

Huddle Up: Game Planning your Litigation Defense to Business Claims Offensive, Defensive, and Early Resolution Tactics

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Presented by:

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Panelist



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Jim Kinsel has defended and prosecuted hundreds of business disputes involving breach of contract, trade secret misappropriation and other business tort claims in federal courts as well as Virginia and Maryland state courts. In addition to handling cases that settle or get resolved through pre-trial motions practice, Jim has tried numerous jury and bench trials. A cofounder of Protoraе Law, Jim received his law degree from the University of Virginia School of Law and he clerked in the U.S. District Court for the Western District of Virginia for the Honorable Norman K. Moon.

Panelist



James S. Kennell
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Jim Kennell is Senior Vice President & General Counsel for the National Security Sector of Leidos. His areas of practice include Government and commercial contracts, litigation, internal investigations and compliance-related counseling. He is a member of the American Bar Association Public Contract Law Section, the ABA Section of Litigation, the ABA Standing Committee on Law & National Security and the National Defense Industry Association, and is also a past chair of the NDIA Procurement Division's Legal Committee. Prior to joining Leidos (then SAIC) in the Fall of 2000, he practiced with the law firm of Fried, Frank, Harris, Shriver & Jacobson in its Washington, DC office. He is a graduate of the University of Illinois (B.A. 1987), and the University of Michigan Law School (J.D. 1990).

Panelist



William Colwell
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Bill Colwell has been in-house since 2007, first with Boeing in both Seattle, Wash. and Washington, D.C., and, since October 2012, with Northrop Grumman, in their Falls Church headquarters.

Before coming in house, Bill practiced in D.C., at Wiley Rein, in their Government Contracts, Aviation and Aerospace and Intellectual Property practice groups. Before becoming a lawyer, he spent five years in the U.S. Navy as a nuclear submarine officer, most of that assigned to the Los Angeles class fast-attack submarine USS Hampton, based in Norfolk, Va. He attended Northwestern University on a Naval ROTC scholarship and, after leaving active duty, attended Duke Law School.

Bill is currently Chair of the National Defense Industrial Association's Legal Committee, and he serves on the Board of Directors of the Federal Circuit Bar Association. He is also involved with the American Bar Association's Section on Public Contract Law and the Association of Corporate Counsel National Capital Region Chapter.

Initial Review - Assessing the Opposition

Complaint - Defines the Contest

- Monetary Demand
 - How Much?
 - How Precisely Measured?
- Injunctive Relief?
- Contract Breach and/or Business Torts?
- Business Reputation Effect?
- Personal Reputation Effect?

Ask Basic Questions

Who

- Who is the Plaintiff?
- Who are your Co-Defendants?

What

- What claims are being made?
- What are the possible outcomes?

Where

- Where is litigation brought - State or Federal court?
- Where can litigation be brought?

When

- When do you switch to the offense?
- When do you negotiate a settlement?

Why

- Why proceed with litigation in lieu of settlement?
- Why should you be aggressive in defense?

How

- How to keep executives focused on Business?
- How to avoid negative publicity?

Breach of Contract

- Contractual Language
- Good Faith and Fair Dealing
 - Breach of the implied covenant of good faith where (1) a party acts dishonestly where that party has a clear contract right, or (2) where a party acts arbitrarily or unfairly in the case where a party has discretion in performance.
 - *Stoney Glen, LLC v. Southern Bank and Trust Co.*, (E.D. Va. 2013).

Common Business Tort Claims

- Tortious Interference with Business Expectancy
- Business Conspiracy
- Trade Secret Misappropriation
- Bootstrapping “bad acts”
 - Liability for one tort often overlaps with, or is dependent on, bad facts forming another tort
- Heightened Damage?
 - Attorneys’ Fees
 - Punitive Damages
 - Multiples of Actual Damage

Tortious Interference

- Elements of claim:
 - (1) Valid business expectancy exists;
 - (2) Interferor's knowledge of the relationship or expectancy;
 - (3) Intentional interference inducing or causing a breach or termination of the relationship or expectancy; and
 - (4) Resultant damage
 - *Chaves v. Johnson*, 230 Va. 112, 335 S.E.2d 97, 120 (1985).
- “Improper interference” is required:
 - Act is illegal or independently tortious
 - Sharp dealing, overreaching, or unfair competition may also constitute improper methods
 - *Duggin v. Adams*, 234 Va. 221, 227 (1987).

Statutory Business Conspiracy

- Elements of claim:
 - Two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever . . . and
 - Resulting injury to the plaintiff's reputation, trade, business or profession
- Only legal malice required (“intentionally, purposefully, and without lawful justification”)
 - *Commercial Bus. Sys., Inc. v. BellSouth Servs.*, 249 Va. 39, 47 (1995).
- Damages:
 - Compensatory damages (including lost profits)
 - Treble damages
 - Attorneys' fees
- Key code provisions are Va. Code. § 18.2-499 and § 18.2-500

Acts Supporting a Conspiracy Claim

- An otherwise lawful act to accomplish an unlawful purpose
- Unlawful act
- Must be “predicated on an independent common law duty arising outside of contract”
 - *Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 211 (Va. 2014).
- Examples:
 - Tortious interference
 - Breach of fiduciary duty

Misappropriation of Trade Secret

- Trade Secrets Acts
 - Many States Follow Uniform Trade Secrets Act
 - Recovery of Attorneys' Fees Possible
 - Some Key Differences
 - Preemption of Other Tort Claims
 - Measure of Damages Can Differ
 - Actual Loss
 - Unjust Enrichment
 - Reasonable Royalty
 - Punitive Damages – Some States Cap Punitive Damages
 - Damages and Injunctive Relief
 - Damages Often Unnecessary for Cause of Action to Exist
 - Injunctive Relief Sought is Enough

Timing and Pace of Court Procedural Issues

- **Federal Courts (US Dist. Courts) – Civil cases in 2014:**
 - Most cases were disposed of prior to trial
 - 20.77% of cases are disposed of without court action – Median time interval: 5.1 months
 - 77.94% of cases are disposed of by court action
 - 1.29% of cases are disposed of by trial – Median time interval: 25.3 months
 - By Jurisdiction –Median Time Interval (in months) for Civil Matters Resolved by Trial
 - Eastern District of Virginia (“Rocket Docket”) – 11.9 months
 - Western District of Virginia – 17.9 months
 - District of Maryland – 19.1 months
 - District of Columbia – 53.6 months

Sources:

- *Statistical Tables For The Federal Judiciary, Median Time From Filing to Disposition of Civil Cases, by Action Taken, December 31, 2014 Reporting period*
- *Virginia Annual Caseload Report (Through 2013)*

Timing and Pace of Court Procedural Issues (cont'd)

- **Virginia Courts** – Civil cases concluded in 2013 (independent of means of disposition):
 - Most cases were disposed of prior to trial:
 - 26.88% concluded by settlement, nonsuit or dismissal
 - 21.78% concluded by “other” (likely includes dispositive motions)
 - 21.74% concluded by bench trial
 - 0.54% concluded by jury trial (512 in the whole state)
 - Duration statistics:
 - 45.4% of cases concluded were pending 0-3 months
 - 15.94% of cases concluded were pending 4-6 months
 - 15.03% of cases concluded were pending 7-12 months
 - 7.61% of cases concluded were pending 13-18 months

Sources:

- *Statistical Tables For The Federal Judiciary, Median Time From Filing to Disposition of Civil Cases, by Action Taken, December 31, 2014 Reporting period*
- *Virginia Annual Caseload Report (Through 2013)*

Procedural Issues

- **Some Differences Between Jurisdictions**
 - Specific Judge Assigned vs. Rotation of Judges
 - Summary Judgment Availability
 - Depositions
 - Affidavits
 - Proving Dispositive Motions
 - On the Papers or Evidentiary Hearing
 - Ease of Plaintiff Voluntarily Dismissing Case
 - Nonsuit
 - Voluntary Dismissal (Rule 41)
 - Compulsory Counterclaims
 - Discovery Limits
 - Number of Depositions and Limit on Length
 - Subpoena Power
 - Page Limits for Motions and Pace of Motions (scheduling problems)

Hypothetical 1

- You are General Counsel at Delta Industries. Delta hired a new division manager from Gamma Consulting, a major competitor to Delta, two months ago
- Gamma sends you a demand letter alleging the new manager informed his Gamma clients that he was moving to Delta while still employed at Gamma, in violation of his duty of loyalty to Gamma
- Gamma demands Delta terminate the manager
- Delta hired the Manager following an exhaustive search and expects the division's revenue to increase dramatically
- Gamma's letter is likely designed to suppress competition, but Gamma has deep pockets with a no holds barred reputation

Hypothetical 1 (cont'd)

- While interviewing the Manager, he says:
 - He only mentioned the fact that he was interviewing and that he would accept the job with Delta to “long-term friends” in the industry; and
 - These “friends” just happen to be key decision makers at some of the would-be clients he is now pitching work

Hypothetical 1 (cont'd)

- Gamma's follow up letter provides more information from Gamma's investigation:
 - Your new Manager downloaded key documents multiple times within his last two months of employment, including ones relating to Gamma's performance of a subcontract to develop software for the U.S. Government; and
 - A copy of the Manager's employment agreement with Gamma, including the non-solicitation clause that prevents him from soliciting Gamma's "clients" or "potential clients" for 10 years

Step 2: Going on the Offensive

- Counterclaims
- Cross-claims
- Third-Party Complaints
- Dispositive Motions/Pleadings
- Affirmative Defenses
- Sanctions
- Discovery as Offense

Counterclaims

- Considerations:
 - Compulsory or noncompulsory
 - May Have to Use It or Lose It
 - Well plead counterclaim can be a good deterrent
 - Opens an offensive front
 - Increases fees and costs for all parties
 - Requires defendant to meet burden of proof
 - Can reduce settlement value to plaintiff
 - Weak counterclaims
 - Risks preliminary motions
 - Risks sanctions
 - Risks being distracted
 - Risks derailing settlement talks

Cross-Claims

- Claim by one defendant against another defendant
- Considerations for Deciding Friend or Foe
 - Friend?
 - Can Coordinate Litigation Strategy
 - Allows Greater Ideation - Sharing Information Can Lead to Better Ideas
 - Spread Certain Costs Out Amongst Defendants
 - One-Two Punch Combinations
 - Good Cop and Bad Cop Roles Sometimes Develop
 - Foe?
 - May Be Able to Pin Liability on Co-Defendant(s)
 - Legally and for Trial Theme Purposes
 - Likely Poison Future Business Relations
 - Minimizes Power of Joint Effort Against Plaintiff
 - Increases Fees and Costs
 - May Distract from Real Litigation Objective

Dispositive Motions/Pleadings

- Motion to Dismiss or Equivalent (Virginia – Demurrer)
 - Complaint fails to state a cause of action
 - Leave to amend complaint is often granted
- Motion for Summary Judgment
 - Available in Federal Court
 - May not be viable in some state courts
- Other Defensive Pleadings
 - Plea in Bar – Virginia state court
 - “asserts a single issue, which, if proved, creates a bar to a plaintiff’s recovery.” *Hawthorne v. VanMarter*, 279 Va. 566 (2010).
 - Motion for Judgment on the Pleadings
 - Motion to Strike

Motion to Dismiss or Demurrer

- Consideration
 - Chance of knocking some or all claims
 - Risks plaintiff making out better claims
 - Can incur costs without positive effect
- Alternatives
 - Motion for Judgment on the Pleadings
 - Rule 16(c) - After the pleadings are closed a party may move for judgment on the pleadings
 - Motion for Summary Judgment
 - Plaintiff may be confined to allegations in complaint
 - But discovery costs become a given

Affirmative Defenses

- Understanding difference between defenses and affirmative defenses
 - Defendant bears burden of proving affirmative defense
 - Ordinary defense blocks plaintiff's proof
 - Affirmative defense – “matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it. A response to a plaintiff's claim which attacks the plaintiff's *legal* right to bring an action, as opposed to attacking the truth of claim.”
 - *Black's Law Dictionary 6th Ed. (emphasis added)*
- Jurisdictions vary as to what constitutes an affirmative defense and whether a specific affirmative defense must be plead in a responsive pleading to be preserved
 - Generally, must be pled in a responsive pleading or the defense is waived.
 - *See F.R.C.P. 8(c)*
 - Virginia recognized exceptions: “(1) where the issue addressed by the affirmative defense was not disclosed in the plaintiff's pleading; (2) where the affirmative defense is not an absolute bar to recovery; and (3) where the affirmative defense is “addressed by statute.” - *New Dimensions, Inc. v. Tarquini*, 286 Va. 28, 36 (Va. 2013).

Affirmative Defenses (cont'd)

- Examples of Affirmative Defenses:
 - Statute of limitations
 - Statute of frauds
 - Accord and satisfaction
 - Estoppel
 - Failure to mitigate damages
(See F.R.C.P. 8(c) for a more complete list)
- Considerations when raising affirmative defenses
 - Asserting affirmative defenses without factual support is subject to sanctions
 - *Ford Motor Co. v. Benitez*, 273 Va. 242, 252 (Va. 2007)

Sanctions

- Sanctions Motions Can Be Effective
 - Frivolous Claims and Defenses
 - Avoid Knee Jerk Reaction to Claims
 - Overused Recently and Some Judges May Have Sanctions Motion Fatigue
 - Avoid Chicken Little Effect
 - Most jurisdictions have mechanisms to sanction parties and attorneys for filing claims that are not warranted by law or supported by fact
 - Authority
 - Fed. R. Civ. P. 11
 - Va. Code § 8.01-271.1

Design Discovery to Test Claims

- Focus on elements of each claim
- Damages is a necessary element for some counts
- Plaintiff must prove all elements to prevail
 - Claims only as strong as weakest elements
 - Initial Discovery Acts as Test of Claims/Elements
 - Follow-up discovery can focus on weaker elements
- Look for potential weaknesses
 - Plaintiff's emails and text messages may be particularly rich with information valuable to defenses and can:
 - Expose motives
 - Contain key concessions
 - Contain embarrassing relevant information
 - Consider taking early deposition(s) to try to gain key admissions

Design Discovery to Test Claims (cont'd)

- Robust discovery
 - Sets tone for remainder of litigation
 - Aggressive and complete defense will be asserted
 - Defendant is ready to bear associated fees and costs
 - But beware of power of “goose and gander” arguments and corresponding discovery scope and costs

Hypothetical 2

- BigCo subcontracted with SmallCo for years to provide ten employees to perform on BigCo's prime government contract
- In email, BigCo has always maintained that it would continue the "status quo" to subcontract with SmallCo, but no formal written contract was executed to extend the term of the subcontract
- After learning that some of SmallCo's employees were unsatisfied with SmallCo, BigCo hired six of those employees
- Of the four other unsatisfied employees, two of them formed NewLLC and two of them remained with SmallCo
- BigCo terminated the subcontract with SmallCo, and signed a subcontract with NewLLC for 1/5 of the work previously subcontracted to SmallCo
- SmallCo now receives no work from the contract

Hypothetical 2 (cont'd)

- SmallCo files a complaint against BigCo, NewLLC, and BigCo's eight former employees, alleging that during their work performance, SmallCo's former employees emailed a mixture of the following to their personal email accounts:
 - Proprietary internal business documents,
 - Documents necessary to the performance of the government contract,
 - Private emails, and
 - Negotiations with BigCo about salaries, start dates and which employees were resigning to join BigCo

Step 3: Factors to Consider in Setting Strategy

- Weighing Your Objectives
 - Obvious Goal: Least Cost/Earliest Resolution
 - But Strategy Usually Involves Balancing Multiple Objectives
 - Quick Settlement May Require Overpaying
 - Cost Mitigation Tradeoff
 - Higher/Unrealistic Monetary Demand
 - May Dictate Aggressive Defense
 - May Delay Meaningful Settlement Discussions

Factors to Consider in Setting Strategy (cont'd)

- Impact of ongoing and sometimes substantial fees
- Effect of Public Nature of Litigation
 - Litigation is Public, including complaint and motions
 - Risks potentially embarrassing facts and confidential information being made public
 - Is there any need to publically clear the defendant's name
- Would a “Home-Run” verdict be financially crippling
- Potentially embarrassing discovery
- Distractibility of defendant company's executives
 - Saving money in settlement, but reducing profit generation because of distraction could result in Pyrrhic victory
- Minimizing Copy-Cat Litigation

Strategies

- Setting Depositions Early
- Early Mediation
- Offer of Judgment
- Subpoena non-parties to discovery information Plaintiff does not want out
- Robust discovery requests for Plaintiff
- Overpaying Early
- Time Motions Practice to Fit Strategy

Questions / Discussion

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