

SPECIAL REPORT Litigation

Dispute over scraps morphs into dispute over success

Commentary by Alan Kluger

As the South Florida economy rebounds from the recession, industry insiders may be tempted to think there will be a downturn in litigation.

However, while we are seeing less litigation between business partners fighting for the leftover scraps remaining from failed business ventures, we are seeing more disputes among partners and joint venturers fighting over the fruits of the bounty of success.



Kluger

Many real estate projects that were previously faltering are now flourishing. So parties that were previously trying to restructure deal terms to mitigate their losses now want to restore the original deal terms to reap the benefits of the rebounding economy. As a result, the litigation landscape is changing but not at all dwindling.



As the building up of the South Florida skyline continues, much of the litigation now surfacing occurs in the context of real estate. For example, some developers are seeking to modify unfavorable financing terms in the face of the improving economic climate. During the recession, many developers borrowed money from hedge funds in order to salvage floundering or failing

real estate projects. Those investments came with steep interest rates, equity kicker and high pre-payment penalties. So now, developers are suing or threatening suit in order to remove the hedge funds in favor of better borrowing terms from commercial lenders that were not financing any projects during the economic downturn.

As businesses begin to do better in a growing economy, many

minority shareholder cases lingering during the recession are now being revived and resolved.

SETTLEMENT PUSH

Minority shareholder cases rose in prominence as these shareholders sought to recoup their investment at a time when companies were faltering due to weak performance a few years ago.

In an effort to mitigate losses and to recoup their investment, minority shareholders sued the company claiming mismanagement, waste and other bad acts.

We have represented parties on both sides of these disputes, and in many instances the litigation has crept along. But now, with the economy on the rise and with the increasing availability of financing at attractive rates, these companies are being bought by third parties, satisfying the minority shareholders and ending the disputes.

Generally, these types of clashes tend to be had by sophisticated clients who understand that swift settlements are instrumental to running successful and profitable businesses.

Even in the minority shareholder cases described above, the shareholder usually knows that, absent fraud or mismanagement, it is in his or her best interest to allow the company to continue to run smoothly

and with little interference in order to maximize the return on investment.

As a result, early mediation is often the fastest way to resolve these types of disputes.

Moreover, Miami is a “small town,” and chances are that the parties will cross paths numerous times, particularly if they work in a similar industry such as real estate, so there is usually a mutual desire to resolve the dispute without protracted litigation and without the hostility often associated with lawsuits.

In recent months, because the disputes are over profits, the parties want to avoid spending money on legal fees so there is a mutual push toward settlement.

Of course the best way to resolve a dispute is to avoid the litigation phase in the first place. While careful drafting of contracts can allow the parties to resolve disputes outside of the courtroom by providing for mediation or arbitration, settlement conferences are often effective for resolving issues among the parties before they lead to the courthouse.

These conferences can be held with or without counsel. In order to be successful, however, it is critical that both sides come to the table prepared to resolve disputes realistically.

It is often frustrating when a

shareholder or investor wants its investment back in the midst of a recession and will accept nothing less. Even the best-intentioned company cannot draw blood from a stone if there simply isn't the cash to buy out the investor.

This is where a sophisticated and industry-savvy attorney can provide guidance and counsel to his or her clients, explaining the various possible outcomes and their long-term ramifications.

While the recession appears to be over in South Florida, economies tend to be cyclical. Those riding the wave of the boom are using the legal system to resolve disputes borne out of the downturn.

However, a rising tide does not mean an end to litigation.

In fact, as companies continue to grow and prosper, we expect to see disputes arise as shareholders disagree over the next steps for their companies, such as whether to distribute or reinvest profits and whether or not to sell. Strong litigation counsel can and should work closely with their clients to evaluate their options and needs in order to provide the best result possible.

Alan Kluger, a founding member at Kluger, Kaplan, Silverman, Katzen & Levine, is a veteran courtroom lawyer who represents some of the nation's largest businesses and prominent individuals.