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ONE-ON-ONE-INTERVIEW

# ENTERPRISE RESOURCE PLANNING LITIGATION

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**Mark P. Ressler**, who leads the Software Litigation group at Kasowitz, Benson, Torres & Friedman LLP, has established the country's leading practice devoted to litigation arising out of the business disruption and financial losses caused by failed software implementations, particularly those involving Enterprise Resource Planning (ERP) business software. Mr Ressler has become counsel of choice for companies and governmental entities seeking to recover from ERP vendors – including ERP software providers and consulting firms implementing ERP software – in connection with mission-critical projects plagued by delayed or disastrous go-lives, skyrocketing costs, deficient project management, missing functionality, defective interfaces and excessive customisation.



**CD: Could you provide an insight into the recent proliferation of litigation in the enterprise resource planning (ERP) space?**

**Ressler:** ERP litigation has surged over the last five-plus years, for several reasons. First, competition from alternative business software platforms has led some ERP vendors to generate revenue by taking on certain projects they should have avoided. As a result, they've been increasingly unable to deliver the promised functionality at all, or deliver it on time and on budget. Second, since the 2008 financial crisis, companies are less inclined to tolerate the business disruption and financial losses caused by failed ERP projects. Third, the embrace of ERP by governmental entities has resulted in a spate of failed implementations and accompanying lawsuits at the state and municipality level. Fourth, companies now realise that through litigation, they can recover from ERP vendors that botch implementations – companies don't have to accept costly delays, ballooning costs, missing functionality, expensive change orders, and so on.

**CD: What are some of the common reasons behind failed ERP software implementations?**

**Ressler:** The first step in an ERP engagement is to investigate what went wrong on a project and why. Some projects fail because vendors overpromise and under-deliver regarding their consultants' experience or their software's functionality. Sometimes the software itself is the problem, especially when

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*Mark P. Ressler,  
Kasowitz, Benson, Torres & Friedman LLP*

an ERP provider attempts to penetrate a new industry or develop functionality for challenging business processes. Usually, however, projects fail not because of an intrinsic software problem but because of mistakes in the implementation. Botched implementations result from deficient project management, as consulting firms fail to apply an appropriate implementation methodology. Project management lapses are reflected by, among other things, failure to assign an appropriately skilled and experienced team of consultants, failure to conduct

sufficiently robust testing, slippage between project phases – for example, the build phase begins before the design phase is completed – and failure to identify, manage and mitigate project risks.

**CD: In your opinion, what initial steps should a company take to identify the business risks associated with implementing an ERP software solution?**

**Ressler:** Companies must conduct intensive due diligence in selecting their ERP solution and the consulting firm to implement it. During the selection phase, they need to ensure that vendor candidates are acutely familiar with the business processes at issue. They need to require consulting firms to identify the individual consultants who will be assigned to the project, and provide specific information about the consultants' prior experience. What projects did the consultants work on previously? What roles did they play? Moreover, vendors must be pressed for details about how they intend to address functional gaps. What level of customisation is required? Will the software's core code be modified? When it comes to selecting ERP vendors, companies should ignore the Rolling Stones' admonition that "you can't always get what you want". You always want and you always need the 'A-Team'. That's what consulting firms promise, but don't always deliver. The 'B-Team' can doom a project.

**CD: Could you outline the range of potential damages facing parties responsible for a failed ERP implementation?**

**Ressler:** The potential damages can be substantial. While ERP contracts typically contain provisions limiting damages to a return of fees, such damages caps can be avoided by proving that the ERP vendor fraudulently induced the contract. If the project was cancelled before go-live, recovery might include fees paid to all project vendors, software licence fees, amounts related to the company's internal project-related spend, and, under some circumstances, lost profits stemming from delays in meeting a strategic plan. If the project suffered through a failed or problematic go-live, recovery can also include fees paid for stabilisation and remediation work, and lost profits stemming from cancelled orders, missed shipments, failure to invoice, impairment of expansion or acquisition plans, and so on.

**CD: To what extent can the blame for a failed ERP software implementation be apportioned? Should responsibility reside at the CIO, CFO level or elsewhere?**

**Ressler:** In our cases, the blame lies with the ERP vendors. Companies that lack ERP implementation

skills and experience pay ERP vendors millions of dollars. ERP projects fail because ERP vendors did not provide the implementation services they were hired to provide. The ERP vendors, meanwhile, sometimes try to shift the blame onto the clients while minimising their own role and invoking the misleading mantra of shared responsibility, which is usually another way of trying to blame the victim. Our clients rely on the evidence to overcome blame-the-victim defences.

**CD: What advice can you offer to companies on managing the ERP litigation process? Are there any particular strategies that can be deployed?**

**Ressler:** Just as ERP implementations succeed or fail based on effective project management, so too do successful ERP litigations depend on the right team of attorneys and experts who can apply the skills and experience they've developed on prior ERP cases. There's no room for a learning curve when it comes to litigating ERP cases. Strategies include a thorough pre-complaint fact investigation to ensure a well-pleaded complaint, using as technical experts a team of ERP consultants who specialise in evaluating and rescuing failed ERP projects, using as a damages expert an economist who specialises in losses stemming from failed ERP projects, focusing in discovery on the precise kinds of internal ERP vendor documents that will be the

most incriminating, and deposing the ERP vendor witnesses who, based on their project roles, will provide the most incriminating testimony.

**CD: How do you envisage the ERP litigation landscape unfolding in the coming 12-18 months? What trends and developments do you expect to see?**

**Ressler:** I expect the ERP litigation docket to grow for the foreseeable future. Some consulting firms will continue to engage in 'bait-and-switch' sales tactics, promising the 'A Team' and delivering anything but. Some software providers will continue to make promises about functionality they should not be making. In the meantime, key constituencies – boards, analysts, activist investors and private equity owners or acquirers – will continue to demand that mission-critical ERP projects are completed successfully, on time and on budget. That means that in-house counsel and senior leadership need to be proactive in monitoring project progress and holding ERP vendors' feet to the fire at the slightest sign of delays or issues. Gone are the days when the business side could simply delegate ERP projects to the IT team and check in again after go-live. Increased involvement in ERP projects by in-house counsel and the executive suite is a positive trend that will likely intensify. **CD**