Affirmative Business Litigation in the United States and in Other Countries

By Ira Neil Richards

For a long time, businesses have thought of litigation as a burden, requiring many hours of employee time responding to discovery requests, as well as often incurring significant legal fees and other related costs. Consequently, businesses, historically, have not welcomed lawsuits. However, that corporate business perspective has been changing in the United States and abroad, as businesses are recognizing lawsuits as an opportunity to convert business losses into profits.

In the United States, businesses are becoming increasingly active in taking affirmative steps to recover damages when they have potential claims against other businesses. This trend towards "affirmative litigation" is most notable as it relates to class action lawsuits in U.S. courts. In addition, businesses are considering whether claims can be asserted not just in the U.S. but in other countries, as well. Companies with operations outside the U.S. similarly are bringing claims in a variety of countries to recover damages, especially when there are allegations of anticompetitive conduct in multinational markets, including European, Asian, and Latin American markets.

In the U.S., in a class action, for the sake of efficiency, one business, small or large, can represent the interests of all other businesses in a single case. For example, in the case of alleged anticompetitive conduct, one business can represent all purchasers of a product against the manufacturers of the product if the manufacturers are alleged to have conspired to set prices, or otherwise have agreed to not compete with each other. Historically, in these instances, most businesses would have chosen to see if another business brought a class action lawsuit rather than bring their own case. In that situation, the business is choosing to be an "absent class member." That is, they would not do anything on their own, but would wait to see if they would be entitled to file a claim to get part of a class action recovery. Historically, by taking this passive approach, businesses have avoided many of the burdens of being a party to a lawsuit, while they still would have had the opportunity to get at least some kind of recovery.

However, businesses no longer are taking a passive approach because U.S. courts have made it more difficult for them to pursue class action cases. For example, now, courts take a closer look at whether one business can represent others in a class action, requiring more evidence before agreeing that there can be a class action claim. As a result, it now is riskier for businesses to take a "wait and see" approach, since there might not be any class action recovery for the business to share and, therefore, the business will need to consider whether to bring its own case.

If a business *is* entitled to participate in a class action case, it still must consider whether the best option is to remain in the class instead of pursuing a claim on its own. A business looking at whether to stay in or opt out of a class must consider that there might be limitations to the kind of recovery it can receive as part of the class. For example, if there is a recovery, the proceeds might be distributed in a way that is not tailored to that particular business' circumstances. In addition, the business needs to evaluate whether it has claims that it can pursue on its own that will give it a better chance of recovering more money than if it were to pursue claims along with the class, thereby foregoing those additional claims.

As a result, there has been a considerable increase in the number of businesses that are choosing to bring their own lawsuits to recover damages in situations where, in the past, they would have waited for a class action recovery. These affirmative business litigation cases provide opportunities for businesses to turn their law departments into profit centers, instead of costs centers, especially when the businesses systematically look for opportunities to pursue claims for recoveries. Businesses even have set up specialized teams within their legal departments that focus on bringing affirmative cases. Examples include claims against credit card companies for overcharging them on various fees, claims against auto parts manufacturers for alleged price fixing, claims against air and ocean cargo shipping companies for price fixing, and claims against manufacturers of a variety of computer or technological components for price fixing.

There are many factors that a business has to evaluate when considering whether to bring an affirmative litigation claim. These factors include the strength of the potential claims, the size of the potential recoveries, the costs of a lawsuit, and the relationships they have with the companies they would be suing. However, businesses pursuing these

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claims can contain their legal costs by retaining law firms willing to work on a contingent fee basis where the law firm's fee depends on whether there is a recovery. In addition to a contingent fee arrangement, there are a variety of other fee structures that law firms consider when they evaluate whether to pursue the claim on behalf of the business.

Schnader lawyers have significant experience in pursuing affirmative litigation claims for businesses, including serving as lead counsel in complex, multiparty lawsuits involving claims of anticompetitive conduct, securities fraud, and other types of business litigation claims. This experience enables Schnader to assist businesses in assessing options available in the U.S. and elsewhere as to whether to pursue claims for losses.

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