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# Traub Lieberman Attorney Andrew N. Adler Wins Three Appellate Motions for Hedge Fund Client

Related Attorneys:

TLSS lawyer Andrew N. Adler has successfully argued three complex appellate motions, included two in the New York Court of Appeals (the highest New York state tribunal), for his Hong Kong-based hedge fund client.

Plaintiff, TLSS's client, had invested in a cell phone technology company. An Investor Rights Agreement ("IRA") mandated, inter alia, that the technology company and its subsidiary hire an accounting firm approved by plaintiff, and that defendant, the companies' principal, individually indemnify plaintiff for losses occasioned by any breach of the IRA.

After executing the IRA, plaintiff signed two letter agreements with the companies. These letters postponed the deadlines by which the companies were required to retain the accountant, provided for \$1 million in liquidated damages if they missed the new deadline, and waived any additional damages otherwise due. The letters did not reference the IRA but rather amended the terms of an indenture and promissory note. Defendant did not personally sign the letters or the indenture. The companies did not hire an approved accountant, and their business eventually failed.

After plaintiff secured (partial) summary judgment for the liquidated damages in a Decision of the Appellate Division, First Department, defendant moved for reargument on two related grounds. First, he claimed that the letter agreements superseded his indemnification obligation in the IRA. Second, he contended that plaintiff waived his liability.

In opposing reargument, TLSS addressed several legal issues not previously raised in the appeal. For example, TLSS explained the doctrine of "novation," under which parties substitute a new contract for a prior one. Andrew argued that waiver and novation do not apply, since the letter agreements left the IRA's pre-existing obligations in full force and effect, albeit to be fulfilled at a later date and for limited damages. To the extent this reprieve operated as a waiver, it represents a narrow kind, forgoing an immediate remedy but not the continuing duties of the indemnitor. Andrew also analyzed and reconciled numerous different clauses in the various related financial contracts.

Once the First Department denied defendant's motion to reargue and his accompanying motion for leave to further appeal, defendant asked the Court of Appeals itself for leave to appeal. When the high court denied that effort, defendant took the unusual step of moving to reargue the denial. In opposing this third motion, TLSS had to contend at length that (1) the case did not present sufficiently novel or important legal issues to merit the further appeal; (2) plaintiff had made no "judicial admissions" adverse to its position in its summary judgment motion; and (3) defendant ran afoul of the high court's practice rules. The Court of Appeals denied this motion as well, thus finally bequeathing defendant no additional avenues to contest summary judgment as to the liquidated damages.

Andrew's assistance in this matter exemplifies his general commercial litigation practice. While at TLSS, he has also prosecuted contract-based suits on behalf of an individual art collector and a Czech porcelain manufacturer, among others. In another case, he obtained a 42-page, single-spaced Decision and Order dismissing the complaint against his client, who served as escrow agent in a complex commercial transaction.