Inside 2Q2020

ACC Association of Corporate Counsel
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President's Message

Larry Venturelli

I hope this newsletter finds all our ACC members and families well and safe during this unprecedented pandemic. By the time you read this article we will be three plus months in to the new norm of working from home, providing homeschooling for our children including keeping them on task with their e-learning, and only leaving the house for essential needs. With this new norm, I often find myself wondering what day of the week it is; and when on a work-related call I find the conversation goes on longer to fill that need of having a connection with someone in a face to face interaction.

As a Chapter we are partnering with our amazing sponsors to continue to support all of you with webinars and a COVID-19 resource page on our website. As a Board we have been having regular virtual Thursday Happy Hours in order to continue to connect and brainstorm new ways that we can continue to provide resources to all of you as we get through this pandemic together. At this time, we have provided you with four webinars presented by our premier sponsors Nelson Mullins, Womble Bond Dickinson, Jackson Lewis, and Miles & Stockbridge. Please be sure to provide us with any feedback regarding the webinars so that we can gauge whether we are on the right track or if any improvements are needed.

The Board voted to cancel our annual Golf/ Spa event due to the fact that many expressed concerns about attending and due to the logistical challenges of having an event that will require social distancing and other anti-virus spread measures. We hope that as a state we get on the other side of this pandemic allowing us to hold this amazing event next Spring.

On February 24th we had a wonderful Winter Social sponsored by Jackson Lewis at Classic Catering. There were three cooking stations of Pasta, Sous Vide, and Pear Galette, and we even had a few brave cooks step up to participate during the demonstration.

In 2020, we have welcomed one (1) new Board member, Kristin Stortini. If you have any ideas or suggestions, please feel free to contact our Chapter Administrator or one of your Board members.

We want your input so that your Chapter delivers the programming you need in your in-house counsel role. Membership with the Baltimore Chapter will connect you with a group of talented and collegial fellow counsel. It also gives you access to all that ACC Global offers, including educations, model forms, small group sections, "quick hit" learning, listservs, and, of course, the Annual Meeting. Hopefully, this October we will still be able to attend in person in our neighboring city of Philadelphia and connect with in-house counsel from all over the world at the Annual Meeting.

In light of the tragic murder of George Floyd and the events that have shaken our nation over the past several weeks, your ACC Baltimore Board and officers wanted to echo and affirm the words of Veta Richardson, President and CEO of ACC, that social injustice and inequality cannot and must not be tolerated. We, as attorneys, have a special obligation to ensure that the law is applied so that our communities are places where we respect differences and powerfully denounce and dislodge hatred, bigotry and intolerance.

As attorneys, each of us has a voice and a platform. We hope that during this time and into the future, each of us will use our voices to speak up about intolerable injustices in our society, in our workplaces, and in the law. And, that we will use our skills and our positions as attorneys to influence others, whether one person or one hundred.

We pledge to do so.

Please stay safe and healthy.

Yours truly,

Larry Venturelli, ACC Baltimore Chapter President, and the Officers, Board, Past Presidents Advisory Council, and Chapter Administrator of ACC Baltimore

Stepping Up: How Companies Are Helping First Responders During the Pandemic

By Karmen Fox

When COVID-19 spread across the globe, medical workers traveled from afar to help their peers beleaguered by overcrowded and understaffed emergency rooms.

Unfortunately, many regions were not prepared for the pandemic and didn't have enough personal protective equipment (PPE) needed to shield essential workers from the contagion. Hospital staff were forced to fashion masks out of bandanas and wear ski goggles to stop the spread of the coronavirus.

With inadequate government resources further hampered by delays, dozens of companies stepped up, converting their production facilities to make PPE for first responders, from jean brands sewing medical masks to brewers making hand sanitizer.

ACC Docket reached out to the in-house counsel of companies that are helping the heroes on the front lines. Below, they share how they repurposed their supplies and skills to help stop the pandemic, and how you can galvanize your company to help too.

Alpargatas/Havaianas — José Daniello, Chairman of the Board of the Alpargatas Institute and Director of People

What processes did Havaianas use before that made reconverting possible? (i.e., what tools, goods, techniques, etc. has your company traditionally used that made this effort happen?)

Havaianas is one of Alpargatas' brands. As a global company, we set up a crisis committee at the beginning of the coronavirus issue in China. We designed several scenarios and prepared to adapt the operation if needed.

Administrative professionals are working from home all over the world. We shut down brick-and-mortar stores and advised our franchisees to do the same.

We reduced production to safe levels and reinforced the essential product line to avoid any bottlenecks.

Our factories have been adapted to churn out new products: masks, lab coats, and hospital footwear. We made a commitment to produce and donate one million masks. This number may increase if we are able to source more raw material.

We are also donating 250,000 pairs of shoes to the underprivileged and healthcare professionals, the latter will receive a specific model for hospitals that we started to produce during the pandemic. In addition to footwear, 100,000 families will receive kits with essential products.

How are you balancing employee safety while ramping up production of equipment?

Since March 23, we have reduced the number of employees in logistics and production operations, reaching a minimum level and keeping only those who are essential, complying with health safety guidelines and rules. We are maintaining strict safety and social distancing standards in order to comply with the schedules and standards established in each region where we operate.

How does Havaianas ensure that it's complying with medical-grade sterilization techniques?

After all the adaptations that we promoted in our factories, we had an inspection from Anvisa, the regulatory organization that works with the Brazilian Government Healthy Ministry. They approved all the initiatives and changes in our production.

What internal stakeholders need to be involved to approve and implement these decisions?

The strategic committee, which includes the general counsel, is responsible to approve all the decisions.

How can in-house counsel who want to help during the pandemic get their stakeholders on board with implementing these decisions?

We have weekly lives streaming [calls] with all the employees to update the decisions, initiatives, and new processes during the coronavirus crisis.

In order to make it possible for individuals, such as employees and customers, to participate in helping the society, the Alpargatas Institute (IA), the company's social responsibility program, has created a fund. This fund will receive cash donations, which will be carefully recorded, and then converted into kits of essential products (e.g., hygiene products, food, and Havaianas) to be donated.

The kits are R$15 and for each donated kit, the company will double the number of donations.

Lucky Brand — Maryn Miller, General Counsel

What processes did Lucky Brand use before that made reconverting possible? (i.e., what tools, goods, techniques, etc. has your company traditionally used that made this effort happen?)

As an apparel brand, it was fairly straight forward to pivot into non-medical cloth masks. Through our collaboration with LA City, we identified an appropriate pleated mask template, created by Kaiser Permanente and shared on LAprotects.org.

With these tools and an existing apparel vendor base, we were able to identify a domestic vendor that was already sampling the same non-medical masks. Because we were flexible about fabric style choices, it allowed us to produce our first 10,000 masks within one and a half weeks. Since it was domestic production, we could deliver to our distribution center within four days.

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We have also partnered with other brands in The Open Innovation Coalition, led by Rothy's and including Fabletics, Marine Layer, Outerknown, and Thirdlove, among others. The purpose of the coalition is to gather others within our industry to information and resource share to factories currently producing protective equipment. The coalition has routed fabric and other supplies to Suay Sew Shop, who are making a mask for medical and essential workers when there is a lack of N95s.

How are you balancing employee safety while ramping up production of equipment?

All of our corporate employees are working from home and have been sent cloth masks for their protection.

Our third-party distribution centers remain open and Lucky has given them the same masks to protect themselves at work. These distribution centers have also instituted social distancing measures on the floor for employee protection.

All of our stores are closed to the public, but 50 of approximately 200 are fulfilling online orders. While these store associates are working alone in store, they have also been given cloth masks to protect themselves going to and from stores.

In addition to sending all employees cloth masks, our human resources department has widely communicated information on social distancing measures and how to protect oneself.

The factory that produces our masks for sale is a contractor. All their employees have their temperature checked when they enter the building. They are aware of symptoms to look out for, are spaced properly to ensure social distancing, and wear masks and gloves at work.

What internal stakeholders need to be involved to approve and implement these decisions?

We have a crisis management team made up of the following positions:

- Chief financial officer and chief administrative officer
- VP Human Resources – Corporate and field
- Director, Loss Prevention and Corporate Security
- Director, OMNI operations and communications
- Director, facilities
- General counsel
- Chief technology officer
- Corp communications, HR program administrator
- CEO

How can in-house counsel who want to help during the pandemic get their stakeholders on board with implementing these decisions?

Stakeholders have been fully supportive of these decisions and are fully invested in efforts to help our community during this crisis, especially where the stakeholders see that the teams have thought through the legal, operational, and logistical considerations upfront.

How can the public support Lucky Brand's efforts?

Charitable donations are always a personal choice in both amount and recipient. At Lucky, we have offered our customers a few options to make an impact. They can purchase a five pack of masks and donate a five pack to our community partners and other beneficiaries recommend by the Los Angeles mayor's office.

Our #LuckyTogether page has information about how to donate directly to Suay Sew Shop, who are making masks for front line workers. This same page includes the donation pages of Lucky's community partners who service the unhoused in Los Angeles. Customers are welcome to choose how they want to participate and with who.

AB InBev — Cybelle Buyck, VP of Legal and Corporate Affairs

How is AB InBev helping the medical community during the pandemic?

We are a global company but strongly rooted in the local communities where we brew our beers, which is why we acted quickly to support medical efforts in these communities.

As [medical] supplies shorten in the fight against COVID-19, our breweries are producing much-needed disinfectant alcohol and over one million bottles of hand sanitizer gel to distribute for free to hospitals and frontline workers in some of the most impacted areas.

We use the residual alcohol from the brewing process and work with excellent partners who complement our production capacity and determination to help with their expertise in making biocide products.

Additionally, in Belgium and the Netherlands, we are donating billboard space to support public health campaigns by FIFA and the World Health Organization (WHO), as well as the Dutch government.

We are also helping the medical community by donating water and non-alcoholic beers to hospitals and medical workers to support their work and show our appreciation. In some parts of the world, we are working with local authorities to build modular hospitals.

What processes did AB InBev use before that made reconverting possible? (i.e., what tools, goods, techniques, etc. has your company traditionally used that made this effort happen?)

We pride ourselves on being an agile company, able to act and react quickly. In order to produce disinfectant alcohol and hand sanitizers, we used our residual alcohol left over from de-alcoholising our non-alcoholic beers.

In addition, we reoriented multiple departments, such as procurement teams to purchase the packaging, our marketing team to develop the labels, our transport team to help with logistics, and our legal and corporate affairs teams to find the right places to distribute and cooperate with the governments' crisis coordination centers and hospitals.

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How are you balancing employee safety while ramping up production of equipment?

The health and safety of our people is our highest priority and we won't take any shortcuts in this area.

We have implemented a significant number of measures across our organization to ensure our colleagues have the support and resources that they need to stay safe and healthy. For instance, we proactively introduced enhanced cleaning cycles, social distancing measures, and entry-checks in many countries before they were mandated by the governments to safeguard our people.

Where we do produce hand sanitizer locally (e.g., in Germany or our small test brewery in Leuven, Belgium), in all circumstances, we ensure the strictest safety guidelines.

How does AB InBev ensure that it's complying with medical-grade sterilization techniques?

When we started the process to produce biocide products to help our communities, it was outside our comfort zone. We are brewers, not biocide producers. We started looking for experienced, fast-moving, and innovative partners who were familiar with the biocide regulatory framework.

Together with our partners, we were able to follow and adhere to the regulatory framework and in addition we received assistance from local governments and industry associations. Many governments made emergency exceptions in regards to obtaining biocide licenses and the European Union decided to release product standards free of charge, which has been a tremendous help.

How is AB InBev helping the public at large during this pandemic?

In addition to helping the public health sector, we are supporting our partners in the hospitality sector. As restaurants, bars, pubs, and clubs in many European countries have closed their doors, as part of government efforts to contain the spread of COVID-19, we've acted quickly to support the hospitality sector.

In addition to offering deferred rent payments, free tap cleaning services, and keg restocks, our team has developed a series of online voucher platforms in Belgium, the United Kingdom, Italy and France, which allow individuals to pre-pay for beers in their favorite bar to redeem once reopened.

We've also pledged to match each donation, so pubs and bars get double the immediate cash injection. So far, almost 500,000 beers have been "prepaid."

In addition, we have also supported our local communities through donating laptops to support distance learning for children and young students.

What internal stakeholders need to be involved to approve and implement these decisions?

Helping to combat the effects of COVID-19 for our colleagues, customers, and communities has been a company-wide effort. All teams are involved and needed to implement decisions, ranging from our brewery teams to marketing, procurement, legal and corporate affairs, IT, and logistics colleagues.

We have an ongoing dialogue with our global senior leadership team but also operate as a European team to decide how best to support the communities we live and work in.

How can in-house counsel who want to help during the pandemic get their stakeholders on board with implementing these decisions?

In-house counsel have to radically prioritize time and resource to deliver workable solutions for rapid – and compliant — deployment of critical community support measures. Achieving that for each initiative means focusing on its specific legal challenges (e.g., permits for hand sanitizer) and covering compliance triggers.

At the same time, in-house counsel need to keep all stakeholders on the right path, even in tumultuous times, through a consistent drumbeat of reminders on data protection, antitrust, anti-corruption, anti-fraud, and other compliance requirements.

Once it's clear that in-house counsel are on top of initiatives and retaining broader compliance control even in a crisis, stakeholders are confident to back novel measures to the fullest.

Operation BBQ Relief — David Rosen, General Counsel

Operation BBQ Relief has been helping communities affected by disasters across the United States since 2011. How does your team determine which areas to help?

Since 2011, Operation BBQ Relief has provided meals to those in need and to support first responders, military personnel, and veterans. As a 501(c)(3), our charitable mission is to provide comfort to those in need by connecting, inspiring, serving, and educating in communities far and wide. Whether it is in response to a natural disaster, or as is this case now, a pandemic, we are doing our best to respond and make a positive impact in as many communities as possible.

Through our new program, Operation Restaurant Relief, we empower a local restaurant to reopen and rehire formerly laid off employees while providing 2,500 free meals per day to their community. The Operation BBQ Relief programs department developed this program and implemented it within a few weeks, and the results thus far have been very successful.

What we need most of all is funding to activate in new areas. We rely heavily on our corporate sponsors and donors. Our COVID-19 deployments started in our hometown of Kansas City, and expanded to a Kansas City restaurant, South Carolina restaurant, then via the sponsorship of Dignity Health, we activated a restaurant in Bakersfield, CA.

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The Pennsylvania Department of Health Services contracted us to feed 180,000 meals per week in conjunction with The Salvation Army. We understand the need at this time is far and wide, and we are trying our best to help in as many places as possible. We hope to work with corporations ready to deploy our resources in their local community to feed those in need and get seven to 10 employees working again at each restaurant.

How is Operation BBQ Relief helping medical, first responders, or other essential workers during the coronavirus pandemic?

They have been one of Operation BBQ Relief's targeted beneficiary groups. Our restaurant contractors have been delivering meals to their facilities.

How has Operation BBQ Relief helped other community members during this pandemic?

Operation BBQ Relief understands the comfort a hot meal brings to both the body and soul. Through Operation Restaurant Relief, we are providing that comfort to those in need, first responders, and other front-liners. The added benefit is the reemployment of previously laid off employees at our restaurant contractors.

How is Operation BBQ Relief ensuring the safety and health of its chefs and volunteers during the pandemic?

Operation BBQ Relief is committed to following all US federal, state, and Center for Disease Control (CDC) guidelines, with relation to all laws, rules, and regulations. During this crisis, we have continuously updated our standard operating procedures and policies to reflect the changing guidelines.

We have implemented many new operational protocols governing mask usage, gloves, mandatory glove changes, sanitization of all hard surfaces every 30 minutes, checking the temperature of incoming people and then again randomly throughout the day, and many other [rules].

What internal stakeholders need to be involved to approve and implement these decisions?

The Operation BBQ Relief programs department evaluates potential deployment sites and then the CEO with input from the management team makes the final determination.

How can in-house counsel who want to help during the pandemic get their stakeholders on board with implementing these decisions?

Operation BBQ Relief is actively looking for corporate partners and donors that want to make a positive impact in their local communities. Please share this information with decision makers within your corporate foundation, corporate social responsibility department, marketing department, and the executives.

How can the public support Operation BBQ Relief efforts (aka deployments)?

Please visit www.obr.org to get involved and become a registered volunteer or make a donation.

For more advice on the coronavirus pandemic, visit our Coronavirus Response Resource Page.

Author:

Karmen Fox is the web content editor of *ACC Docket*.

ACC News

2020 ACC Annual Meeting: It. Is. Happening.

Mark your calendars for October 13-16. For the first time, ACC Annual Meeting will be taking place in-person in Philadelphia, as well as virtually. Reserve your spot today at acc.com/annualmeeting.

In-house Counsel Certified (ICC) Designation

The ACC In-house Counsel Certification Program, helps in-house counsel become proficient in the essential skills identified as critical to an in-house legal career. The program includes live instruction, hands-on experience, and a final assessment. Those who successfully complete the program will earn the elite ICC credential. Your law department and your employer will benefit from having a lawyer that returns with global best practices in providing effective and efficient legal counsel. Attend one of these upcoming programs:

- **Melbourne, Australia (Virtual)**, August 10-14
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Learn more and register at acc.com/BU.

Are you prepared to comply with new state privacy laws?

Rapidly growing data privacy regulations from California to New York make you accountable for all third-party service providers that access, process, or store your company's personal data. Visit www.acc.com/VRS for more information.

New ACC Report Shows the Value of Legal Operations

One of the most comprehensive reports of its kind, the 2020 ACC Legal Operations Maturity Benchmarking Report, created in partnership with Wolters Kluwer Legal & Regulatory, analyzes data for 316 legal departments of all sizes, across 29 countries, and 24 industries. Quickly assess how your department rates and develop a roadmap to improve critical functions. Download this complimentary report now.

Five Considerations for Maryland Employers Bringing Employees Back to Work

By Kathleen A. McGinley and Judah L. Rosenblatt (Jackson Lewis PC)

Once authorized by state and local governments, reopening physical workplaces amid the new COVID-19 landscape is a multi-layered endeavor. In addition to following new and existing COVID-19-related government directives, there are practical considerations employers must make before reversing furloughs and revisiting other employment decisions made during Maryland's declared state of emergency. Below are five common questions facing employers.

1. Does a furloughed employee return with a paid leave balance?

It depends on the employment action and the type of paid leave (vacation, sick leave or paid time off).

Furloughed employees who were temporarily laid-off during a company slowdown or shutdown and who were able to use accrued paid time off while furloughed may have exhausted their leave balance and will return without a balance or with a lesser balance depending on the length of the furlough.

If employees were not able to use leave while laid-off, whether furloughed employees will return with a balance depends on the details of the company's policy. For example, perhaps unused, accrued paid time off is usually paid at termination, per policy. The furlough that occurred may not have been considered a termination by the company because the employees remained employed and were classified as inactive. As a result, accrued, unused paid time off, otherwise payable at termination, may not have been paid at the time of furlough. In this circumstance, returning employees should have their paid time off balance restored. It may be the case, however, that some furloughed employees have not returned to work because of a continued slowdown of business. In that case, if the employer discharges the furloughed employee, the employee should be paid for any accrued, unused paid time off, pursuant to any eligibility requirements under the employer's policy, at the time of discharge.

Regarding sick leave, employees who did not exhaust their sick leave balances or who were not paid out for their unused balances at furlough or discharge, must have their sick leave balances (or equivalent paid time off balances) restored if rehired within 37 weeks and their Montgomery County sick leave balances (or equivalent paid time off balances) restored if rehired within nine months (unless the employee voluntarily left employment without good cause, as defined by the Montgomery County code).

Additionally, many employers may have implemented temporary leave policies during the shutdown. Whether these policies apply to returning employees depends on the terms of the policy.

2. Are returning employees eligible for paid leave under Families First Coronavirus Response Act leave?

The federal Families First Coronavirus Response Act (FFCRA) runs through the end of 2020 and contains two paid leave entitlements: (1) the Emergency Paid Sick Leave Act (EPSLA), which entitles eligible employees to take up to 80 hours of paid leave for certain COVID-19 related reasons; and (2) the Emergency Family and Medical Leave Act (EFMLA), which entitles eligible employees to take up to 12 weeks of unpaid and paid leave for child care purposes related to COVID-19.

If an otherwise qualified employee is recalled or rehired before December 31, 2020, the employee will immediately become eligible for EPSLA leave regardless of how long they have worked for their employer. However, with regard to EFMLA leave, an otherwise qualified employee who was laid off or otherwise terminated on or after March 1, 2020 and is rehired on or before December 31, 2020 will only become eligible for EFMLA leave if the employee had previously been on the employer's payroll for at least 30 of the 60 calendar days prior to the layoff or termination date.

3. Are temperature checks permitted at work?

The federal government's Guidelines for Opening up America Again encourage employers to develop and implement appropriate temperature check policies, in accordance with applicable law.

The Equal Employment Opportunity Commission (EEOC) has confirmed that measuring employees' body temperatures and testing employees for COVID-19 before allowing them to enter the workplace is permissible because, currently, an individual with the virus will pose a direct threat to the health of other employees at the workplace. Similarly, COVID-19 symptom screening questionnaires for employees, if the questions are consistent with public health authority and reputable medical sources, are also currently permissible, per EEOC guidance.

While Maryland has not officially opined on the subject, several other states, such as Delaware, Pennsylvania, and Ohio, have implemented orders or issued guidance urging or requiring that temperature checks be implemented before employees of certain employers are permitted to report to work. If an employer does implement temperature checks, the screening should be implemented consistently, and all information learned and recorded should be treated as confidential medical information under the American with Disabilities Act and applicable state and local laws.

Also, it's important to remember that screening employees' temperatures will not completely mitigate the risk of contagion, as some people with COVID-19 do not have a fever and may be contagious without experiencing any symptoms. Therefore, a combination of various permissible pre-entry screenings may be necessary to mitigate risk to employees.

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4. *Once employees are allowed to return to work, must employers allow employees to continue working from home?*

Whether to continue to allow employees to work at home will depend on a number of factors, including government directives and individual employee circumstances.

The Maryland Strong: Roadmap to Recovery, which details the Governor's plan for easing business and social restrictions imposed during the mitigation phase of the state government's response to the COVID-19 pandemic, encourages employers to extend teleworking arrangements through each of the progressive stages of reopening the state's economy to support social distancing, which will be a continued practice in the state for the foreseeable future. Additionally, the Governor's plan further encourages employers to adopt flexible leave policies to encourage workers to stay home when sick or when exposed to COVID-19.

The federal government's Guidelines for Opening up America Again also instructs employers to continue to encourage telework whenever possible and feasible, and to strongly consider special accommodations for employees who are "vulnerable." "Vulnerable individuals" are defined as "elderly individuals" and individuals with certain serious underlying health conditions, such as high blood pressure, chronic lung disease, diabetes, obesity, asthma and compromised immune systems.

Further, in its Pandemic Preparedness in the Workplace and the Americans with Disabilities Act guidance, the EEOC opines that employers can encourage all employees to telework as an effective infection-control strategy. Further, employees with disabilities that put them at a high risk for complications of pandemic influenza may request telework as a reasonable accommodation, which should be considered by an employer as is any other reasonable accommodation.

5. *What is the process for reversing pay decisions made during the shutdown?*

During the recent business slowdown, many employers reduced employee wages and may have reclassified exempt employees as non-exempt employees due to those reduced wages, reduced hours and/or changed duties. Unwinding these actions is not administratively burdensome. Unlike pay decreases, which require one pay period advance notice in Maryland, there is no requirement to provide advance notice when increasing wages. Employees should still be notified of their new wage and also of a new wage classification.

Additionally, before reclassifying employees back to their exempt status, employers should consider whether the affected employee was appropriately classified as exempt before the slowdown, under the Fair Labor Standards Act and Maryland law. Similarly, employers should consider whether reclassification is warranted if the employee has assumed new duties following the slowdown.

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Kathleen A. McGinley

Judah L. Rosenblatt

Patent IP Enforcement Can Pay Unexpected Dividends During Economic Slowdown

By Barry Herman & Jeffrey Whittle, Womble Bond Dickinson (US) LLP

During these difficult times, companies naturally focus on ways to enhance the value of their assets while reducing costs. So how does this impact the IP portfolio management and litigation arena? Conventional wisdom tells us that as companies look to reduce costs, they have a tendency to be less likely to engage in potentially expensive litigation.

But this train of thought may not hold true in the area of patent litigation. In fact, a 2015 University of San Diego study[1] found that even as companies seek to reduce expenses during an economic downturn, intellectual property (IP) departments also can tap into overlooked IP resources to generate value. The report's authors write that while some in-house legal departments may look to reduce litigation volumes during economic downturns, "a decline in profits spurs firms to extract greater revenue from dormant assets by litigating more aggressively against perceived infringers." Diligently asserting patents against infringers can be a strategic way to drive value and improve a company's market position, particularly if a business may not be in position to invest in growth. This also holds true for situations where companies have yet to move forward with potential new product development and launches.

"Because the relative internal rate of return on investing in patent litigation rises during downturns, it becomes a more attractive business strategy relative to other investment opportunities," authors Alan Marco (US Patent and Trademark Office), Shawn Miller (Stanford Law School) and Ted Sichelman (University of San Diego School of Law) wrote.

Enforcing Patent Rights in an Economic Downturn

A 2009 BTI Consulting survey found that corporate legal departments planned to reduce spending on IP litigation during that period's economic downturn. In fact, the projected 7.7 percent decline in IP litigation spending was the largest in any single category.

However, that did not necessarily correlate to a decline in IP litigation activity. Instead, corporate legal departments merely intended to spend less per lawsuit. In-house legal departments are not looking to downsize – they are looking for the maximum return on their legal spend, working with firms that give them the biggest per-dollar impact.

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This means that outside counsel with a real value proposition, that can work within the parameters of a client's financial reality, may have a competitive advantage over traditional (i.e. inflexible) law firms during an economic downturn. "Patent litigation rates tend to increase in economic downturns characterized mostly by declines in investment and other measures of productivity, provided that credit remains freely available," the report's authors write.

IP Audits: Knowing is (More than) Half the Battle

The first step in capitalizing on a robust patent portfolio is knowing exactly what assets your company has. During this uncertain period caused by the coronavirus pandemic, companies should consider conducting a thorough internal audit to identify and evaluate the patent assets in their portfolio.

For example, Nortel Networks filed for bankruptcy in 2011, following the aforementioned economic downturn, unaware of the vast value of the company's lucrative patent portfolio. This knowledge gap caused a significant failure on the part of the company's board and proved to be a sizable loss for Nortel's shareholders—but a tremendous win for its creditors. A portfolio of 6,000-plus Nortel patents sold for a whopping $4.5 billion.[2] On the flip side, Microsoft has reaped billions of dollars[3] from its successful management and enforcement of its patents related to software used on the Android platform.

Savvy in-house counsel understands that successfully managing patent and other IP assets can boost their professional reputations, as well as their employers' economic well-being. Companies that best leverage their intellectual properties can make the case to board members and shareholders that their confidence is merited.

Acquiring patent portfolios from struggling companies can provide tremendous value, not only as a potential revenue generator, but as a signal to competitors that they should be wary of launching a patent attack. Competitors will think twice before suing if the likely result comes with the risk of a counter-attack that puts its own products in harm's way. One strategy that a company struggling during an economic downturn can employ entails seeking to license existing but underutilized patents to others. The licensee receives the benefit of these patent rights, while the licensing company earns income from commercializing products protected by the patents.

This is a particularly attractive option when the licensee is not a direct competitor or if the licensees operate in different markets than the licensor. In addition, IP assets can be sold to others or used as collateral to help secure loans or other funding.

But in order to leverage underutilized patents, a legal department first must know what it has in hand—and that requires an IP audit. An IP audit serves two essential functions: (1) it identifies any underutilized intellectual property within a company's portfolio; and (2) it reveals any potential risks and gaps within that portfolio, giving the owner an opportunity to address those issues before litigation is necessary. A thorough IP audit also should identify the IP assets with specificity, the lifespan of the IP assets, and their potential value to the company.

The Value of a Value Proposition

The bottom line is that even in tough times, boards of directors and company executives should take the time to manage and defend their IP portfolios. But they should do so by partnering with a law firm that works closely with management in the most strategic and effective manner possible. The following are a few considerations to keep in mind:

- Risk avoidance is the best defense. The most cost-effective strategy in protecting IP assets is to make sure those assets are secured before infringement claims arise. This is where a comprehensive IP audit can be so important. Such an audit should prioritize identifying potentially untapped or underutilized assets that can be monetized and should help understand the relative strength of such an asset. Find a firm that can work closely with you on such a complex and mission-critical endeavor.
- Evaluate your IP litigation capabilities, and fill in gaps with outside counsel where needed. While companies understandably want to avoid litigation during an economic downturn, safeguarding valuable IP is worth the long-term investment and can help maintain or garner more market share. A good starting point is an external evaluation identifying possible infringers.
- The value proposition between law firms can vary greatly. And value does not necessarily mean billable rates. A law firm's value proposition can best be understood as "Amount of value provided to the client for the legal spend." So look for firms that provide add-on services, and those that are willing to work with clients to contain costs. For example, firms with litigation support services, such as case management and document review, can provide IP litigation clients with exceptional value.
- Now is a good time to look at alternative fee solutions. The right law firm is open to flat- fee and incentive-based fee arrangements that share the risk burden, while providing clients with greater cost certainty.

By working in partnership with outside counsel, companies can find much-needed stability, revenue and market share by aggressively protecting patents and other IP during the current economic downturn. What's more, by having those IP assets in hand, companies that act now will be better positioned to capitalize and grow when the economy inevitably rebounds.

Barry Herman

Jeffrey Whittle

[1]Alan Marco, Shawn Miller & Ted Sichelman, *Do Economic Downturns Dampen Patent Litigation?* (University of San Diego Law Faculty Works, 2015).

[2]"Nortel Patents Sold for $4.5bn", The Guardian (July 1, 2011).

[3]Ewan Spence, "Microsoft Takes Six Billion Dollars from Android", Forbes (November 1, 2015).

Restrictive Covenants in the Time of COVID-19

By Anthony W. Kraus

As the COVID-19 pandemic increasingly impacts employers' ability to do business, their primary worries have become managing furloughs, reductions of hours and pay, layoffs and unemployment and leave-related benefits. Hiring and its competitive impact seem like distant concerns. A favored few, however, still need to take on new employees; and most businesses cutting personnel can still envision a day when they and their competitors will be hiring. What then will be the impact of restrictive covenants? If laid-off employees are not rehired by their former employers, but are offered work by competitors either during, or in the wake of the pandemic, will such covenants be enforceable to prevent it or support a claim for damages for any provable related losses?

A minority of employers have effectively answered the question in the text of their covenants, although somewhat inadvertently. Their agreements expressly exclude layoffs, or other involuntary terminations not for cause, as a triggering event for post-termination restrictions. They have adopted such limitations in realistic recognition that restraints can be difficult to enforce against employees let go through no fault on their part. By embracing such an exclusion, their restraints are enhanced by seeming less oppressive and being less susceptible to accusations of overreaching; and the companies can still at least partially manage competitive threats by judiciously choosing whom to let go and whom to retain. Unfortunately for such employers, they are not likely to have foreseen the necessity for mass layoffs from an unexpected world health crisis or to have appreciated the threat they may face from former employees competing against them as the businesses attempt to rebound.

At least one state—Massachusetts—commands the same result by statute, precluding enforcement of noncompetition agreements against employees laid off or terminated without cause.[1] For most other employers elsewhere requiring covenants, however, their restraints purport to be triggered by any separation of employment; and no statute overrides such breadth. By their terms, such covenants will consequently apply to any employees laid off during or as the result of the current emergency. Their enforceability will be determined by the usual tests. Courts in most states assess covenants for the reasonableness of their restrictions in length of operation, geographic scope and activities constrained.[2] Assuming that the covenants pass the test of reasonableness, courts also rely on a multi-factored balancing of interests, including the hardship on the employee and the impact on the public interest, to determine enforceability. *Id.*

Impact of No-Fault Termination on Enforceability. The balancing of interests will be the most critical aspect of restrictive covenant disputes arising from pandemic-based layoffs. As already noted, many courts have expressed general reluctance to enforce covenants in situations where employees have been let go by their employer through no fault of their own.. Some decisions conclude that because layoffs serve the unilateral business interest of the employer, destroying the mutually beneficial employment relationship between the parties, the employee's unilateral interest in finding new work, even if for a competitor, should reciprocally be given controlling weight after the layoff.[3] Other cases stress that because the employer has cast the employee aside, it should be deemed in fairness to have forfeited any right to limit the employee's ability to find other available work, including in competitive positions.[4] Augmenting such concerns is the maxim that restrictive covenants generally conflict with the public policy of promoting competition and are disfavored. Such precedents might therefore seem, at least superficially, to portend a mass liberation from post-termination restraints for employees terminated in COVID-19-related layoffs and who, for various possible reasons, do not return to their old jobs.

There are a number of other factors, however, that conceivably might mitigate against any such automatic limitation on enforcement. Layoffs caused by COVID-19-related closures or restrictions on operations cannot be so easily characterized as initiated simply for the business convenience of the employer. Nor do they rest upon any ordinary business judgment that the employees are expendable, which typically can undercut an employer's right to, or perceived need for, competitive restraints upon them. Instead, such layoffs in many instances are legally compelled because the employers are non-essential businesses, or are economically necessitated because of a temporary dip in demand. Such layoffs are sudden and contrary to the employer's wishes or expectation, and can be required to enforce the public interest in social distancing, or compelled as a temporary necessity to keep businesses solvent for the short term, so that they are able to rehire employees after the emergency abates. Accordingly, the normal judicial inclination to decide in favor of employees discharged without fault may be offset by legitimate concerns about fault-free employers, who are not acting exclusively from self-interest, but in part for the interests of others.

Other factors that also might make a difference are whether the employer initially made efforts to manage around layoffs and keep workers partially employed, or represented to employees the intent to rehire as soon as conditions allowed, or is able to show a likelihood of offering to rehire in the near future. Similarly, if the employee has qualified for unemployment or other relief during the layoff, it also could be a factor militating against any instant emancipation from restrictive covenants, much as, for example, extending salary through garden-leave helps mitigate the perceived hardship of restrictions.

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Impact of Suspended Operations as Competitor. Another common setting in which employees have been able to evade their restrictive covenants is when their former employer is no longer competing in the restricted market.[5] These situations typically involve employers who have changed product or service offerings or are in economic distress or bankruptcy and unable, at least temporarily, to operate. During a period of pandemic-based closure, or of limited operation involving curtailed lines of business, a former employee might therefore also be able to argue that if the employer is not operating competitively, it has no protectable interest that can justify restraining a former employee. The argument will be stronger if the former employer remains closed for a significant period after emergency restrictions are lifted, as many smaller or marginally sustainable businesses are anticipated to do. In such cases, however, there is the counterargument that a period of economic distress is exactly when an employer especially needs protection of restrictive covenants in order to have a chance at recovery. During a period of pandemic-based closure, that rejoinder is even stronger due to the accidental nature of the disruption, the public purposes which can prompt closure, and the general interest in promoting businesses' efforts to restart. The competing equities in such can be complicated.

Impact of Pandemic-Related Contract Changes. Apart from the effect of no-fault employee terminations and former employers' suspended status as competitors, there are other more specific pandemic-related issues that are likely to arise concerning enforceability of employee restrictive convents, including even for non-laid-off employees. One likely example will involve employers' efforts to revise the terms of employment for some or all personnel, to reduce costs during the pandemic's economic downturn. Such changes can arguably violate the terms of express or implied employment contracts, although in many jurisdictions the doctrine of employment at will precludes such changes from being considered breaches. If the employer arguably does breach a contractual right, and it is significant enough to be material, the affected employee may be able to claim the employer was first to breach their contract, thus discharging the employee from the obligation to counter-perform by obeying restrictive covenants.[6] There are likely to be significant disputes over whether employer breaches exist, whether the unique circumstances can in any way excuse such breaches, and whether common covenant language purporting to make covenants enforceable despite employer breaches is enforceable in such cases.

Impact on Employee Solicitation and Recruitment. Another likely hot spot may arise in connection with covenants that seek to prohibit employees' post-termination efforts to recruit co-workers for other employers. Employees who have been laid off by or have left an employer as a result of the pandemic's impact will often want to watch out for the interests of laid-off former co-workers and to direct them to other employment opportunities they learn about. Such conduct may violate the terms of their non-solicitation and non-recruitment covenants, which not only prohibit recruitment of currently retained employees, but often try to encompass departed personnel who worked for the employer anytime during a look-back period, often a year in duration. One likely issue will be whether prohibiting recruitment of laid-off former personnel, who will only fall within the prohibition by virtue of such look-back periods, furthers a valid protectable interest and is enforceable. That lurking issue has not attracted much attention historically but is likely to now. Former employers will contend that efforts to recruit such employees deprive them of a pool of trained personnel for rehiring, and will hamper their economic recovery. Employees will contend that are entitled to keep all avenues of reemployment for themselves and others open, and cannot be impeded in helping former co-workers earn a livelihood. Once an employee is out the door, they will contend, the former employer should have no right in any way to affect their prospects.

Impact of Predatory Intent. The situations discussed above do not involve any predatory or other improper intent by the parties, but rather simply unforeseen changes in circumstances and the need for the employer to take action and for employees to earn a livelihood from available sources. Obviously, if there is evidence of an effort to exploit the crisis for unfair competitive advantage, it is easy to imagine that also being an important consideration in this context. If a large out-of-state competitor, for example, was subject to less legal or economic constraint during the crisis than hard-pressed local firms in a heavily affected area, and sought to pirate the temporarily laid-off employees of local firms in the same business, the former employer's interest against such calculated predation might influence a court against permitting disregard of restrictive covenants.

Existing Case Law and Possible Legislative Intervention. The existing case law appears not to contain much direct guidance involving the enforceability of restrictive covenants in the wake of business closures and temporary layoffs from disasters, such as hurricanes, terrorist attacks or similar catastrophes. Such events are usually local in impact and do not prompt widespread or readily discoverable legal precedents. While there were a handful of cases addressing covenant enforcement in the wake of the 2008 economic downtown, their resolution did not involve distinctive considerations related to that crisis; and many industries were not greatly affected by it.

In contrast, because the current crisis is likely to have a much more pervasive impact, we can expect in coming months to see pandemic-based concerns playing a significant role in covenant enforcement litigation. It is also likely that legislators who have been advocating for cutbacks in restrictive covenants will see the pandemic as an opportunity to try to place further constraints on them, which can be promoted as a form of relief for widespread unemployment caused by

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the emergency. Courts and legislatures confronted with such issues will face difficult choices, with complicated balances of interests to weigh.

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Anthony W. Kraus

Author:

Anthony W. Kraus is a principal in the Labor, Employment, Benefits & Immigration Practice Group of Miles & Stockbridge. Tony counsels and defends regional and national clients on the full spectrum of traditional labor-management matters, including those related to COVID-19.

[1]M.G.L c. 149, § 24L(c).

[2]See, e.g., *Deutsche Post v. Conrad*, 292 F. Supp. 2d 748, 754-756 (D. Md. 2003); aff'd, 116 Fed. Appx. 435 (4th Cir. 2004).

[3]See, e.g., *Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 N.Y.2d 84, 89 (1979).

[4]*Insulation Corp. of Am. v. Brobston*, 667 A.2d 729, 735 (Pa. Super. Ct. 1995).

[5]See, e.g., *PlanGraphics, Inc. v. Hall*, 2006 WL 8446168 at *1 (E. D. Ky., Feb. 17, 2006).

[6]See, e.g., *Jorgensen v. United Communications Group Ltd. Partnership*, 2011 WL 3821533 at *10 (D. Md., Aug. 25, 2011).

New Employment Laws in Maryland

By Fiona Ong, Parker Thoeni, and Courtney B. Amelung, Shawe Rosenthal, LLP

In the midst of the COVID-19 pandemic, the Maryland General Assembly managed to pass well over 600 bills in the three days before the session's early adjournment. One of the bills, which has already been signed into law, was emergency legislation intended to address the COVID-19 situation. There were a number of other significant employment bills that have been sent to the Governor's desk as well. The Governor can choose to sign them into law, allow them to become law without his signature, or veto them (with the possibility of a veto override when the General Assembly next convenes, which may be for a special session in May). Assuming that they become law, these remaining bills will take effect on October 1, 2020.

COVID-19 Public Health Emergency Protection Act of 2020 (HB1663/SB1080). This law contains several employment-related provisions, in addition to others, intended to address the current COVID-19 emergency in Maryland. It will remain in effect only until April 30, 2021.

The law provides that an employee who is temporarily unable to work for the following COVID-19-related reasons will be eligible for unemployment insurance benefits:

- The employer temporary ceases operations due to COVID-19, preventing employees from coming to work. (This provision is likely implicated by the Governor's shut-down order for non-essential businesses.)
- The employee is quarantined due to COVID-19 with the expectation of returning to work after the quarantine is over.
- The employee leaves employment due to a risk of exposure or infection of COVID-19 or to care for a family member due to COVID-19. (This would apply to situations where an employee is sent home by the employer due to a possible exposure to COVID-19. In addition, we note that the "due to COVID-19" language with regard to the care of a family member is very vague and broad, and therefore conceivably could cover school closures or situations where the employee must provide care for a child or parent who has been exposed to, but is not showing symptoms of, COVID-19).

The law also protects employees from being terminated solely because the employee has been required to be isolated or quarantined under Maryland law. (Notably, this is a right that already exists in Maryland law. Now it exists twice over.) An order of isolation or quarantine is defined in the Maryland law, both in the Public Safety article and the Health General article, and requires a directive of the Secretary of Health that meets very specific requirements, including a right to a hearing to challenge the directive. Thus, the Governor's shut-down order and employer requirements for employees who may have been exposed to COVID-19 to self-quarantine do not meet the definition of a "quarantine" under state law.

Mandatory WARN Act (HB1018/SB0780). Similar to the federal Worker Adjustment and Retraining Notification Act, Maryland has a law providing for certain notifications to employees in the case of a reduction in operations, although unlike the federal WARN Act, Maryland's mini-WARN has been voluntary. This bill, however, makes the state law mandatory.

Maryland's mini-WARN applies to employers with at least 50 employees operating an industrial, commercial or business enterprise in the State for more than one year. It is triggered by a reduction in operations, meaning either:

1. the relocation of part of its operation from one workplace to another; or
2. the shutting down of a workplace or a portion of its operations that reduces the number of employees by the greater of at least 25% or 15 employees over a 3-month period (not counting employ-

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ees working less than an average of 20 hours a week or who have worked less than 6 of the preceding 12 months).

A "workplace" is defined as a factory, plant, office or other facility where employees produce goods or provide services, but does not include construction sites and temporary workplaces.

The law also exempts the following types of reductions in operations by private employers: resulting solely from labor disputes; occurring at construction sites or other temporary workplaces (redundantly); resulting from seasonal factors customary in the industry (as determined by the state Department of Labor); or resulting from an employer's bankruptcy.

Under the bill, an employer must give a 60-day (a reduction from the voluntary 90 days under the existing law) written notice prior to a reduction in operations to:

- All employees at the workplace that is subject to the reduction in operations, including those working on average less than 20 hours a week and those who have worked less than 6 months during the prior 12-month period;
- Any representative or bargaining agency representing those employees (i.e. a union);
- The state Dislocated Worker Unit; and
- All elected officials in the jurisdiction where the affected workplace is located.
- The required notice must include:
- The name and address of the affected workplace;
- A supervisor's name, telephone number and email address to contact for further information;
- A statement explaining whether the reduction in operations is expected to be temporary or permanent, and whether the workplace is expected to shut down; and
- The expected date the reduction in operations will begin.

The bill further directs the Secretary of Labor, in cooperation with the Workforce Development Board, to develop mandatory guidelines regarding the required written notice and the continuation of benefits, such as health, pension, and, of particular concern, severance. (New Jersey recently amended its mini-WARN act to require the payment of severance).

- If there is a violation, the Secretary can issue an order compelling compliance and may assess a discretionary civil penalty of up to $10,000 per day. The following factors will be considered in determining the amount of the penalty: the gravity of the violation, the size of the business, the employer's good faith, and the employer's history of prior violations. The Commissioner's penalties shall be subject to notice and hearing requirements.

Salary History Ban (HB123). Riding the wave of salary history bans in other states and local jurisdictions, this bill imposes a number of obligations and prohibitions:

- It requires an employer to provide the wage range for the position in question upon an applicant's request.
- It prohibits an employer from relying upon an applicant's wage history in screening, hiring, or determining wages.
- It also prohibits an employer from asking for wage history, whether orally, in writing, or through an employee or agent, or from a current or former employer.
- It prohibits an employer from retaliating against, or refusing to interview, hire, or employ an applicant who did not provide their wage history or who requested the wage range for the position in question.
- It acknowledges that an applicant may voluntarily provide their wage history.
- After a conditional offer of employment is made, it permits the employer to confirm and to rely on voluntarily-provided wage history to support a higher wage offer than initially offered, as long as the higher wage does not create an unlawful pay differential based on sex or gender identity.

Applicants may complain of violations to the Commissioner of Labor and Industry. The Commission can issue an order compelling compliance. The Commissioner also has the discretion to issue a letter compelling compliance for a first violation, a civil penalty of up to $300 per applicant for a second violation, and a civil penalty of up to $600 per applicant for each subsequent violation occurring within three years of a prior violation. The following factors will be considered in determining the amount of the penalty: the gravity of the violation, the size of the business, the employer's good faith, and the employer's history of prior violations. The Commissioner's penalties shall be subject to notice and hearing requirements.

Hair Textures and Hairstyle Discrimination Ban (HB1444/SB0531). In the wake of public outrage over media reports that a high-school wrestler was forced to cut off his locks before a match, several states and local jurisdictions passed laws prohibiting discrimination based on hairstyles associated with race. This bill follows that lead, and adds "protective hairstyle" including braids, twists, and locks to the list of characteristics that are protected from discrimination under state law. It also clarifies that "'Race' includes traits associated with race, including hair texture, afro hairstyles, and protective hairstyles." (Virginia enacted similar legislation, effective July 1, 2020.)

Equal Pay Act Revision (HB0014). Maryland's Equal Pay Act was expanded in 2016 to prohibit discriminatory pay practices based on gender identity as well as sex and to add a new pay transparency provision. The bill amends the law to prohibit taking any adverse employment action against an employee for asking about the employee's own wages, as well as the wages paid to other employees.

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Heat Stress Standards (HB0722). This bill requires the Commission of Labor and Industry to develop regulations on or before October 1, 2022, requiring employers to take certain actions to protect employees from heat-related illness. Maryland Occupational Safety and Health will hold informational hearings in four different locations within the State to obtain input. The Commissioner is directed to consider standards created by the National Institute for Occupational Safety and Health, the American Conference of Governmental Industrial Hygienists, and the American National Standards Institute.

Revised Definition of Family Member Under Maryland Healthy Working Families Act (HB0880). The 2018 Maryland Healthy Working Families Act requires employers to provide paid sick and safe leave for employees, which can be used to care for family members. This bill expands the provision of "family member" to now include the employee's ward, as well as the legal guardian or ward of the employee's spouse.

Facial Recognition Technology for Applicants (HB1202). This bill prohibits the use of a facial recognition technology during an applicant's interview without their consent. An applicant may consent to the use of such technology by signing a waiver that contains the applicant's name, the interview date, the applicant's consent to the use of facial recognition during the interview, and whether the applicant read the consent waiver.

Adjusting the Amount for Wage Complaints to the Commissioner (SB0119). Under current law, there is a wage complaint resolution procedure before the Commissioner of Labor and Industry, and the bill increases the cap on the amount eligible for this procedure from $3000 to $5000.

List of Incentive Programs for Hiring and Retraining the Formerly Incarcerated (HB0835). This bill directs the state Department of Labor to develop and make available on its website a list of federal and state incentive programs available to an employer who hires and trains formerly incarcerated individuals.

Authors:

Parker E. Thoeni and Fiona W. Ong are partners and Courtney B. Amelung is an associate at Shawe Rosenthal, a management-side labor and employment law firm based in Baltimore, Maryland. We may be reached at shawe@shawe.com or 410-752-1040.

Parker Thoeni

Fiona Ong

Courtney B. Amelung

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