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A Defense Litigation Perspective: "Don't Snatch Defeat From the Jaws of Victory"

BY ROBERT R. LONG AND TEJAS S. PATEL

Imagine the following: a plaintiff files a wide-ranging lawsuit against your client and alleges nearly $100 million in damages. At the trial level, after hard fought battles, you secure a total victory—your motion for summary judgment is granted in a careful, well-reasoned opinion, all claims are dismissed, and the court enters judgment and closes the case. Your client is thrilled, and so are you.

Then, despite the well-deserved dismissal, the plaintiff appeals. How do you help ensure that the trial court's decision is affirmed?

In a recent case, *Cummins v. SunTrust Robinson Humphrey Capital Markets Inc.*,[1] our client SunTrust faced this very situation—a clear victory in the U.S. District Court for the Southern District in New York, followed by an appeal to the U.S. Court of Appeals for the Second Circuit. We were thrilled to have secured the trial court victory, but we knew that we needed a Second Circuit affirmance to avoid continued litigation by the plaintiff. We adopted four basic strategies to increase the chances of an appellate win and, ultimately, these strategies proved effective—the Second Circuit recently affirmed the district court's ruling in its entirety.[2]

Strategy 1: Add an Appellate Expert to the Team

While the lawyers who were involved in the case at the trial level should remain involved during the appellate process, it is important to add an appellate expert to the team to help carefully scan the appellate landscape and the unique challenges to be faced there. Our client agreed with this strategy.

Bringing an appellate expert onto the team during the appellate stage of the *Cummins* case gave us several advantages. First, we wanted someone on the team who was well-versed in appellate procedure. Second, introducing an appellate expert to the team made it easier to identify and frame the pertinent legal arguments at the appellate level to increase the odds of the appellate court affirming the trial court's decision. Third, our appellate expert brought a fresh perspective to the case and allowed us to revisit the arguments that were most persuasive.

Using an appellate expert may raise client concerns that a case is being overlawyered. And these concerns may be legitimate in cases where significant monetary or other legal exposure is negligible.

Nevertheless, in cases where your client has significant monetary or other legal exposure, appellate expertise can not only be important to winning, it can be the best decision for your client's bottom line for several reasons. First, the trial record is likely to be relatively limited in scope, particularly if the case was decided by

[1] 649 F. Supp. 2d 224 (S.D.N.Y. 2009), *reconsideration denied* 2010 U.S. Dist. LEXIS 25162 (S.D.N.Y. 2010).

[2] 2011 U.S. App. LEXIS 6112 (2nd Cir. 2011).

the lower court on a motion to dismiss or motion for summary judgment, and as a result, having an appellate expert get up to speed might not be a significant expense. Further, the appellate expert will know the applicable rules, which can save time and money by obviating the need to spend unnecessary billable hours researching the sometimes arcane appellate level requirements.

Finally, the client will certainly avoid major costs if the appellate court affirms the trial court's order and effectively cuts off the plaintiff's leverage to extract a settlement. Even better, an affirmance of a dismissal should put an end to the continued costs of defending against the claims.

Strategy 2: Don't Get in the Way of a Good Trial Court Order

When you have a thoughtful and well-reasoned order from the trial court, do not underestimate the value of tracking the court's order when briefing on appeal. When a trial court order is clearly well-reasoned, appellate courts are likely to take the trial court's significant care and thoughtfulness into account when deciding whether the trial court's reasoning should be second-guessed.

Even if you might quibble with certain points or the way the trial court characterized holdings in cases, be thoughtful about the potential disadvantages of undermining any portion of the order when, ultimately, the trial court sided with your client!

In the *Cummins* matter, we were fortunate to have had an extremely thoughtful, well-reasoned, and detailed order that was over 80 pages and thoroughly addressed each of plaintiff's allegations. Nevertheless, the trial judge's order did not simply adopt the arguments we advanced in our motion for summary judgment wholesale.

Thus, on appeal, we had to decide whether it was worth addressing points that we argued but that were either rejected or not addressed in the trial court's order. In the end, we decided that we were better off focusing on the points that the trial court judge found persuasive and highlighting and discussing in detail the relevant cases the trial court cited in support of its decision.

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Strategy 3: Don't Get in the Way of Successful Trial Court Arguments

On appeal, it is also important to remember the old adage: ''If it ain't broke, don't fix it.''

Our appellate team had no qualms about adopting—sometimes verbatim—the trial team's points that proved successful. It is a mistake to assume the appellate judges or clerks will read the trial court briefings. Repackaging that material in the appellate briefs is the best way to get the court to read the facts and argument presented in the way that got the job done at the trial level.

Lawyers sometimes assume that appellate judges and clerks like to wallow around in the trial court record. Usually, that is not true. After spending their energies sifting through the appellate briefings and the relevant evidence, it may well be that neither the appellate judges nor the clerks find it necessary to read the trial briefs.

Thus, in *Cummins*, our appellate team drew heavily on several portions of our trial court briefing, including the introduction, fact section, and various argument sections. As a result, the appellate team crafted a brief with points that had already proven persuasive and avoided spending unnecessary time on arguments that may not have been as effective or well received.

Strategy 4: Focus on Appellate Court Interests

While it is important to stay true to the arguments that already carried the day, the appellate team must also consider that the appellate judges' perspective and interests might vary from those of the trial judge. Thus, lawyers should focus on highlighting the arguments that were both successful at the trial level and that would appeal to appellate judges' perspectives and interests.

For example, in the *Cummins* matter, the parties did not agree on whether New York law or Texas law should apply. At the trial level, we argued that New York law applied; plaintiff argued that Texas law applied. The district court found that Texas law applied, but that even under Texas law, plaintiff's claims failed.

On appeal, we did not contest the finding that Texas law applied. In part, as mentioned above, we thought that it would be unwise to quibble with the trial judge's opinion when he had ruled so clearly and decisively in our favor.

A further consideration, however, was that the Second Circuit has much less interest in ruling on issues of Texas law. This was a point that our appellate expert made that might never have occurred to our trial team.

The Second Circuit is primarily focused on deciding issues and setting precedent on questions of federal law in the Second Circuit and, perhaps to a lesser extent, questions of New York state law. If we raised issues of federal law as interpreted by the Second Circuit or state law in New York, then we were likely to force the appellate court to opine upon those laws. In contrast, the Second Circuit was less likely to reverse a district court simply to address issues of Texas law—a state typically not within the Second Circuit's jurisdiction.

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For this reason, we decided that because the ideal situation was for the Second Circuit to simply affirm the district court's ruling and move on, it would be best not to raise issues of whether New York law applied, or whether the Second Circuit needed to consider issues of federal Second Circuit law or New York state law. We wanted to avoid giving the Second Circuit reasons to exact unwarranted scrutiny on the district court's decision.

Conclusion

Both our trial and appellate strategies were successful because we brought the appropriate expertise to the team. That team effort resulted in cost efficient advocacy that focused on points that were proven to be effective and likely to be persuasive. In the end, we believe that is the best formula for getting excellent results for clients.