

Notes on Complex Commercial Litigation

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Volume I, Issue 1

September 2005

Welcome to the inaugural issue of *Notes on Complex Commercial Litigation*. It aims to help CCL participants – judges, lawyers, and clients – become more successful in their roles by offering them a selection of news, tips, and resources. I hope you find it helpful.

Expediting and Streamlining Commercial Litigation

The American Bar Association will soon publish the second edition of its excellent multi-volume treatise on *Business and Commercial Litigation in Federal Courts*. The 2005 version will add several chapters, including one that my partner Steve Susman and I wrote on “Techniques for Expediting and Streamlining Commercial Litigation.” Excerpts from the opening pages give a sense of the chapter’s ambitions:

Scope note

The high stakes and complexity of business disputes test the ability of federal courts to dispense civil justice speedily and inexpensively. If participants believe they will not benefit from quick and low-cost justice, they may try to evade it.

This chapter identifies techniques that experience has shown can expedite and streamline commercial cases even in the face of opposition. It begins by discussing interests that may cause participants in civil litigation to resist its efficient conduct and outlines ways to give them a common interest in efficiency. It then reviews techniques—from the start of a case through trial—for overcoming resistance and realizing the advantages of litigating commercial disputes faster and easier.

Overview

[The] model of judges, parties, and counsel pursuing civil justice involves imperfect actors. The system struggles with their flaws, none more than the blemish of self-interest. That not everyone really cares about justly, speedily, and inexpensively determining every civil action in the federal courts should surprise no one. Some participants in fact find Rule 1 counter to their own interests; some let self-interest prevail.

Who are these resisters of fast and inexpensive civil justice? Are they judges? Parties? Their lawyers?

Sources of resistance to expediting and streamlining litigation

Judges are seldom the problem. They generally do want fast and cost-effective civil justice. For one thing, under the Civil Justice Reform Act of 1990, they have to report their own slowness in moving cases. For another, an appellate court may overrule them if they reach the wrong decision. And the great majority of federal judges simply believe in the civil justice system and work hard to make it operate fairly.

Parties—and the lawyers, who must represent them zealously—do not always share the judiciary’s interests. Like the guilty criminal defendant who wants freedom instead of justice, the wrongdoing civil defendant and the lawsuit-abusing civil plaintiff prefer victory to a just result. Ideally, the lawyers will behave strictly in keeping with their obligations as officers of the court and will restrain their clients from pursuing self-interest inappropriately. But the clash of interests between the parties creates incentives for them and their counsel to take advantage of imperfections in the civil justice system.

Overcoming resistance

We believe that the best techniques for streamlining and expediting commercial litigation provide incentives for the participants to align themselves with the system’s goal of efficient civil justice. These techniques include measures that involve only one side—such as fee arrangements that reward efficiency and trial team procedures that economize on costs without compromising likelihood of success. Others involve interaction between opposing counsel—including establishment of a good working relationship and agreeing on ground rules for discovery, motion practice, and the like. And some techniques will require the court to exercise its authority—for example, to set and keep a firm trial date, actively discourage squabbles between lawyers, minimize duplicative litigation through transfer or consolidation, impose time limits, and employ creative ways to resolve cases on the merits.

The balance of the chapter explores the sources of resistance to cost-effective and speedy civil justice and suggests techniques for overcoming the resistance. It does so by examining opportunities in the three relationships that exist in all civil litigation – between lawyer and client, between the opposing lawyers, and between the judge and the adversaries.

The second edition of *Business and Commercial Litigation in Federal Courts* will come out during October 2005. If you would like an advance copy of the “Techniques” chapter in manuscript form, please send an email requesting one to dmiller@susmangodfrey.com or call Donna Sue Miller at 214-754-1921 with your request. For more information on the treatise, please see <http://west.thomson.com/product/15342716/product.asp>.

Did you know?

You *don't* lose the right to accept or reject settlement offers when you retain counsel on a contingent fee basis.

Symbiosis of In-House and Trial Counsel in Patent Cases

Moderating a recent panel discussion taught me a lot about what in-house counsel expect and need from trial counsel. Last month, the Intellectual Property Law Section of the Texas Bar Association held a continuing legal education seminar at the Bar's annual meeting in Dallas. The program drew more than 250 and included the panel discussion that I moderated – on the “Effective Management and Trial of a Patent Case: The Symbiotic Relationship of In-House and Trial Counsel.” The superb panel consisted of Bruce Sostek, a shareholder at Thompson & Knight in Dallas; Steven Rose, the general counsel of STMicroelectronics in Carrollton; Toni Nguyen, assistant general counsel with Travelocity in Southlake; and Patrick Flinn, partner in Alston & Bird's Atlanta office.

Panelists' insights for in-house and outside counsel in CCL included:

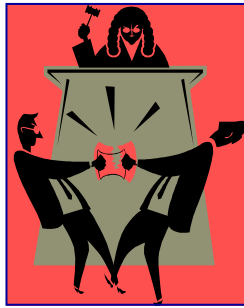
- In-house counsel in patent cases look first for the best trial lawyer – not necessarily the best law firm and often not a patent lawyer – and assemble a trial team around him or her.
- The best trial counsel will not only master the case but will also take the time to understand the client's business, its people, and its goals. “It's not about the trial lawyer; it's about the client.”
- In-house counsel rarely have “beauty contests” or similar processes to select counsel for a specific case. As a result, existing outside lawyers have a strong advantage over competitors.
- At the same time, only 30 percent of in-house lawyers say they would recommend their outside counsel to a colleague at another company. The main reason? Too many outside lawyers focus on the legal work and don't pay enough attention to

empathizing with the client, serving the client, and understanding how the case affects the client's people and business.

- In-house counsel tend to prefer hourly fee arrangements, particularly with existing outside counsel. Budgeting is difficult but very important. Contingent fee and other performance-based arrangements aren't common with larger companies.
- Trust and communication are essential to a symbiotic relationship between in-house and trial counsel.

Cartoon

Ask your lawyer if commercial litigation is right for you. It's not for everyone.




Medical Devices and CCL

A currently very hot area of CCL involves antitrust claims against manufacturers of medical devices and the group purchasing organizations that represent hospitals in making supply contracts with the manufacturers. The cases typically allege that a dominant manufacturer of a medical device illegally excluded competition by, among other things, entering into exclusive dealing arrangements with GPOs, prohibiting purchasers from testing competing products, and bundling products so as to tie the purchase of a medical device in which the manufacturer has a monopoly with the purchase of another medical device in which it has a smaller market share. Excluded competitors as well as purchasers and insurers may have claims under antitrust law.

On March 24, 2005, for example, a federal jury in the Central District of California found that Tyco International had monopolized the market for pulse oximeters – which measure oxygen levels in patients' blood – and awarded our client, Masimo Corporation, damages totaling \$420 million after trebling. Susman Godfrey also represents Applied Medical in an antitrust case against Johnson & Johnson and its Ethicon subsidiary for monopolization of the market for trocars and clip appliers. We expect the Applied Medical case to go to trial in the first half of 2006. Other cases are pending around the country.

Direct purchasers of monopolized medical devices – primarily hospitals and clinics – as well as insurers and other payors may also assert antitrust claims against a monopolizing device maker. These claims allege that the manufacturer’s exclusion of competition raised the price of medical devices above a competitive level and seek to recover three times the difference between the actual price and the price that would have prevailed in the absence of exclusionary conduct.

If you would like a copy of pleadings from ongoing cases or more information, please send an email to bbarnett@susmangodfrey.com. General information about the medical device industry from the perspective of smaller manufacturers is at www.medicaldevices.org.

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