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Strategic Use of 'Early' in Limine Motions

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Motions in limine (sometimes called "in limine motions") typically are thought of as applications made proximate to the time of trial that seek the exclusion of specific pieces or types of evidence. In general, New York state courts disfavor the practice of making such motions before the close of discovery (particularly if they seek potentially issue-dispositive relief), often on the basis that they are premature partial summary judgment motions in disguise. There are, however, some trial court decisions that can be used to support the argument that it's appropriate to resolve certain issues through an in limine motion made early in a case, before discovery has closed. This article will explore case law in the area and identify considerations for counsel as they weigh the potential strategic benefits of making an in limine motion relatively early in a case.

Traditionally, in limine motions are used to obtain a preliminary order, before (or sometime during) trial, excluding the introduction (or limiting the use) of what is argued to be inadmissible, immaterial and/or prejudicial evidence.[1] The typical goal is to make clear that the challenged evidence will not even be referred to (much less offered) by an adversary in front of a jury.

While most motions in limine are made close to the time of trial, New

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York state procedural law does not prevent litigants from bringing them earlier—including prior to the completion of discovery.[2] No statute or provision in the New York Civil Practice Law and Rules, for example, contains any limitation on when motions in limine can be made.[3] Although various court parts and individual judges can have rules about the timing of motions in limine, they usually require only that motions be made by no later than a certain time (as opposed to requiring that they *not* be made *before* a certain time). The rules of the Commercial Division, for example, require parties to "make all motions in limine no later than ten days prior to the scheduled pre-trial conference date."[4] But there is no prohibition against bringing a motion before then.

As a practical matter, however, New York courts are generally reluctant to grant motions in limine prior to the conclusion of discovery, especially when doing so would require the court to rule on substantive legal issues. New York courts also typically reject the use of motions in limine to decide broadly applicable or dispositive legal issues, characterizing them as the functional equivalent of a motion for summary judgment.[5]

Courts have applied the same logic when parties move in limine prior to the close of discovery where the effect of granting the motion would be to bar a particular category of damages.[6] For example, in *Hefti v. Brand Union Co.*, the court concluded that the defendant's motion, "though dressed up as a motion in limine, [was] really one for partial summary judgment."[7] In part, the court came to this conclusion because, based on the motion papers, it was clear that the purpose of the motion was to limit damages to a particular period. The court was not persuaded by the defendant's attempt to frame its motion, instead, as a request to "limit the use of evidence."[8]

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There are, however, exceptions to these general practices, as two trial court cases demonstrate. In one case, *Schron v. Grunstein*, 32 Misc.3d 231, 239 (Sup. Ct. N.Y. Co. 2011), aff'd sub nom, *Schron v. Troutman Saunders*, 97 A.D.3d 87, 95 (1st Dep't 2012), aff'd, 20 N.Y.3d 430, 437 (2013), the court granted a motion in limine, made relatively early in the litigation, to preclude the use of parol evidence. In the other, *MBIA Ins. v. Countrywide Home Loans*, 30 Misc.3d 1201[A], 1201A (Sup. Ct. N.Y. Co. 2010), the court granted a "permissive" motion seeking a ruling that a particular form of proof would be admissible at trial.

At issue in *Schron v. Grunstein* (*Schron*) were two contracts—a loan agreement and an option agreement—executed by the parties. The defendants, who refused to honor the plaintiff's exercise of the option agreement, maintained that the two contracts were, in reality, part of one agreement and should be read together. Relying primarily on extrinsic evidence, they argued that they had no duty to perform under the option agreement because performance under the loan agreement was a condition precedent to performance under the option agreement and, they alleged, the plaintiff had failed to satisfy his obligations under the loan agreement.

Relatively early in the litigation, and well prior to the conclusion of discovery, the plaintiff filed a motion in limine to preclude the defendants' use of parol evidence. In opposition, the defendants maintained that the motion was inappropriate because: (1) it was premature; (2) the court had not yet even seen the evidence the plaintiff sought to exclude; and (3) the motion was "an inappropriate attempt at a disguised summary judgment."[10] The trial court disagreed, concluding that the loan agreement and the option agreement were separate contracts; that the agreements contained merger and integration clauses, which explicitly barred the use of parol evidence; and, further, that the contractual language was unambiguous, containing no language that made funding of the

loan an express condition precedent to the plaintiff's right to exercise the option.[11] Thus, the court granted the plaintiff's in limine motion.

The court explained that because the agreement at issue was unambiguous, it was not necessary to wait until after discovery closed to rule on whether parol evidence would be admissible.[12] The court noted that a party is not allowed to submit parol evidence in order to create ambiguity in an otherwise clear and complete agreement. In view of that, the court reasoned, "'[a]ny such discovery would simply be an opportunity for plaintiff to uncover parol evidence to attempt to create an ambiguity in an otherwise clear and unambiguous agreement.'"[13] "'Unless this Court were to find an ambiguity,'" the court added, "'such parol evidence would be inadmissible at trial or on a subsequent motion for summary judgment.'"[14]

The Appellate Division, First Department, and thereafter the New York Court of Appeals, affirmed. Although neither explicitly addressed the timing of the motion in limine, the Court of Appeals' explanation of the evidentiary question at issue sheds light on the rationale for permitting such an early motion despite the general rule disfavoring motions in limine prior to the conclusion of discovery:

> Under New York law, written agreements are construed in accordance with the parties' intent and "[t]he best evidence of what parties to a written agreement intend is what they say in their writing." As such, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Parol evidence—evidence outside the four corners of the document—is admissible only if a court finds an ambiguity in the contract.[15]

Courts are capable of ruling on the threshold issue of ambiguity early in the litigation life-cycle. Doing so does not require a court to consider whatever evidence could be developed during discovery because the question of whether or not a contract clause is ambiguous typically can be determined from the face of the contract.

The strategy employed by the plaintiff in *Schron* also allows for a possible "second bite at the apple" if the court denies the in limine motion on the basis that the contract provision at issue is ambiguous. "Summary judgment is not limited to those cases where the contract is free from ambiguity and not subject to differing interpretations."[16] In such cases, summary judgment is appropriate when the uncontradicted extrinsic evidence definitively establishes the meaning of the ambiguous language.[17] In other words, a "loss" in a *Schron*-style in limine motion made early in a case does not necessarily mean that summary judgment cannot be granted later in the case.

In *MBIA Insurance v. Countrywide Home Loans* (*Countrywide*"), the plaintiff sued the defendants for fraud and breach of contract in a case arising out of the defendants' underwriting of complex residential mortgage-backed securities. Given the complicated structure of the financial instruments at issue, each comprised of hundreds of individual loans, the plaintiff faced certain practical challenges in terms of proving its case at trial with a modicum of efficiency. Thus, "well in advance of the pre-trial conference date," the plaintiff brought a "permissive" motion in limine seeking a determination that it could use statistical sampling as evidence in support of its claims.[18] (A "permissive" motion is one made by the party seeking to offer the evidence and asks for a determination that the evidence in question is admissible.[19])

Rejecting the defendants' argument that the motion was premature, the court explained that "[w]hile the majority of motions in limine are made close to or during trial, neither New York statute nor code prevents a party from bringing a motion as their litigation strategy dictates. Neither does New York statute or code prevent the court from deciding that motion."[20] The court also distinguished the line of New York cases cited by the defendants to the effect that rulings on the admissibility of evidence should be made at or near trial because, at that point, the relevance of the challenged evidence can be determined in context with all the other evidence. The court observed that there was no question that the facts the plaintiff sought to prove through statistical sampling were relevant to the plaintiff's claims for fraud and breach of contract. Thus, "[t]he question is not of admissibility and relevance," the court clarified, "but of the *form* that the relevant and admissible evidence will take at trial."[21]

The court acknowledged that, on the merits, there were factual issues still in dispute; however, it rejected the contention that these were "threshold issues" that needed to be resolved

before addressing the plaintiff's in limine motion.[22] "Defendants do not argue how resolution, or non-resolution, of any of their purported issues will be affected by a statistically significant sampling of the securitizations at issue, nor do Defendants attempt to link the list of issues with their other arguments," the court wrote. "Defendants simply state that if Plaintiff does not prevail upon all of the listed issues '[the plaintiff's] proposal will not work.'"[23] Because the defendants offered no nexus between the disputed factual issues and the *form of evidence* proposed by the plaintiff, there was no need to resolve the factual issues before ruling on the plaintiff's motion in limine.

The defendants also raised concerns about the proposed sampling methodology itself. But, finding that the proposed methodology satisfied the well-known *Frye* standard for admissibility of scientific expert evidence,[24] the court explained that the defendants' criticisms went to the weight of the evidence, not its admissibility. "[W]hile Plaintiff is permitted to present evidence as it so chooses, and the court will permit Plaintiff to present evidence of its claims through its chosen sampling methodology, the court does not necessarily endorse the Plaintiff's method as better or worse than any other method."[25] The court noted that the plaintiff would still be required to prove each element of its claims, as well as damages, and that the defendants would have the opportunity to challenge the plaintiff's proofs. "Sampling itself is not proof, but merely a vehicle to present evidence," the court emphasized.[26]

The strategy employed in *Countrywide* seems well suited to cases involving complicated scientific or econometric issues. As another New York trial court noted, "[i]n relation to the conduct of the civil litigation, there is an evolving preference for early presentation [of issues concerning scientific evidence] because scientific issues may involve a time-consuming analysis of an expert's methodology and the pertinent literature."[27] In cases involving complicated technical issues, there is a significant potential benefit in knowing, well before trial, whether a particular means of proving claims or defenses will be acceptable to the trial judge. And, even if the court declines to decide an early permissive in limine motion on the basis that it's premature, the early motion may help to educate the trial judge about important issues concerning the ultimate conduct of trial.

In sum, although the common wisdom is that New York courts are reluctant to grant motions in limine made in the early stages of a case, case law suggests that there are some situations when such a motion is appropriate. *Schron* and *Countrywide* represent two such situations, and forward-thinking counsel may well be able to identify and pursue others and thereby achieve a tactical advantage by obtaining an early ruling on a key issue.

1. *State v. Metz*, 241 A.D.2d 192, 198 (1st Dep't 1998).
2. See *Hefti v. Brand Union*, No. 150832/2014, 2014 WL 2990389, at *1 (Sup. Ct. N.Y. Co. 2014).
3. Id.
4. 22 N.Y.C.R.R. 202.70, Rule 27.
5. *Sadek v. Wesley*, 117 A.D.3d 193, 203 (1st Dep't 2014); *Downtown Art Co. v. Zimmerman*, 232 A.D.2d 270, 270 (1st Dep't 1996); *Carrasquillo v. New York City Dep't of Educ.*, 104 A.D.3d 516, 516 (1st Dep't 2013); *A.R. Med. Rehabilitation, P.C. v. GEICO Gen. Ins. Co.*, 39 Misc. 3d 1206[A], 1206A (Civ. Ct. Bronx Co. 2013).
6. *Charter Sch. for Applied Techs. v. Bd. of Educ. for City Sch. Dist. of City of Buffalo*, 105 A.D.3d 1460, 1464 (4th Dep't 2013) ("Defendant's motion to preclude plaintiffs from introducing any evidence with respect to damages was 'the functional equivalent of a motion for partial summary judgment.'"); *Scalp & Blade v. Advest*, 309 A.D.2d 219, 224 (4th Dep't 2003); *Rondout Elec. v. Dover Union Free Sch. Dist.*, 304 A.D.2d 808, 810 (2d Dep't 2003); *Avail Shipping v. Shero Shipping*, No. 600112/2009, 2015 WL 1158556, at *1-3 (Sup. Ct. N.Y. Co. March 12, 2015).
7. *Hefti*, 2014 WL 2990389 at *1.
8. Id.
9. *Speed v. Avis Rent-A-Car*, 172 A.D.2d 267 (1st Dep't 1991) (citing *Carroll v Nunez*, 137 A.D.2d 911, 913 (3d Dep't 1988) ("A decision regarding the admissibility of evidence … is more properly made at trial when its relevance, or lack of relevance, may be determined in context."); *Grant v. Richard*, 222 A.D.2d 1014 (4th Dep't 1995).
10. *Schron*, 32 Misc.3d at 234.
11. Id. at 236-39.
12. Id. at 237.
13. Id. at 238 (quoting *R.M. Realty Holdings v. Moore*, 64 A.D.3d 434, 437 (1st Dep't 2009)).
14. Id.
15. *Schron*, 20 N.Y.3d at 436 (quoting *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002)).
16. *Hudson-Port Ewen Assoc., L.P. v. Chien Kuo*, 165 A.D.2d 301, 303 (3d Dep't 1991).
17. *Evans v. Famous Music*, 1 N.Y.3d 452, 460 (2004); *Fed. Ins. Co. v. Ams. Ins. Co.*, 258 A.D.2d 39, 44 (1st Dep't 1999).
18. *Countrywide*, 30 Misc.3d at 1201A.
19. 4 N.Y. Prac., Com. Litig. in New York State Courts §38:3 (4th ed.).
20. *Countrywide*, 30 Misc.3d at 1201A.
21. Id.
22. Id.
23. Id.
24. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
25. *Countrywide*, 30 Misc.3d at 1201A.
26. Id.
27. *Drago v. Tishman Constr.*, 4 Misc.3d 354, 361 (Sup. Ct. N.Y. Co. 2004).