Litigation Forum:

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

Peter Carlson
Senior Counsel
Motorola Solutions

George Calhoun
Member
Ifrah PLLC

Michelle Cohen
Member
Ifrah PLLC
SPEAKERS

Paul Haase
General Counsel, Talent & Properties
Octagon

Sloane Perras
Former SVP, Chief Administrative & Legal Officer
The Krystal Company & On The Border
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
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

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

Peter Carlson
www.motorolasolutions.com
Peter.Carlson@motorolasolutions.com
847.576.5000

George Calhoun
www.ifrahlaw.com
george@ifrahlaw.com
202.524.4147

Michelle Cohen
www.ifrahlaw.com
michelle@ifrahlaw.com
202.524.4144

Paul Haase
www.octagon.com
Paul.Haase@octagon.com
703.905.3300

Sloane Perras
www.krystal.com
sloanepperras@gmail.com
678.296.9343