

# Commercial Litigation

Throughout the United States, we represent public and private-sector companies that include multinational businesses, emerging companies, start-ups, governmental and quasi-governmental agencies, and not-for-profits in contested matters in federal and state courts, agencies, arbitration, and in other dispute-resolution settings such as mediation. Our commercial litigation team of 85-plus experienced trial and appellate attorneys includes former judicial law clerks from trial and appellate courts in both the state and federal systems, former state and federal prosecutors, former regulatory agency counsel, and individuals with extensive backgrounds in business, politics, and public service.

Our mission is to bring strategic, results-driven, and cost-effective advice and service to our clients. We manage commercial disputes to avoid litigation where possible and vigorously protect our clients' interests when adversarial proceedings are required. We use the latest litigation technologies and resources, and pride ourselves on proactive client communication, creating early and accurate case budgets, and on our deep understanding of the business-sector issues, interests, and needs of our clients.

Our commercial litigation clients come from diverse industries that include energy, finance, insurance, transportation, manufacturing, and more.

Our team counsels clients on matters that include:

- Bank and credit union lender liability
- Business contract disputes, including business formation, structuring, succession, securities, sales, mergers, acquisitions, and dissolutions
- Contested commercial foreclosures
- Disputes governed by the Uniform Commercial Code
- False Claims Act and whistleblower litigation
- Insurance defense and re-insurance matters
- Intellectual property and licensing
- Joint venture and partnership disputes
- Unfair competition and trade matters

## **Alternative Fee Arrangements and Litigation Financing**

Barclay Damon offers a range of alternative fee arrangements (AFAs) that have been successfully implemented for our clients in a variety of circumstances. We have utilized the following types of AFAs where appropriate.

- Fixed fees, such as fixed fee by project, phase, or portfolio
- Fee caps and collars
- Benchmark and objectives-based fees
- Shared-risk and "broken-deal" discounts
- Pure contingency, hourly-contingency blend, and reverse contingency
- Progressive and incremental hourly fee discounts for major, long-term engagements

These AFA options provide our clients with flexibility and cost certainty to complex litigation and transactional matters.

We also help clients secure financing through third-party funding companies for high stake, costly litigated matters. We connect clients using our strategic relationships with several litigation financing companies and help guide them through the financing process.

Barclay Damon will be pleased to collaborate with you to evaluate the most effective fee structure and financing for your matters.

## Representative Experience

- Negotiated payment schedule regarding employee's tolling and forbearance agreement with Splashlight
- Represented a former telecommunications services provider in a six-day trial seeking to collect payment for telecommunications services provided and accepted under the terms of a services contract. The matter involved various breach of contract claims, resulting in damages in excess of \$1.5 million to the client, plus statutory interest at 9 percent per annum.
- Represented a fashion manufacturer in a partnership dissolution arbitration against a former design-related business partner, obtaining a \$350,000 judgment. The matter also included litigation surrounding a breach of contract for violating a noncompetition clause, breach of fiduciary duty, and piercing the corporate veil claims, which have not yet been finally determined by the court, but withstood the test of an early motion to dismiss.
- Represents siblings in breach of fiduciary duty litigation stemming from the co-trustee siblings' misuse of family assets for over two decades.
- Represents an out-of-state business in staying the enforcement of judgment and ultimately vacating the entry of judgment on grounds of breach of contract and improper business practices after the merchant advance lender improperly entered the judgment by confessing against an out-of-state defendant.
- Obtained a consensual dismissal of interpleader action against a real estate developer client.
- Successfully obtained a decision from the Appellate Division, Second Department affirming the trial court's denial of a municipality's motion to dismiss a \$4 million cost-recovery action against them for damages arising from the destruction of a client's records-storage warehouse.
- Represented an animal-health business in a lawsuit seeking immediate injunctive relief regarding control of manufacturing acquired by an industry competitor. Identified mediation as the best route to restore the client's supply, and, following 20 hours of mediation, reached an approved creative resolution that achieved the client's objectives.
- Obtained summary judgment for a third-party benefits provider for self-funded health- and risk-management plans in a pair of federal civil-rights actions commenced by retired disabled police officers who were challenging the manner in which their medical benefits were paid under Section 207-c of the NY General Municipal Law. The decision granting summary judgment was affirmed by the US Court of Appeals for the Second Circuit. One of the plaintiffs then commenced a near-identical action in NYS Supreme Court against the client. Obtained dismissal of most of the claims in an initial motion, and then obtained summary judgment dismissing the remaining claims. The decision granting summary judgment was then affirmed by the Appellate Division, Fourth Department.
- Successfully defended an adversaries' appeal of a lower court's denial of an Article 78 petition that sought to reverse the Public Service Commission's denial of retroactive reimbursements to a group of residential developers for certain trenching work used to install utility service. The Appellate Division's decision to affirm the lower court order was particularly important to the utility client because an adverse decision would have potentially caused other developers to also seek retroactive reimbursements, opening the client up to additional claims and damages.
- Obtained a highly favorable settlement for a coalition of NYS transportation-related businesses in a lawsuit against the NYS Workers' Compensation Board. The coalition was comprised of former members of a group self-insured trust that was fraudulently formed and unscrupulously managed, leading to the insolvency of the trust. The clients alleged the "deficit assessment" issued by the board against the members violated both procedural and substantive due process, several statutory provisions, and common law. Obtained successful motions for stay of enforcement and partial summary judgment and settled related third-party litigation with no exposure for the clients.

- Successfully defended a multinational corporation against a lawsuit claiming the operation of a 13,000+ acre underground mining operation had not been subjected to an adequate environmental impact review.
- Represented the City of Watertown in a lawsuit from Ives Hill Country Club seeking to invalidate a public-property lease the client had entered into with a for-profit enterprise on the basis of statutory and constitutional grounds. The firm cross-moved for judgment, successfully obtaining a denial of Ives Hill's motion with the court granting the City of Watertown's cross-motion and dismissing the case.
- Defended Native American police officers in an excessive-force lawsuit filed in federal court. Obtained complete dismissal of the case on summary judgment after discovery.
- Represented defendants in a dispute over millions of dollars recovered allegedly owed to plaintiffs.
- Represented a defendant accused of a contract dispute and accused of making libel/defamatory statements against the plaintiff.
- Represented a defendant who was accused of making defamatory statements against the plaintiff.
- Defended a doctor and his practice against a breach of fiduciary duty case arising from their self-dealing and misconduct with respect to the management of two of their businesses.
- Represented defendants during a contract dispute with a private equity firm involving breach of good faith and fair dealing, promissory estoppel, tortious interference, and tortious interference with actual and/or prospective economic advantage.
- Obtained summary judgment, which was affirmed on appeal, in favor of a multinational consumer goods company defending breach of contract and lost profit claims by the distributor for alleged failure to completely fill certain purchase orders.
- Defended a medical practitioner in an investigation brought by the Board of Registration in Medicine (BORM).
- Assisted in an internal, confidential investigation into a high-level executive and drafted a memorandum of findings.
- Represented an international electric company against agreement breach claims.
- Representing nationwide hospital and health care provider and its entities in suit brought by former nurses and doctors regarding retirement and agreed-upon pension.
- Represented a technology company in a dispute arising out of claims asserted against the company and a selection of its officers.
- Mediated a claim against a multinational consumer goods company brought by a pharmaceutical company in the American Arbitration Association.
- Represented a former partner with a law firm in a dispute over contingency fees.
- Represented an international gaming company in a dispute over licensing.
- Represented a top-tier law firm in an investigation brought forth by the Department of Labor.
- Secured discontinuance of insurer's subrogation claim, alleging breach of contract, breach of duties under the Carmack Amendment (49 U.S.C. Sec. 14706), and breach of bailment for de minimis settlement based on role as freight co-broker, as evidenced by subject insurance policies, indemnity provisions, and certificates of insurance.
- Obtained dismissal with prejudice of federal Defend Trade Secrets Act (DTSA) claims against our client, in a \$200 million action pending in US District Court for the Southern District of New York. Plaintiff claimed defendants, including our clients, misappropriated trade secrets and violated alleged fiduciary duties in connection with the establishment of a stock index identifying opportunities to invest in publicly traded shares based upon the brand value of the issuing companies. The court held that the pleading did not state a federal claim under the DTSA, denied the plaintiff leave to re-plead, and dismissed all related state law claims.

- Represented a health care provider in an audit of patient records by an insurance company that alleged approximately \$400,000 in overpayments. The insurance company rescinded its determination regarding the overpayment, and the client was not required to repay any of the alleged overpayments.
- Represented a commercial tenant in an action they commenced seeking declaration they were not in default of commercial leases and were thus entitled to injunctive relief pending the outcome of the litigation.
- Handle appeals for minority and women-owned business enterprise (MWBE) certifications.
- Represents a small lawn care company in a breach of contract suit brought against a commercial property management company seeking to collect payment for extensive work on several properties throughout Western New York. The Supreme Court of Erie County denied the defendant's motion to dismiss, holding that the contract was so offensive to the public policy of New York that the court retained jurisdiction despite Arizona being designated in the contract as the controlling law and forum.
- Successfully obtained dismissal on summary judgment of a claim for a \$2 million "finder's fee" arising from the sale of a pharmacy business.
- Litigated securities class action and ERISA claims against investment advisor to pension and benefit funds arising out of the Madoff Ponzi scheme.