



SWANSON, MARTIN & BELL, LLP

**Contracting to Avoid
Litigation - or To Win
at Trial If Necessary**

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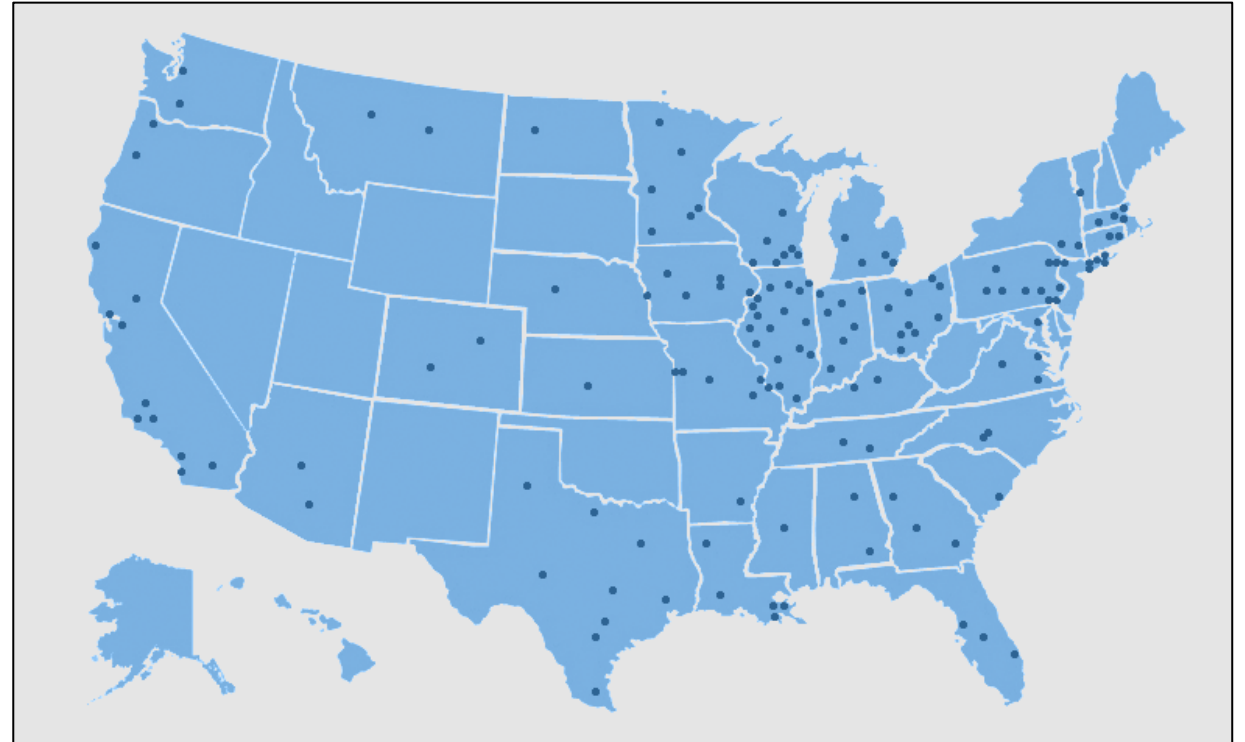
About Swanson, Martin & Bell, LLP

- **Founded in 1992 by 13 attorneys who represented the core of the trial practice at a large Chicago law firm.**
- **Founded on the principles of providing high-quality and cost-effective legal representation to corporate and individual clients.**
- **SMB today:**
 - More than 130 lawyers
 - 30 practice areas
 - Four Illinois offices (Chicago, Libertyville, Lisle, Edwardsville) and offices in Hammond, Indiana and St. Louis, Missouri.
- **Fortune 500 and other corporations routinely retain SMB on a national basis.**



Trial Experience and Map

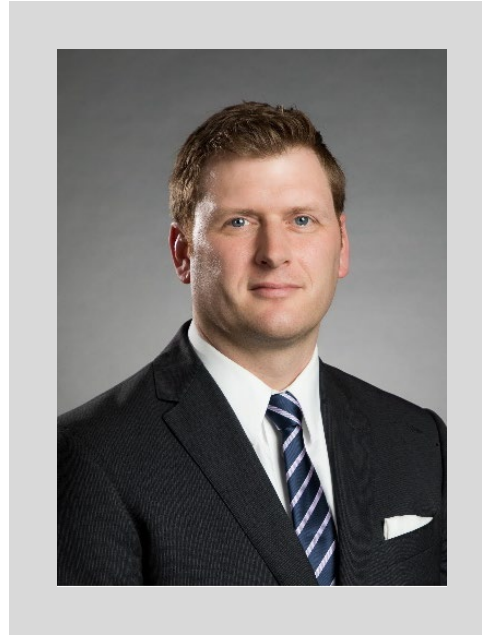
- Trial work is SMB's hallmark.
- SMB lawyers have:
 - Tried over 1,000 cases to verdict, the vast majority with more than \$1,000,000 at issue.
 - Appeared or managed litigation in almost every major venue in the United States.
 - Tried cases to verdict in 35 states (blue dots).



Swanson, Martin & Bell, LLP Presenters:



Peter G. Skiko



Robert W. Stephens

Issues We'll Be Touching On:

- **Restrictive Covenants**
- **Indemnity/Limitation of Liability Contract Language**
- **Other Important (Often Overlooked) Contract Terms**

Restrictive Covenants

- **What are they? They serve a vital purpose!**
- **Are they always enforceable?**
- **The elephant in the room...are they even legal?**

Restrictive Covenants

- **Missouri HB 1202 (the “Right-To-Start Act”)**
 - Notwithstanding any...provision of law to the contrary, **a covenant not to compete created after (January 1, 2022) shall be void and unenforceable if an employee or prospective employee receives seventy-five thousand dollars or less in income from such employer or prospective employer.**
- **Candidly, this is pretty sloppy. What would it mean?**
 - **\$75,000/year or total?**
 - **Only non-competition or non-solicitation of clients/employees as well? {MO Supreme Court says “yes,” but the bill seems to say “no” (bill defines “covenant not to compete” as a document wherein the “employee agrees not to *compete against an employer* or agrees not to accept any positions with a competitor of an employer.”)}**

Restrictive Covenants

- **Ill. SB 672 (“Illinois Freedom to Work Act”)**
 - Applies to both non-competes and non-solicitation agreements. (\$75,000/\$45,000)
 - Employees get their costs/fees back if they win.
 - *Fifield* and *Arredondo* both codified.
 - Void if employee not instructed to consult with an attorney or not given 14 days to review before signing.
 - “Blue-Penciling” allowed.
 - Both Illinois and Missouri laws would be PROSPECTIVE, not retroactive. (Illinois – 1/1/22)
- **Employers still need to show a “legitimate business interest” before courts will enforce them.**

Restrictive Covenants

- **Ill. SB 672 (“Illinois Freedom to Work Act”)**
 - ***Fifield*: the TWO-YEAR RULE**, or “adequate consideration”
 - “Adequate consideration” means:
 - the employee worked for the employer **for at least two years** after the employee signed an agreement containing a covenant not to compete or a covenant not to solicit, or
 - the employer otherwise provided **consideration adequate to support an agreement to not compete or solicit**, such as a period of employment plus additional professional or financial benefits, or merely professional or financial benefits by themselves, e.g. a signing bonus.

Restrictive Covenants

- **What qualifies as a legitimate business interest?**
 - Courts consider the “totality of the circumstances.”
 - Factors such as time, place, and scope of activities, as well as the employee’s exposure to the employer’s near-permanent customer relationships, will be considered.

Restrictive Covenants

- **Time:**
 - 12 months – OK
 - Longer than that – questionable
- **Place:** In a remote world, will courts balk at a nationwide restriction?
- **Scope of activities:** Must be related to the work THE EMPLOYEE and THE COMPANY were doing; one is generally not enough.
- **The employee's exposure to the employer's near-permanent customer relationships:** Courts strive to require “near-permanence” here.

Restrictive Covenants

- **Litigation: Where do we run into trouble?**
 - Give the employee time to review, and time for attorney review
 - Don't overreach on time (keep it to a year if possible)
 - Don't overreach on scope ("you can't take a job with any company that competes with our company" is too broad)
- **Remember:**
 - Almost universally, courts will only enforce these if they're no more restrictive than necessary to advance your legitimate business interest. You want to "narrowly tailor" your non-competes, especially in this legal environment.

Poll Question #1:

- **Do you routinely incorporate restrictive covenants into either employment agreements, severance agreements or both?**
 - A) Yes
 - B) No

Issues We'll Be Touching On:

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- **Indemnity/Limitation of Liability Contract Language**
- **Other Important (Often Overlooked) Contract Terms**

Indemnity/ Limitation of Liability

- **Businesses make mistakes when trying to limit their own contractual liability.**
- **They're much more commonly-made than you might think.**
- **When you write up a contract...**
 - Be specific.
 - Protect yourself.
 - What's fair is fair.

Indemnity/ Limitation of Liability

- **Be specific.**

- Don't rely upon boilerplate.
- If you know you've got a litigation "blind spot," account for it in your contracts.

- **For example:**

"It is expressly understood and agreed that **we are not responsible for performing ANY maintenance services** including, but not limited to, elevator or escalator maintenance; parking lot, sidewalk or interior floor surface cleaning or repair; light repair; lock or alarm device repair or maintenance; building upkeep; snow removal; garbage or debris removal; and water removal. It is further understood and agreed that we are not required or requested to inspect for or report any maintenance needs or failures to Client.

Indemnity/ Limitation of Liability

- **Protect yourself**
 - If it's your paper...**make it your wish list**
 - Client agrees that Subcontractor **shall not be liable** for any claim, liability or loss incurred by Client for property loss or damage or for personal injury, whether or not such property loss or damage or personal injury was caused, directly or indirectly, by performance or nonperformance of obligations imposed by this Agreement, including those related to the hiring, training, supervision or retention of personnel, by Subcontractor, its agents or employees. *Client waives any right to contribution it has or may have against Company related to any such claim, liability or loss.*

Indemnity/ Limitation of Liability

- **Protect yourself**
 - Client agrees to **indemnify and hold Company harmless** from and against any Claims made by a third party(s), including but not limited to, injury, death or damage or loss of property, whether directly or indirectly caused by performance or nonperformance of obligations imposed by this Agreement, including those relating to hiring, training, supervision or retention of personnel, of Company, its agents or employees *(and if that doesn't fly, add)*, except when arising (solely) from the negligent acts or omissions of Company.

Indemnity/ Limitation of Liability

- **What's fair is fair**
 - **Don't accept one-sided terms.**
 - If a client/vendor/subcontractor insists that it be protected in a given circumstance, insist upon equal protection for both sides.
 - **Notice of termination** (60 days for them? 60 days for you.)
 - **Indemnity** (You indemnify them for your negligence? They indemnify you for theirs.)
 - **Waiver of subrogation** (either both carriers do, or neither does.)
 - **Waiver of subrogation.** “Each Party, on behalf of itself, its employees, agents, contractors, and its and their insurers, waives any and all rights to subrogation of any and all claims and losses to the fullest extent permitted by law. Each Party represents that its applicable policies of insurance required by this Agreement permit a subrogation waiver.”

Issues We'll Be Touching On:

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What other contractual language makes sense, depending on the roles/obligations of the parties?

- **Force majeure**
- **Limitation of liability**
- **Non-compete agreements**
- **Forum selection clauses**

Force Majeure

- **In Missouri, force majeure is not statutorily defined, so the parties must rely on case law for guidance.**
- **Missouri Courts recognize force majeure clauses, however, there are few cases directly addressing these clauses.**
 - No case law specifically addressing force majeure in the context of a disease, pandemic, or change in law.
- **Missouri Courts frequently rely on the Black's Law Dictionary of "force majeure."**
 - "A contractual provision allocating the risk if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled." *Black's Law Dictionary* 718 (9th ed. 2009).

Litigating Force Majeure Clauses Can Be Won or Lost While Drafting

- **Applicability of force majeure clauses to a given situation is a function of the precise language and the circumstances sought to be used as an excuse for avoiding performance.**
- **Missouri recognizes a defense generally applicable to the enforcement of any contract where "performance is rendered impossible by an Act of God, the law, or the other party."**

Litigating Force Majeure Clauses

- **Express provisions of contract**
- **Supervening circumstances**
- **Market fluctuations**
- **Temporary disability**
- **Partial disability**
- **Proving diligence and good faith**
- **Limited certainty**

Poll Question #2:

- **Are you more concerned about declaring force majeure due to the pandemic or a party invoking a force majeure against you?**
 - A) Declaring force majeure due to the pandemic.
 - B) A party attempting to invoke a force majeure clause against you.

Force Majeure Litigation Arising from the Pandemic

- **No rulings in Missouri (state or federal) invoking, or defending against, force majeure clauses related to COVID-19 pandemic.**
- **Other jurisdictions have interpreted force majeure clauses drafted pre-COVID-19.**
- **It has yet to be determined how courts will rule on force majeure arguments involving contracts drafted after the pandemic had been declared.**

Force Majeure Litigation Arising from the Pandemic

- **According to a Covid-19 Complaint Tracker, 876 of over 11,000 Covid-19 related complaints are based on contractual disputes. Of these 876 contractual disputes:**
 - 84 attempt to cancel or suspend contract for force majeure or related common law principles.
 - 42 are related to a termination of a supply contract.
 - 33 are due to a failure to close a deal due to COVID-19, including force majeure and material adverse change clause cases.
 - 20 are associated with the cancellation of an event.
- **Only 11 force majeure complaints filed in Missouri**
 - 3 to cancel or suspend contract for force majeure or related common law principles and
 - 1 related to the termination of a supply contract.

***In re Hitz Rest. Grp.*, No. 1:20-br-05012 (Bankr. N.D. Ill. 2020)**

- **Judges in Illinois are relying on the *In re Hitz* decision for guidance.**
- **A restaurant tenant attempted to invoke the force majeure clause, citing the “governmental action” language in the clause based on Governor Pritzker's shut down order which temporarily restricted on premises dining at restaurants.**
- **The court agreed, in part, finding that the tenant’s rent would be reduced on a pro rata basis based on the decrease in revenue due to the restriction of on-premises dining.**

Limitations of Liability

- **A limitation of liability clause is a provision in a contract that limits the amount of exposure a company faces in the event a lawsuit is filed or another claim is made.**
- **If found to be enforceable, a limitation of liability clause can "cap" the amount of potential damages to which a company is exposed.**
- **Missouri courts generally enforce a limitation of liability clause.**

Enforceability of Limitation of Liability Clauses

- **When attempting to enforce a limitation of liability clause, one must be able to show the court that:**
 - ***The limitations of liability clause is reasonable.***
 - What is reasonable depends on the type of contract, size of contract, and parties involved.
 - Limit to cost of services provided or limit to certain categories of damages.
 - ***The language must be specific.***
 - Depends on the sophistication of the parties.
 - Clause should be unambiguous, specific, identifiable, and easy to understand.

Non-Compete Agreements

- **In Missouri, non-compete agreements are governed by statute (R.S.Mo. § 416.031 & R.S.Mo. § 431.202), as well as court decisions.**
- **Generally, non-compete agreements are enforceable in Missouri if they are:**
 - reasonable in both duration and geographic scope, and
 - reasonably necessary to protect an employer's legitimate business interests.
- **However, courts still take many other factors into account when determining whether a non-compete agreement is enforceable.**

Enforceability of Non-Compete Agreements

- **Missouri courts generally enforce a non-compete agreement if it is demonstratively reasonable under the circumstances.**
- **A non-compete agreement is reasonable if it is no more restrictive than necessary to protect the legitimate interests of the employer.**
- **A non-compete agreement must be narrowly tailored in its length and geographic scope and must seek to protect legitimate employer interests beyond mere competition by a former employee.**

Litigating Non-Disclosure Agreements

- **Missouri courts take a very fact specific approach to determining the enforceability of non-disclosure agreements.**
- **These clauses must be drafted with litigation in mind.**

Litigating Non-Disclosure Agreements

- **Two ways to show the clause is reasonable:**
 - Duration of the clause.
 - Missouri case law supports the reasonableness of a non-compete lasting between one, and sometimes up to two years.
 - Geographic limitations.
 - A lack of a geographic restriction in a non-compete agreement may potentially render it unenforceable.
 - clauses without a geographic limitation may be enforceable, if there are sufficient other limitations included in the clause.

Forum Selection Clauses

- **Forum selection clauses seek to provide a court with jurisdiction and venue, as well as, to determine which state or federal laws will apply to litigation arising from the contract.**
- **In Missouri, the proper way to enforce a forum selection clause is through the doctrine of forum non conveniens.**
- **The doctrine of forum non conveniens “permits a court to decline jurisdiction even though venue and jurisdiction are proper” because “the action should instead be tried in another judicial forum.”**
- **A forum selection clause is “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.”**

Forum Selection Clauses

- **To overcome a valid forum selection clause, the party must show that the public-interest factors “overwhelmingly disfavor a transfer.”**
- **The plaintiff’s choice of forum merits no weight as they are the party defying the forum selection clause and bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted.**
- **Missouri courts have held that adhesive forum selection clauses are not unfair and unreasonable on their face.**

Litigating Forum Selection Clauses

- ***EJKJ, LLC, et al v. Invasix, Inc., et al, 4:20-cv-01203 (E.D. Mo.)***
 - Plaintiffs allege they were fraudulently induced into entering multiple contracts related to the purchase and finance of medical equipment.
 - In granting Defendants' Motions to Dismiss, the Court stated that Plaintiffs' general claim that they were fraudulently induced into entering the agreements is insufficient to avoid enforcement of the clauses.
 - Plaintiffs did not identified any “extraordinary circumstances” suggesting this is one of the rare cases where a valid forum selection clause should not be enforced.
 - Rather than sever this case and transfer portions to different jurisdictions based on the differing forum selection clauses, the court dismissed the entire case and permitted Plaintiffs to file suit in the appropriate, contractually agreed-upon forums.

Closing Remarks



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Thank you!

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