



Litigation Forum:

Going on Offense – When Is it Time to Enforce Your Company's Rights as a Plaintiff?

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AGENDA

Proactive Planning

- Contract Language
- Dispute Resolution Clauses
- Choice of Forum
- Insurance/Indemnity

Assessing Your Dispute

- Trusted Counsel
- Risks "big picture"
- Possible Resolution

Litigation

- Discovery
- Confidential documents
- Settlement

Special Issues

Conclusion





STRATEGIC CONSIDERATIONS

Risk Management

Early consideration will shape future disputes

Negotiation Leverage

— Do you have sufficient leverage to get what you want?

Enforcement

— What remedies and provisions will best ensure that you have an enforceable resolution of any dispute that is most favorable to your company?



Proactive Planning – Dispute Resolution

In contracts (e.g., vendors, other business partners, employees), consider litigation mitigation and strategy

- Substantive ability to enforce (ex. non-compete)
- Dispute resolution clauses, including cure periods and escalation measures
- ADR do you want as a prerequisite/option?
- Choice of Forum/Choice of Law
 - By choosing forum or law/may be committing company to a jurisdiction that is not ideal
- Waiver of jury
- Indemnity clauses/Insurance





CASE STUDY

Enforcing a Non-Compete

- Virginia will not "blue pencil" (revise) a non-compete to make it conforming, so litigation to enforce may result in invalidation – could have broad implications beyond this one non-compete!
- Lasership Inc. v. Watson, No. CL-2009-1219, 2009 WL 7388870 (Va. Cir. Ct. Aug. 12, 2009). Lasership filed suit against its former employee, Brenda Watson, to enforce a non-compete. The court sustained the demurrer without leave to amend because the underlying contract was not narrowly tailored to protect the employer's legitimate business interests. The non-compete, non-solicitation, and confidentiality provisions were unenforceable.





Choice of Forum

Choice of Forum

- Consent to jurisdiction
- Exclusive
- Non-exclusive
- Waiver of forum non conveniens





Goals & Possible Resolution

What is Your Company's Goal?

- Enforce contract rights/IP rights?
- Deter others from similar behavior (copycats/employee poachers?)
- Establish precedent?
- Get injunctive relief to stop behavior
 ASAP prevent ongoing damages



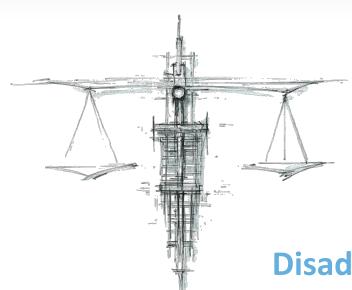


CASE STUDY

Protecting Company's Public Image

- In Feb. 2018, Sallyport Global Holdings filed defamation suit vs. two former employees.
- Sallyport claims they made false and misleading statements to AP about operations at Ballard Air Force Base.
- Employees claimed company involved in sex trafficking ring.
- Company said would not pursue if employees issued retraction.

WEIGHING THE PROS AND CONS: LITIGATION



- Immediate Injunctive Relief
- Readily Enforceable Domestically
- Fulsome Discovery
- Availability of Jury
- Precedential

Advantages

- Disadvantages
- Costly
- Uncertain Judicial Expertise
- Availability of Jury
- Fulsome Discovery
- Public
- Less Efficient than ADR
- Uncertain Enforcement Internationally



Assessing Your Company's Dispute

Trusted Counsel

- Consult with trusted counsel crucial. Can review risks/benefits/including fees/likely outcomes
 - Regular subject-matter counsel/seek proposals?

Appetite/Reporting

- Do your <u>officers/directors/shareholders</u> have the appetite for litigation?
- Need to report to auditors/regulators?
- Communications strategy for shareholders/public

Risks

- Many different types of risks to consider
 - Counterclaims! /Third parties
 - Burdens on your company depositions, document productions distraction from business
 - Reputational risk/social media spreads now more than ever
 - Employee morale





PREPARING FOR LITIGATION



Attorney-Client Planning

Educate the Client

- Explain process
- Discuss budget/expenses
- Outline each side's strengths and weaknesses

Set Realistic Expectations

- Length, cost, and likelihood of success
- Focus on risk assessment, not persuasion

Choose Participants

 Consider schedules, personality styles, factual knowledge, and expertise (size of company affects of course)

Litigation Hold





Litigation – Game On

Complaint

- What's being filed with your complaint as attachments?
 - Under seal?
- Any special service issues ?

Discovery

- Have discovery planned and some ready to go
- Protective order in place

Motions

- What motions do you anticipate filing?
- What motions do you expect defendant to file?

Counterclaims/Additional Defendants

- Insurance coverage?
- What additional resources necessary to address any surprises?





Settlement

What's the Company's Goal? Has it Changed?

Shifting to Mediation (court-ordered or voluntary) or Arbitration?

- Settlement authority how much? Get cleared as necessary.
- Note settlement may include non-monetary commitments
- Who to attend
- Consider schedules, personality styles, factual knowledge and expertise
- Managing expectations once again (and accruals)





Special Issues

Serial Plaintiffs

 At what time "enough is enough" and company should go on offense – and under what theory?

Employees

- How does suing employees affect future hiring, morale, company reputation, etc.? Are there alternatives (e.g., the company that hired employee?)
- Other restrictions ex. NLRB protections on social media speech
- Social media accounts hot topic

Intellectual Property

Regulatory Risk/Concerns (e.g., data breach)

Customers





CASE STUDY

- Ownership of Social Media Accounts
- BH Media Group Inc., the parent company of The Roanoke Times, filed a lawsuit alleging Virginia Tech football beat reporter Andy Bitter misappropriated trade secrets by using the account at his new job at The Athletic website.
- Suit alleged Bitter received employee handbook that made it clear social media accounts "and communications on those accounts" are BH Media's property.



THANK YOU!





QUESTIONS?

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