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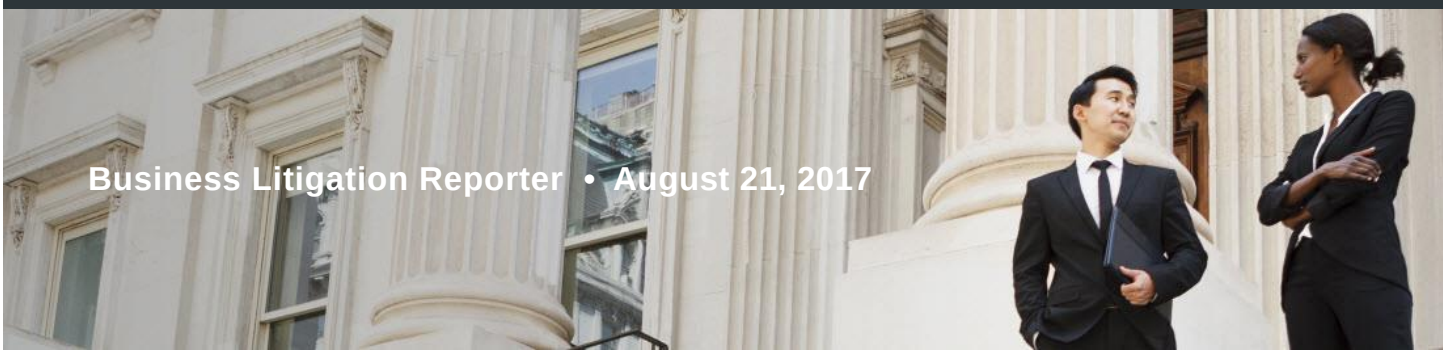

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Though law firms have been handling litigation on behalf of corporate clients for decades, industrywide surveys continue to suggest that, in a significant portion of cases, these clients feel they are not receiving very good “value” for their outside litigation spend. For most clients, value is typically based on two key factors: first, that outside counsel put the client’s best case forward, and second, that the client paid a fair price for those efforts. We describe concrete steps the parties should take to ensure that clients receive good value in litigation matters.

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1 PARTNERING WITH OUTSIDE COUNSEL TO FIND VALUE

Though law firms have been handling litigation on behalf of corporate clients for decades, industrywide surveys continue to suggest that, in a significant portion of cases, these clients feel they are not receiving very good “value” for their outside litigation spend. For most clients, value is typically based on two key factors: first, that outside counsel put the client’s best case forward, and second, that the client paid a fair price for those efforts. A client may not feel that it has received good value if outside counsel failed to present the client’s best case, or if a favorable result came at a cost that exceeded the client’s expectations.

Open communication between client and outside counsel, from the start of a case through its conclusion, remains the best way to ensure the client obtains – and believes it has obtained – good value from its counsel. Recent improvements in both technology and resources at leading law firms provide tools that can also assist both in presenting the client’s best case as efficiently as possible and in maximizing the accuracy of a litigation budget.

Increasingly, helpful information is available on maximizing client value. Here are some of the ways clients and counsel can make sure the client will be satisfied with the value received for its litigation spend:

1. **Review the Litigation**. Instead of just assigning a piece of litigation to counsel, discuss with prospective outside counsel the importance of the litigation to the company. Make sure counsel understands the business and reputational impact of the litigation for the company. Discuss and agree upon the litigation strategy at the outset (understanding that strategies may evolve), check that the key legal and business people at the company are on board with that approach, and make sure outside counsel is prepared to implement the agreed-upon strategy.
2. **Scope**. Agree on foreseeable issues as to how the litigation will proceed. How many witnesses will there be and who are they? How many documents will need to be reviewed and produced? How many experts are anticipated? Will there be motion practice? Will opposing counsel or jurisdictional complexities create complications? Can some work be done in-house or by contract attorneys? These important considerations help to ensure that in-house and outside counsel have a baseline understanding about what the litigation will entail and what the client expects from the representation.
3. **Use Knowledge Management and Artificial Intelligence to Predict Cost**. Outside counsel should assess, based on the likely scope of the matter, the projected total cost using standard hourly rates. Both the client and outside counsel should understand this cost and the assumptions on which the assessment was made. Consider leveraging the firm's and the client's historical data on matters similar to the case at hand to better understand the potential costs. Using internal firm resources, outside counsel should be able to identify comparable matters by matter type, jurisdiction and outcome in order to identify the range of costs required for the most likely potential results. Advanced data analytics and artificial intelligence can also yield substantial benefits here. New tools such as IBM Watson's Outside Counsel Insights, while requiring significant up-front investment, can ultimately help clients leverage documents, time entries, work patterns and other matter information to identify inefficiencies and deviations from billing guidelines, providing greater transparency to all parties concerning work efficiency. Other vendors and applications will likely be moving into this space as the capacity and accessibility of data analytics spread.
4. **Align Interests**. Once the likely scope and estimated cost of the representation are understood, outside counsel can make a customized proposal that highlights how value can be achieved through strategically aligned interests. There is no one-size-fits-all when it comes to charging for legal services. In some circumstances it may be in both sides' interests to use a traditional hourly rate payment structure. Or an alternative fee arrangement may be appropriate. A client may want an arrangement that entails a lower hourly rate with a success fee to counsel if a successful outcome is achieved. Or the client may want more cost certainty at the outset, and prefer a fixed-fee payment structure. This topic should be discussed at the outset to align the interests of the client and outside counsel for the particular representation.
5. **Use Knowledge Management For Streamlined Matter Execution**. Knowledge management can assist outside counsel in executing matters, connecting practitioners to the substantive work product samples, exemplars, forms and know-how they need to do the work more efficiently. Companies should expect their outside counsel to leverage these resources to improve efficiencies and gain insights into the judge, forum, opposing party, opposing counsel, etc., and to use these resources and insights to manage the case to the agreed-upon budget.
6. **Communicate and Reassess**. Client and outside counsel must communicate regularly to evaluate shifting factors and make appropriate adjustments. The scope of litigation often changes, for better or for worse. A matter that was anticipated to involve months of discovery and a lengthy trial may be limited by agreement of the parties or court orders. Conversely, a matter for which limited discovery was anticipated could greatly expand based on the actions of opposing counsel or the court. These kinds of changes must be assessed against initial estimates of the scope and cost of the litigation to ensure client expectations remain aligned with outside counsel.
7. **Follow-up**. When the engagement has ended, schedule time for key representatives to discuss the matter and whether good value – in work product and in cost – was achieved. Examine how the value to the client changed over the life of the matter and have a concrete discussion about how to use this engagement to deepen a mutually beneficial relationship between the client and counsel in future matters.

A successful, value-driven litigation proposal makes an investment in a client in a way that is both quantifiable and meaningful to counsel and client. Execution of a value-driven proposal at the outset drives the key components of a successful lawyer/client relationship: efficiency, trust, predictability and sound legal judgment. Client and counsel should choose an approach that best aligns their interests for the particular representation at hand. They must also be able to adapt to changing goals and priorities inherent in a legal representation, and communicate regularly about these changes to foster a successful, long-term relationship.

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2 BUSINESS LITIGATION COURTS CASE SUMMARIES

CALIFORNIA

Arbitration Clause That Bars Seeking Public Injunctive Relief Is Invalid: In *McGill v. Citibank, N.A.*, S224086 (Cal. Apr. 6, 2017), a Citibank customer filed a class action under California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. As part of her relief, plaintiff requested an injunction in favor of the public prohibiting Citibank from engaging in the challenged marketing practices. Citing an arbitration clause in the customer agreement, Citibank sought to compel arbitration. The California Supreme Court held that the arbitration clause was invalid because it prohibited the plaintiff from seeking public injunctive relief not just in arbitration but in any forum – which, the court held, violated substantive California state law.

Party That Obtains Forum Non Conveniens Dismissal of Contract Claim Is Not Entitled to Attorneys' Fees: The parties' software-related contract at issue in *DisputeSuite.com LLC v. Scoreinc.com*, S226652 (Cal. Apr. 6, 2017), specified that any dispute would be resolved in Florida. When the plaintiff nevertheless filed a breach of contract action in California, the court dismissed the case for forum non conveniens based on the forum selection clause. The defendant then sought to recover more than $80,000 in fees from litigating the motion to dismiss pursuant to California Civil Code § 1717, which provides that the prevailing party in certain contract actions may recover attorneys' fees and costs. The California Supreme Court held that although the defendant had won its motion to dismiss, it was not entitled to recover its attorneys' fees under Section 1717 because it had not achieved a final victory as to the parties' contract dispute.

After 17 Years of Litigation, Court Dismisses Cross-Claim for Lack of Jurisdiction: The Ninth Circuit, in *Herklotz v. Parkinson*, Nos. 07-56657, 07-56662 (9th Cir. Feb. 14, 2017), reminded litigants that a federal court may exercise jurisdiction over a severed cross-claim only if that claim has its own jurisdictional basis. In 2000, WRS Inc. filed a federal court suit in Pennsylvania against various defendants, and defendant Herklotz – a California resident – had asserted a state law cross-claim against the other defendants – also California residents. In 2007, WRS was granted summary judgment, and the cross-claims were severed and transferred to federal court in California. On appeal from a merits ruling on the cross-claim, the Ninth Circuit held that the federal court lacked subject matter jurisdiction over the cross-claim. The court rejected Herklotz's argument that the district court retained supplemental jurisdiction over the claim, holding that once a cross-claim is severed, it becomes an independent action and requires an independent basis for jurisdiction.

California's Expansive Assertion of Jurisdiction in Multi-Plaintiff Cases Is Overturned: Issuing a much-needed corrective ruling in a case described in our last issue, the United States Supreme Court, in *Bristol Myers Squibb Co. v. Superior Court of San Francisco County*, No. 16-466 (U.S. June 19, 2017), reversed a California Supreme Court decision which had held that a California court had personal jurisdiction over an out-of-state defendant for tort claims asserted by numerous out-of-state plaintiffs, as well as for the claims asserted by in-state plaintiffs, because all of the claims allegedly arose out of a "single, coordinated, nationwide course of conduct." The U.S. Supreme Court, calling the California Supreme Court's approach a "loose and spurious form of general jurisdiction," held that because the out-of-state plaintiffs' claims did not arise from conduct by the defendant in California, the California court lacked specific jurisdiction over the defendant with respect to the out-of-state plaintiffs' claims.

DELAWARE

Allegations That Board Was Not Adequately Informed Establish Demand Futility Needed to Bring Shareholder Derivative Action: Under Delaware law, the failure of shareholders to make a pre-suit demand before filing a derivative action will be excused if particularized allegations in the complaint create reasonable doubt, measured by the concept of gross negligence, that the board was adequately informed in making the challenged decision. In *H&N Management Group, Inc. v. Couch*, 2017 Del. Ch. LEXIS 140 (Aug. 1, 2017), the Court of Chancery held that this test was met based on allegations that the board's compensation committee had met only briefly to discuss the issue even though the challenged management agreement was the company's largest annual expenditure, did not hire any external advisers, was conflicted, based its decision on only information from the manager itself, and did not conduct a thorough review of the manager's performance.

Minority Shareholders Denied Access to Privileged Corporate Documents to Support Derivative Action: In *Salberg v. Genworth Financial, Inc.*, No. 2017-0018-JRD (Del. Ch. July 27, 2017), the Chancery Court addressed whether a corporation must produce privileged documents in response to a shareholder's section 220 books and records demand. The court observed that minority shareholders alleging a breach of fiduciary duty may obtain privileged documents by showing "good cause," and that the three factors with "particular significance" are "the colorability of the claim," "the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing," and "the apparent necessity or desirability of shareholders having the information and availability of it from other sources." The court held that the plaintiffs had not shown good cause because they were using the section 220 request to obtain documents to use in a derivative action that they would not have been able to obtain through discovery in the derivative action itself.

MASSACHUSETTS

Agreement's Choice-of-Law Provision Does Not Control Which Statute of Limitations Governs Disputes: In *Petrucci v. Esdaile*, No. 1684-cv-03998-BLS2 (Suffolk Sup. Ct. May 31, 2017), the plaintiff asserted claims for breach of contract, breach of fiduciary duty and unfair business practices against the defendants. The defendants invoked the Delaware choice-of-law provision in the operating agreement and argued that the plaintiff's claims were time-barred under Delaware's three-year statute of limitations. The Business Litigation Session of the Suffolk County Superior Court (BLS), however, held that Massachusetts' six-year statute of limitations applied because Massachusetts had a more substantial relationship to the claims than Delaware, as the parties lived and worked in Massachusetts and the operating agreement was signed and allegedly breached in Massachusetts. The BLS reasoned that the choice-of-law provision did not "expressly address limitations periods" and, thus, did not "control which State's statute of limitations" applied in the case.

Preliminary Injunction in Non-Competition Case Denied Due to Delay and Type of Allegedly Misused Information: In *Easy Access Distribution, Inc. v. Potter, et al.*, No. 1784-cv-01105-BLS1, 2017 WL 2466128 (Suffolk Sup. Ct. Apr. 24, 2017), the Business Litigation Session of the Suffolk County Superior Court (the BLS) denied the plaintiff company's motion for preliminary injunction seeking to enjoin its former employee and his new company from competing with the plaintiff or soliciting its vendors or customers. The company alleged that the former employee breached a non-competition agreement by copying the company's customer contact list and forming the competing enterprise. In denying the motion for a preliminary injunction, the BLS held that the company failed to establish that the former employee breached his non-competition agreement because the only "confidential information" the former employee allegedly used was a customer list that the BLS determined was not a trade secret under the circumstances. The BLS also ruled that the company had not shown irreparable harm, as the company had known for months that the former employee had formed a competing company and had information suggesting that the former employee had taken the customer list, yet the company delayed in seeking preliminary relief.

NEW YORK

Allegations of Lost Opportunity, Potential Loss of Reputation, and Potential Litigation Expenses Are Insufficient to Support a Fraud Claim: Under New York law, a claim of fraud must allege actual, out-of-pocket damages. In *Connaughton v. Chipotle Mexican Grill, Inc.,* et al., 29 N.Y.3d 137, 75 N.E.3d 1159 (2017), the plaintiff chef claimed that he was fraudulently induced to enter into an agreement with defendant Chipotle by its failure to disclose a prior arrangement with another chef. The New York Court of Appeals upheld dismissal of the complaint because it merely alleged a "lost opportunity" to enter into an arrangement with another company, "which [is] not a recoverable out-of-pocket loss." Justice Rivera also held that the plaintiff's allegations that he might incur litigation expenses or suffer a loss of reputation if sued by the other chef similarly did not constitute not actual, out-of-pocket losses.

Corporate Officer's Access to Financial Information Is Insufficient to Establish Liability for Fraud: In *RKA Film Fin., LLC v. Kavanaugh*, 2017 N.Y. Misc. LEXIS 2459, 2017 NY slip op. 50846(U), 56 Misc. 3d 1203(A) (N.Y. Sup. Ct. June 27, 2017), the plaintiff claimed that it had been fraudulently induced to invest in a media company and it sued, among others, one of the company's officers (Steve Mnuchin) on the theory that he could have determined through his access to the company's financial information that loaned funds were not being used for their previously represented purpose. Justice Ramos granted Mnuchin's motion to dismiss on the ground that (a) he did not make any of the alleged misrepresentations, which occurred before he joined the company, and (b) even if he had been aware of the alleged misconduct (which he was not), he had no fiduciary or other duty of disclosure to the investor. Justice Ramos emphasized that an officer's "[m]ere knowledge (or awareness) of [a company's] finances is inconclusive to establish fraud absent evidence of any representation made by" the officer.

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