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PERSPECTIVE

Reassessing litigation in a pandemic: 4 questions worth asking

By Mark LeHocky

The world has changed and it won't change back soon. Maybe ever. The coronavirus outbreak has triggered massive layoffs and sobering jobless numbers. New bankruptcies presage additional pain with many ripple effects. In turn, courts delay trials and outcomes even further. It all cries out for a pause to rethink litigation strategy and the value of many disputes.

While some companies still prosper, many more suffer with no apparent end in sight. Companies in some industries (retail, movie theaters, travel, autos) were already wobbly, and COVID-19 may have broken their backs. Witness bankruptcy filings by Hertz Corp., J.C. Penney, J. Crew, Briggs & Stratton, Neiman-Marcus, etc. Even companies still faring well have reason to pause, as they rely upon selling ads, goods or services to so many struggling businesses and consumers.

Time to reassess priorities, particularly as to disputes that divert significant resources — both dollars and people — precisely when companies must get by with less of each.

Certainly, many disputes are unavoidable. Thefts of trade secrets, failures to perform key agreements, individual and class employment and consumer claims posing great individual harm or impact on large numbers — may not wait without offsetting harm. Disputes will go on. Yet the pandemic and its effects warrant recalibration and a fresh approach for resolving them.

As a first step, answer these four questions about each potential or active dispute:

Does it still matter as much today? A vaccine won't save us from COVID-19's economic pain. Based upon prior economic downturns, available dollars should matter more today than they did before. Even companies with substantial cash reserves are cutting certain initiatives and growth. Witness Google's recent decision to cancel expansions in Canada and Silicon Valley. They are by no means alone.

As companies reduce headcount, a fitting corollary is to re-examine the importance of each dispute — in terms of direct dollars, diversion of people, and the underlying business initiatives they impact. Do they still matter as much today with everything else that is going on?

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Will it matter as much later when later may be much later? The pandemic shut down courts for months. As those courts start to reopen, civil trials will be delayed the most, as already overburdened courts must prioritize criminal and other matters. As well, continuing uncertainty as to the safety of assembling juries will likely delay civil trials even further.

Justice delayed often translates into justice more costly, in both direct and indirect ways. As well, delayed resolution poses greater risk of obsolescence as to the underlying product, technology, initiative or venture implicated in the dispute. With further court delays, the value of the litigated outcome may dissipate even more.

Will there still be a there there? With apologies to Alice B. Toklas, whether a defendant will still be there to satisfy a judgment later is more problematic today. Even pre-COVID, many disputes got way too close to trial before a defendant's true economic health was revealed.

Think about it: Parties facing a high risk of loss often re-prioritize their spending, seeing little reason to reserve their dollars to fulfill an adverse judgment. Complicating matters is the fact that our litigation system does not lend itself to financial wellbeing inquiries before liability and damage are established. No trickery needs be in play. Rather, defendants may simply invest in their people and pay other debts as the litigation plows along, reducing the chance of a collectible judgment later.

Will there still be a there here? Businesses are interdependent. If enough struggle for extended periods, most businesses will be hurt. Layoffs are only the beginning. The next wave often involves wholesale cuts in marginal, untested and less profitable business initiatives. Does this dispute fall into any of those categories?

If so, time to recalibrate. Even if a business' fundamentals and bank account remain solid, continuing investment in non-core or marginal initiatives may no longer make sense, especially when the workforce and resources have been significantly depleted.

So, what to do? Civil disputes will of course continue. COVID-19 has already produced a slew of new matters while complicating disputes already underway. Here, a few suggestions built on these questions and tested by the author while managing disputes at various companies:

Apply the same discipline to measuring disputes as to reducing initiatives and headcount: In periods of economic turmoil, companies and agencies frequently impose financial cuts throughout an organization — requiring significant cuts in workforce, pay or spending. Apply that same discipline to the inventory of disputes at hand: Which are less valuable or less obvious in terms of the return on investment, measuring both (a) the direct expenditures on counsel, experts and costs and (b) the indirect cost of diverting internal people and resources when you have fewer of each to spare. Those lower on the list may warrant a new look as to the appropriate amount of time and effort, as well as alternative paths toward resolution.

Engage the other side directly and repeatedly in substantive conversations about the facts, merits and alternatives. Modern litigation practice has shifted over recent decades away from direct conversation about substance and solutions and toward formal bickering through court process. Conversation gave way to email and more formal position statements. The unintended consequence is that gaps in understanding facts and objectives don't surface until much later — often at a late stage mediation or mandatory settlement conference.

Settling late may be unavoidable for some disputes. But for many others, late settlement efforts are often encumbered by sunk costs that may eclipse the real value of the dispute by the time the good, bad and ugly of many disputes is fully revealed.

Seek out experienced help early if the direct conversations don't suffice. Sometimes, the most reasoned direct approaches to an adversary fall short because your side is, well, the other side and often blamed for the problem at hand. Here an experienced mediator — ideally with business as well as legal acumen — can present a neutral assessment, alternatives that may beat anything a court can order, and balanced view of all tradeoffs of a fully litigated case.

Reject the old school "one and done" model for dispute resolution. Modern mediation practice evolved a few decades ago using a dated judicial model. Mimicking late-stage mandatory settlement conferences, many mediations today are often delayed until all the pre-trial work is done and sunk costs have grown into a major counterweight to reasonable decision-making.

For many disputes, a better model is the initial case management conference where a judge invests time early on to help the parties sort out the most efficient path ahead. Properly constructed and aided by a skilled neutral, parties can similarly pare down a dispute greatly, if not fully resolve it there and then. If follow-up conversation is needed, with some focused homework in between, the result consistently is a narrower dispute, more efficiently handled and resolved much sooner than a court action typically produces.

Given the greater court delays and financial uncertainty triggered by COVID-19, this is a perfect time to reassess both how to measure and resolve disputes. Hopefully, these suggestions will help with that review. ■

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