more optimistic about success on the merits than I am. You may wish to consider getting another opinion. But, it appears from my analysis that the only substantive result of continuing to litigate would be an expensive "scorched earth" endgame or potlatch.[5]

Recommendations

[3] I.e. the current complaint is deficient and will have to be amended by a new complaint that is largely re-written, which will re-set all case deadlines and permit more discovery, new motions to dismiss, motions for summary judgment, and a new answer with affirmative defenses and counter-claims, all of which will have to be dealt with just as they were the first time around.

[4] The American rule provides that each party is responsible to pay its own attorney's fees unless specific authority granted by statute or contract allows the assessment of those fees against the other party. Under the American rule every party — even the party prevailing — must pay its own attorneys' fees. The American rule contrasts with the English rule, under which the losing party pays the prevailing party's attorneys' fees. Contrast this case with TILA or FDCPA claims, where both statutes provide for attorneys fees. Here, the claims are common-law and not statutory, and no basis has yet been proposed for payment of attorneys fees.

[5] An American-Indian ceremony whereby valuable possessions are destroyed in the sight of allies or enemies in order to demonstrate the strength or wealth of the destroying party.

Neil, I recommend that you negotiate and execute a three-way mutual release of all claims against the Defendants and Mr. Bauer. Given the economics of the case, the complexity of the current issues including those which have arisen since the inception of the case, and the physical, psychic and emotional toll it is taking on you personally, it seems to me that it is time to exercise mature discretion and abandon this project in favor of more productive activities.

In no way should you interpret my recommendation as a critique of your entitlement to the damages. I believe you win the abstract argument. The problem is that enormous cost is required in order to prove in a court of law that you are right. Furthermore, the issues have been clouded by the subsequent (understandable) actions of yourself and those of others.

I have spoken with both parties and I believe that some minor outstanding issues could be successfully negotiated. I think such an agreement is not only possible but likely if you concur with this course of action. Such a release should require no parties to pay any other party any amount. For example, Mr. Bauer told me that he would be willing to waive his outstanding attorneys fees to achieve the settlement and release from all current and future claims. The Defendants would waive any entitlement to their counter-claims. You would waive your claims against the Defendants and against Mr. Bauer for any potential professional malpractice or negligence.

Thus, by settling via a "walk away" agreement, you would relieved of liability for and thus to the good in the amount of almost $25,000 ($11,550 plus $12,517).

There is an outstanding issue of the disposition of approximately $600 in cash which has been garnished but not yet turned over. I believe it may be possible to require the other parties to allow you to keep this amount as part of the settlement, but this is not certain and the $600[6] should be considered a negotiating asset.

Neil, you may wish to work with Mr. Bauer to put this settlement together. Or, if you prefer to have independent counsel, I would be happy to represent you in drafting the settlement and causing it to be executed. My estimate for this service would be two hours (1.5 hours to draft an agreement satisfactory to all parties, and .5 hours for negotiating via phone and email).

I hope that you have found this analysis to be helpful.

Very best regards,

Jeff Childers

[6] Or whatever the actual amount is.