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## Managing the Early Stages of Commercial Litigation: Critical First Steps

# PRELIMINARY LITIGATION CONSIDERATIONS: STRATEGIC AND PROCEDURAL ASPECTS

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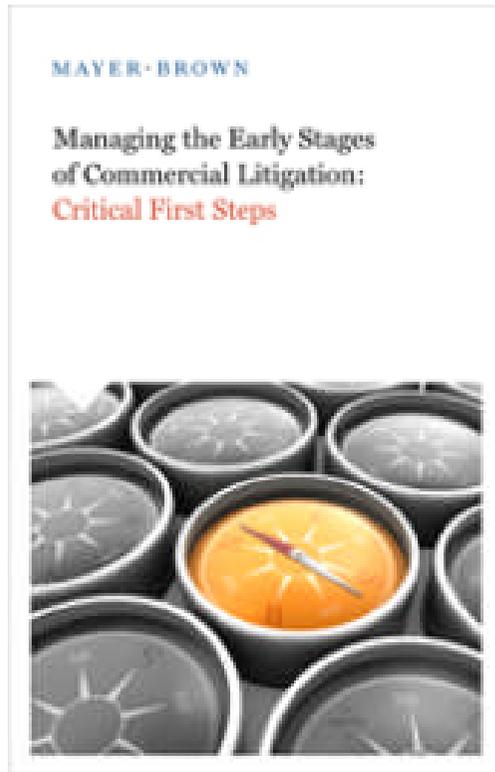
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# *Managing the Early Stages of Commercial Litigation: Critical First Steps – Introduction*



- Assist in-house counsel with key legal and strategy issues that often arise early in a case.
- Additionally, for in-house lawyers who do not handle a great deal of litigation, but who find themselves charged with managing a lawsuit, we set out many of the issues that will arise during the early stages of a lawsuit and identify the important elements to be considered.

## You've Been Served – How Serious is This Case – Nuisance, Large But Manageable, Bet the Company?

- ◆ Review the complaint, ask yourself, and maybe other members of the legal team, whether the allegations make common sense in view of your business practices
- ◆ Validate your sense with the business team
  - Select a small group of business folks who work in the area that the complaint concerns and discuss it with them
  - If the allegations/facts have any traction with you and your team, consider what the potential exposure might be
- ◆ Ask the business team to be forthright. The best defense is aggressive and forceful, but informed by the realities on the ground

## You've Been Served, Cont'd

- ◆ Assess your defenses.
- ◆ Weigh the merits of your defenses against:
  - Potential expense for outside counsel, experts, litigation support services
  - The potential costs and timing of settlement
  - The need (sometimes) to vigorously fight the complaint for business or strategic reasons— even if it may not be strictly cost effective, such as to establish or defend a critical market imperative

# You're Thinking of Filing A Significant Complaint – Things To Be Sure You Know Before Filing

- ◆ Candidly assess the problem that leads you to consider bringing suit
  - Regardless of how strongly management feels that a wrong has been committed, are you sure your claims are valid?
  - Are you sure that pursuing these meritorious claims is worth the expense and commitment of legal and executive time?
- ◆ Consider the collateral consequences
  - Does the complaint expose you to congressional, regulatory, supplier, customer or press scrutiny that you'd rather avoid?

# Hold Orders – Critically Important

- ◆ Whether plaintiff or defendant, as soon as a complaint is filed (plaintiff) or served (defendant) in a case of any significance - or you learn of a government investigation - you must seriously consider issuing a Hold Order:
  - A Hold Order instructs those employees with potentially relevant documents and information that they cannot destroy this information
  - Hold Orders have a broad reach – they cover electronic files, paper documents, calendar entries, emails and text messages. Simple rule: if it exists in any form anywhere, it's covered
  - Hold Orders suspend the Company's normal document retention policies

## Hold Orders – Cont'd

- Careful thought needs to be given to make sure that the Hold Order reaches all employees with relevant information
- Procedures need to be implemented to deal with employees who exit during the pendency of the litigation
- If your organization is regularly involved in litigation you should consider creating a Hold Order template and standard Hold order procedures
- Consider whether any third party documents fall within the subpoena (subsidiary, accounting firm, public relations firm) and assess Hold Order issues

## Hold Orders – Cont'd

- ◆ Serious consequences can follow failure to issue or apply a required Hold Order – examples include:
  - Monetary sanctions including reimbursing an adversary for the costs of, for example, restoring back up tapes
  - Loss of the ability to contest certain disputed facts
  - Adverse jury instructions
  - The ultimate sanction – striking an answer

# Defense Strategy

- ◆ Do you like the plaintiff's chosen forum, or does a different forum offers you advantages? If so, consider:
  - If there is a contract, what does it say about forum selection?
  - What does the contract say about choice of substantive law?
  - Does the chosen forum assign a permanent judge upon filing and, if so, how does that affect your forum decision?
  - Is there personal jurisdiction over the defendant in the chosen forum?
  - If filed in federal court, is there subject matter jurisdiction?
  - If filed in state court, can and should you remove it to federal court: remember removal has a short trigger – 30 days

## Defense Strategy – Cont'd

- Even if the forum is technically permissible, can you make a forum *non conveniens* argument?
- Does the forum permit you to take advantage of procedures often available where multiple complaints exist concerning the same subject (federal MDL, state court complex designation)?
- After resolving these issues consider whether to answer the complaint or move to dismiss:
  - Answering saves costs but eliminates an opportunity to get legally invalid claims dismissed at the outset
  - Filing a motion to dismiss may result in claims being dismissed, but plaintiffs almost always get leave to replead – consider whether the same result can be achieved on summary judgment with better long-term result and less cost

## Defense Strategy - First Steps

- ◆ Are there service of process/insufficiency of process issues worth making?
- ◆ Are there other initial pleading motions worth bringing?
  - Motions to strike
  - Motions for more definite statement
- ◆ Determine which motions are deemed waived if not brought initially

# Plaintiff's Initial Strategy Considerations

- ◆ As to forum selection, determine where you will do best:
  - Best substantive law, best procedural law, best judge selection
- ◆ Then pretty much reverse the process you would go through as a defendant from your defendant's view
  - Look at forum selection issues, personal and subject matter jurisdiction, as if you were the defendant
- ◆ Rarely a benefit in giving the other side an early procedural or substantive victory when that can be avoided by advance planning.

# What To Do About Co-Defendants?

- ◆ Co-defendants can be your ally, but also can pose real risks:
  - Figure out who your natural allies are and who are your allies of convenience
  - Quickly determine whether you want to enter into a joint defense agreement – without a joint defense agreement conversations among co-defendants are not privileged
  - Are there insurance and indemnity obligations that will or could convert co-defendants to adversaries; if so, consider a tolling agreement and carve outs to the joint defense agreement
- ◆ Subject to privilege issues, share big costs if possible
  - Experts, electronic document repositories

## Key Witnesses – Current and Ex-Employees

- ◆ Once you receive a complaint (or when you are planning to file your own complaint) determine who your key employee and ex-employee witnesses will be:
- ◆ For current employees:
  - Make sure they understand that interviews with you are privileged
  - Make sure they understand, by contrast, that discussions with colleagues without counsel are not privileged
  - Remind them that documents they create about the subject of the litigation are likely subject to discovery

## Key Witnesses – Cont'd

- ◆ For Ex-Employees:
  - If you need to rely on ex-employee support, make sure your relationships with those employees are good and that their current employers will give them time to support your efforts
  - Figure out the best avenue of approach and pursue it carefully – be sure to determine whether the ex-employee needs his/her own counsel and whether you're willing to pay for this counsel
- ◆ Confirm that the ex-employee understands that these communications are privileged and what they should do to avoid losing the privilege

# The Press – What Role Does It Play – Do You Need A Public Relations Strategy

- ◆ Determine quickly whether this case (plaintiff/defendant) is likely to be a matter of public concern requiring a press/public relations strategy
  - If so, get the best public relations consultants you can find, mediocrity never helps you
  - Generally, outside litigation counsel should not serve in this role
  - Designate a press spokesperson – keep them out of the loop of privileged debates
  - Prepare your executives to live with the ups and downs of the news cycle – people don't remember so much what they hear on the news as how the speaker reacted to difficult questions
- ◆ Integrity and Consistency Always Sound the Right Note

# Mayer Brown Speakers



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