

Anatomy of a Litigation



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Agenda

- Jurisdiction
- Complaint
- Discovery
- Dispositive Motions
- General Pleadings – The Answer and Affirmative Defenses

Jurisdiction and Venue Issues

- Before filing suit against a customer, a threshold question must be answered: where do I file?
- Basic tenets:
 - File in the customer's home state OR
 - Where the customer has minimal contacts OR
 - The state in which the contract was negotiated/signed.
- Filing in U.S. District Court – depends on whether “diversity” jurisdiction exists:
 - Plaintiff and defendant in different states; and
 - At least \$75,000 at issue
- Forum selection clauses in contracts

Complaint

- This initiates litigation – the lawsuit.
- Usually includes background, identity of the parties (Plaintiff(s) and Defendant(s))
- Plaintiff must make allegations in good faith
- Caption – identifies court, county, allegations (counts)
- Must include allegations fully to show that each cause of action is valid
 - Example: Breach of contract
 - Offer, acceptance, consideration, meeting of the minds, damages
 - Example: Preference
 - Transfer, of debtor's property, to or for benefit of creditor, within 90-days of petition, and antecedent debt

Discovery

- Various methods of discovering data and information
 - Requests to Admit
 - Interrogatories
 - Requests to Produce
 - Depositions
- Generally begins after an Answer is filed
- 30 days to respond to discovery requests, though usually more time is granted due to extent of requests

Discovery

- Requests to Admit
 - These can be particularly useful
 - Requires an Admission or Denial
 - If a party misses a deadline in responding, all of the requests could be deemed admitted
 - Can be used to eliminate issues and narrow the focus of litigation
 - Often there is an unlimited number of requests to admit that you can propound on your opponent

Discovery

- Interrogatories
 - This discovery seeks written answers from your opponent
 - Explain, List, Describe, etc....
 - Most of the time good attorneys can work their way around being specific in the responses, but can be useful at times
 - It can provide a basis to seek further documents from document production requests or provide a basis for questioning in depositions – especially on written response that indicate obfuscation
 - Interrogatories are limited by Federal or Local Rules – agreements between the parties can usually work to increase the number of interrogatories

Discovery

- Requests to Produce
 - This discovery seeks documents – paper and electronic
 - Typically, documents are now transferred electronically
 - Requests can be unlimited, but must be germane to the topics of litigation
 - This can be burdensome – for both sides in producing and in reviewing
 - Documents can be used to prove your side, but also disprove (or show lack of proof) for counterclaims or affirmative defenses
 - After receiving documents, and in conjunction with Requests to Admit and Interrogatories, we now have a basis for depositions

Discovery

- Depositions
 - This discovery allows for questioning of individuals involved in the case
 - 30(b)(6) – requires a *company* defendant to provide subject matter expert – equates to deposing the company itself
 - Questioning is under oath and can be used as evidence in trial or dispositive motions
 - Schedule via subpoena
 - Many depositions now occur virtually – via zoom – rather than in-person

Discovery - Expert

- You might need an expert witness
 - Valuation, ordinary course of business in an industry, specific scientific, medical, or technical issues
 - Countering oppositions experts
 - Consulting expert (retained in anticipation of litigation) or Testifying expert (will testify in trial)
 - No information about consulting experts is discoverable; testifying experts and information must be disclosed
 - Daubert – five factors –
 - Theory/technique has been tested or can be tested
 - Theory/technique subjected to peer review and/or publication
 - Known or potential error rate;
 - Existence/maintenance of standards controlling its operation
 - Attracted widespread acceptance within relevant scientific community

Dispositive Motions

- Motion to Dismiss
- Motion for Judgment on the Pleadings
- Motion for Summary Judgment

Dispositive Motions

- Motion to Dismiss
 - This is a motion seeking to dismiss the case before anything has really happened within the case
 - Rule 12(b) –
 - (1) – lack of subject matter jurisdiction
 - (2) – lack of personal jurisdiction
 - (3) – improper venue
 - (4) – insufficient process
 - (5) – insufficient service of process
 - (6) – failure to state a claim
 - 12(b)(6) is seemingly the most popular ground for a motion to dismiss

Dispositive Motions

- Motion to Dismiss
 - 12(b)(6) – failure to state a claim
 - Essentially is an allegation that even if everything the Plaintiff says is true, the Plaintiff cannot win.
 - Breach of Contract claim – did the P fail to allege a contract existed?
 - Fraudulent transfer or Preference – did P fail to allege transfer of Debtor's assets
 - For Fraud related – must have heightened level of pleading
- **MUST BE MADE BEFORE AN ANSWER IS FILED!**

Dispositive Motions

- Motion for Judgment on the Pleadings
 - Alleges that there are no material issues of fact to be resolved
 - The party filing is entitled to judgment as a matter of law
 - This is not often used because facts are often in question – or their application/meaning can be left to interpretation

Dispositive Motions

- Motion for Summary Judgment
 - This usually occurs after Discovery has concluded
 - The basis is that there are no material issues of fact which are disputed
 - Similarly to the motion for judgment on the pleadings, the court can only come to one conclusion – that judgment **MUST** be found in favor of the movant
 - This can be costly and can also signal to opposing side what your strategy is
 - But, it is cheaper than trial and can often trigger real settlement discussions if they have been less than meaningful

Answers (and Affirmative Defenses)

- Answers are the official response to a lawsuit before or after a motion to dismiss (remember, can't file a MTD once you've answered)
- You respond as to whether the allegations in the complaint are “admitted,” “denied,” or “insufficient information to determine, so it is denied.”
- Must make a good faith effort to respond and investigate

Answers (and Affirmative Defenses)

- Affirmative Defenses are defenses where the burden falls to the Defendant
 - Ordinary Course of Business, Subsequent New Value, Concurrent New Value
 - Failure to state a claim
 - Failure/lack of consideration (Breach of Contract)
 - Illegality
 - Laches
 - Set off
 - Res judicata
 - Equitable estoppel
 - In pari delicto
 - Unclean hands
 - Failure to mitigate

Then What???

- You have a Complaint, Dispositive Motions, and Answer and Discovery is complete – than what?
- Trial
 - Pre-trial motions – maybe to exclude evidence or to allow by stipulation the entry of evidence
- Witnesses, pretrial briefs, evidence, submission and exchange of exhibits
- Opening and closing arguments – often waived at bench trials
- Plaintiffs present case, Defense presents case, then decision and possibly post-trial briefs summing up positions and the case

Helpful Hints To Be Effective and Efficient

- Document Management
 - Have a common filing nomenclature – makes access of documents easy;
 - The more organized, the less time your lawyers spend;
 - Be careful what you write
 - Notes on collections
 - Smart-aleck remarks
- Know your metrics
 - Don't sue when it will harm you in the long-run
 - Sometimes cheaper to write it off
 - Preserve relationships

Presenter Contact Information



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