

LITIGATING A SUBROGATION CASE IN NEW YORK

Michael J. Sommi, Esquire
Cozen and O'Connor
16th Floor
45 Broadway Atrium
New York, New York 10006

I. How long does it usually take to try a case to verdict?

A. State Court: Minimum of 1/2 years, but often between 4 and 6 years or more.

B. Federal Court:

1 - 2 1/2 yrs.

II. What explains the difference between state and federal court?

A. State Court - New York Supreme Court:

1. Courts are overburdened
2. Typically discovery is not closely supervised. As a result, Counsel rarely held accountable and forced to abide by court imposed deadlines. The state courts are much more tolerant of delay.
3. Structural Impediments:
 - a. Automatic adjournments on unopposed motions in New York County.
 - b. Cases typically sit dormant for as long as 18 months once they are on the calendar, ready for trial.
4. Endless motion practice.
5. Appellate practice.

Virtually every order is immediately appealable whereas in Federal Court only final orders are generally appealable.
6. Labyrinth of procedural rules that defendants use to their benefit to delay and confuse proceedings.
7. Different judges for discovery and trial.

B. Federal Court:

1. Court of limited jurisdiction with relatively smaller caseload.
2. Activist magistrate judges who closely monitor discovery.
3. Court annexed mediation and arbitration programs.
4. Judges take much more active role in settling cases.

5. Sanctions - court enforced accountability.

Rule 11 of the Federal Rules of Civil Procedure.

6. Limitations on use of written discovery devices.

Southern District:

Limits interrogatories to those seeking names of witnesses and custodians of records.

Eastern District:

Limits the number of interrogatories served at the commencement of discovery to 15.

Automatic disclosure of identity of witnesses, general description of documents and insurance information within thirty days of the service of an answer.

7. Expedited process for discovery disputes.
No discovery motions permitted without first addressing the issues by way of oral or letter motion.

8. Depositions:
Strict limitations on types of objections and manner in which counsel can interfere.

Much more difficult to delay. Judges will intervene and force recalcitrant or dilatory counsel to participate.

III. Strategies for moving the case:

A. Pre Suit:

1. Obtaining Fire Marshal Reports:
Issue FOIL (Freedom of Information Law) request specifically requesting the report with all attachments and interview sheets.
2. Obtaining Police Reports
FOIL requests to police department -- ask for complaint and "complaint follow ups."
3. Pre-suit subpoenas
Motion required - could take time.

4. Negotiate pre-suit with opposing carrier.
5. Alternative Dispute Resolution:
Mandatory Intercompany Arbitration if the claim is less than \$100,000.00.

Voluntary arbitration or private mediation for claims of any size.

B. Pleading Stage:

1. File suit in Fed. Ct.
 - a. Requirements:
 - (1) Diversity of Citizenship
Insured or carrier
Citizenship of insured usually determined by place of residence whereas citizenship of carrier is determined by the state of incorporation or the principal place of business (headquarters).
 - (2) Amount in controversy in excess of \$75,000.00
 - b. ADR in Federal Court:
 - (1) Eastern District Court Annexed Arbitration Program:
Mandatory Arbitration program for cases under \$100,000.00.

Arbitration occurs within 120 days of the date that the Answer was filed.

Voluntary arbitration for cases in excess of \$100,000.00.

Right to trial de novo, however, loser must pay the arbitrator's fees if a less favorable decision is rendered at the subsequent MW.
 - (2) Eastern District Early Neutral Evaluation Program:

Attorney from court appointed panel essentially acts as a mediator and assesses the case before the parties proceed with disclosure.

No cost to the parties.

Voluntary and non-binding.

(3) Court Annexed Mediation:

No cost to the parties

Available in both the Southern and Eastern Districts.

Depends on skills of mediator - could have defense orientation.

Non-binding

c. Tactical Advantage:

Often, opposing counsel are not as familiar or comfortable in federal court since they usually do not have as great an opportunity to litigate in that forum.

2. Venue considerations if suit must be filed in New York Supreme Court:
Shorter calendar delays in some counties.

Suburban counties such as Nassau and Suffolk tend to move discovery a bit faster although this is by no means a hard and fast rule.

C. Discovery:

1. Federal Court:

Request settlement conference with Magistrate or assigned judge.

Request that representatives of the respective carriers appear at the settlement conference.

Request short deadlines but be prepared to stick with them.

Rule of thumb - one adjournment.

Keep the judge involved.

2. State Court:

File request for preliminary conference as soon as answer is received.

Involve the court early in discovery dispute to avoid motion practice.

D. Trial:

1. Federal Court:

Consent to try case before a magistrate judge. Usually allows for a sooner trial and more control over scheduling.

E. Settlement:

1. Incentives for defendants to settle.

Mandatory prejudgment interest of 9% per year.

Joint and several liability still applies in property damage cases.

2. State Court Process:

Defendant must remit the settlement proceeds within 21 days of receipt of an executed release and stipulation of discontinuance. CPLR 5003-a.

3. Federal Court Process:

No similar rule in federal court; however apply the same period and conference with judge if distribution of proceeds is delayed.

IV. Why file suit in state court?:

1. No diversity -- insured, insurance carrier and defendant from the same jurisdiction.

2. Total claim is less than \$75,000.00.

3. Substantial uninsured loss and insured is not diverse from defendant. If suits filed simultaneously, the Federal Court may abstain or refuse to hear the federal court case before it, effectively enforcing all of the parties to litigate in state court.

4. Fear of potential prejudice against insurance carriers.

5. Favorable substantive caselaw.

6. Discovery advantages if weak experts:

CPLR 3101(d) vs. Rule 26 of the Federal rules of Civil Procedure.

Michael J. Sommi, Esq.

Cozen and O'Connor - New York

PHILA1\1142651\1 099994.000