

# UNDERSTANDING DAMAGES FROM THE IN-HOUSE COUNSEL PERSPECTIVE

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**CHAPTER 12**





## MONICA W. LATIN

Partner

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Ms. Latin serves on Carrington Coleman's four-person Executive Committee. As an active trial lawyer who is also Board Certified in Civil Appeals by the Texas Board of Legal Specialization, she handles trials, arbitrations, and appeals throughout the country. Her experience includes commercial disputes, professional liability, construction litigation, fiduciary obligations, insurance litigation, employment law, and trade secret litigation. She has extensive experience advising clients concerning issues relating to the hiring and departure of employees, including covenants not to compete and misappropriation. Before joining the firm's Executive Committee, she chaired its Business Litigation practice group. Ms. Latin also serves on the American Arbitration Association's National Panel of Commercial and Employment Arbitrators.

Ms. Latin has held a Preeminent AV® Rating from Martindale-Hubbell (5.0 out of 5.0) for more than ten years, and was named one of the Best Lawyers in America. She has also been named one of the Top 100 Lawyers in Texas and one of the Top 50 Women Lawyers in Texas by *Super Lawyers*/Thomson Reuters. *D Magazine* has named her one of the "Best Lawyers in Dallas" for business litigation since 2008, and she has been recognized as a "Super Lawyer" each year since that award began in 2003. She was named the "Outstanding Young Lawyer of Dallas" in 2004, and was twice named one of the "Best Lawyers Under 40 in Dallas" by *D Magazine*.

Ms. Latin is a frequent speaker on litigation issues. She has chaired both the ABA's National Institute on E-Discovery and the Sedona Conference Institute multiple times. She is actively involved in the Working Group on Electronic Document Retention and Production of The Sedona Conference® and was a founding member of the advisory board for the Georgetown University E-Discovery Institute. She was also a member of The Sedona Conference® Working Group Series on Protective Orders, Confidentiality and Public Access.

Ms. Latin serves as the Chair of Leadership Dallas Alumni, and serves on the board of management of the T. Boone Pickens YMCA and the board of directors of the Woodrow Wilson High School Community Foundation. Ms. Latin is a founding board member and past Chair of the Board of The Chiapas Project, a nonprofit dedicated to awareness-raising and fundraising for microcredit programs in Latin America. She also serves in leadership in the American Bar Association's Section of Litigation and is a life fellow of the Texas Bar Foundation and the Dallas Bar Foundation.

### Judicial Clerkship

Honorable Lloyd Doggett, Supreme Court of Texas, 1993-1994

### Education

University of Texas, J.D., with honors, 1993  
Editor in Chief, *The Review of Litigation*

Trinity University B.S., *summa cum laude*, 1990  
Computer Science and Philosophy  
Kings College, University of London



## **C.E. Rhodes**

C.E. Rhodes is U.S. Operations and Compliance Counsel to Baker Hughes Incorporated, where he advises management and employees. Rhodes received his B.A. in History from the University of Virginia, where he was a Jefferson Scholar and played football, and his J.D. from Emory University School of Law.

A TYLA director since 2004, Rhodes served as TYLA chair in 2009–10 and as an executive committee advisor to the Community Education/Consumer Affairs Committee. As co-chair of the TYLA Member Services and Outreach Committee, he co-authored *Office in a Flash* and co-authored and produced *Justice 101: The Client's Guide to Litigation*. He also co-authored and produced TYLA's Emmy-award winning video, *They Had A Dream Too: Young Leaders of the Civil Rights Movement*. In 2007, Rhodes was the recipient of the Joseph M. Pritchard Outstanding TYLA Director of the Year Award.



## **Rudy Rodriguez**

Mr. Rodriguez is Senior Vice President and General Counsel of CEC Entertainment, Inc., which owns, operates, and franchises over 700 family dining and entertainment stores under the Chuck E. Cheese's and Peter Piper Pizza names in 47 states and 11 foreign countries. Before CEC, from 2012 to 2014, Mr. Rodriguez was a Senior Attorney in the Legal Department of J.C. Penney Corporation, Inc., where he practiced commercial and employment litigation. He previously practiced commercial and employment litigation at three law firms in Dallas and at American Airlines, Inc. From 2000 to 2003, Mr. Rodriguez was Vice President and General Counsel of American Eagle Airlines, Inc., which at that time was the regional airline affiliate of American Airlines. Mr. Rodriguez has been active in local and statewide professional, civic, and charitable organizations throughout his career. He obtained his Bachelor of Arts from Texas A&M University in 1987 and his Juris Doctorate from Harvard Law School in 1990.





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## PROFESSIONAL EXPERIENCE

- **Xerox Business Services, LLC f/k/a Affiliated Computer Services, Inc. (2007-Present)**  
Senior Vice President & Group Counsel
  - Handle worldwide commercial litigation for XBS, a \$8B company with over 75,000 employees.
  - Regularly represent XBS in trials, arbitrations, mediations, depositions and hearings.
  - Assist global business units with their daily legal business needs ranging from contract negotiations and compliance to global acquisitions and divestitures.
  - Responsible for conducting internal investigations, including assessing and mitigating risk associated with issues involving employee misconduct, privacy violations, FCPA, False Claim Act and governmental inquiries.
- **Bracewell & Giuliani, LLC (2002—2007)**  
Corpus Christi and Dallas, Texas
  - Handled a wide variety of commercial litigation, including matters involving contract disputes, corporate governance, securities (public and private), employment, intellectual property, real estate, oil and gas, consumer class actions, insurance and indemnity.
  - Represented clients in jury and non-jury cases; briefed and argued appellate matters; argued numerous matters in national and international arbitrations; and represented clients in numerous depositions, mediations and hearings.
  - Internal investigations- worked on a variety of internal investigations stemming from state and federal government and regulatory agency inquiries.
- **The Kleberg Law Firm (2000-2002)**  
Corpus Christi, Texas
  - Litigation: Represented clients in wide variety of matters including toxic tort litigation, admiralty, accountancy fraud, and indemnification actions.
  - Transactional: Formed the Kleberg Small Business Group. Aided business owners in creating, maintaining and dissolving business operations. Prepared corporate documents, including contracts, capital acquisition/divestitures and corporate governance documents. Advised business and governmental entities on corporate structure and procedure.

## EDUCATION

- J.D., Texas Tech University Law School, 2000
- M.B.A., Texas Tech University, 2000
- B.A., University of Texas at Austin, 1997

## PROFESSIONAL RECOGNITION

- Texas State Director & Fellow, Council on Litigation Management
- Winner— 2010, Finalist, 2012 DCEO/ACC Best Corporate Counsel Awards
- Finalist, 2008 Dallas Business Journal Best Corporate Counsel Award
- Finalist, International Law Office (ILO) Global Counsel Award
- TYLA President's Award, 2004 - 2005
- TYLA President's Award of Merit, 2006 - 2007
- Life Fellow, Texas Bar Foundation
- Member, The Pro Bono College 2003-Present
- Joseph M. Pritchard Inn of Court

## BAR SERVICE

### **State Bar of Texas**

- Corporate Counsel Section, Board of Directors, 2009—Present
- Access to Justice Committee, 2005 - 2006
- Jury Service Committee, 2007 - 2009
- Annual Meeting Committee 2007-2009

### **Texas Young Lawyers Association**

- Chair, 2008 - 2009
- Chair-Elect, 2007 - 2008
- Board of Directors 2002 - 2007

### **Dallas Association of Young Lawyers**

- Board of Directors, 2006 - 2009
- Freedom Run Chair, 2006 - 2010

### **Corpus Christi Young Lawyers Association**

- Board of Directors, 2002 - 2005
- TYLA District 12 Representative, 2002 - 2005

## COMMUNITY SERVICE

- Trinity Commons Foundation— Board of Directors
- Leadership Corpus Christi Leadership XXXII
- Neighborhood Visions, Board of Directors
- Coastal Bend Regional Park, Board of Directors
- YMCA, Corpus Christi - Board of Directors
- Corpus Christi Beachcombers, Officer





## ALEX MORE

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Before becoming a lawyer, Alex More spent over a decade participating in, and teaching, competitive interscholastic debate at the highest levels. He excels at the art of argument, developing and executing nuanced litigation strategies. In corporate transactions, his whatever-it-takes attitude makes him an invaluable and reliable team member.

Working primarily in the securities and corporate governance sections, Alex has particular experience representing and advising directors of publicly traded companies and litigating fraud claims. Alex also has experience in mergers and acquisitions, and has represented both plaintiffs and defendants in a variety of commercial disputes through all stages of litigation.

### Education

University of Texas  
J.D., 2008

University of Texas  
B.A., with honors, 2005  
Research Assistant, Prof. Loftus C. Carson II, 2006-08  
Submissions Director, Texas Journal of Women and the Law, 2007-08

### Honors and Distinctions

*Texas Monthly* magazine named Mr. More to the Texas Super Lawyers -- Rising Stars list in Securities Litigation from 2012-2014.

Mr. More has also been recognized as an Outstanding Attorney Under 40 by the Jewish Federation of Greater Dallas Cardozo Society in 2010 and 2012.

### Speeches/Publications

Author: *Sufficient Descriptions of Property When a Metes and Bounds or Lot/Block Description is Unavailable*, Carrington Coleman Capital Newsletter (Winter 2013).



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## UNDERSTANDING DAMAGES FROM THE IN-HOUSE COUNSEL PERSPECTIVE

### I. INTRODUCTION

In effectively counselling a client through the litigation process, understanding your client's perspective and interests is key. So is the effort to deduce the perspective and interests of your adversary. When the litigant is a business, those considerations are more complex, and when representing or litigating with a company with in-house counsel, understanding that person's unique perspective becomes that much more important.

We interviewed in-house counsel at companies of varying sizes, in a variety of industries. Not all corporate counsel think alike, of course. But their feedback fell into a series of categories we have summarized below.

### II. UNDERSTANDING THE IN-HOUSE COUNSEL'S CLIENT

#### A. Nature and Structure of the Business

It is helpful at the outset to understand the company's business, including its industry, corporate structure, competitive landscape, and any regulatory or other legal framework that may apply to its operations. These factors, as well as the size of the company, whether it is public or private, the geographic territory in which it operates, and the relative size of the company's legal department, can all affect an in-house lawyer's approach to assessing a dispute.

While in-house counsel are likely to perceive significant monetary damages as material in their risk assessment of any case, the nature of the company's business could give rise to additional considerations that make a claim more or less significant in their eyes.

A \$100,000 fraud claim may be immaterial to a large private corporation operating in a mostly unregulated industry, but may be very material to, for example, a securities brokerage firm that may have disclosure obligations or may draw regulatory scrutiny as a result of fraud allegations.

Our interviewees consistently commented that they want outside counsel to have a basic understanding of their client's business, and to make the effort to ask. This inquiry will likely improve early assessment of the case, as well as identification of the issues most likely to matter to the company.

#### B. The Corporate Persona

Apart from objective descriptors, it is also important to understand the subjective perspective of the company's in-house counsel and management.

Companies have varying appetites for litigation risk. Some prefer to litigate whenever they feel that they are in the right, while others favor the certainty that comes with settling even weaker claims. It has been said that Wal-Mart's legal department derived

its approach to litigation from Sam Walton's instruction to ask "what did we do wrong?" If Wal-Mart was at fault, settle, and if not, litigate.

Assessment of liability exposure may also be colored by the company's self-image and reputation. The risk of significant negative publicity or airing the company's dirty laundry in open court may weigh in favor of settling disputes early. A company that seeks to present itself as friendly and customer-oriented may be more likely to settle customer disputes in order to protect its image, whereas other companies prefer a swaggering, litigious reputation. One in-house lawyer commented that aggressive litigation of disputes with its business partners helps to keep them honest. Another said that his company was much more likely to settle disputes with business partners to maintain harmony.

Internal structure and politics can also affect a company's approach to litigation and damages. Corporate counsel operate with varying degrees of autonomy. Small cases and serial litigation may be handled with little to no management involvement, but management may be more actively involved in litigation strategy when damages are substantial or when a lawsuit raises issues of unique importance to the company's interests. Or management may be actively involved in all disputes.

#### C. Insurance

Insurance coverage can significantly affect in-house counsel's perspective on damages. From one point of view, when a claim is covered, the company is proverbially playing with house money. Several respondents remarked that insurance coverage is thus more likely to tilt the company towards aggressive litigation of covered claims.

But insurance also adds another layer of decision-making and oversight to the litigation. Insurers may bring to the table divergent attitudes towards risk assessment, and will need to work with both in-house and outside counsel on the litigation and settlement strategies. The insurer may be more or less risk averse than the company, and certainly a *Stowers* demand backed by a credible threat of damages exceeding policy limits can obviously increase pressure on an insurance company to settle the dispute. But some insurers in some situations likewise prefer to mount an aggressive defense, lest they be seen as easy marks by future litigants.

Moreover, even when insurance limits the company's monetary exposure, a significant adverse judgment or high-dollar resolution can nevertheless have a negative impact on the company's image, particularly when it must be disclosed in a public filing. It can also affect the company's insurance premiums in the future, or even the availability of coverage. In short, insurance coverage generally adds more complexity to case assessment.

### III. THE CASE IN CONTEXT

#### A. Exposure to Monetary Damages

From a monetary damages perspective, litigation can generally be broken down into three categories:

- So-called nuisance value defense cases in which liability is questionable at best, and monetary exposure is modest and likely to be exceeded by the cost of defense;
- Mid-range cases in which the cost of litigating is proportionate to or less than the risk of exposure, and the company may be the plaintiff or defendant; and
- So-called bet-the-company cases in which an adverse judgment may put the company out of business.

In nuisance value cases, one might expect that the objectively rational decision in most cases would be to work toward an early settlement if the case cannot be quickly disposed in an economical manner. And some in-house counsel do prefer this approach. But any number of factors may weigh in favor of litigating nuisance value cases. In-house counsel may choose to litigate small matters to avoid setting a precedent for further litigation, to send a message that the company will aggressively defend itself or protect its rights, or simply out of principle. As one corporate counsel explained, if there is a small claim where there is some risk of liability and it does not appear that either the plaintiff or the plaintiff's counsel is likely to be a serial litigant, the company is more likely to work towards an early settlement. In-house counsel must also weigh whether the matter will require apex depositions or other significant time commitments from management or other personnel that add to the effective cost of litigating. But if for example a lawsuit challenges a company's ownership of its core intellectual property, or the enforceability of a key provision in many of the company's contracts, such as an arbitration provision or a non-compete, the company may well decide to aggressively protect its broader interests even if the particular case involves a small amount in controversy.

Mid-range cases tend not to be as complicated. When the cost of litigating is proportionate to the risk of exposure, the company will more often litigate, unless some other interest weighs in favor of settlement (e.g., substantial negative publicity, damage to business relationships, or a reasonable settlement opportunity that fairly reflects the company's risk/reward assessment).

In bet-the-company litigation, the company often faces not only the possibility of massive monetary damages but also significant, long-term defense costs. The assessment shifts from whether or not to litigate to how to properly budget for what may become a protracted battle. In-house counsel's

perspective on damages in bet-the-company litigation is therefore usually more focused on factors such as the likelihood of recovery (is this really a mid-range case with a speculative but potentially disastrous damages theory?), allocation of resources for litigation defense, and the possibility of a settlement that is acceptable to the company's executives and investors. Such litigation will almost certainly involve company management. And while a company might not be as sensitive to its reputation or publicity in connection with smaller matters, bet-the-company litigation often also implicates the company's reputation as well. In-house counsel may also decide to overspend in relation to the merits of the claim in order to mitigate the risk of an adverse judgment, although some in-house counsel maintain that they evaluate and respond to bet-the-company litigation in the same way that they treat all other cases.

#### B. Precedent

All counsel are concerned with the precedential effect of litigation, in both the legal and practical sense. They worry whether early settlement of a small-dollar case will invite serial lawsuits by litigants looking for an easy payout. An adverse finding of liability on a small matter may set precedent for future litigation, and companies may therefore refuse to settle even though the cost of defense far exceeds the amount in controversy.

In-house lawyers also consider the precedential impact of litigation with its employees, customers or business partners. A franchisor, for instance, must balance the importance of enforcing its franchisees' contractual commitments against deterring new franchisee business and potential harm to its relationships with its other franchisees. A company that frequently litigates agreements with arbitration provisions is likely to be fiercely protective of the enforceability of that arbitration provision, regardless of the amount in controversy.

#### C. Defining the Win

It is well-known that the vast majority of cases are resolved before trial on the merits. So apart from a take-nothing verdict, what does it mean to this particular company to win the lawsuit?

The corporate counsel we interviewed told us there are numerous factors that contribute to whether they characterize a litigation outcome as a win:

- Whether the response was proportionate to the assessed risk of exposure;
- Whether a substantial part of the case was favorably disposed as a matter of law;
- Whether the company successfully defended its reputation;
- Whether the company or the opposing party recovered more than what the company perceived as fair or reasonable;



- Whether the result preserves business relationships;
- Whether the company avoided negative publicity (and in some cases, regulatory scrutiny);
- Whether the company lost an opportunity for a more favorable outcome at some point in the dispute; and
- Whether management was happy with the result (for whatever reasons they may have).

Outside counsel must be sensitive to what the company really wants to achieve, and opposing counsel may find that they can reach a more favorable resolution by acknowledging and making concessions relating to the company's intangible priorities so that the parties can find a mutually beneficial resolution.

#### **IV. THE RELATIONSHIP WITH OUTSIDE COUNSEL**

##### **A. Choosing Outside Counsel**

Corporate counsel's perspective on damages also colors the choice of outside counsel. Some lawyers seek to scale the legal fees they pay to the size of the matters, using lower rate attorneys for small matters, and higher rate attorneys for large matters. Other in-house counsel focus less on rates and more on other factors, including expertise in the type of case, experience in the particular jurisdiction, an established track record of good representation (i.e., outside counsel has consistently delivered wins for the company, as the company defines winning), and familiarity and a good working relationship with the company.

##### **B. Experience**

In any given matter, in-house counsel will have varying degrees of relevant experience. When in-house counsel have significant experience—for example, with serial litigation, or personal experience litigating similar cases in the past as outside counsel—they may play a more significant role in the substantive aspects of the representation. With regard to damages, past experience can give corporate counsel a sense of comfort in assessing the company's exposure. On the other hand, in-house counsel also deal with cases outside of their personal experience, including disputes in jurisdictions with which they may not be familiar. In these circumstances, they are more likely to rely on outside counsel to provide accurate case assessment and expertise. Several respondents emphasized the importance of clear communication with outside counsel, and it would be helpful for outside counsel to make sure they know their client's expectations in this regard in terms of frequency and depth of analysis.

##### **C. Budgeting**

Civil litigation is increasingly expensive, and a significant duty of in-house counsel is to appropriately budget this expense. The reality of a finite cash flow was summarized by one respondent as being available on the one hand to pay outside lawyers or a judgment or settlement, or on the other hand to pay employee salaries and fund corporate opportunities. In a very real sense, litigation expense may translate to lost jobs, lost corporate opportunities, or soured relationships.

While some corporate counsel budget for litigation primarily in proportion to the company's damages exposure, others prioritize accurate cost estimates or simply whatever it takes to win (as the company defines winning). As several in-house counsel remarked, management generally wants to know, with reasonable accuracy, how much the litigation is going to cost. Accurate assessment of the company's exposure may facilitate early settlement, may be material to disclosures the company must make, and may be important to in-house counsel's relationship with management. A predictable, steady \$40,000 per month legal bill can sometimes be more palatable than a ballpark estimate that the litigation as a whole will cost the company \$200,000 to \$300,000 over a period of two to three years, which then ends up having a disproportionate impact in a certain quarter or fiscal year. Some corporate counsel expect outside counsel to accurately estimate cost, sometimes by stage of litigation, and then to stick to that estimate. Others give outside counsel latitude to litigate with the expectation that outside counsel will scale their work appropriately to each matter.

In-house counsel may also employ a wide range of alternative fee arrangements to add stability and predictability to their litigation budgeting or to hedge against adverse case results. Outside counsel should consider whether alternative fee arrangements are more attractive when dealing with certain ranges or categories of damages (e.g., fixed fee for small matters, or a bonus for getting a particularly weak theory of damages thrown out). Opposing counsel should consider whether a company may be using an alternative fee arrangement and how that may affect the company's approach to the case.

#### **V. CONCLUSION**

At times, outside counsel can slip into myopic focus on the matter at hand, without appreciating the bigger picture for the client. Lawyers litigating against companies with in-house counsel may never interact with them directly, and may lose sight of the interests that drive their litigation and settlement strategies. Consideration of these issues can help both of these groups communicate better and ultimately achieve better results. Particularly with regard to damages, it is all too easy to think in terms of dollars and cents, when from the corporate counsel's perspective, many other issues are driving

their decision-making process. Insofar as litigation is ultimately an exercise in dispute resolution, consideration of these issues will contribute to an effective strategy.