

## Advocate's View: Tips on use of the motion in limine in the commercial division

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Sometimes described innocuously as a motion to exclude anticipated inadmissible, immaterial or prejudicial evidence, the motion in limine in a commercial case is a valuable strategic tool that can be effective in limiting discovery and explaining and narrowing complicated commercial issues in advance of trial. More importantly, in some instances the well-planned motion in limine can lead to settlement. This article offers tips and insights about this strategic and sometimes overlooked pre-trial motion.

The advantages of a well-planned motion in limine in commercial cases are seemingly recognized by the Rules of the Commercial Division, which require that motions in limine be made not later than 10 days prior to a scheduled pre-trial conference date and returnable on the date of the pretrial conference, unless the court directs otherwise. [Rule 202.70. Uniform Rules for New York State Trial Courts]. Although 10 days may appear to be a generous time period, the best practice is to consider the motion in limine well in advance of the ten days specified in Rule 202.70. It is worthwhile to review well in advance of the trial date, pre-trial scheduling orders and expert disclosures, and to outline trial briefs to identify bases for a motion in limine.

The uses of the motion in limine in commercial cases are varied and include efforts to preclude evidence on such issues as lost profit or lost appreciation damages (*Scalp & Blade v Advest, Inc.*, 309 AD2d 219 (4<sup>th</sup> Dep't 2003) (preclusion order reversed)); expert testimony as to the interpretation of the parties' contractual obligations (*Science Applications Intl. Corp. v Environmental Risk Solutions, LLC*, 37 Misc3d 1202 (A) (S Ct Albany Cty 2012) (motion denied because akin to partial summary judgment relief); defendant's evidence in support of an argument that plaintiff failed to provide prompt notice pursuant to a Service Agreement (motion denied); evidence as to causation (motion granted); and evidence concerning due diligence and investments by investors in trust certificates (motion denied) (*LaSalle Bank National Association v Nomura Asset Capital Corp. & Asset Securitization Corp.*, 2006 NY Misc. LEXIS 9296 (S Ct NY Cty 2006).

Two decisions bear mention relative to ways in which motions in limine can be used in non-traditional ways. In *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 30 Misc3d 1201 (A), 958 NYS2d 647, 2010 NY Misc. LEXIS6182, 2010 NY Slip Op 52239 (U) (S Ct NY Cty 2010), plaintiff moved in limine, well in advance of trial, for an order allowing it to use statistical sampling to present evidence to prove its causes of action for fraud and breach of contract and to prove damages.

The trial court, noting that the motion in limine was utilized in a "permissive" manner, was not precluded by New York statutes, codes or common law, ruled in plaintiff's favor so as to permit expert testimony regarding the use of scientific evidence of statistical sampling in support of an action involving mortgage-backed securitizations.

In *Schron v Grunstein*, 32 Misc3d 231, 239 (Sup Ct NY Cty 2011), *aff'd sub nom, Schron v Troutman Saunders*, 97 AD3d 87, 95 (1<sup>st</sup> Dep't 2012), *aff'd* 20 NY3d 430, 437 (2013) the trial court granted a motion in limine, before the conclusion of discovery, to preclude the use of parol evidence by defendant in relationship to an argument that a loan agreement and an option agreement should be read together. Such an order has the potential to curtail discovery.

Generally, no appeal lies from an order adjudicating in advance of trial the admissibility of evidence. In this regard however, when planning a motion in limine, it is worthwhile to consider *Scalp & Blade v Advest, Inc.* because overuse (misuse) of a motion in limine can produce unintended consequences.

In *Scalp*, just prior the start of trial, defendants moved in limine to preclude plaintiffs from offering proof of additional profits which supported plaintiff's demand for lost appreciation damages. The trial court granted defendant's motion and plaintiff appealed.

The Fourth Department ruled that the in limine order was appealable because it was the "functional equivalent" of a motion for partial summary judgment dismissing the complaint. The court found that the motion clearly involved "the merits of the controversy" and reversed the trial court in a decision shedding considerable pre-trial guidance on substantive trial issues.

Trial preparation requires disciplined planning, well in advance of the trial date and the motion in limine is one tool that can be very effective when made part of the early stages of trial preparation.

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