Complex Commercial Litigation

Contributing editors
Simon Bushell and Daniel Spendlove

2019

GETTING THE DEAL THROUGH

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Contributing editors

Simon Bushell and Daniel Spendlove
Signature Litigation LLP

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

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Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
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Fax: +44 20 7229 6910

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Second edition

Getting the Deal Through is delighted to publish the second edition of *Complex Commercial Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Nigeria and the United Arab Emirates.

Getting the Deal Through titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Simon Bushell and Daniel Spendlove of Signature, the contributing editors, for their assistance in devising and editing this volume.

GETTING THE DEAL THROUGH

London
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United States

Ryan D Frei and Ashley P Peterson
McGuireWoods LLP

Background

1 How common is commercial litigation as a method of resolving high-value, complex disputes?

Many complex, high-value commercial disputes are resolved by litigation. It is increasingly rare, however, for such matters to proceed all the way through trial. Many courts, particularly at the federal level, impose mandatory mediation requirements. It is also common for courts to partially or fully resolve lawsuits based on the insufficiency of the pleadings or by granting summary judgment before trial. Additionally, contractual alternative dispute resolution (ADR) provisions can force pre-litigation settlement discussions to obviate the need to file suit, while rising litigation costs can encourage early settlement discussions after litigation commences.

2 Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

The US is known for having many lawyers and a strong market for litigation. Most significantly sized businesses have had at least some experience with litigation, either as a party or as a non-party with relevant documents or information.

Litigation tends to be regional in nature at both state and federal levels. Even with foreign companies, the parties actually litigating in US courts are most commonly – and appropriately – US-based subsidiaries. But with globalisation and e-commerce expanding, foreign entities and the parents of US affiliates may find themselves litigating here more frequently. Plaintiffs' lawyers sometimes name foreign-based parents as co-defendants with their US affiliates to increase settlement leverage.

3 What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

Most commercial litigation involves claims rooted in common law or based on state or federal statutes. The federal system is governed by the US Code, and each state has its own code. Common-law claims tend to allow for more varied and flexible damages, whereas statutory claims often prescribe specific remedies or damages. Commercial litigation may also involve constitutional law and administrative regulations.

Bringing a claim – initial considerations

4 What key issues should a party consider before bringing a claim?

When deciding whether to file a lawsuit, a party should consider, among other things, the most appropriate jurisdiction and venue in which to bring the claim. A number of factors may influence this decision, including the party's claims and applicable choice of law, the composition of the court and potential jury pool, the speed of the docket, and the possible existence of any contractual venue or choice-of-law provisions.

5 How is jurisdiction established?

To adjudicate a lawsuit, a court must have subject-matter jurisdiction over the claims at issue and personal jurisdiction over the defendant or defendants. Federal courts have subject-matter jurisdiction over lawsuits in which one or more of the claims asserted arises under federal law, or in which the parties are citizens of different states and the amount in controversy exceeds US$75,000. In state courts, subject-matter jurisdiction often depends on the amount in controversy. Some states also have 'specialty courts' that exercise subject-matter jurisdiction over particular types of claims.

Federal courts have personal jurisdiction over defendants that live, are incorporated or maintain their 'principal place of business' in the state where the court is located. Courts can exercise jurisdiction over a non-resident defendant only when the defendant has 'minimum contacts' with the forum state, which must be related to the litigation. Personal jurisdiction in state courts is generally governed by similar principles.

If a court lacks personal jurisdiction, the defendant must raise a challenge early in the proceeding – typically in conjunction with its first appearance in the case – or risk waiving the defence altogether. Once a plaintiff has filed suit, the defendant generally cannot file a competing lawsuit in a preferable jurisdiction. Under the 'first to file' rule, when two suits are brought by the same parties, involving the same issues, the first court usually retains jurisdiction to the exclusion of the second.

6 Res judicata: is preclusion applicable, and if so how?

Res judicata is available and prevents a claim from being relitigated when the claim was decided, or could have been decided, in a prior proceeding. A party asserting res judicata must show that a court of competent jurisdiction has entered a final judgment on the merits on the same claim in a prior action between the same parties. The related concept of collateral estoppel provides that factual determinations in one lawsuit are binding on the parties in subsequent litigation. Collateral estoppel can also be applied under certain circumstances against litigants who were not involved in the prior lawsuit.

7 In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

US courts apply foreign law to claims litigated before them when that law is deemed applicable based on the 'choice of law' rules applied by that court. Although the rules vary, a court generally looks to the law of the jurisdiction that is most closely tied to the facts and circumstances underlying the claims at issue. If a contract provides that it should be interpreted in accordance with foreign law, a court will likely honour that provision and apply the foreign law to claims arising from the contract. For tort-based claims, some courts apply the law of the jurisdiction with the 'most significant relationship' to the lawsuit, while others apply the law of the place where the alleged injury occurred. In either instance, the court will apply foreign law where appropriate, unless the court concludes that the foreign law is contrary to public policy.

8 What initial steps should a claimant consider to ensure that any eventual judgment is satisfied? Can a defendant take steps to make themselves 'judgment proof'?

A defendant can attempt to make him or herself judgment proof by transferring assets to others or placing them into an asset protection trust. A party is generally not permitted to seek discovery regarding a

defendant's assets or ability to pay prior to judgment; however, if there is reason to believe a defendant is intentionally dissipating its assets to avoid satisfying a future judgment, a plaintiff may ask the court to intervene.

9 When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

In the US, private litigants seeking money damages are typically not able to obtain an asset-freezing order unless it becomes apparent that a defendant is intentionally dissipating assets to avoid paying a future judgment. In that circumstance, a plaintiff may seek an injunction to restrain further asset transfers.

10 Are there requirements for pre-action conduct and what are the consequences of non-compliance?

Although US courts do not require any specific pre-action conduct, private contracts often impose pre-filing obligations on the parties. Many commercial contracts require the parties to provide notice of potential claims – or the opportunity to 'cure' defaults – in a prescribed time period. Contracts also frequently require the parties to submit any disputes arising under the contract to ADR. Failure to comply with contractual requirements before filing suit may result in the stay or outright dismissal of a party's claims.

11 What other forms of interim relief can be sought?

A party can seek a preliminary injunction, restraining the opposing party from taking some action (or, less commonly, requiring the party to continue some action) until the case is decided on the merits. To obtain a preliminary injunction, a party must typically show:

- a substantial likelihood that it will succeed on the merits;
- a substantial, immediate threat of irreparable injury;
- that the 'balance of harms' weighs in favour of the party seeking the injunction; and
- that the injunction would serve the public interest.

In federal courts, a preliminary injunction cannot be issued until after the opposing party is provided with notice and an opportunity to be heard.

In certain limited circumstances, a party can seek a temporary restraining order (TRO), which can be issued without notice to the opposing party. To obtain a TRO, a party must satisfy the four factors outlined above, and must also show that the threat of harm is so immediate as to require restraint without prior notice. TROs generally expire within a short period of time, in which the moving party must seek a more permanent injunction if further restraint is desired.

12 Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

Many state and federal courts encourage or require litigants to participate in some form of ADR. In the federal system, courts will often order litigating parties to engage in formal mediation during the early stages of a proceeding, sometimes facilitated by a federal magistrate judge. Failure to participate in court-ordered mediation may result in significant negative consequences for litigants, including the imposition of monetary sanctions or other adverse rulings.

13 Are there different considerations for claims against natural persons as opposed to corporations?

One key consideration in asserting a claim against a natural person, as opposed to a corporation, is service of process. Most jurisdictions require service to be effectuated on an individual defendant in person, or, if the person cannot be found, on a suitable individual found at the defendant's residence. Service on corporations is generally easier, as they can be served via a registered agent designated for that purpose.

14 Are any of the considerations different for class actions, multi-party or group litigations?

Class actions or multiparty litigations are typically brought when a group of similarly situated individuals faced the same type of alleged wrongful conduct by the defendant. A plaintiff in a class action must meet specific requirements to proceed in this fashion. Ordinarily, a plaintiff must first meet the following requirements:

- numerosity;
- commonality;
- typicality;
- adequacy; and
- in class actions seeking monetary relief, which is usually the case, a plaintiff must establish two additional requirements:
- superiority; and
- predominance of common issues.

Courts will give significant scrutiny to cases that seek to be maintained as class actions, raising the stakes and costs of litigation far more than what is seen in individual cases. Plaintiffs should have experienced and well-qualified class counsel before pursuing these matters.

15 What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

Outside of the insurance context, third-party litigation-funding is relatively limited in the US, although it has become more common in recent years. Some states have enacted laws regulating litigation funding activities, and professional ethics rules require attorneys to act in the best interests of their client and maintain client confidentiality, even when paid by a third party.

The claim

16 How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

A lawsuit is initiated through the filing of a complaint. Pleading requirements vary in state and federal courts, but, typically, a complaint must provide sufficient factual allegations to put the defendant on notice as to the nature of the claims asserted. In federal courts, a complaint must contain a 'short and plain statement' of (i) jurisdictional grounds and (ii) the asserted claims and corresponding facts that, if accepted, would demonstrate entitlement to relief. A complaint must also demand specific relief.

Pleading length varies significantly, ranging from a few pages in a simple breach-of-contract action to more than a hundred pages in some complex commercial litigations. Generally, the documents on which a claim is based (eg, a contract or a key piece of correspondence) should be attached as exhibits. The federal system and most state courts allow defendants to incorporate into the pleadings – for some purposes – omitted documents on which a plaintiff's claim depends or relies.

17 How are claims served on foreign parties?

Federal Rule of Civil Procedure 4(f) provides that service can be effectuated 'by any internationally agreed means of service that is reasonably calculated to give notice', and the most common method is in accordance with the Hague Convention, assuming the defendant is located in a signatory country. The specific procedure for service depends on the country.

18 What are the key causes of action that typically arise in commercial litigation?

Causes of action commonly asserted in commercial litigation include:

- breach of contract;
- breach of warranty;
- unjust enrichment;
- quantum meruit;
- tortious interference with contract or business relations;
- fraudulent inducement;
- actual fraud;
- constructive fraud;
- conspiracy;
- breach of fiduciary duty;
- misappropriation of trade secrets; and
- conversion.

19 Under what circumstances can amendments to claims be made?

In the federal system, a party can amend a pleading once as a matter of right within 21 days of serving it, or, with respect to a complaint, 21 days after service of an answer or certain types of responsive motions. Other amendments can be made with the opposing party's consent or with leave of court. Leave to amend is liberally granted when good cause exists to justify the amendment (eg, newly discovered facts) and to promote justice, but courts do consider whether there has been undue delay and whether the opposing party would be unfairly prejudiced (eg, a requested amendment on the 'eve of trial' that would affect strategy).

20 What remedies are available to a claimant in your jurisdiction?

Available remedies depend on the nature of the claims and the unique facts and circumstances of a case. State and federal courts have equitable powers to fashion appropriate remedies. For example, courts can impose injunctions or restraining orders to require a defendant to take an action or refrain from certain conduct, order specific performance of contractual obligations, rescind contracts (eg, those procured by fraud), order disgorgement of profits and impose a constructive trust. Another remedy available is a declaratory judgment, in which a court will adjudicate uncertain legal rights, duties, or obligations to guide the parties' conduct. Other remedies include monetary damages, described below.

21 What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

Damages in commercial litigations most often consist of monetary awards of 'compensatory' or 'punitive' damages. Recoverable damages are highly dependent upon the basis for the claim.

The most common types of compensatory damages are referred to as 'direct' or 'actual' damages, which are designed to make a plaintiff 'whole' through an award of the reasonably certain amount of loss sustained, assuming that loss was ordinarily predictable. 'Special' damages may also be awarded, including 'incidental' damages and 'consequential' damages, which can include lost profits.

Many contract disputes are governed by the Uniform Commercial Code, which prescribes remedies and damages for certain buyers and sellers. But parties to a contract can limit or modify recoverable remedies and damages.

Liquidated damages can also be awarded, most often in contract disputes in which the parties agree at the outset that damages would be difficult to determine with exactness, provided that the fixed amount is not out of proportion to the likely loss. Perhaps the most common example is for delay damages in construction disputes.

Statutory causes of action often quantify damages recoverable for each violation, which incentivises plaintiffs to allege as many separate violations as possible. Some statutes allow for recovery of 'treble' damages, which will triple the recoverable damages for wilful or wanton misconduct.

Reasonable legal costs and attorneys' fees are commonly sought in commercial matters. The 'American rule' that federal and most state courts follow limits fee recovery to the prevailing party only when it is expressly provided by statute or contract.

Finally, punitive damages are reserved for particularly egregious misconduct and are designed chiefly to punish wrongdoers and discourage similar misconduct by others. This is a controversial area of law, with many states imposing statutory caps on such awards.

Responding to the claim

22 What steps are open to a defendant in the early part of a case?

During the early stages of a proceeding, a defendant has several options to eliminate, limit or otherwise address the claims asserted against it. A defendant can move to dismiss a complaint for failure to state a claim, or for inadequate process or service of process. If the court lacks jurisdiction, a defendant can move for dismissal. If the court has jurisdiction, but the defendant believes another forum is more closely connected to the litigation or is more convenient to the parties and witnesses, the defendant can move to transfer venue. Similarly, if a defendant is sued in state court, but a basis for federal jurisdiction exists, he or she can remove the case to federal court. Defendants often seek removal because they prefer the uniformity and predictability of the federal system.

If there is no basis on which to seek dismissal or transfer of a case, a defendant must file a written 'answer.' The defendant must also assert any 'compulsory counterclaims' against the plaintiff, which are those arising out of the same 'transaction or occurrence' at issue in the complaint. Finally, if the defendant believes a third party may be responsible for all or part of a claim asserted, he or she can bring that third party into the action by filing a third-party complaint.

23 How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

A defendant initiates its defence by filing an 'answer,' which must address each allegation made in the plaintiff's complaint. The answer must also include a list of the defendant's affirmative defences, which are those defences on which the defendant will bear the burden of proof at trial. If an affirmative defence is not asserted timely, it may be waived. In federal courts, an answer must be filed within 21 days after the plaintiff's complaint is served, unless the defendant files a preliminary motion, in which case the answer need not be filed until 14 days after the court resolves the motion (if the case is not dismissed).

24 Under what circumstances may a defendant change a defence at a later stage in the proceedings?

A defendant may seek leave of court to amend its answer to assert additional affirmative defences at a later stage in the proceedings. Under Federal Rule of Civil Procedure 15, leave to amend should be 'freely' granted, absent bad faith or prejudice to the opposing party.

25 How can a defendant establish the passing on or sharing of liability?

If a third party may be liable for all or part of the damages claimed, a defendant may assert a third-party claim seeking contribution. The law governing contribution liability varies by jurisdiction. A defendant may also be entitled to indemnification from an insurer or other third party. Indemnification claims are generally governed by the terms of the applicable contract.

26 How can a defendant avoid trial?

A defendant can avoid trial by seeking dismissal of the plaintiff's claims during the early stages of the case. After the parties have engaged in discovery, a defendant can move for summary judgment, which asks the court to resolve the case before trial where there is no genuine dispute of material fact to be resolved at trial. Defendants also frequently avoid trial by negotiating a settlement resolving the plaintiff's claims.

27 What happens in the case of a no-show or if no defence is offered?

If a defendant does not timely answer a complaint filed against him, the plaintiff can seek entry of a default judgment. A court entering a default judgment against a defendant will deem the defendant to have admitted liability to all conduct alleged in the complaint. Once default judgment has been entered, a court can enter judgment in the full amount of damages sought by the plaintiff if that amount is fixed by contract or statute. If the amount of damages is not fixed, the court will typically hold a hearing to determine the appropriate amount.

28 Can a defendant claim security for costs? If so, what form of security can be provided?

Under the so-called 'American rule', each party is obligated to pay its own fees and costs, regardless of who wins or loses. Accordingly, a defendant generally cannot claim security for costs absent a statutory or contractual right.

Progressing the case

29 What is the typical sequence of procedural steps in commercial litigation in this country?

A typical commercial case that proceeds through trial follows this sequence:

- a complaint is filed;
- an answer or motion to dismiss is filed;
- if any claims remain after a motion to dismiss is resolved, the parties proceed through fact and expert discovery;
- after sufficient facts are adduced through discovery, many litigants move for summary judgment if no genuine issue of material fact exists to warrant a trial; and
- if summary judgment is denied, a bench or jury trial is conducted.

30 Can additional parties be brought into a case after commencement?

State and federal courts have rules that allow new parties to be drawn into litigation under certain circumstances. In the federal system, for example, a defendant can serve a complaint on a third party 'who is or may be liable to it for all or part of the claim against it' [Fed. R. Civ. P. 14(a)(1)]. If a defendant files a counterclaim against the plaintiff, that plaintiff may also bring in a third party on the same basis. Federal Rules 19 and 20 set forth provisions for when a third party must, or may, be joined. On their own initiative, federal courts can also add or drop parties as appropriate.

31 Can proceedings be consolidated or split?

State and federal courts can consolidate related actions for one or more purposes, ranging from joint discovery to a consolidated trial on all claims and issues. To avoid prejudice or to promote judicial economy, courts can also order separate trials on separate issues and claims, or 'sever' claims out of a case.

32 How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

The fact-finder – either a judge or a jury – must consider the evidence presented to determine if a plaintiff has satisfied its burden of proving the elements of its claims. Every cause of action has its own distinct elements. Most civil proceedings have a 'preponderance of the evidence' burden of proof, which requires only that a plaintiff prove its position is more likely true than not – also referred to as the 'greater weight of the evidence'. Some claims require a higher 'clear and convincing evidence' burden of proof.

33 How does a court decide what judgments, remedies and orders it will issue?

Generally, a court enters a judgment or awards remedies based on the specific requests made by a plaintiff in the pleadings or at trial, assuming the evidence presented supports those requests. While orders can be issued by a court sua sponte, they are most often entered in response to a party's motion.

34 How is witness, documentary and expert evidence dealt with?

Typically, for a party to be able to rely on a witness or a particular document, the witness must be disclosed and the document must be produced to the opposing party during discovery. Many witnesses provide sworn deposition testimony before trial. Experts must generally prepare written reports summarising their opinions and the underlying data considered, and they must submit to depositions as well.

Live witness testimony is generally more impactful and, thus, preferable. But some witnesses are unavailable for trial, in which case deposition testimony must be presented via video or by reading the transcript aloud. In complex commercial matters that tend to be document-intensive, one common tactic is to create compilations or demonstrative exhibits that summarise a large volume of documents.

35 How does the court deal with large volumes of commercial or technical evidence?

Some courts will appoint 'special masters' – often former judges or reputable practitioners – to analyse and summarise voluminous sets of technical evidence to aid the presiding judge. Judges also rely on counsel to determine how best to streamline the presentation of voluminous evidence.

36 Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

Tools exist for obtaining testimonial and documentary evidence abroad for use in US proceedings, and vice versa, including use of the Hague Convention, letters of request, and letters rogatory. Obtaining international discovery can take considerably longer than domestic discovery, and the responding party will likely have more grounds to object or limit scope, including, for example, EU privacy laws.

37 How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

Most trial witnesses are deposed prior to trial, which gives the opposing party a preview of their likely testimony. Any witness who testifies at trial is subject to cross-examination. For documents to be available as evidence at trial, they must generally be produced during discovery, although exceptions are made for documents intended solely for cross-examination.

38 How long do the proceedings typically last, and in what circumstances can they be expedited?

This depends entirely on the court in which a case is pending, as well as the number and complexity of the claims. Broadly speaking, most commercial litigations filed in state and federal courts are resolved within one to two years of filing. Some jurisdictions, such as the US District Court for the Eastern District of Virginia (known as the 'Rocket Docket'), routinely resolve matters in less than a year. Other jurisdictions – particularly those with limited resources – may have complex cases pending for four to five years, or longer. Proceedings can be expedited when all parties consent to an early trial date, or when, for example, injunctive relief is sought, such that the exigencies of a case genuinely require swift resolution.

39 What other steps can a party take during proceedings to achieve tactical advantage in a case?

Whenever appropriate, many litigants will file a motion to dismiss at the outset of a case in lieu of answering a complaint. Perhaps the most common type is a motion for failure to state a claim upon which relief can be granted, which accepts as true all well-pleaded allegations of fact and argues that, even on those facts, the claims are not legally actionable. Other common initial bases to dismiss are for lack of personal or subject-matter jurisdiction. A motion to transfer venue to a more favourable forum is another tool some litigants use early in a case to gain a tactical advantage.

A motion for summary judgment is often filed in the more advanced stages of proceedings to win judgment without the need for trial. Typically, summary judgment motions are not filed until at least some discovery is taken, because the moving party must demonstrate that no genuine issue of material fact exists, which can be difficult to do without discovery.

40 If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?

As some states have begun softening common law restrictions on 'maintenance' and 'champerty', third-party litigation funding has begun to emerge as an industry in the US. Third-party funding can result in claims being pursued that might not otherwise be filed due to lack of resources. And given that the appetite for litigation often decreases as legal fees mount, external funding can increase a plaintiff's staying power and, consequently, lengthen the duration of a case. Proponents characterise third-party funding as a justice-promoting tool that ensures corporate defendants cannot effectively immunise themselves from liability based on the depth of their pockets.

Because litigation financing is almost always an aid to plaintiffs, whose prospects for monetary recovery incentivise third-party investment, many critics worry about the negative impact on defendants – particularly those more susceptible to high-dollar claims (eg, patent or copyright infringement, antitrust, etc) due to the nature of their business. In addition, while ethics rules can limit a funder's ability to control litigation strategy or settlement determinations, the mere existence of a third-party funding arrangement – and the financial agreement between the funder and the plaintiff – can have a significant impact on

settlement decisions, pushing plaintiffs to seek larger payouts, which can delay or even preclude settlement altogether.

41 How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?

Parallel proceedings are increasingly common, particularly in highly regulated sectors including finance, pharmaceuticals and energy. Individuals and corporations facing parallel civil litigation and criminal or regulatory investigations must be carefully attuned to the effect a decision in one action may have on other proceedings. For example, an individual may choose to assert their rights under the Fifth Amendment, which protects against self-incrimination, if asked to testify in a civil or regulatory proceeding related to pending or anticipated criminal charges. Relatedly, under certain circumstances, producing documents or providing testimony in one proceeding may risk waiving privilege or confidentiality of that information, rendering it available to adversaries in other forums.

Although private parties generally cannot prosecute criminal or regulatory violations, they can typically report suspected or known criminal or regulatory violations to the appropriate authority or authorities. A number of state and federal laws exist to protect so-called 'whistleblowers'. The False Claims Act also allows private individuals (called 'relators') to file actions on behalf of the federal government against entities that have allegedly defrauded it.

Trial

42 How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

Most trials proceed with evidence of liability and damages presented during the same phase, with the case then submitted to the fact-finder. Some trials are bifurcated, with a liability phase first, followed by a separate damages phase if liability is established. Trial duration can vary from a single day in straightforward cases, to several months in some complex matters involving dozens of witnesses and hundreds – or even thousands – of trial exhibits.

43 Are jury trials the norm, and can they be denied?

The Seventh Amendment to the US Constitution, as interpreted by the US Supreme Court, guarantees litigants a right to a jury trial for most types of claims commonly asserted in commercial disputes. At least one party must make an affirmative jury demand, however, or else a matter will be set for a bench trial. Parties to a private contact can waive the right to a jury, and often do, particularly if they are larger corporations that jurors might view less sympathetically. Parties in complex, highly technical matters may also choose to forgo jury trials.

44 How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

It is common in discovery for parties to execute a protective order to protect certain materials and information produced during discovery as 'confidential' – most often information viewed as proprietary and commercially sensitive, such as trade secrets. But discovery material being deemed confidential by one or both parties does not mean it will be afforded the same protection in court filings. A strong presumption exists for the public's right of access to court proceedings and records, rooted in both the common law and in the First Amendment to the US Constitution.

Federal courts and most state courts allow parties to request 'sealing' of confidential materials to keep them from the public eye. Sealing is generally disfavoured, and litigants must establish that they would be put to a genuine commercial disadvantage if the information were disclosed publicly. Proceedings may be closed and documents sealed in other circumstances as well, including matters involving minors or sensitive national security issues.

45 How is media interest dealt with? Is the media ever ordered not to report on certain information?

In furtherance of the public's general right of access to court proceedings and 'freedom of the press' considerations grounded in the US Constitution, US courts generally accommodate requests by the media to attend proceedings, and the media will freely cover cases of public interest. Reporters are customarily allowed in courtrooms, and some trials are even televised. Exceptions can be made when the sensitivities of a case require it. Courts can issue 'gag orders' to restrict parties and counsel from commenting on proceedings to limit potential prejudice from pre- or mid-trial publicity. But, even in those instances, the media can, nonetheless, report on a case using publicly available information, including pleadings, briefs, and other court filings.

Update and trends

Litigation and regulation involving cyber security and data protection are on the rise. Businesses of all sizes in nearly every industry are at risk for claims stemming from the alleged mishandling of personal identifying information (PII), including, for example, social security numbers, credit card information and health information. Companies operating in the healthcare, financial, education and retail sectors may be particularly susceptible.

Data-breach litigation can take many forms. In recent years, companies that have experienced hacks or other data breaches have faced class action claims brought by consumers directly harmed by the breach, class action claims by financial institutions indirectly harmed by the breach, and shareholder derivative claims based on allegations that the breach would not have occurred but for corporate mismanagement.

A number of state and federal government agencies also regularly pursue litigation and regulatory actions related to data security. Most notably, the Federal Trade Commission (FTC) has filed several data-breach actions on behalf of consumers, asserting that defendant companies failed to take reasonable measures to secure PII. Several state attorneys general have also instituted data-security enforcement actions against companies.

Companies seeking to minimise exposure to data-security claims should implement and consistently follow reasonable internal procedures designed to prevent data breaches from occurring and to minimise damage caused by any breach. Cybersecurity insurance may also offer additional protection under some circumstances.

46 How are monetary claims valued and proved?

A party pursuing common-law claims must prove damages based on competent evidence. In complex commercial matters, expert testimony is sometimes necessary to substantiate and quantify a claim for damages. A party is not barred from recovering damages simply because the nature of the injury does not lend itself to being calculated with mathematical precision. As a general matter, however, damages must be concrete and established to a reasonable degree of certainty. They cannot be speculative.

Statutory causes of action often have pre-determined damages to be awarded for each violation, similar to liquidated damages in a contract action.

Post-trial

47 How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

Although the 'American rule' provides that each party to a lawsuit must pay its own costs, Federal Rule of Civil Procedure 54 allows the prevailing party to recover certain ministerial costs, such as photocopying and transcript fees. Some state and federal statutes include fee-shifting provisions that permit a prevailing party to recover its attorneys' fees, and many private contracts include provisions requiring a breaching party to pay the non-breaching party's fees.

Judgments entered by the court are almost always accessible to the public. A judgment is generally due and owing immediately upon entry, although the parties may agree to payment of the amount over time.

48 When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

Final judgments (and, in rare cases, certain interlocutory orders) may be appealed. The appellate process varies by jurisdiction, but it generally requires filing written briefs and participating in an oral argument before a panel of appellate judges. The time required for an appeal to be

decided varies widely. In the federal system, most complex commercial matters are decided in nine to 12 months from filing. State appellate courts are, on average, slower than federal courts, with appeals in some states taking years to resolve.

49 How enforceable internationally are judgments from the courts in your jurisdiction?

Because the US is not a party to any bilateral treaty or multilateral convention governing enforcement of foreign judgments, enforcement of a US judgment internationally will depend on the law of the jurisdiction in which the judgment is to be enforced.

50 How do the courts in your jurisdiction support the process of enforcing foreign judgments?

The enforcement of foreign judgments is governed by state law. When deciding whether to enforce or 'domesticate' a foreign judgment, a court will look to whether the judgment was obtained by an impartial tribunal with procedures in place to protect the parties' due process rights, among other factors.

Other considerations

51 Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

Litigants in the US can take advantage of a robust discovery process, particularly in the federal courts. Nationwide service of process means that a third party can be easily compelled to provide documents or deposition testimony in a pending litigation, even when located thousands of miles from the tribunal where the matter is pending. Also, compared to the EU and some other jurisdictions, the US has less restrictive privacy laws, which can make it easier to obtain meaningful discovery.

52 Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

Most state and federal judges in the US are generalists with wide-ranging civil and criminal dockets, which can make it challenging to litigate particularly esoteric or technical subject matter.

53 Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

US courts, particularly at the federal level, are increasingly attentive to electronic discovery issues, which can be both a benefit and a challenge to litigants. Courts are more aware than ever of the burden associated with large-scale data collection and review, and they are willing to impose appropriate limitations. But litigants must also take very seriously their obligations to preserve and properly search and produce electronic data, or risk significant negative consequences.

McGUIREWOODS

Ryan D Frei **rfrei@mcguirewoods.com**
Ashley P Peterson **apeterson@mcguirewoods.com**

Gateway Plaza
800 East Canal Street
Richmond
Virginia 23219-3916
USA

Tel: +1 804 775 1000
Fax: +1 804 775 1061
www.mcguirewoods.com

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