Real Estate Litigation Part 2: Litigation in Context

In September I wrote about the importance of bringing realistic expectations to planned or potential litigation. I noted the common over-optimistic perception non-lawyers may harbor regarding the cost and duration of litigation. In short, most people do not grasp how expensive, time consuming and lengthy litigation can be. In litigating real estate matters for our clients, we at Reinhart correct these misperceptions in those clients who hold them. As a result, our clients are better equipped to make rational decisions—ideally based upon the economics of the situation—concerning litigation.

In this "Part 2" of that article, I describe two other aspects of litigation that clients often do not consider until we bring it to their attention: the invasive nature of litigation and the public relations aspect of litigation. I conclude by encouraging litigants or potential litigants to make decisions regarding litigation with full consideration of all of the factors about which I have written.

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Litigation Is Invasive

A classic example of how invasive litigation can be is a personal injury lawsuit in which the plaintiff demands damages for some sort of psychological or emotional harm. In such a case, the defendants ordinarily would be entitled to access and review the entirety of the plaintiff's health care records including records relating to the plaintiff's psychiatric, psychological or other counseling. It is difficult to imagine a more invasive process than a stranger poring over your psychiatrist's session notes, but if the plaintiff wants to pursue damages based upon his or her mental state, the defendant has a right to investigate that claim.

Real estate litigation rarely, if ever, involves such claims; but it can be invasive in other respects. The "discovery" process embedded in Wisconsin statutes permits a broad investigation by either party into the affairs of the other, so long as there is some relation to the issues present in the lawsuit. If you seek damages for lost profits based upon the breach of a construction contract, real estate sales contract, lease or other instrument related to real estate, you can expect that the opposing party will demand that you produce for inspection copies of your financial statements—and perhaps tax returns—for a number of months or years. Details concerning your business strategies and other potentially sensitive information may need to be disclosed to an opposing party. Moreover, issues relating to witness credibility open the door to a host of inquiries. If you are

deposed in a lawsuit, standard questions include whether you have been sued or have sued anyone before, whether you have a criminal record, your contracts and other relationships with other parties and so forth. The accessibility of court filings through the Internet, combined with the breadth of discovery, have caused a spotlight to be shown on embarrassing details of people's lives. I have been involved in cases where the discovery process brought to light that an "expert" witness was arrested for indecent exposure, that a plaintiff in a dispute concerning real estate had recently been arrested for domestic violence and that a defendant habitually fails to pay bills, leading to numerous judgments and claims against them.

While not all such facts find their way into the evidentiary record in a trial, uncovering facts like these can shift the relative bargaining power between the parties for reasons unrelated to what appear to be the issues that are central to the lawsuit. Sometimes, uncovering such facts are to your benefit—when the negative facts relate to the other side—but other times it is the skeletons in your closet that are revealed. The law presents certain protections against the abusive use of these facts, but a litigant or potential litigant, should disclose these kinds of facts to his or her attorney and create contingencies for their potential use by the other side. At the least, a litigant or potential litigant, should be prepared to have less than flattering information about them marshaled by the opposing party.

The Public Relations of Litigation

The disclosure of negative facts about you or your organization in the course of litigation may not seem problematic if the dissemination of that information is limited to the opposing party. However, such a limitation is not always practical or possible. The same applies to information that a party may consider to be personal or "confidential" but that does not meet certain legal criteria for being protected from public disclosure. Finally, but obviously, you may not consider it embarrassing, personal or confidential, but all of the facts and circumstances surrounding your dispute with an opposing party can find their way into court files, available for public consumption.

What is done with the information that becomes part of the public record can be a two-edged sword. Perhaps your position is one that would find favor in the public, and issuing press releases and granting interviews and otherwise broadcasting your position to the public at large may result in favorable perceptions from colleagues, strangers or the media. On the other hand, dissemination of such information may cast you in a new and negative light with

these same constituencies. In my experience, however, the positive or negative perception the public holds for a litigant rarely translates into an advantage or disadvantage in the courtroom—judges are trained to focus on evidence presented in court and exclude outside interference. Moreover the juror selection process is designed to eliminate any bias infiltrating from the "outside world."

While a lawsuit rarely can be won with a public relations blitz, litigation can be a useful tool in a public relations campaign whose goal is larger than the outcome of a discrete lawsuit. Publicity generated by a lawsuit may alter public opinion in a way that effects change coveted by a litigant. For example, a lawsuit may bring an issue to the attention of the public, who then support turning to the political process to achieve a goal consistent with the desire of a litigant. An injustice demonstrated during the course of litigation may move a zoning committee, town board, city council, county board or even the state legislature to change applicable law. In this way, litigation becomes a tool in a broader public relations campaign. However, as I've described, it is a very expensive tool and it could take a long time before it serves its purpose.

Litigation: Decisions in Context

This two part article may seem like an indictment of litigation—it is not. Rather, it is an attempt to bring some balance to what are often overly optimistic and naïve views concerning litigation. Under the appropriate circumstances, litigation is absolutely a worthwhile endeavor: if the stakes are high enough, the risk low enough and the available resources sufficient enough to see litigation through to a (hopefully) successful resolution. One can only assess whether litigation might make sense by looking at the big picture, litigation-wise. Imagine the pleasurable vindication and monetary compensation that you hope to achieve through litigation; however, understand and acknowledge the costs, time and other sacrifices that will be required to create the circumstances for the possibility of a favorable outcome. Also, consider whether the litigation is best viewed as an end in itself or a component of a larger movement.

All of these considerations will make you better able to make rational decisions about litigation that you will not come to regret. At Reinhart, we will inform you about the good, the bad and the ugly of litigation to ensure that litigation is consistent with your goals.

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