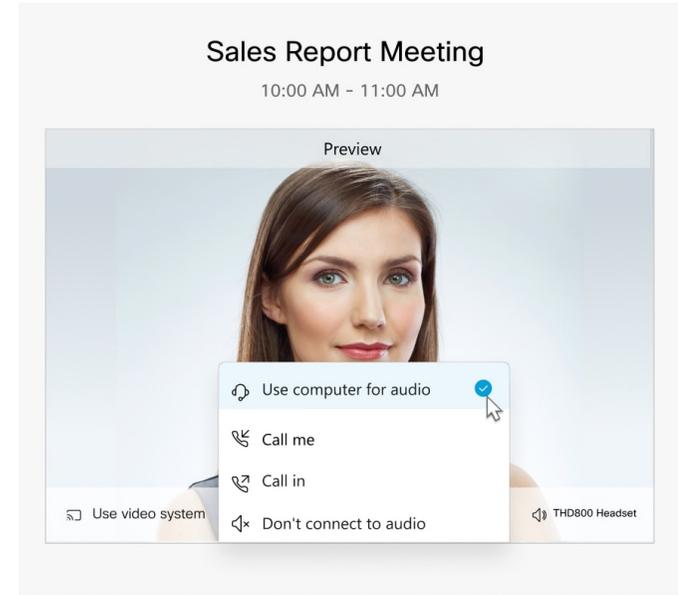
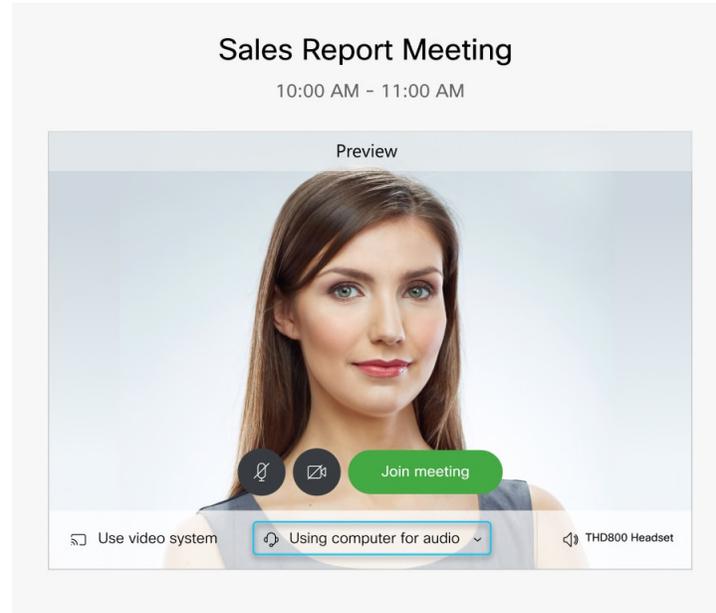


Welcome and thank you for joining us for today's presentation. Our topic is **“Litigation ABCs & COVID-19 Concerns.”**

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Litigation ABCs & COVID-19 Concerns

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May 21, 2020

Why Learn About Litigation?

- Impact on life and business
- Preventive measures
- If necessary, prepare for battle



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Drawbacks of Litigation

Impact on Business and Quality of Life:

- Costs
- Relationships
- The Bottom Line



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Litigation Sources

- Contracts:
 - Courts reluctant to rewrite them
 - What do they say and what does that mean?
 - Language and definitions of key terms
 - Process for resolution
 - Non-competes and confidentiality provisions
 - Damages
 - Read and understand



Non-Compete Clauses

Q: In New Jersey, can a former employer or buyer sue you for working for someone else (i.e., a competitor) when contract contains restrictive covenant, providing for injunctive relief in the event of breach.

Short Answer: Yes.

In New Jersey, non-compete agreements are enforceable by employer if they protect a legitimate business interest and if they are reasonable in duration and scope.

Examples: Doctors*, engineers, sales, business executives, employees, sale of business*



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Anatomy of a Lawsuit in New Jersey

- Complaint and Answer
- Discovery: Written, Documentary and Depositions
- Mediation
- Experts: Reports and Depositions
- Motion Practice
- Trial



What Is Discovery?

- The process of “discovering information” from the other side by asking questions, demanding the production of documents and compelling depositions of parties and witnesses
- Depositions: Sworn testimony under oath without the judge
- Use of discovery at trial
- Importance of preparation



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Litigation Prevention Measures

- Read your contracts, understand responsibilities and update as needed
- Get advice before entering into contracts
- Comply with notice provisions
- Maintain a good record; documents tell the story
- Watch your emails and texts
- Do the right thing



I Just Got Sued ... Now What?

- Service of Process
- Review Complaint
 - State Superior Court v. Federal Court
 - Allegations (“causes of action”): Contract v. Tort
 - Who is suing you and in what capacity?
 - Time IS of the essence: Safeguard your defenses, invoke insurance coverage where appropriate, preserve cross and counterclaims
 - Contact attorney
- TIP – DO NOT DELETE INFORMATION : SPOILATION



Litigation v. Alternative Dispute Resolution

- What is ADR?
 - Mediation and arbitration
- Binding v. non-binding: pros and cons
- Timing
- Is arbitration required by contract?
- Negotiation



To Sue or Not to Sue ...

- Factors to Consider:
 - Expense: Can you win the battle but lose the war?
 - Business need to enforce rights
 - Can you state a viable cause of action?
 - Hourly rate v. contingency: Types of cases
 - Attorney fees provision by statute or contract?
 - If successful, can the defendant pay the judgment?
 - Consider alternatives: draft complaint



Risk Allocation in a COVID-19 World

- Ongoing challenge: Performance under contract due to COVID-19 disruptions
- Do you have a force majeure clause? (Fr. for “superior force”)
- Contractual risk allocation intended to excuse parties’ performance when things beyond their control arise making performance inadvisable, impossible or commercially impracticable
- Must be negotiated and included in the contract
- Is COVID-19 a force majeure? Well that depends ... (see previous reference to contract review)



Force Majeure

- Historically construed narrowly by courts
- Broad v. specific language: “Acts of God” and “impossible circumstances” v. “pandemic” and “disease”
- Causal link required between force majeure event and the failure to perform
- Proper notice and duty to mitigate damages resulting from non-performance



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Business Interruption Insurance

- Traditional Use: Property insurance coverage for physical loss or damage to an insured's property. Financial impact (i.e. revenue loss) resulting from these covered events.
- Physical damage required
- Commercial property coverage: The suspension of business operations must be caused by “direct physical loss or damage to property at premises ...”
- Yet, COVID-19 losses caused by other factors: Absent employees and customers, supply chain disruptions, etc. These do not relate or result in physical damage and may not be covered.



Contingent Business Interruption Insurance

- Can you recover?
- Sometimes included in property policy to address when key customer or supply chain impacted (i.e., can't produce product or provide services)
- Assist in paying rent, payroll, other expenses
- Review your coverage



Event Cancellation and Travel Insurance

- Cancellation insurance coverage (individuals and businesses)
- Weddings! Purpose: To insure against losses resulting from cancellation due to circumstances beyond control of insured
- May include weather or natural events, labor strikes and acts of terrorism
- “All-cause” COVID-19 coverage: If policy purchased prior to 2020. Difficult now post-outbreak
- Travel: “Cancellations for any reason” not common. Some insurers interpreting coverage to only include emergency care for insured who becomes ill with COVID-19 while traveling and cancellations because of COVID-19 diagnosis before or during the trip.



Tips for Businesses

- Review contracts where COVID-19 has or will impact performance
 - Can you or other party assert force majeure, impossibility or impracticability of performance as defense to non-performance?
 - Did contract allocate risk associated with a global event and if so, to which party?
 - Review existing insurance policies for business interruption coverage
 - Don't sleep on your rights
 - Importance of proper notice: litigation considerations



Tips for Businesses

- Strategy to address breach/loss
 - By you or your contract partner
 - Collaboration to conduct business to prevent unnecessary disruption
 - Pursue litigation?
 - Take a look at your record and the words in your contract
 - Mitigate damage



Tips for Businesses

- Corporate Governance
 - Review governing documents
 - Determine how to address signature authority, board meetings, quorum requirements, manner of performing board meetings
 - Pandemic realities will require updates to bylaws, organizational documents and company policies
 - Everything reconsidered in COVID-19 world
 - Communicable disease coverage



Legislation and Litigation

- Retroactive write out of virus exclusions in commercial property policies
- Massachusetts, New York, New Jersey and Ohio are trying to provide retroactive coverage but languishing (NJ bill pulled before vote)
- Argument by insurance industry:
Violation of Article I, Section X Clause 1 of the U.S. Constitution “No State shall... pass any...Law impairing the Obligation of Contracts...”



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Litigation COVID-19

- *Cajun Conti LLC v. Lloyds*: Restaurant group seeking declaration that coronavirus contamination of its premises would be a covered physical loss or damage to property, especially in event of government shutdown. No virus exclusion in policy. ***
 - See also, *Onion Tavern v. Society Insurance*. Insureds assert that business interruption losses resulting from government ordered shutdown of bars and restaurants should be recoverable. No virus exclusion in policy.
 - Other Litigation: Sanitizer maker, Uber/ Lyft drivers, price gouging for TP, gym charges, ticket resellers and employment claims(OSHA, Wage and Hour, WARN Act)



Wrap Up

- Successful cases follow formula: Best practices in action, credible and prepared witnesses and documents that tell the story
- Run your life and your business thoughtfully and carefully. Take preventive measures
- If litigation is threatened, do not delete or destroy information
- Examine contracts with your insurance company, your employees, and your business partners
- Consider costs of litigation before you institute as well as ADR
- COVID-19: Learn the lessons
- Choose the right attorney to handle your matter



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Thank you!

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