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'Litigation Prenup' Could Face Obstacles In Court

By **Brendan Pierson**

Law360, New York (June 02, 2010) -- A new litigation model that allows companies to agree to a hybrid of arbitration and litigation in order to reduce costs is gaining ground among attorneys, but experts say it will likely face an uphill battle as it runs up against courts' established powers.

This “litigation prenup,” known more formally as an economical litigation agreement, is the brainchild of Daniel Winslow, a partner at Proskauer Rose LLP.

Winslow unveiled the first version of the prenup in April at a Pepperdine University conference, and is currently finishing revisions to an updated version.

Under an ELA, parties to a contract would agree to discovery limits if they ever became involved in litigation. The limits would depend on the size of the dispute.

They would also agree to the appointment of a special ELA arbitrator to decide any disputes about the contract itself.

The idea enjoys support from corporate counsel at Abbott Laboratories, Bechtel Group Inc., Cisco Systems Inc., General Electric Co. and Microsoft Corp., who helped Winslow develop the idea.

Winslow said that the prenup was likely to become widespread and that it would bring about a paradigm change in how companies deal with dispute resolution agreements.

“Commercial litigation is an infinite process for a finite dispute,” he said.

By signing an ELA, companies bring the potential cost of litigation in line with the stakes, while giving the parties — rather than a court — control over the discovery process.

“You're not reliant on the justice system, which is a monopoly,” he said.

Once the prenup model becomes widespread, it will cut litigation costs by 40 percent, Winslow estimated.

But not everyone is sold on the idea. Kathy Bryan, CEO of the nonprofit International Institute for Conflict Prevention & Resolution, pointed out that courts might see it as an affront to their established power.

“The challenge is how it would be received by the various courts around the country,” she said. Some judges might conclude that an ELA is unenforceable because it purports to limit the court's ability to control discovery, according to Bryan.

Further clashes between ELAs and courts could arise if parties ever got into a dispute over the interpretation of the ELA, according to George Apostolides, a partner at Arnstein & Lehr LLP.

For example, he said, companies may disagree about how big a dispute actually is, or about what's up to the ELA arbitrator and what's up to the judge.

“The question we have then is, does the power of that arbitrator overlap with the power of the court?” Apostolides said.

While judges might be happy to let parties resolve discovery disputes between themselves in principle, they will likely be less thrilled if they're confronted with a contractual argument over an ELA in the course of a lawsuit, Apostolides said.

“What I think a judge may not want to do is get involved in a dispute over the scope,” Apostolides said. “You wind up fighting over what you're fighting about.”

Winslow, however, said that his draft agreement was carefully designed not to trample on judicial powers, and that judges would likely be happy about the agreements, which will clear their dockets of protracted discovery disputes.

“It frees up limited judicial resources for judges to do what they do well and do uniquely, which is to decide cases,” he said.

Furthermore, Winslow said, widespread use of ELAs would benefit the judicial system as a whole, by encouraging the development of common law in areas that are now typically resolved through arbitration or settled — especially complex areas like nanotechnology.

A further challenge to the widespread adoption of ELAs is that parties signing contracts, no matter how friendly the feelings between them, may not be eager to give up legal rights should a dispute arise in the future.

An ELA, he said “essentially limits the parties' ability to adjudicate the dispute. They're basically prejudicing themselves from the beginning.”

And even when parties do agree to a prenup, Apostolides said, they may find it doesn't work out as planned.

“The idea behind this works when everyone's working together,” Apostolides said.

But what looked like a seamless agreement could start to unravel when the parties no longer have the same goals, he said.

Similarly, Bryan said that while the litigation prenup model has potential, it will likely be useful only within a “small set” of contracts that are particularly suited to them — for example, contracts in which a much smaller party wants to maintain a degree of parity with a larger, richer party.

Despite these challenges, David Burt, corporate counsel at DuPont Co., said he was optimistic about the idea.

Burt said that the ELA was appealing to him, and likely to other corporate counsel, because by giving parties more control, it promised to make litigation more amicable — unlike the conventional litigation process, which “quickly turns adversaries into antagonists.”

“Litigation is unbusinesslike,” Burt said. “Business gets done by parties getting together and agreeing on what they want to do.”

ELAs would likely be popular for the fairness they can provide in agreements between very large and very small companies, he added.

“I think there's a leveling aspect of this,” he said. “If Mom and Pop get into a contract with the DuPont Co., one of the things Mom and Pop are going to think is, gee, if we get into a conflict, are they just going to spend millions of dollars on winning and crush me.”

Burt conceded that parties might not come out of disputes under ELAs feeling like they got the best possible outcome, but said that in some cases, that may be a lower priority than resolving litigation quickly at low cost.

“It might be a way to get quicker justice, and even rough justice,” he said. That may be exactly what many companies want, Burt said.

The ELA is “a very pithy and readily understood document that leaves very little wiggle room,” he said. “I think it has legs.”

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