

Real Estate Litigation: Realistic Expectations

Reinhart's Real Estate Practice Group attorneys provide exemplary service in counseling and assisting all manner of individuals and entities. For the most part, that service entails many actions that do not directly involve the courts. That's good, because negotiations, transactions, and real estate projects typically are not efficiently administered or advanced when courts are involved. Rather, the court's focus on achieving "justice" under the laws— which is where its focus should be, by the way—often undermines business efficiency.

From time to time, however, our clients encounter circumstances that place them—sometimes voluntarily, sometimes not—in a position that requires them to address litigation. Perhaps our client's contract partner has failed or refused to perform under a contract, and no manner of reasonable negotiations have resulted in an acceptable resolution. Perhaps our client is accused of breaching a contract and is sued. Perhaps a governmental body is misapplying the law, resulting in an obstacle to our client's project. Nearly any kind of action that our client takes, or that is taken by another party in a way that affects our client, can lead to a lawsuit. Of course, as litigious as many believe we Americans are, lawsuits are not commenced at every opportunity. Instead, most rational thinkers carefully weigh the potential costs, benefits, and risks and make a decision to either pursue or forego litigation.¹

Imbuing Realistic Expectations

As a litigation attorney, in addition to engaging in all aspects of pending litigation, I frequently counsel clients who are faced with the prospect of litigation. Often, but quite naturally, clients have a misperception about litigation. Clients who are involuntarily brought into litigation, usually by being sued, sometimes initially have a "I'm right, they're wrong, any judge can see that" perspective. Sometimes they are right; often the issues are not so black and white. Clients who possess a potential claim against another party are, at times, eager to commence litigation to obtain a vindication of their rights. These are clients that usually have a misperception about the litigation process— they perceive litigation as a surgical strike that can provide a speedy remedy.

To be sure, litigation can effect prompt resolutions under the right circumstances; more often, however, litigation costs more and takes longer to reach a conclusion than many potential litigants expect. These variables deserve more attention than

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typically is given them by parties facing litigation. Realigning a client's expectations regarding litigation, to make those expectations more realistic, helps to form a strategy that minimizes surprises and maximizes the prospect that a client will emerge from litigation without regret.

The Cost of Litigation

The cost of litigation, in terms of dollars and cents, is usually something about which clients initially think they have a realistic view. At Reinhart, we strive to be as realistic as possible regarding litigation budgets. However, every budget necessarily contains significant caveats. For example, in addition to the risks and inherent unpredictability of litigation, we have limited control and input into what the other party may impose upon us and what the court may require of us. I recently participated in a mediation with attorneys from two other well-known and respected Wisconsin law firms and our clients. The mediator—himself a well-known and respected former judge—told each of the parties to take the litigation budgets the attorneys had provided to them (and which he had not seen) and double them to get a sense of what litigation would cost. I recall that the budget we provided to our client in that case was actually rather accurate; the point is that the mediator—no stranger to litigation—understood that it is very difficult to predict what litigation will cost.

Moreover, the cost of litigation should be measured in more than just attorneys' fees. A case may require expert testimony or investigation that the client must pay for. I have retained title companies, surveyors, appraisers, and other real estate professionals innumerable times, on behalf of a client, because the case demanded such expertise. Additionally, the client assuredly incurs costs in resources and time it must devote to litigation. Most litigation requires the active involvement of the client, who is likely to be a witness, who maintains documents that must be reviewed and produced to the opposing party, and who will need to consult frequently with his or her attorney as the case progresses. When a client needs to consult with litigation counsel, there is less time to get deals done. Perhaps the client's employees will be drawn into the litigation, as witnesses or otherwise, taking valuable time away from other responsibilities.

The Duration of Litigation

As mentioned earlier, some lawsuits can result in a prompt remedy and resolution—lawsuits seeking an injunction can be processed with surprising



speed by the courts under the right, expedient circumstances. More typical, however, are cases where there is no legal basis for expediency. A client's desire for a prompt resolution, in itself, is not recognized by the courts as a basis to expedite a lawsuit. Although there is some divergence between state and federal court, and among the various counties in Wisconsin, the time between commencement of a lawsuit and final judgment is measured in months and, in many cases, years. Moreover, the "months" typically are not a few months, but ten to twenty months, or more. Also, even after the trial court reaches a final judgment, the appellate courts await. Another 12-plus months is not out of the ordinary for the court of appeals to render a decision. And, that decision may require that the case be returned to the trial court for further proceedings, including another trial.

Realistic Expectations Lead to Better Decisions

Few things are more exhilarating than the vindication of a victory in court. Such a victory is Pyrrhic, however, if it is overshadowed by the journey to that point. Obtaining a \$500,000 judgment by spending \$1 million on attorneys' fees and other clients' costs and by engaging in two years of battle through trial and appellate courts certainly would put a damper on any post-trial victory party. By instilling in our clients realistic litigation expectations, the strategies Reinhart employs result in victories that truly merit celebration.

¹ The choice to pursue or forego litigation can be made by either a plaintiff or a defendant. For example, the plaintiff can choose whether or not to commence a lawsuit, and decide how aggressively to pursue its claims; the defendant can choose to put up a vigorous defense or surrender to the plaintiff's demands.

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