



THE PLAIN & SIMPLE

Getting in a dust-up? Where and how is often more important than whether you have a good case!

Consider your situation. The other side – the bad guys – have wronged you. There is no question about it. Your lawyer – who hedges on whether a steak is medium or medium rare – is even willing to stick his neck out to say you have a good case. Well, then, let's go – let's put on the boxing gloves and mix it up! Not so fast.

Or consider the converse situation. You blew it and you know you blew it. The other side has a great case against you. Your lawyer – the same one as in the preceding paragraph – is sweating – you can see the sweat on his semi-bald pate. You should probably suck it up and settle quickly, right? Again, not so fast.

Sorry, but in both situations, the first thing to do, counterintuitively, is not necessarily look at the merits. Instead, there are some very simple procedural questions that you should start asking up front. And lots of these go back to whether your lawyer had the foresight to draft these into your documents years ago. The answer to these questions could give enormous leverage, either for or against you, and (to mis-quote Sun Tzu), before you go off to battle, it is well to survey the battlefield.

Here are a few examples – not necessarily exhaustive. As you read them, you will probably see why these are so important in setting up the battlefield:

- Where will the case take place? Are you, or your adversary, required to go to an inconvenient and expensive forum, e.g. you are a big pot of money from New York getting sued in, say, Texas?
- Do the documents exclude punitive, consequential and speculative damages?
- Are you – a poor little plaintiff – allowed to go in front of a jury, or is jury trial waived and you will be in front of a judge?
- Are you in court or required to go to arbitration?
- Are you in state court – often slower and more unpredictable – or can you be in Federal court, which is generally thought to be faster and more predictable.
- Which state's law will apply to the dispute?
- Does the loser pay the winner's legal fees? With the incredibly high cost of litigation, this in and of itself can often be the most important question raised.
- Who are you suing – does it have any money, or is it a judgment proof shell?
- Can you or your adversary put a lis pendens on real property that will have the effect of throwing in a roadblock towards reaching a business goal of yours or your adversary, respectively?

Finally, and possibly most important of all, do you or your adversary have a practical reason why a slow resolution to the matter is good or bad? Often a party trying, or needing, to move litigation along quickly is at a disadvantage.

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So, whether you have a good case is sometimes very secondary to the procedural set-up. This is not necessarily fair or right, but it is true.

Many times our clients conclude that litigation is not worth the time or expense. If our clients are lucky the prospective adversary agrees and the resolution is a negotiated settlement. If this cannot be achieved, Duval & Stachenfeld has a high-powered litigation department that is willing and able to step in.

If you have a need for legal advice on any of the above matters, please contact any of the following partners in our Distressed Real Estate Practice Group:

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Firm Facts

Duval & Stachenfeld will be the lead sponsor at IMN's 11th Annual US Real Estate Opportunity & Private Fund Investing Forum in New York, NY on June 3-4, 2010. The following D&S real estate partners will be participating on panels:

- **Bruce Stachenfeld** will be the moderator for the **Hand Over Keys Vs. Sell Vs. Restructure/Adding New \$: A Guide For The Equity Holder** panel on Thursday, June 3 at 4:05PM.
- **Terri Adler** will be the moderator for the **Joint Ventures: Marriages & Divorces** panel on Thursday, June 3 at 2:35PM.
- **Todd Eisner** will be a panelist on the **Project-Level Workouts** panel on Thursday, June 3 at 11:50AM.
- **Craig Brown** will be a panelist on the **Loan-To-Own** panel on Friday, June 4 at 11:25AM.

For the complete conference agenda, please visit www.imn.org/2010/eej1244/brochure/brochure.pdf.

Please contact Caitlin Velez at (212) 672-3747 or newsletter@dslip.com with any questions or comments.

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