Phillips Lytle LLP

Beyond Dispute

SEPTEMBER 2012

A BUSINESS AND COMMERCIAL LITIGATION REPORT FROM PHILLIPS LYTLE

The Commercial Division: the "Business Court" of the New York State Supreme Court

New York State has always been a commercial hub, but until the 1990s the litigation needs of businesses were not being met because dockets were overloaded and judges, without specialized experience in commercial issues, did not always invest the time and research necessary for complex commercial cases.

Attorney Advertising

"The Commercial Division" continued from front cover

In 1995, New York created the Commercial Division, a business court for commercial litigation in the state trial courts. The Commercial Division began in New York and Monroe Counties, but now has 25 judges across 10 jurisdictions statewide. The Commercial Division located in Erie County hears cases from the eight Western New York counties that comprise the Eighth Judicial District. Similarly, the Monroe County Commercial Division has expanded to hear cases from eight counties comprising the Seventh Judicial District. In addition to Erie, Monroe, and New York Counties, the remaining Commercial Division parts are located in the Counties of Onondaga, Albany, Kings, Queens, Nassau, Suffolk and Westchester.

The goals of New York's Commercial Division courts are to reduce expenses and promote efficiency and consistency in the disposition of commercial cases, while at the same time developing the relevant judicial expertise. The Commercial Division is truly a "business court" where the judges are dedicated to hearing commercial cases only.

Once a lawsuit has been filed, any party can request assignment to the Commercial Division for the following types of cases, so long as the monetary threshold is met:

- Breach of contract, fraud, unfair competition, non-compete covenants and trade secrets
- Commercial banking controversies and lender liability
- Shareholder derivative, corporate governance and dissolution disputes
- Partnership disputes
- Environmental and commercial insurance coverage disputes
- Transactions involving commercial real property
- Real property tax assessment challenges where the value of the property is in excess of $1,000,000
- Transactions governed by the Uniform Commercial Code

The monetary threshold ranges from $25,000 in Onondaga County, Albany County and the Seventh Judicial District (Rochester and surrounding counties) to $150,000 in New York County.

The monetary threshold in the Eighth Judicial District, including Erie and Niagara Counties, is $50,000. However, certain matters are expressly excluded from the Commercial Division regardless of whether they meet the monetary threshold amount: suits collecting professional fees; cases seeking declaratory judgment regarding insurance coverage for personal injury or property damage; residential real estate disputes; proceedings to enforce judgments (regardless of the nature of the underlying proceedings); first-party insurance claims and actions by insurers to collect premiums or rescind non-commercial policies; and attorney malpractice actions unless they arise out of a commercial matter.

The Commercial Division justices typically have greater expertise than their counterparts in non-commercial parts in the complex issues that arise in commercial cases, as well as in areas such as electronic discovery disputes that are increasingly prevalent in business litigation. Moreover, the Commercial Division justices and their staff take a "hands on" approach to their cases, conducting preliminary conferences early in each case to establish discovery and motion deadlines and to target a trial date.

While the Commercial Division operates pursuant to statewide uniform rules of procedure, there are some differences among counties and judicial districts. For example, counsel appearing in New York County's Commercial Division must electronically file all papers in the action. At present, electronic filing remains voluntary in other counties and districts. Additionally, some Commercial Division justices have individual rules of practice that supplement the uniform rules of procedure, and may differ from justice to justice, such as whether oral argument on motions is required.

Another unique feature of the Commercial Division among the state trial courts is that its rules expressly require early assessment of electronic discovery issues. Specifically, at the preliminary conference, counsel must be sufficiently familiar with their clients' computer systems so that they can competently discuss all electronic discovery issues that may arise in the case. These rules permit counsel to bring a client representative or outside expert "to assist in such discussions." It is therefore imperative that commercial clients and counsel assess the clients' computer systems, mobile devices, data access and retention issues early in the litigation.[1]

At any stage of a case, a Commercial Division justice may refer the matter to mediation or for a settlement conference before a neutral third-party, a staff attorney or the judge him/herself. Such independent analysis of the strengths and weaknesses of a case and push for early resolution can be particularly useful in commercial disputes where the litigation costs, including electronic discovery costs, can be significant.

A newly-created Task Force on Commercial Litigation in the 21st Century will look for ways to further improve the speed and efficiency of commercial case resolution going forward. The Task Force is slated to consider proposed legislation to appoint seasoned commercial litigators as new judges, increasing referrals to alternate dispute resolution and establishing protocols to control electronic discovery costs.

Overall, the Commercial Division has reduced the time necessary to resolve commercial disputes and improved the quality of decision making in commercial cases. Because of this success, New York's Commercial Division has served as a model for other jurisdictions, across the United States and internationally, that are interested in creating business courts.

If you seek more information about the Commercial Division, please contact Patricia A. Mancabelli, Associate in the Phillips Lytle Business & Commercial Litigation practice, at (716) 504-5777 or pmancabelli@phillipslytle.com. Phillips Lytle attorneys Joseph B. Schmit and Richard T. Tucker were contributing authors to this article. ■

[1] *Phillips Lytle has an in-house E-discovery Support Team dedicated to assisting our attorneys and clients with these complex electronic discovery and technology issues.*

E-Newsletter Sign-up

Different people have different preferences in communication styles. Therefore, Phillips Lytle is offering this newsletter in an electronic format as well as the printed version. To start receiving *Beyond Dispute* via e-mail, visit our website at www.phillipslytle.com and click on "E-Publication Sign-up" under the Publications menu.

The Value Created by Bringing Your Case

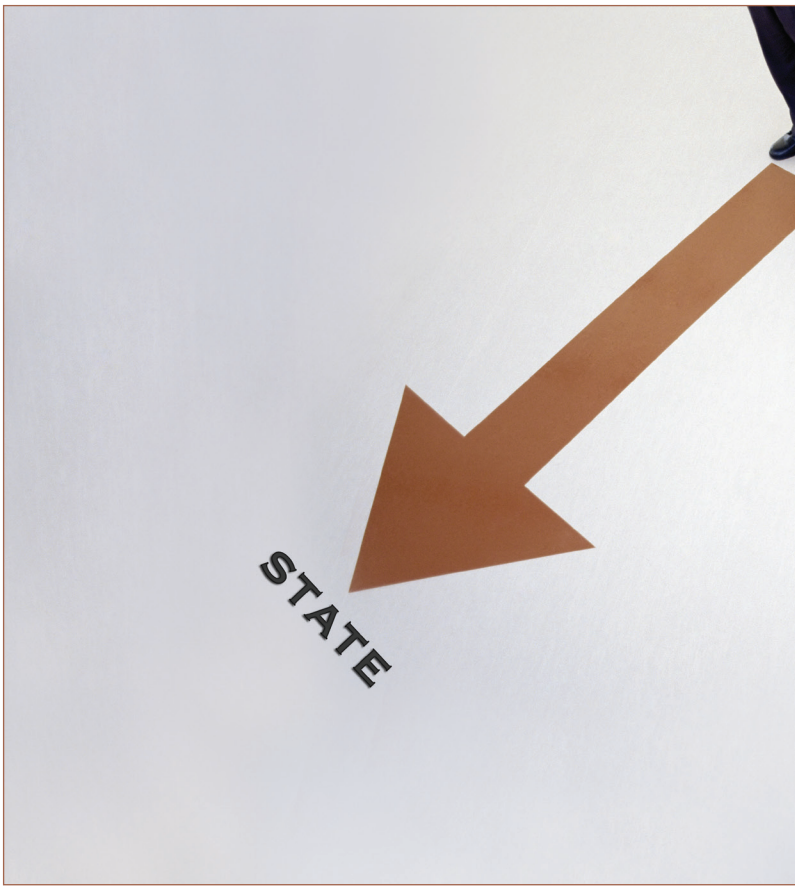
Most businesses agree that taking a dispute to court should be avoided whenever possible. Nonetheless, in today's world, litigation can be a fact of life, or even a desirable course in some circumstances. When litigation becomes necessary, or is thrust upon you, a party may have a choice between having the case heard in state or federal court. This choice should be thoroughly analyzed at the outset because it may have a significant impact on the final outcome of the litigation.

The most common scenario we see in our practice is the choice between the New York State and federal courts. Both have different judges, jury pools, procedures and evidentiary rules. They may also follow different substantive laws. Before deciding where to bring a case, or whether to remove a case from state to federal court, the careful litigator will consider these factors and others within the context of the particular case.

First, thought must be given to what substantive law will apply. Substantive law is composed of the statutes, regulations and common law that create each parties' rights, duties and remedies. Contract law, the Uniform Commercial Code and the Federal Bankruptcy Code are all examples of substantive law. It would be reasonable to assume that federal courts apply federal substantive law while state courts apply their state's substantive law, but that is not always the case. Surprisingly, unless Congress provides by statute that a federal claim is exclusively within the jurisdiction of the federal courts, as it has done with Bankruptcy and Patent Law, both state and federal courts may be able to hear and decide the federal substantive law claim.

There are also instances in which a federal court can hear claims arising under a state's substantive law. This "diversity jurisdiction" arises when: (1) the parties are citizens of different states; and (2) the amount at stake exceeds $75,000. Regardless of which body of substantive law applies, the court will usually apply its own procedural and evidentiary rules. When possible, the careful litigator will use that to his or her advantage.

Procedural laws are the rules of process that a court must follow as a case moves from its beginning to its end. These include the rules for starting a lawsuit, conducting discovery, bringing motions, conducting trials and obtaining and enforcing money judgments. These rules differ, sometimes greatly, between



New York's Civil Practice Law and Rules (CPLR) and the Federal Rules of Civil Procedure (FRCP). Take subpoena power, for example, which allows an attorney to require a witness' attendance in court. There are indirect ways to use the FRCP that effectively allow for nationwide subpoena power. This means that under the FRCP, an attorney can often require a witness to testify in a case regardless of where in the country that witness lives. In contrast, subpoena power under the CPLR ends at New York's borders. This means that where key witnesses, outside of the party's control, live outside of New York, it is advantageous for that party to utilize the FRCP in federal court if possible.

Closely related to a court's procedural law is evidentiary law. Evidentiary law outlines what types of evidence the judge or jury may consider when deciding the case. In New York, much of the evidentiary law is not codified but instead exists in case law. Unlike New York, federal evidentiary law is codified in the Federal Rules of Evidence (FRE). The evidentiary law in each venue is not identical, and the choice may affect the outcome. For example, in both New York and federal court, a statement made by a high-ranking employee

to the Right Place—State v. Federal Court

of an organization, who has authority to speak on the organization's behalf, will be evidence of an admission by the organization. But, what about statements made by lower-level employees who do not have authority to speak on the organization's behalf? In federal court, even a statement made by a lower-level employee will be deemed an admission by the organization where the statement concerns a matter within the scope of the employment relationship. In New York, however, that same statement may be inadmissible hearsay. Suffice it to say, when choosing between state and federal court, one will give thought as to how the different evidentiary laws may affect the case. Failure to do so could have a profound impact on the litigation's outcome.

It is also important to consider the pool of potential jurors. A case brought in New York will have a jury pool made up of individuals who live in the county where the case will be venued. A federal case will have a jury pool made up of individuals from all of the counties that comprise the federal district. Regardless of where they are from, the vast majority of jurors work hard to fairly decide the cases presented to them. Experience tells us, however, that different populations have different predominating view points. Think "Blue States" versus "Red States." These predominating points of view may or may not be advantageous to the particular case at hand.

Similar consideration should be given to the pool of potential judges. The vast majority of judges consistently do their best to be fair and correctly decide the issues. But judges too will have natural inclinations and view points that affect the way they view the relevant issues. Unlike jurors, however, a judge's past decisions are available, and these decisions can help assess how that judge will likely view the case. Now, it is usually impossible at the outset to predict with certainty which judge will hear the case. But by looking at the judicial options within the available jurisdictions, the careful litigator will get a sense of whether one court provides a better chance of having a judge with a viewpoint favorable to the case's procedural, evidentiary and substantive legal issues.

The benefits sought by comparing available courts is not always related to just the outcome; considerations of cost must enter into the analysis as well. Germane to our modern, digital age, e-discovery presents a clear example of the importance of considering costs. E-discovery is centered around locating and producing information that has been stored in an electronic format such as relevant e-mails, instant messages or electronically archived documentation. E-discovery can become expensive. Due to this high cost, a litigant may want to be in a federal court where the rules and case law concerning e-discovery are more settled than many other states. Also, cost-shifting of electronic discovery expenses should be compared between state and federal rules and case law. A litigant should, therefore, anticipate how the CPLR and the FRCP will impact the case before deciding, with counsel, which system to use.

This article presents the briefest of introductions to what many times is a complex analytical process for the attorneys handling a case. The few examples above should help illustrate the value created by investing time in analyzing this issue at the outset of any litigation.

This article was co-authored by Kenneth A. Manning, Partner, and John E. Abeel, Associate, in the Phillips Lytle Commercial Litigation practice. If you have a question pertaining to this article, contact John at (716) 504-5774 or jabeel@phillipslytle.com. ■

Avoid Class Action Exposure in Consumer Transactions

In *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the United States Supreme Court reaffirmed a valuable tool for defeating putative class actions, particularly consumer class actions under such statutes as the Fair Debt Collections Practices Act ("FDCPA"), the Fair Credit Reporting Act and New York's General Business Law §§ 349 *et seq*. The Court ruled in *Concepcion* that a contract that includes an arbitration clause requiring consumers to waive their ability to pursue a class action law suit is not *per se* invalid, overruling a Ninth Circuit Court of Appeals decision to the contrary.

Concepcion addressed the "*Discover Bank* rule" from the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), which invalidated arbitration clauses in consumer contracts containing class action waivers. Under the *Discover Bank* rule, arbitration clauses in consumer contracts were enforceable only if they permitted classwide arbitration. The rules on the enforceability of such clauses in jurisdictions outside of California varied widely. For instance, in the courts of the Second Circuit, which includes New York State, the general rule has been that class waiver clauses are valid and enforceable unless a plaintiff could establish that individual litigation of the claims at issue would be cost-prohibitive. *Reid v. Supershuttle Intern., Inc.*, No. 08-CV-4854 (JG)(VVP), 2010 WL 1049613, at *4 (E.D.N.Y. Mar. 22, 2010) (granting motion to dismiss and to compel arbitration and finding class action waiver in arbitration agreement valid). *Concepcion* makes it clear that the rule across the country is that state policies preventing an arbitration agreement from being enforced due to the presence of a class action waiver are preempted by the federal policy favoring arbitration.

Concepcion was brought by AT&T customers in California who objected to paying state sales tax on cell phones that were advertised as "free." The form consumer contract contained an arbitration clause with an express class action waiver. When AT&T moved to compel arbitration, the motion was denied and the clause was struck down by the district court and the Ninth Circuit as being contrary to California's policy favoring consumer class actions.

AT&T appealed the Ninth Circuit's decision, and the Supreme Court held that the Federal Arbitration Act ("FAA") preempted state jurisprudence, such as the *Discover Bank* rule, which was contrary to the federal policy favoring arbitration.

It should also be noted that the contracting parties are not the only ones that may avail themselves of the protection of an arbitration clause. Depending on the jurisdiction and the language of the clause, third parties and agents of contracting parties may assert the clause as a defense in favor of early dismissal of a putative consumer class action.

For instance, in *Fedotov v. Peter T. Roach & Associates, P.C.,* No. 03 Civ 8823 (CSH), 2006 WL 692002, at *2-3 (S.D.N.Y. Mar. 16, 2006), a debtor brought a putative class action lawsuit against a debt collector. The debt collector moved to compel plaintiff to submit his claim, individually, to arbitration based on plaintiff's card agreement with his creditor. The court granted the debt collector's motion based on an arbitration clause which contained a class action waiver, finding the debt collector could avail itself of the provisions of the card agreement. *Id.* at *2.

A typical arbitration clause would require arbitration for "any past, present or future claim or dispute arising under the contract" concerning "agents, successors and assigns, as well as officers, directors, and employees." While different language may result in a variety of outcomes, Supreme Court precedent should bar a class action against a third party or agent such as a debt collection agency facing FDCPA claims. For example, the clause in *Fedotov* encompassed "any dispute" "by or against anyone connected with [credit card company] or [the cardholder], including an agent or representative." 2006 WL 692002 at *2 (internal quotation marks and citation omitted). Courts have also noted that cases where motions to compel by non-signatories have been granted "have tended to share a common feature in that the non-signatory party asserting estoppel has had some sort of corporate relationship to a signatory party." *Ross v. Am. Express Co.*, 547 F.3d 137, 143 (2d Cir. 2008). Thus, a clause concerning "agents, successors and assigns, as well as officers, directors, and employees," should be held to bar a class action against a non-signatory that can demonstrate that it is an agent or assignee of a signatory.

Now that the roadblock of the *Discover Bank* rule has been removed by the Supreme Court, businesses should be accorded more protection against wasteful class actions when the consumer contract at issue contains a properly worded arbitration clause.

If you have a question about class action litigation, contact either Phillips Lytle Business & Commercial Litigation attorneys: John G. Schmidt Jr., Partner, at (716) 847-7095 or jschmidt@phillipslytle.com or Andrew J. Wells, Associate, at (212) 508-0422 or awells@phillipslytle.com. ■

In New York State, Allegations of Loss Are Not Enough

A decision last year from the Commercial Division of the New York State Supreme Court, Erie County, provides two helpful reminders to commercial litigants. First, at least in New York, the plaintiff's damages must have been actually and proximately caused by the defendant's allegedly wrongful conduct. Second, in a breach of contract case, alleged damages that are speculative and not reasonably foreseeable may not be recovered.

In *Weaver v. Hatch Acres Corp.*, Sup. Ct., Erie County, Sept. 8, 2008, Index No. 007642/2008, a developer entered into a contract to purchase vacant land where he planned to construct a residential development. The purchase contract was contingent on the developer obtaining permits and other governmental approvals that would allow him to construct fifty homes on the land. If approval to build at least fifty homes could not be obtained, he could cancel the purchase contract or reduce the purchase price proportionally. In connection with the purchase, the developer engaged an environmental engineering firm to perform a wetlands delineation for the vacant property. Based on the wetlands delineation, the developer concluded that he could build fifty homes on the land and proceeded to close on the purchase contract before obtaining a wetlands permit from the federal government or the other required approvals from the municipality. The United States Army Corps of Engineers subsequently determined that additional wetlands were present on the land, leaving only enough unrestricted space to build thirty-six homes. The developer then sued the engineering firm to recover his alleged lost profits on the fourteen homes he was prevented from building, arguing that the engineering firm had breached its contract by preparing an inaccurate wetlands delineation.

The engineering firm, represented by Phillips Lytle attorneys, moved for summary judgment seeking dismissal of the developer's claims. The Court agreed, and dismissed the complaint, holding first that the allegedly inaccurate wetlands delineation was not the cause of developer's inability to develop more than thirty-six homes. Rather, it was the presence of wetlands, which were not created by defendant, that restricted the amount of development. The Court found that since the developer's alleged lost profits were caused solely as the result of the presence of the wetlands and not anything that the defendant did or failed to do, there was no "but-for" causation between the alleged wrongful conduct and the alleged lost profits.

The Court also found that the alleged lost profits were speculative and not reasonably certain. Although the developer contracted to purchase the land in 2003, eight years later the developer still had not sold even the first of the thirty-six homes that were unaffected by the wetlands and that were approved for development. In opposing the summary judgment motion, the developer argued that he had not proceeded with the development because of the sudden downturn in the economic conditions of the housing industry. According to the Court, though, the developer's acknowledgement that other independent causes, unrelated to the wetlands delineation, had contributed to his lost profits was fatal to his claim. Because the alleged lost profits were not "reasonably certain," but rather were "merely speculative, possible, or imaginary," they were not recoverable under New York law.

This matter was handled by Phillips Lytle attorneys Kevin M. Hogan, Partner in the Environmental and Business & Commercial Litigation practice areas, and Sean C. McPhee, an Associate in the Business & Commercial Litigation practice. Questions pertaining to this article can be directed to Kevin at (716) 847-8331 or khogan@phillipslytle.com. ■

Phillips Lytle has one of the largest Business & Commercial Litigation teams in Upstate New York. Covering every corner of New York State, our attorneys have extensive experience in all phases of disputes, including banking, contracts, sales and product distribution, services, financing, construction, insurance coverage, joint ventures, employment, franchising, licensing, leasing, real estate finance and development, trusts, shareholder and partnership disputes and contract disputes.

Phillips Lytle LLP

For additional information or advice, please contact one of our Business & Commercial Litigation attorneys listed below:

JOHN G. SCHMIDT JR., PARTNER, TEAM LEADER
PRESTON L. ZARLOCK, PARTNER, TEAM LEADER

JOHN E. ABEEL, ASSOCIATE
JENNIFER A. BECKAGE, ASSOCIATE
EDWARD S. BLOOMBERG, PARTNER
ALAN J. BOZER, PARTNER
WILLIAM J. BRENNAN, PARTNER
MARC W. BROWN, ASSOCIATE
CRAIG R. BUCKI, ASSOCIATE
JOANNA J. CHEN, ASSOCIATE
WILLIAM D. CHRIST, PARTNER
JOANNA DICKINSON, ASSOCIATE
JAMES D. DONATHEN, PARTNER
KEVIN J. ENGLISH, PARTNER
CHAD W. FLANSBURG, ASSOCIATE
MARC H. GOLDBERG, ASSOCIATE
JAMES R. GRASSO, PARTNER
CHRISTOPHER L. HAYES, ASSOCIATE
KEVIN M. HOGAN, PARTNER
TIMOTHY W. HOOVER, PARTNER
MINRYU (SARAH) KIM, ASSOCIATE
ERIC M. KRAUS, PARTNER
MICHAEL R. LAW, PARTNER
CRAIG A. LESLIE, PARTNER
AMANDA L. LOWE, ASSOCIATE
PATRICIA A. MANCABELLI, ASSOCIATE
KENNETH A. MANNING, PARTNER
DAVID J. MCNAMARA, MANAGING PARTNER
SEAN C. MCPHEE, ASSOCIATE
ANNA R. MERCADO, ASSOCIATE
MARK J. MORETTI, PARTNER
PAUL MORRISON-TAYLOR, PARTNER
JOHN A. MOSYCHUK, ASSOCIATE
PETER C. OBERSHEIMER, ASSOCIATE
SCOTT T. PELOZA, ASSOCIATE
RYAN G. PITMAN, ASSOCIATE
MICHAEL B. POWERS, PARTNER
TODD A. RITSCHDORFF, ASSOCIATE
JODIE L. RYAN, ASSOCIATE
JOSEPH B. SCHMIT, SPECIAL COUNSEL
MARTIN V. SCHWARTZ, SPECIAL COUNSEL
WILLIAM J. SIMON, ASSOCIATE
PAUL K. STECKER, PARTNER
RICHARD T. TUCKER, ASSOCIATE
ANDREW J. WELLS, ASSOCIATE
JAMES W. WHITCOMB, PARTNER
THOMAS S. WISWALL, PARTNER

ALBANY OFFICE
OMNI PLAZA
30 SOUTH PEARL STREET
ALBANY, NY 12207-3425
PHONE 518 472 1224
FAX 518 472 1227

BUFFALO OFFICE
3400 HSBC CENTER
BUFFALO, NY 14203-2887
PHONE 716 847 8400
FAX 716 852 6100

CHAUTAUQUA OFFICE
201 WEST THIRD STREET
SUITE 205
JAMESTOWN, NY 14701-4907
PHONE 716 664 3906
FAX 716 664 4230

GARDEN CITY OFFICE
1305 FRANKLIN AVENUE
SUITE 200
GARDEN CITY, NY 11530-1630
PHONE 516 742 5201
FAX 516 742 3910

NEW YORK CITY OFFICE
437 MADISON AVENUE
34TH FLOOR
NEW YORK, NY 10022-7021
PHONE 212 759 4888
FAX 212 308 9079

ROCHESTER OFFICE
1400 FIRST FEDERAL PLAZA
ROCHESTER, NY 14614
PHONE 585 238 2000
FAX 585 232 3141

CANADIAN OFFICE
THE COMMUNITECH HUB
151 CHARLES STREET WEST
SUITE 152, THE TANNERY
KITCHENER, ONTARIO N2G 1H6
CANADA
PHONE 519-570-4800
FAX 519-570-4858