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Commercial Litigation Concerns

In the labyrinth of commercial litigation within our civil justice system, clients may find relief by following time-tested paths.

By George N. Saliba, Managing Editor

While both small and large businesses offer useful products and services to their customers, lawsuits in various iterations can wreak financial, productivity and emotional havoc on companies and their owners/employees. *New Jersey Business* magazine has previously explored how to avoid lawsuits, with companies striving to conducting business only with reputable persons and/or businesses, and by consulting attorneys who can carefully prepare contracts, and, among other tasks, identify areas that might subject their clients to liability. Overall, astute preparations and fair business dealings can often keep a company from having to file – or be served with – a lawsuit.

Yet, the business world is inherently replete with Machiavellian companies

and persons, and lawsuits –within the sphere of commercial litigation – may arise. The first step in dealing with a lawsuit, attorneys say, is to comprehend it with the correct mindset.

Anthony P. La Rocco, administrative partner at K&L Gates – who has handled extremely high profiles cases – says, "The approach 'millions for defense, not a penny for tribute,' is folly. Litigating on principle, while noble, is also folly. Becoming too emotionally involved in a case, and its outcome, to the point of losing objectivity and realistic expectation, is [a mistake]. Not knowing the judge presiding over your case, as well as possible – his or her likes, dislikes and proclivities – can be disastrous. Dictating strategy to your counsel is always a bad idea. Looking for a 'yes' person or a 'yes' man in your counsel, is likewise a bad idea. You must trust your counsel; you must respect your counsel – that's why you hired him or her. You must allow counsel to develop, articulate and execute - with the client's involvement - a practical, efficient and realistic plan of action. Each case is different, it is not cookie cutter – and each judge is different. … In addition, [sometimes] clients don't allow their attorneys to satisfy their legal obligations of due diligence, with respect to asserting a claim or defense, or conducting discovery, particularly discovery when it comes to electronically stored information; the clients must understand that the case needs to be prepared for trial. Even though you have one eye on trying to resolve it prior to then, you cannot proceed half-cocked; you must proceed as though the case is going to trial."

La Rocco adds, "The client should not insist upon a short-term, expedient or facile solution, or strategic move, in the hopes of advancing the ball to an early economic settlement. That's always dangerous. You must have a long-term plan, coupled with concrete, interim moves, or strategic moves, to advance the client's cause or position. I always see litigation as a three-dimensional game of chess. And 90 percent of litigation is strategy; 10 percent is execution and timing of the strategy."

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La Rocco also says, with great emphasis, "Neither the client nor the lawyer should ever, ever permit one or the other to engage in scorched earth, bad faith litigation conduct, for the sake of doing it. It is going to backfire, and it is going to backfire significantly, to the point where it can have reputational damage to not only the client, but also the lawyer and the law firm."

If that's the overview – and its sentiments are echoed by numerous attorneys – lawyers generally advise that a company involved in a lawsuit first endeavor to resolve a conflict via quality mediation. A skilled mediator can often assist parties with resolving their differences in a confidential way, which can help avoid further expense and nettlesome interaction, yet still permit the possibility of a trial at a later date, if necessary. Overall, the longer a dispute lasts, the greater its toll may be on the involved parties.

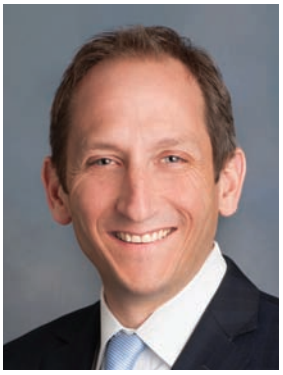
As an example of the perils of litigation, Stuart M. Lederman, a partner at Riker Danzig Scherer Hyland & Perretti LLP, says, "Clients have to remember that they have a business to operate. It is not only the cost of the litigation, or any dispute resolution [at stake]. You are going to have personnel, whom I am going to pull out of being productive and that I am going to have to spend time with, either learning the facts about the case, prepping them for deposition, or helping me deal with the [opposing] side, in terms of discovery and answering discovery. Those things take a lot of time.

"At some point, you are going to say to me: 'You can't use that person. I need them to do 'X.' When they are working with you, Stuart, they are not billing time. They are

not making the widget. They are not helping the client that's paying us.' People have to get past the animus [toward the opposing party in a lawsuit], quickly, or it just becomes a black hole. If I counsel clients early on about that - and clients recognize it – it allows them to make intelligent decisions throughout the process, and to recognize opportunities for resolving cases short of going to trial."

Most commercial litigators recognize that mediation is indeed an outstanding tool for resolving cases, and if it is conducted at the right time, it has a chance of success. Adam K. Derman, member of the firm and co-chair of Wolff & Samson's litigation group, says, "Sometimes clients are concerned that mediation is a waste of time. I view it as: Even if the case doesn't settle, you often set in motion a framework to settle the case, later on. If you have mediation at the beginning of the case, or at the middle of the case, you may not reach a resolution, but you learn something about both sides' positions, and how they will approach settlement. We find that we come back to that framework later on, when the parties are in a better position to settle."

While mediation is one form of alternative dispute resolution (ADR) – which, again, leaves open the option for a full-blown trial – arbitration is another form of ADR, which has different rules regarding the admission of evidence, may be costly, and, above all, is binding. Short of proving that the arbitrator accepted a bribe or committed another egregious action, an arbitration's outcome cannot be overturned. There may be more rapidity to arbitration, but if clients contractually agree to a blanket arbitration clause, attorneys advise that they generally face great risk. Yet, an arbitration cause may be crafted to permit some form of discovery. Riker Danzig's Lederman says, "In those circumstances, when you have drafted an arbitration clause that protects you from the arbitrator running amok, then arbitration can work well. The problem is that, most often, that doesn't happen."



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David R. Kott, partner at Newark-based McCarter & English and member of the New Jersey Supreme Court Working Group on Business Litigation, summarizes, "I do not like arbitration, because you lose the right to have a jury decide your case. I think juries usually get to the right decision. If I have a good case, I would rather it be before a jury. People think arbitration is less expensive, but often the arbitration procedures drag on for days and days, and days. And the rules of evidence don't apply in arbitration. There's a good reason for rules of evidence. They ensure that reliable evidence is admitted before the fact finder. And if you are not going to apply the rules of evidence - and in most arbitrations they don't - then the arbitrator is going to hear things that may not be reliable."

Court Trials

Arbitration aside, with a lawsuit, there are built-in opportunities for disposition of the case, through, for example, dispositive motion practice: Motions for summary judgment, partial summary judgment or motions to dismiss.

If, for whatever reason, a case heads to trial – its associated cost and unpredictable juries - will follow. In New Jersey, the courts are besieged with a variety of cases, and the New Jersey Supreme Court Working Group on Business Litigation has advocated for designating specific judges within vicinages to preside over commercial litigation cases, on a routine basis. That said, the Supreme Court is adverse to establishing separate courts such as a hypothetical veterans court, or a court to address gay and lesbian concerns.

McCarter & English's Kott says, "The Working Group on Business Litigation has made a recommendation, and written a report to the

Supreme Court, that is before the Supreme Court, at this time, for its consideration. It recommends expanding pilot programs in Bergen and Essex counties. We would not have a separate business court. There would be a business litigation track. In the vicinages, there would be one judge assigned to the business litigation track … and that judge, similar to the chancery division judges – if not already a specialist at business litigation and business issues – would become an expert. It's [analogous] to when you go to your family practitioner, and you have a problem with your heart. He or she may refer you to a cardiologist, because we think cardiologists are specialized. [In this case,] we essentially have a specialist judge who would understand the law that governs business disputes, and, again, understand the practicalities."

Against this potential civil justice reform backdrop, there is a tremendous focus on case management by magistrate judges, who are ultimately extensions of the actual district court judge. They work as a team to move a case toward final disposition.

In an actual trial, attorneys obviously extend their arguments to a judge and a jury. Wolff & Samson's Derman explains, "In terms of educating the judge or the jury, one of the hardest things for trial lawyers is that we learn so much information during the course of the case, but we have to pick and choose what is really important. Sometimes we create a theme, that we believe the jury or judge can understand or connect with. That may involve letting go of some of the facts that we learned along the way, and just focusing on the key ones. Those are hard decisions to make, because you don't want to look back and say, 'Well, I should have talked about this, or I should have added that witness.' But, the counter of that is that sometimes you can make something longer and confusing. The challenge, for commercial litigators and trial lawyers, is to present either your case or your story, in a way that people can understand."

Conclusion

Regardless of the outcome, entrepreneurs and executives must remember that the same intrepid spirit in their hearts that led them to boldly establish a company or lead one, must thoughtfully carry them through commercial disputes, and toward an outcome that is truly in their companies' best interest.

K&L Gates' La Rocco was ⁋one of the partners who led a team of other lawyers in a high-profile, massive dispute between a smaller company and a larger company. He tells *New Jersey Business*, "The adversary party was just excoriated by the court, for engaging in what – the court found – was scorched earth litigation, conducted by the party, and the actual plaintiff. These tactics were considered to be bad faith engagement of the judicial process, and we were awarded prejudgment interest, as a matter of the court's discretion, based upon a very, very difficult burden to meet."

Earlier, his client – Continuant CEO and founder Doug Graham – told Tacoma, Washington-based *The News Tribune* that the company spent "tens of millions of dollars" during the dispute. Graham was quoted as saying, "I quite frankly didn't realize that even when you're right, it is a difficult process. If I didn't have as good of a legal team, we wouldn't have won." NJB

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