Batten the Hatches: Preparing for an Automotive Dispute

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Just as death and taxes are certainties in life, so too is litigation for many automotive companies. And while each case varies widely in terms of facts, law, parties, and forum, there are common points to consider in most effective pre-suit gameplans. Doing so as soon as litigation becomes foreseeable will increase the likelihood of a favorable outcome, help minimize risk, and may even facilitate resolution before a complaint is ever filed.

Strategy. The road from filing to final judgment can be a bumpy one. Before embarking on it, prospective litigants should ask the following questions: What are you trying to accomplish? What would qualify as an acceptable result? What are you willing to invest in time and resources to achieve your goal? How much risk are you willing to take? The answers to these questions will differ from case to case. For instance, a party hoping for a modest recovery in a collections action will likely be more conservative than a party whose trade secrets have been stolen by a competitor. During the strategy phase, client and counsel should work together to collect the underlying facts. Once done, counsel can then analyze these facts under relevant statutory and case law to determine whether the case has merit and what the estimated costs might be. Input from other advisors (e.g., IT, publicists) may also be needed so that an informed decision is made.

Information Privileges. U.S. jurisdictions recognize various information privileges that can protect certain documents and communication from disclosure. These include the attorney-client privilege, the work product doctrine, spousal privileges, and other professional privileges. In the pre-litigation phase (and beyond), these privileges are invaluable because they allow for open and honest discussions about the issues and permit counsel to develop the case without fear that the opposing party will invade their thought processes. These protections, however, are not absolute, and unless certain conditions are satisfied, a court may order disclosure. Consider, for instance, the attorney-client privilege. This privilege protects client (or potential client) communications with an attorney where the communication's purpose is to obtain or furnish legal advice. Thus, copying an attorney on a communication, by itself, is insufficient to avoid disclosure. Additionally, the privilege may be lost if a privileged communication is later shared with a third party. By way of example, if a manufacturer received written legal advice from counsel on the impact of new regulations affecting autonomous vehicles, the attorney-client privilege will likely be deemed waived if the manufacturer were to forward that communication to an outside parts supplier. The same is true with respect to protections for trade secrets and other confidential business information. While federal and state protections may exist, they can be lost if a business is careless with its proprietary information or fails to adequately secure it. Clear and well-defined policies addressing privilege and confidentiality can help guard against these possibilities, as well as thorough protective orders once litigation commences.

Evidentiary Holds. Once a party reasonably anticipates litigation, it must take steps to ensure relevant documents and information are preserved. In some cases, this might occur when a complaint is received, but in others, it might be earlier, such as when a party receives a demand letter. Part of the preservation process involves distributing and implementing an evidentiary hold (also known as a litigation hold). The purpose of an evidentiary hold is to inform employees and others with relevant information that they must preserve data. This includes hardcopies, electronic documents, and associated metadata. It can also include goods and property, even vehicles. Note that merely distributing a litigation hold is not enough. Companies must follow up with custodians (i.e., those that authored or received the materials) to ensure preservation continues throughout the litigation. Other steps, such as imaging email inboxes and disabling autodelete functions, may also be prudent. If a party fails to preserve evidence, courts may find that party spoliated evidence and impose sanctions or adverse instructions to the jury. Again, clear and well-defined policies can help parties avoid such penalties.

Forum Selection. In commercial disputes, the initiating party may have a choice between litigating in a public forum (i.e., federal or state court) or a private forum (i.e., arbitration). Whether such a choice exists depends on whether the parties have agreed to private alternative dispute resolution ("ADR"). Such agreement may occur before or after the dispute arises, but without agreement, arbitral associations will dismiss the demand. Private ADR carries with it certain potential benefits, such as more careful enforcement of contract terms and avoiding runaway jury awards, but it can also be costly with arbitrator fees added to those of counsel. Generally, when selecting the forum location, the initiating party should file the action in the best *feasible* country, state, and county for itself, as doing so will help reduce litigation costs and increase outcome predictability. Note, however, that the location of the defendants and any property at issue will also be factors. The plaintiff's choice of forum will often be presumed valid, but the tribunal must still have jurisdiction over the defendant(s) and the claim(s), and the venue must be proper by statute. And, even if those are met, a defendant might still challenge a highly inconvenient forum if a better choice exists. Companies should consider including forum selection and choice-of-law provisions in their agreements to provide certainty with respect to jurisdiction, venue, and governing law.

Prefiling Maneuvers. Not every case needs to be tried to conclusion. In fact, many can be resolved short of formal legal proceedings. Businesses can sometimes avoid litigation by exchanging certain assurances – both substantive and evidentiary – before a dispute arises.

These might include individual guaranties, collateral to secure a debt, letters of credit, insurance coverage, and liquidated damages, among others. Before filing a complaint, parties should also consider sending a demand letter, especially if their contract or potential cause of action requires a declaration of default, acceleration of debt, or a pre-suit demand. Sending a demand letter may help persuade a potential adversary that defending the case would be difficult and/or costly. In some cases, particularly where liability is clear, the parties may benefit from mediation or early settlement negotiations. In such settings, parties may negotiate creative solutions, such as trading more time to pay for confirmation of the obligation, additional security, interest, or cost-shifting.

Counsel Selection. When selecting counsel, businesses should turn to attorneys with expertise and prior experience in the relevant industry.

At Miller & Martin, PLLC, our attorneys represent automotive companies and business owners of all kinds in connection with commercial disputes. If you need help with such a matter, please feel free to contact Jason McCarter or Peter Critikos or a member of our Automotive Practice Group.