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Chapter 71

Litigation Avoidance and Prevention

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Research References

Westlaw Databases

Business and Commercial Litigation in Federal Courts (4th ed.) (BUSCOMLIT)

Successful Partnering Between Inside and Outside Counsel (SPARTNER)

Treatises and Practice Aids

Haig, Business and Commercial Litigation in Federal Courts §§ 63:1 et seq. (4th ed.)

Haig, Successful Partnering Between Inside and Outside Counsel §§ 2:1 et seq.

I. INTRODUCTION

§ 71:1 Scope note

The goal of this chapter is to identify for the reader a number of fundamental issues that should be given careful consideration by any party seeking to eliminate (or at least minimize) the risk of potential litigation.

While it is impossible to catalog the countless circumstances in which disputes can arise, experience has shown that early attention and a well thought-out strategy for dealing with common issues that arise in everyday business activities—well before the onset of a dispute—can help limit a party's exposure to potential claims and better prepare it for dealing with those claims in the event they develop into full-blown litigation. The strategies include, among others, implementing procedures to ensure compliance with applicable laws and regulations, consideration of the consequences of business strategies on regulators, competitors and other potential adversaries, maintaining effective information governance systems, providing comprehensive and continuous employee training, and developing a good working relationship between business people and both in-house and outside counsel.[1]

The chapter will also review various considerations that both

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[Section 71:1]

[1]See §§ 71:5 to 71:11.

clients and their attorneys should evaluate once a dispute arises to determine if a mutually beneficial resolution of the dispute may be achieved before a lawsuit is even filed. These considerations include how to approach one's adversary, the value in preserving an ongoing business relationship, potential avenues for enhancing the parties' relationship in the context of the ultimate resolution, and the advantages of involving a third party to assist the parties in reaching the desired outcome.[2]

Finally, we offer some specific examples of these considerations in the context of particular types of claims and disputes that commonly result in litigation before the courts of New York State.[3]

§ 71:2 Preliminary considerations

As any seasoned businessperson or commercial litigator will readily acknowledge, disputes are an unavoidable part of doing business today. It would be impossible to enumerate all of the different situations and circumstances that could give rise to a dispute in the course of everyday business activities. Disputes comes in all shapes and sizes ranging from the relatively minor, like a contractual disagreement with a customer, to the significantly more important, such as a "bet-the-company" litigation that could threaten the company's continued existence.

Just as there are many ways in which disputes can arise, there also exist a number of approaches that can be adopted to resolve them. In particular, there has been a steady movement towards alternative dispute resolution methods, particularly in the context of commercial disputes, that do not involve litigation.[1] Yet, notwithstanding the different alternatives that have been developed, for the most part, litigation still remains the most commonly used form of dispute resolution.

When it comes to figuring out how best to resolve a dispute, there is unfortunately no "one-size-fits-all" rule that, if followed, will guarantee the desired result. Rather, like many of the issues in litigation, settling on the right approach will invariably depend on the circumstances. In certain cases, resorting to litigation may be the most advisable course of action in dealing with a particular conflict where, for example, other attempts at resolution have proved unsuccessful. In other cases, however, there may be more to gain—or, at least, less to lose—by pursuing options that seek to avoid the risk of litigation. Considerations relevant to deciding

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[2]See §§ 71:12 to 71:16.

[3]See §§ 71:17 to 71:23.

[Section 71:2]

[1]See generally Chapter 69, "Arbitration" (§§ 69:1 et seq.); Chapter 68, "Mediation and Other Nonbinding ADR" (§§ 68:1 et seq.).

whether, when, and how to pursue such options are the focus of this chapter. At first glance, some of these considerations may seem obvious or instinctive to the reader, and, to be sure, some of the ideas discussed in this chapter are based on common sense. At the same time, certain of these issues involve subtleties and nuances that deserve specific attention because they can have a material impact on the ultimate result.

§ 71:3 Reasons to avoid litigation

One of the most commonly-cited reasons for avoiding litigation is the monetary cost. Litigation is expensive, and complex commercial litigation can be especially so. To most businesspeople, the cost of litigation is viewed primarily as comprising attorneys' fees. And while those fees do often constitute a very significant component of the overall cost, there are a number of other expenses that can be significant in and of themselves. One prime source of such expenses is discovery. The prevalence of electronic documents and communications in today's information technology age has resulted in an exponential increase in the volume of discovery typically generated in commercial cases.[1] That growth has resulted in a corresponding escalation of the costs involved. Another potentially significant expense that is not uncommon in commercial matters is that of engaging an expert—or typically, multiple experts—for purposes of pretrial consultation and advice as well as to provide expert testimony at trial. For these reasons, it should come as no surprise that the total cost of litigating a commercial lawsuit through trial in New York State courts can easily run into the millions of dollars. And if an appeal is taken, the number only gets bigger.

Another related concern often raised by corporate managers about the detrimental impact of litigation is the considerable drain it imposes on management's time and resources. Although outside counsel is usually tasked with the primary responsibility for managing the litigation on behalf of the company, they cannot effectively discharge that responsibility without active involvement by relevant personnel at the company. In particular, employees with direct knowledge relating to the subject matter of the litigation are a vital source of information for litigation counsel in its investigation of the underlying facts, and those employees are also likely to be called on to serve as fact witnesses at trial. Separately, other employees may be required to devote time and resources to assist with discovery and other pretrial preparations. Given that the average timeline for preparing a

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[Section 71:3]

[1]See generally Chapter 30, "Document Discovery" (§§ 30:1 et seq.).

case for trial is measured in years (as opposed to months), notwithstanding efforts by the New York courts to streamline case management deadlines,[2] litigation continues to be seen by many clients as an unwelcome interference with their day-to-day business activities.[3]

Where a dispute arises between two parties who have a pre-existing business relationship, such as between a company and its customers or suppliers, avoiding litigation takes on special significance. It is not difficult to see how the adversarial nature of the process may inflict long lasting damage on the relationship even though the specific issue involved in the lawsuit may be relatively minor when viewed in the context of the parties' overall relationship. As explained below, in such situations, rather than risking such damage to the parties' relationship, serious consideration should be given to whether the existing ties between the parties may provide a useful starting point for fashioning an end result that not only resolves the current dispute, but also enhances the benefits to both sides from continuing their relationship.[4] Another reason to avoid litigation is that it is inherently public. Save for very limited exceptions,[5] pleadings and other documents filed in New York State courts are accessible to members of the public generally, and in particular, to the press. For certain high-profile companies, the very fact that a lawsuit has been filed invariably attracts unwanted attention. Once information about the lawsuit is made public, the company may, depending on the nature of the lawsuit, need to take steps affirmatively to address the impression created by such publicity in the minds of numerous parties, including its customers, suppliers, peers, investors, or government regulators. Closer to home, news of a significant lawsuit may also have an adverse impact on employee morale, which would need to be addressed promptly by the company.[6]

Finally, all litigation involves an element of risk. No matter how strongly the client, or its attorneys, may feel about their chances of prevailing, the very act of placing resolution of the matter in the hands of a third-party decision maker—who knows

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[2]See generally Chapter 39, "Practice Before the Commercial Division" (§§ 39:1 et seq.).

[3]See, e.g., Polizzotto, Preventing Retail Brokerage Litigation, A.L.I.—A.B.A. Continuing Legal Education, January 13, 1994.

[4]See § 71:15.

[5]See, e.g., 22 NYCRR § 216.1, N.Y. Ct. Rules § 216.1 (Sealing of Court Records in Civil Actions in the Trial Courts) (providing that documents filed with the court shall not be sealed unless the court makes a finding of "good cause"); see generally Chapter 28, "Sealing of Court Records" (§§ 28:1 et seq.).

[6]See generally Chapter 72, "Crisis Management" (§§ 72:1 et seq.).

far less about the complexity of the dispute than the parties themselves—requires surrendering an element of control over the outcome. The parties must ask themselves whether they really want to hand over a dispute they care so much about to total strangers who may or may not even understand it. Viewed in this light, early attention to potential avenues for resolving a dispute outside of litigation is essentially just another facet of effective risk management and mitigation.

§ 71:4 Congestion in New York State courts

"Justice delayed is justice denied."[1] Courts in New York State are among the busiest in the country. While the available statistics do not break out commercial disputes as a separate subset, of the 3,101,891 cases filed in 2018, 1,334,710 of those filings were in civil matters, and of those civil cases, 460,063 filings were in the Supreme Court of New York State.[2] That number is significantly higher than the 24,616 civil cases filed in the district courts in all four of New York's federal districts during the 12 month period ending December 2018.[3]

As a result of progressively increasing caseloads and shrinking staffing brought on by State budget constraints, trial courts in New York have remained significantly over-utilized and understaffed for many years. From the perspective of many commercial practitioners and their business clients, the overburdened dockets and lengthy delays in proceedings made New York an unattractive forum for litigation.[4] However, towards the late 1990s, this trend began to reverse itself, largely due to the establishment of the Commercial Division of the Supreme Court in 1995.

Conceived as a specialized court of original jurisdiction in the New York State court system, the Commercial Division is devoted exclusively to hearing complex business disputes. The judges of the Commercial Division, who remain assigned to each case from

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[Section 71:4]

[1]William E. Gladstone, British Statesman and Prime Minister, 1809–1898.

[2]New York Unified Court System, 2018 Annual Report, at 39, Table 4 (available at http://www.nycourts.gov/legacypdfs/18_UCS-Annual_Report.pdf).

[3]See Administrative Office of the United States Courts, Federal Judicial Caseload Statistics 2018 Tables: Table C., U.S. District Courts—Civil Cases Filed, Terminated, and Pending During the 12-Month Periods Ending December 31, 2017 and 2018 (available at https://www.uscourts.gov/statistics/table/c/statistical-tables-federal-judiciary/2018/12/31).

[4]The Commercial Division of The Supreme Court Of The State Of New York—Celebrating a Twenty-First Century Forum for the Resolution of Business Disputes, January 25, 2006, at 4 (available at http://www.courts.state.ny.us/courts/comdiv/PDFs/ComDiv-Jan06.pdf); see generally Chapter 1, "Commercial Litigation in New York State Courts" (§§ 1:1 et seq.).

filing to final disposition, pay very close attention to case management and scheduling, and also take an active role in supervising discovery and other pretrial proceedings with a view to preventing unnecessary delays and costs. Another feature of the Commercial Division that has contributed to its success is the vigorous use of pretrial motions to dispose of cases. The Commercial Division is also one of the first New York courts to have implemented mandatory electronic filing for all cases, thereby eliminating many of the inefficiencies and costs associated with the traditional paper-based docket system. Since its establishment, the court has periodically adopted various rule amendments—covering a diverse array of subjects including an opt-in program for resolving cases under "accelerated" procedures, procedures for parties to request an "immediate trial or evidentiary hearing" on potentially dispositive factual issues, guidelines for discovery of electronically stored information, voluntary informal discovery to aid potential early settlement, and simplified requirements for privilege logs[5]—all of which are designed to streamline and reduce the overall costs and time for litigating commercial cases. The court has also attempted to facilitate early resolution of cases by encouraging use of its Alternative Dispute Resolution Program and requiring counsel to certify that he or she has discussed the availability of mediation with the client in advance of the preliminary conference.[6] Overall, judges and practitioners in New York have viewed the Commercial Division as a resounding success given the positive impact it has had on the time and costs involved in resolving commercial and business litigation.[7]

While the improvements brought about by the introduction (and subsequent expansion) of the Commercial Division have

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[5]See 22 NYCRR § 202.70(g)(9), N.Y. Ct. Rules § 202.70(g)(9) (Commercial Division Rules) (Accelerated Adjudication Actions); 22 NYCRR § 202.70(g)(9-a), N.Y. Ct. Rules § 202.70(g)(9-a) (Commercial Division Rules) (Immediate Trial or Pre-Trial Evidentiary Hearing); Rules of the Commercial Division of the Supreme Court, 22 NYCRR § 202.70(g)(11-c), N.Y. Ct. Rules § 202.70(g)(11-c) (Commercial Division Rules) (Discovery of Electronically Stored Information from Nonparties); 22 NYCRR § 202.70(g)(8)(a), N.Y. Ct. Rules § 202.70(g)(8)(a) (Commercial Division Rules) (Consultation prior to Preliminary and Compliance Conferences); Rules of the Commercial Division of the Supreme Court, 22 NYCRR § 202.70(g)(11-b), N.Y. Ct. Rules § 202.70(g)(11-b) (Commercial Division Rules) (Privilege Logs).

[6]See 22 NYCRR § 202.70(g)(10), N.Y. Ct. Rules § 202.70(g)(10) (Commercial Division Rules) (Certification Relating to Alternative Dispute Resolution).

[7]The Commercial Division of The Supreme Court Of The State Of New York—Celebrating a Twenty-First Century Forum for the Resolution of Business Disputes, January 25, 2006 at 3 (available at http://www.courts.state.ny.us/courts/comdiv/PDFs/ComDiv-Jan06.pdf); see generally Chapter 39, "Practice Before the Commercial Division" (§§ 39:1 et seq.).

ameliorated some of the concerns about litigating commercial cases in New York State courts, there still remain, as discussed herein, sufficient compelling reasons why litigation should be viewed as a last resort, not a first response.