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Managing the Early Stages of Commercial Litigation in the US

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Today's Discussion



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Agenda

1. Early Case Assessments and Evidence Issues
2. Privilege Issues and Early Litigation Steps
3. Achieving Early Resolutions of Disputes

Early Case Assessments

Goals of Early Case Assessments

Assess Relevant
Facts

Ensure Compliance
with Relevant
Notice Obligations

Assess the Stakes
Regarding the
Dispute

Outline
Potential
Options

Create Budget and
Potential Alternative
Fee Arrangements

Prepare
Strategy

SAVE



ECA: Assess Relevant Facts

| <u>Step</u> | <u>Key to Success</u> |
|----------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Collect Relevant Documents | <ul style="list-style-type: none">• Agreements and drafts exchanged• Key email (not all email) |
| Interview Witnesses | <ul style="list-style-type: none">• Test the key documents• Memorialize in notes• Identify new documents• Develop chronology |
| Assess Legal Issues | <ul style="list-style-type: none">• Identify critical terms in agreement• Build evidence in support of interpretation• Use jury instructions to identify elements of claims and check each element |

ECA: Ensure Compliance with Obligations

Identify Potential Legal Obligations

Issue Document
Preservation Notice

Determine If Third
Parties Must Be
Notified to Preserve
Documents

Notice to Insurers

Determine If Reserve
Is required

Determine If Board
or Management
Must Be Notified

Determine If 8-K or
Public Notice Must
Be Issued

Determine If
Independent
Investigation
Required

Determine If
Regulators Must Be
Notified

Determine
Contractual Notice
Obligations



ECA: Assess Stakes of Case

Amount at Stake

- Potential for theories of damages: consequential, tort, punitive damages
- Range of potential damages under various theories
- Consider use of expert (many will consult for low cost early on)

Likelihood of Loss

- Develop best estimate likelihood of liability under various theories
- Evaluate other judgments in jurisdiction

Potential Mitigants

- Insurance coverage
- Third party claims

Non-Financial

- Reputation impact
- Precedential impact
- Relationship impact

ECA: Outline Options & Develop Strategy

1. Options
2. Financial Impact
3. Likelihood of Result
4. Timing
5. Budget Impact
6. Non-Financial Impact

Develop
Strategy

Worst Case

Best Case

Privilege Considerations

- Attorney client privilege
 - (i) Communication (ii) made in confidence (iii) between a lawyer (iv) and a client (v) for the purpose of seeking or obtaining legal advice
- Work product privilege
 - Materials prepared in anticipation of litigation
- Communications with regulators
 - Certain communications with regulators may have restrictions on disclosure

Privilege Considerations

- The elements of attorney client privilege are consistent in US courts
- Scope of that privilege can vary based on the court
 - i.e., Upjohn (subject matter) v. Control Group Test (typically senior employees who communicate with counsel and control the litigation)
- Burden is on the entity asserting privilege
- Fact specific determination

Privilege Considerations

- Broad discovery in US courts can often implicate foreign laws and regulations regarding disclosure and privilege
 - Foreign corporations involved in United States litigation
 - United States corporations which have foreign operations, subsidiaries or affiliates which are advised by local counsel and become involved in United States litigation

Privilege Considerations

- Common law jurisdictions include Canada, United Kingdom, Ireland, Australia, New Zealand, Hong Kong and Singapore
- Civil law jurisdictions cover most of the rest of the world
- Broadly speaking:

Common Law

Privilege attaches to communications for the primary purpose of giving advice and belongs to the client

Civil Law

Confidentiality obligations typically set out in code of procedure

Privilege Considerations

- Common law countries
- Attorney client privilege (legal advice privilege or solicitor client privilege)
 - Typically does apply to in-house counsel
 - May not apply to communications with client's employees
- Work product privilege (litigation privilege)
 - Typically a qualified protection
 - Privilege may end when litigation ends

Privilege Considerations

- Civil law countries
- Confidentiality rules developed differently because civil law countries typically have disclosure obligations in litigation which are far more circumscribed than in common law countries
- Depending on jurisdiction, confidentiality
 - May not apply to in-house counsel communications
 - May not belong to the client

Privilege Considerations

- Communications with regulators may be protected from disclosure
- In the United States, financial institutions and insurers (among other entities) report to both state and federal regulators
 - Certain communications may only be disclosed with the consent of the regulator
- Outside the United States

Privilege Considerations

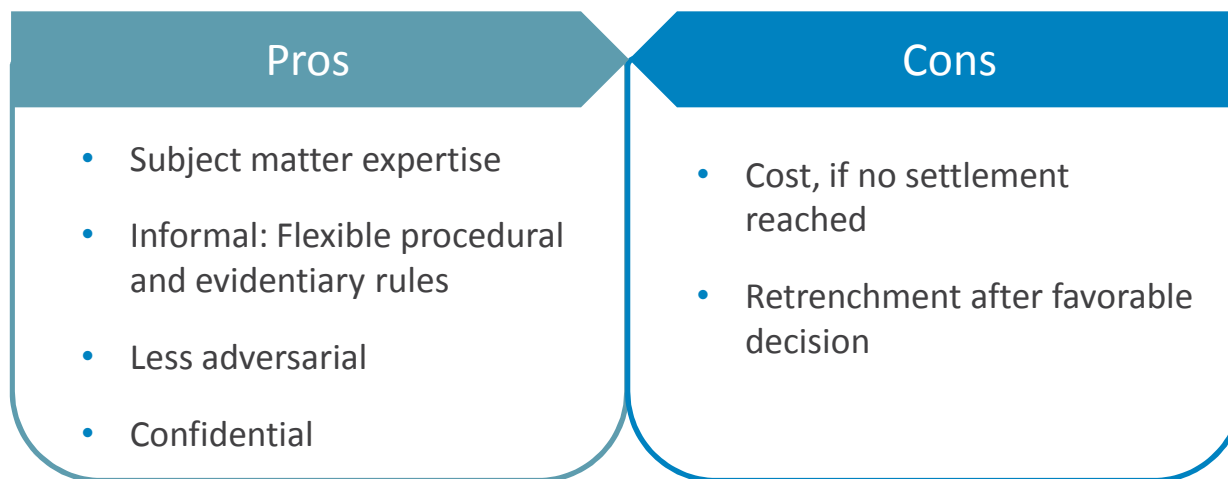
- Application of foreign privilege/confidentiality rules in US courts
- May result in more extensive disclosure than would be otherwise permitted if a local court in either jurisdiction applied local law

Pathways for Resolution

- Traditional settlement strategies
 - Negotiation
 - Mediation
- Alternative dispute resolution strategies
 - Conciliation
 - (Early) Neutral evaluation or expert determination
 - Mini, summary or mock jury trials

(Early) Neutral Evaluation

- N.D.Ca. ADR LR 5: Available by stipulation, motion of one party or sua sponte initiative of the Judge



Alternative Fora For Resolution

- Forum (venue) selection clauses
- Arbitration

Forum Selection Clauses

- Symmetrical: Parties agree on a single forum or venue for litigation (or arbitration)
- Asymmetrical: One party consents to exclusive jurisdiction for litigation, but the other party retains the right to sue in any court of competent jurisdiction
- Enforcement of asymmetrical forum selection clauses
 - Yes: Some US courts, England, France
 - No: China, Russia and India

Arbitration Clauses

- Increasingly common and routinely enforced
- Must you enforce?
- Should you enforce?
- By when must you act if you choose to enforce?

Other Legal Process Issues

- Personal jurisdiction
- Subject matter jurisdiction
- Improper venue
- Forum non conveniens

Thank you for joining us!

- Should you have additional questions related to today's topic, please email them to Pascale Rucker at prucker@mayerbrown.com, and they will be promptly forwarded to the speakers

Please visit www.mayerbrown.com/Managing-the-Early-Stages-of-Commercial-Litigation/ to download a digital copy of our booklet, *Managing the Early Stages of Commercial Litigation*.



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