



## Litigation Forum:

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

# SPEAKERS



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# SPEAKERS



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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



## Advantages

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

## 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 officers/directors/shareholders 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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