

# Volume of business disputes remains high

SPECIAL TO THE RBJ

**Todd Etshman**

Not many things are certain in life, but one certainty in life and law is that there will always be business disputes. With or without a pandemic, business disputes are always happening.

## Commercial litigation keeps attorneys busy

Local firms that specialize in business or commercial litigation don't have to look for business clients with legal issues. Businesspeople need them as much today or more than ever before.

"We have quite a few people calling us with business related contract issues," says Steven Cole, managing partner at Adams Le-Clair LLP. He emphasizes having a legal business relationship with a commercial or business lawyer before disputes occur between business partners, vendors and parties.

Big companies with experience of the commercial law dispute resolution process typically do have a commercial law attorney, but smaller companies often think they won't encounter the level of complex legal issues that need an attorney. That is an assumption they shouldn't make, says Chad Flansburg, a partner in the commercial litigation group at Phillips Lytle LLP.

There are enough commercial law cases for Rochester and the other populated counties of New York State to have its own commercial court. Commercial litigation is really a subset of civil litigation or "two sides of the same coin" Flansburg explains but there are differences.

The rules are the same in civil and commercial law, but commercial law cases often have higher dollar amounts and more sophisticated players and issues, Flansburg says. The tactics, motion practice and depositions can be more complex, which keeps Rochester's commercial law court docket full today and likely long into the future.

## The courts

"Commercial court seems to be extremely busy right now. There's still a bit of a (COVID-19) backlog" says Cole.

Backlogged or not, Underberg & Kessler LLP's managing partner Thomas Knab says the commercial division court works well.

"They created the commercial division because they wanted to give business litigants the same level of scrutiny and analysis as they do in federal court," he says.

Flansburg now has a case in Nevada involving a local business where one of the parties is arguing COVID-19 impacted the expectations and performances the par-



Chad Flansburg



Thomas Knab

ties originally agreed upon. Such a defense is called force majeure.

The venue of dispute resolution – Nevada in this case – isn't unusual since the parties typically agree, in their contract, where a dispute will be heard. A contractual arbitration agreement is common, especially for big companies who don't want a court case to be in the news.

In fact, the federal Western District Court of New York,

where many commercial law cases are heard, mandates mediation for the parties. A judgment from the court is still required to enforce a mediation decision but it does help relieve an already crowded court docket that is just beginning to hear cases it couldn't hear during the height of the pandemic.

A decision by the US Supreme Court regarding whether federal courts have subject matter jurisdiction to confirm or vacate arbitration awards was argued in November, but the decision in *Badgerow v. Walters* has yet to be released.

Ordinarily, rulings by the New York Court of Appeals, the state's highest court have the most influence.

One thing Cole says is different about New York courts is how they deal with a contract's restrictive covenants such as non-disclosure or non-compete clauses for former employees.

In New York, courts won't enforce restrictions that are considered to be against public policy. Other states enforce the wording of the contract, Cole says.

Still, Flansburg notes, post-employment restrictive agreements often get litigated due to the increasing importance of protecting a business client's trade secrets.

**Force majeure defense**

Force majeure, as local attorneys and Black's Law Dictionary explain, is a defense used in commer-

cial law (and construction cases in particular) that protects a party from not having to live up to or perform its contractual obligation due to causes or complications beyond its control. Not surprisingly, those factors include COVID-related issues and restrictions such as delivery of materials.

Knab had such a case here where a vendor in the construction of a condominium development couldn't deliver the necessary lumber for the job. Delivery issues in the COVID era beginning in March 2020 were extremely common and aren't uncommon even now.

Force majeure was a well-accepted COVID era defense. "Now that excuse of COVID isn't being tried as much as things get better," Knab says.

Foreclosures were stayed by moratorium during the pandemic including high dollar commercial evictions, but landlords need money too and those cases will be moving forward now with the help of commercial law attorneys.

The pandemic delayed some cases but didn't halt the steady stream of nearly inevitable business disputes. "People were still running their businesses and dealing with their issues, real property or whatever," Knab says.

**Solve the issue as fast as possible**

Ultimately, most business disputes aren't going to trial or maybe even to court.

Most of the time, if it's a business dispute, the parties have already tried to resolve it themselves one way or another without getting a lawyer involved, Knab explains.

"Nobody wants to spend that kind of money and it distracts them from their day to day business," he says. By the time a business dispute gets to his firm it has likely been percolating for some time.

Lawyers we spoke with said once they are involved, their goal is also to help settle the dispute before it takes up a lot of time and moves toward a trial.

While allegations of breach of contract are standard in commercial litigation, data breach is going to be a bigger issue going forward and is something commercial law attorneys are counseling clients about today so they can mitigate the risk.

There are reporting obligations that must be made depending on the size and nature of the breach as well that must be made to the New York State Attorney General's Office and credit reporting bureaus. Commercial law attorneys will assist their clients in meeting those regulatory obligations.

Finally, if you have a law degree and are looking for work, the law firm partners we spoke with would welcome more associates to tackle the growing volume of commercial and civil law cases and issues.