Webcast: Asserting and Overcoming Non-Compete Agreements Across the States and in Canada
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ASSOCIATION OF CORPORATE COUNSEL

Moderator: Mike Reinecke
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Operator: Just a reminder, today's conference is being recorded.

Female: Please go ahead, (Mike).

(Mike Reinecke): Thank you. We have a very aggressive agenda for our presentation today and not a lot of time to do it. As the moderator and the least informed of our panel today, I'll try to keep my participation to the lowest level possible. I don't want to spend a lot of valuable time introducing myself other than to explain the relevance of today's presentation to my current company, Accretive Solutions.

Unlike the traditional or maybe historical setting of (root) salesman, our insurance brokerage firms, et cetera, where the focus has mostly been on protecting clients, my company has the unfortunate distinction of having to protect itself on both the buy side and on the sell side.

Accretive Solutions is primarily a professional consulting firm and as such, we have the usual customer relationship concerns. But we also provide some staffing and executive services to our clients and like all service organizations, our inventory goes home every night. So, protecting our employee and (candidate) information has proven to be as much of a challenge as protecting our customer information.

It's not unusual for Accretive Solutions to save several six-figure legal fee battles in any given year, as well as a dozen or so less expensive but certainly no less important routine battles with former employees. And by routine, I mean, something that's well placed, well timed and thorough and you take a shot across the ((inaudible)) and put an end to it right away before it becomes a major battle.

As general counsel to Accretive Solutions, I've had the pleasure of working with the firms, the constituent firms to the (Work Along Network) including, by the way, two of the firms participating in today's presentation. For better or worse what I naïvely assumed was going to be a one-time consultation has turned to some long-term relationships, which I think says a lot for the quality of the firms that make up this network, which is a nice lead into the introduction on the next screen of the real participants in today's discussion identified here and also identified on the left under the "Links" screen. Also under that "Links" screen on the left is a – links also to the (Work Along Network) itself and item number three is an outline of non-compete – 39-page outline of non-competes and various citations to (it).

I want to reserve the actual introduction of the individual members until I introduce them with their topics. But I do want to note that there is also more extensive biographical information in that, again, in that "links" (sock) on the left that you can go to and get a much more thorough biography of every one of them.

You'll also notice that on the left is item number – the first item is the evaluation form of this presentation and our speakers. We certainly encourage you to take the time to click on that link and to fill out the evaluation form. It's important to the studying of these programs on a going forward basis.

Also, you'll notice on the left that there's a chat box that you can use to send real time questions to our panel. If you enter your question in there and click the "send" button, the question will appear. Because of the breadth of our program, we can't guarantee that we're going to get to all the questions, but the speakers will attempt to answer them in the discussion if possible, and if not, they will try to answer them at the end.

It's hard to pin the importance of covenants not-to-compete on any single factor. But certainly the shift from a manufacturing based economy where 80 percent of the company's assets were hard goods and maybe 20 percent were intellectual property to a service economy where those numbers are easily reversed. It's quite a key role in this (reliance). When you add to that, the ease of theft that has been facilitated by technology could be an obvious ((inaudible)) have to rely so heavily on covenants to protect themselves.

To make this all work on our favor, we have to take into account, the various commonwealth biases against enforcement, the importance of reasonableness and the (fact) and enforcement of these provisions is inherently a function of equity. All of that demonstrates the great discretion yield advisor (judiciary) in this field.

For all practical purposes, judges are free to do almost as they wish with any given non-compete (case) which makes the importance of preparation and presentation paramount to this topic, and that, of course, is what this presentation is all about. So, on that note, let's go to our first speaker, (Bill Berger).

Bill is the shareholder in the Denver law firm of (Stanton & Miller). His practice focuses on the representation of employers, and labor and employment matters. He has extensive litigation experience including federal and state court, and administrative agencies. He's the former management side chair of the Colorado Bar Association's Labor and Employment Law Section and he's also the Adjunct Professor of Law at the University of Denver Law School, and he authors a multi-column for the Denver Business Journal called "Labor Law." Bill's going to be giving us some advanced perspectives on the foundational aspects of enforcing non-competes.

(Bill Berger): Good morning and thank you, (Mike).

First of all, thank you all for attending today and thank you for inviting us. It's great to be joining this group and we appreciate the opportunity, at least I do certainly. I'm going to talk about three topics this morning, and it's morning still here in Denver. I know it's probably afternoon for some of you. First, is consideration. Second, is whether or not the documents need to be in writing and signed. And third, the scope and general remedies – the scope of remedies and relief that's available and the general remedies that are sought.

In each of these topics, I'm going to try to give everyone some tips that come out of practical experiences that I have had litigating these cases. And I think like all of our panelists, each of us has this as a fairly substantial part of our practice and do anywhere around about half-a-dozen of these at least every year.

So the first topic I'd like to talk about is consideration. Consideration is certainly one of the laws – issues that is govern by state law, and so it does vary significantly from state to state. However, there are basically three general issues that come up over and over again in most of the states.

First is what consideration is sufficient; the second is what consideration is a loser and therefore, insufficient; and the third is when is the sufficiency of consideration measured?

As a practical matter, the courts are looking for sufficient consideration that have something to do with the actual covenant that is at issue. So the courts, certainly as a matter of law in almost every state, anything of significance is sufficient. But as a practical matter, they're looking for something of real significance to the employee preferably that actually assist the employee in his or her career development. And third, that is related to the employer's proprietary interest, especially the trade secrets that might be the underline reason for the covenant.

A good example of that would be, hopefully that the employee signed the covenant in exchange for consideration that included a promotion to a management position, was given a significant raise as part of that promotion. And then as part of that promotion was also given access to and began working with the very trade secrets that the covenant seeks to protect. And the courts do like, as a general matter even if their specific state law doesn't require, they do like to have employers try to connect up those dots when they are enforcing these covenants not-to-compete and deciding whether or not to order someone to give up their business basically.

A (losery) consideration generally is a consideration that has not value. It may look like it does, but it does not. An issue that comes up over and over again in ((inaudible)) whether at-will employment is sufficient because if all that an employee receives is a promise of continue at-will employment that could terminate at any time with or without notice, with or without cause, the argument is that they've received nothing.

We saw an interesting case that came out of Texas that addressed these issues, and that case was called ("Sheshanav"). It just came out in the last couple of weeks. And it explains a good example – it provides a good example of how the courts look at these issues, try to weigh the practical consequences of them and oftentimes it comes down to when they measure the sufficiency of the consideration.

In the Texas case, there was a special statute that deals with covenants not-to-compete, and it has some particular language. There was a also a prior case that held that in general continue at-will employment is not sufficient, nor is it a promise to provide training unless there's an obligation to do it even after an employee is terminated because then all employee (guess) a promise to provide training, but since they could be terminated at any time, in fact that promise is a (losery).

(Sheshanav) extended that and said, you know, if the employer actually provides the training or is required to provide the training after the termination, so if before the termination the employee actually gets the training or if after the termination, the employee gets the training, then the employee is getting the benefit of their bargain and that is, sufficient consideration.

Some issues here were – we got to keep close to our time, so I'm going to skip ahead to the next slide and give you my tip on this. I think that employers need to remember that after each promotion or the like, they should have employees re-sign the covenants. That's important. They need to have that because the consideration is measured at the time the covenant is entered into. So after each major promotion, make sure employees have their covenant signed. And as soon as practical after signing a covenant, the employee should actually receive the training that's bargained for, then you have adequate consideration.

Must covenants be written and signed? Well, actually there's a growing number of cases that say they don't have to. Often they do have to at least be in writing. Most start courts, state law, states have a law that requires them to be in writing. But if they're in writing and signed by the wrong person, or they just never got around to getting the signature from the right person, oftentimes performance or other ((inaudible)) of consent may be sufficient to overcome the actual lack of the signature. We've given you a couple of cases and we've outlined that in our outline in greater detail.

The next slide talks about the various covenants that are – contracts that are subject to the laws regarding covenants and not-to-compete, and there are quite a few, much broader than simple covenants not-to-compete. And no rating clauses, no solicitation clauses, even non-disclosure clauses can be subject to covenant not-to-compete laws.

A reasonable term for a covenant, almost every state requires that covenants be enforceable – to be enforceable must be reasonable both in their term as in their duration, and their scope as in their geographic scope. The reasonableness is measured by the actual practical effect of the covenant. What is it that the covenant is trying to prohibit? In some companies, the business may be something where the turnover is very quick. And a covenant may be reasonable if it's only a matter of weeks. In others, it may be a matter of years that a company has interest and need to continue to be protected. And we've given you some cases that talk about how, given the nature of the interest to be protected, it may actually be reasonable for a covenant to be enforceable worldwide. That's a growing issue, and that's one that the courts are continuing to address.

Colorado has a series of cases here where the courts have said, we have a lot of technology and the court just said, well, we haven't yet decided if it is or it isn't, but we sure can see how it might be enforceable.

A tip here on the remedies, I think the major tip and then I'm going to go ahead and hand off to our next speaker and skim through the slides, is that when you're filing these lawsuits, a couple of things. Be sure to be prepared to provide injunctive – to seek injunctive relief, and if the lawsuit is filed, the courts are usually expecting you to seek injunctive relief immediately. If not, the court can view that as a waiver or failure to mitigate. And another one is, as you do file these cases, the monetary aspects where monetary relief is sought or claimed by the other side, often involve the exchange of financial statements and other things that are usually confidential themselves.

And therefore, these cases raises a second tier of need to protect a company's financial information and that is through fairly sophisticated protective orders.

And with that, I'm going to go ahead and advance the slides to the next speaker, Scott Harvey.

(Mike Reinecke): Thanks, Bill.

(Mike Reinecke) again, I'd like to offer a few observations, if you don't mind.

First of all, a few years back we had an employee who's employment contract mysteriously disappeared from her personnel file. We did have am offer letter that recited the obligations to sign the standard not-to-compete and we had an HR person who specifically remembered getting the signature. It wasn't pretty, but we got the injunction. I don't recommend it, but it can be done.

The second thing that I'd like to point out is the insignificance in real life of geographic limitations, that the law's reluctance to acknowledge that fact. I don't really have anything to offer in terms of advice on that other than to be aware of the law's shortcomings ((inaudible)) that regard.

The final thought that I would just leave you with is a warning that arose as we built a case that's ongoing right now for us. When our former employee went to a direct competitor, we moved against ((inaudible)) pretty much a full hard core press. We were unable to get the judge to enforce the non-compete itself, but we did get some very broad injunctions both against the employee and against her new employer.

Now the former employee then began engaging in some rather fragrant violations of the injunction with one particular client. Now this generated two results that from my perspective, were almost perverse. One, she was able to focus on this violation to distract the judge by

focusing on the fees incurred at that one client and started demonstrating that monetary damages clearly could suffice. And if the focus remained on that one client, that would be true.

And the second thing, her new employer put forth a forceful argument that the measure of damages from their perspective was the (nut) it received and effectively they're arguing that they're entitled to keep our money and (ill gotten) gains to pay their bills. The good news is this thing is settling or in the process of settling right now, so we don't know how it's going to turn out. But the warning is watch that you don't allow the defendant in these cases to redirect the focus of the case.

That brings us to Scott Harvey's topic, the (Protectable) Interest. Scott's an attorney with (Louis & Nobler) in Cleveland, Ohio, where he represents management in all areas of employment law, employment litigation and traditional labor law. He's been practicing law since '92 and his primary practice area is litigation including litigation involving trade secrets and covenants not-to-compete.

Scott, you'll be speaking on the one area that is very often misunderstood when enforcing non-compete, the need for protectable interest.

Scott Harvey: Thanks, (Mike).

Yes, I'm going to be talking about the protectable interest, and this is an extremely significant concept because irrespective of issues regarding reasonableness in geographic scope and duration as a threshold matter, the employer who is trying to enforce a non-compete covenant has to show that it has a protectable interest or in other words, a legitimate business interest to protect.

And assuming that the employer can show that it has a legitimate business interest to protect, the covenant will be enforced only to the extent that is necessary to protect the employer's legitimate business interest. And that's where you get into issues regarding duration and reasonable geographic scope.

The two protectable interest that are obviously invoked most often that we see in the case law most often and that has been – that I've most often dealt with in my practice are, number one, trade secrets and/or confidential information. And number two, goodwill based on customer relations.

And I'd say in the 10 to 12 years that I've been involved in litigating non-compete agreements, these two areas represent about 99 percent of the protectable interest that I've dealt with on both sides of the case. There are some others that you see once in a while. One, unique services of the employees or two, specialized or extraordinary training. These are very high thresholds for the employer who's trying to enforce the covenant based on these interests to meet and there are a lot – they're going to be a lot harder to show than your standard areas, trade secrets and customer relations.

There's also another area, another protectable interest that we see in the context of (leased) employees, and that's a concept called disintermediation. And if we have any companies out there who are temporary employee agencies, or leasing agencies, or they deal with employee leasing agencies and use those types of employees, this is a very significant issue.

Disintermediation has basically been defined by the case law and we cited some cases on pages 16 and 17 of the outline, cutting out the middleman resulting from companies and employees commencing the direct employment relationship. In other words, the client of the leasing agency commencing a direct employment relationship with the employees and thereby cutting out the middleman; in this case, the middleman being the employee leasing agency.

The typical non-compete in this context basically says that the employees cannot accept employment with the client employer after the assignment for a certain period of time, which is usually of short duration. And these types of covenants keep the client's employer from being able to terminate its contract or relationship with the leasing agency and then either hiring the employees directly or contracting with a competitor leasing agency thereby cutting out the middleman. The courts has said this is a protectable interest that justifies enforcement of the covenant. And this is strangely premise on the, as we say in the outline, the (antiquated) notion that leasing – of the leasing agency has a property interest in the employees.

I'll focus my – the rest of my discussion on the two primary areas of protectable interest, trade secrets and confidential information and customer relationships. With regard to trade secrets and confidential information, I think we're probably all aware that this is going to be guided, at least as far as trade secrets are concerned, by the Trade Secrets Act, the Uniform Trade Secrets Act, which has been enacted by a majority of the states including Ohio. And I've listed in this slide the two elements that are necessary to show that something's a trade secret. And if you're going to enforce a covenant on this basis, you're going to have to prove that the information in question does meet this definition.

A covenant can also be enforced on the grounds of protecting confidential information even though that information may not necessarily rise to the level of a trade secret. And depending on the state, it may actually be easier to prove that the information is confidential than it is to prove it's a trade secret. And I can tell you in Ohio there's actually a statute that we have on the books that prohibits employees from disclosing confidential information that they learn by virtue of the employment relationship. And there's a case in Ohio that holds that this – that this is – this statute provides the employer with a grounds actually to file a (Tort Action) against the employee who's misappropriating confidential information.

There's also a case that came out in Ohio six years ago, Procter & Gamble verses (Stonam) that defines confidential information as simply as known only to a limited few, not publicly disseminated. And obviously, that's a much easier definition to meet than definition of trade secrets in the Trade Secrets Act.

The confidential information can also be define by agreement and this is why companies like to have confidentiality and non-disclosure agreements with their employees in addition to non-compete agreements.

The next few slides lists some examples of trade secrets and confidential information that we most often see in the case law regarding enforcement and non-competes and in trade secret misappropriation cases. And the slide you see in front of you are the most common ones, financial information regarding the company profit loss, pricing, cost structures, supplier information has been held by many cases to rise to the level of a trade secret or confidential information, manufacturing production processes, sales marketing strategies and also the last two here, customer lists and customer information and such information provided that meets the definitional aspects of trade secrets and/or confidential information can give you your protectable interest.

Basically, the ((inaudible)) test that I use here and that I counsel clients when they're – when they have one of these cases they're facing is, would the employee who's left your company, by virtue of his knowledge of your information be able to give a competitor an advantage that it would not have if it had hired somebody off the street who doesn't have such knowledge, and what steps have you taken to guard the secrecy of the information. If the answer is, yes, the competitor is going to have an advantage by virtue this, then you've got a long way towards showing that the information, whatever it may be – whatever category it may meet that's on this list, is going to give you your protectable interest.

A few others that we see, although less common in the case law, is negative research. This is basically been defined as extensive and costly research proving a process doesn't work or that certain potential customers are not likely to use your services. And the key here is extensive and costly. This tells us this is a pretty high standard to meet. Recipes that we cited some cases in the outline dealing with chocolate chip cookies and alcoholic beverages; pretty interesting cases.

Unique bundling or a combination of one ((inaudible)) concepts, this is – you see this in the case where concepts that by themselves are well known in the industry, but when you combine them in a unique way, it gives you your trade secret.

And then information on employees, you see this is in the employee leasing context as well.

What I'd like to talk about next is what we call the Inevitable Disclosure Doctrine, and basically, and this is discussed on pages 11 through 12 of the outline, basically a threat of (irreputable) harm of disclosure or use of trade secrets or confidential information exist warning an injunction in a non-compete case or evening a trade secrets case, where the former employee has knowledge, detailed knowledge of the trade secrets or confidential information and has commenced employment with a competitor in a position that is substantially similar to the position that the employee held with your company.

The lead case on this and the one that cited most often, I think, is PepsiCo verses Redmond. And this is an interesting case; it was based on the Illinois Trade Secrets Act. What's interesting about it is it did not involve a covenant not-to-compete. The complain was misappropriation of trade secrets and breach of a confidentiality agreement.

And the court, notwithstanding that there was no non-compete agreement join the employee from working for approximately six months. Notwithstanding that the employee had a good faith intention to comply with is obligations under the Trade Secret Act. The quote in the case that

really sums this up very well in a nutshell is, “PepsiCo finds itself in a position of a coach, one of who’s players has left with the play book in hand to join the opposing team before the big game.” What this means is if the employee cannot help but call upon his knowledge of the trade secrets in his mind, in his subconscious, if you’re able to show that, you’ll be able to enjoin employment on this basis.

In my experience, however, despite the PepsiCo case and some other ones out there, courts will rarely enjoin competitive employment in the absence of a non-compete covenant.

There’s a case out of Ohio, and this is the first case that I’m aware that’s expressly adopted the Inevitable Disclosure Doctrine in Ohio and it’s Procter & Gamble verses (Stonam). And I had an experience actually earlier this year where I was defending one of these cases and my client hired an employee from the competitor. The competitor sent a letter threatening to go after him for misappropriation of trade secrets and instructing him he wasn’t allowed to work with my client because of his knowledge of trade secrets. No non-compete agreement.

They filed – we tried to resolve it, but we’re not able to, so the competitor filed suit against my client and the new employee and argued – asked for a temporary restraining order when we first went before the judge. Asked the judge to enjoin him from working. (Hammered) the Inevitable Disclosure Doctrine and just kept telling the judge, this is a textbook case. The judge read the Procter & Gamble case and said, you know, guys, I’m not going to enjoin this guy from working. You don’t have a non-compete agreement. I’m not buying this inevitable disclosure doctrine. So, this is going to be – if you’re going to try to enjoin somebody from working without a non-compete agreement, at least in my experience you’re going to have an uphill battle.

And then the second most common protectable interest again is goodwill based on customer relationships. And in this case, you do not need to show that the employee as trade secrets or confidential information, although in many cases, you’re going to see that that is what the

employer is trying to protect in addition to the customer relations. In other words, in a lot of these cases, the employee is going to have knowledge of customer lists, or knowledge of customer's wants, needs and preferences and other information about the customer that does rise to the level of a trade secret.

The restrictive covenant will often be enforced only with regard to customers with whom the former employee has a relationship, and that's the general rule. In other words, the courts are not going to say, you know, you're not allowed – to the employee, you're not allowed to contact any customer of this company regardless of whether you had a relationship with them or not. But sometimes the courts will prohibit competition based on the customer relationship protectable interest within the employee's former territory. And this would cover customers with whom you might not have had a relationship.

You generally only see this where there is a limited number of customers in the industry and a potential for overlap between the competitors with regard to the customer base.

And just quickly to finish up here, in the – in the customer relationship protectable interest arena, we see two types of covenants. One is the standard covenant not-to-compete, which enjoins employment with competitors. And then the second is and more common is a non-solicitation covenant. The non-solicitation covenant is a lot easier to enforce than the covenant not-to-compete especially if you do not have trade secrets or confidential information as your protectable interest. In other words, you're only basing your protectable interest on the goodwill based on the customer relationships themselves that the former employee has with your customers.

And with regard to non-solicitation covenants, the geographic scope is generally going to be irrelevant. In other words, the covenants typically prohibit the employee from soliciting customers wherever they're located. And then with regard to the duration, some courts will measure this by

how long it'll take a replacement employee to develop the relationships with the customers. In my experience, I've seen covenants of this nature enforce from anywhere from one to five years. In fact, a lead case in Ohio, (Briggs verses Butler), which is cited in the outline, goes all the way to 1942, enforced a five-year covenant based on the customer relationship interest.

So that ends my presentation. I will now hand it off to (Bill Polchek) who will be our next speaker.

(Mike Reinecke): Thanks, Scott. You've raised some important concerns, not the least of which I think is the importance of proactive protection of an interest to demonstrate a protectable interest and I'd like to – there's no guarantee methods of preventing theft in the first place. I believe Accretive Solutions are taking a couple measures in that regard.

For one thing, we're centralizing all of our cell phones so that anyone in our company who regularly uses a cell phone must now use a company phone. We will no longer reimburse any employees for the business use of a personal cell phone. That gives us the right to snatch those little treasures (trolls) of information when the employee is making his last exit. But it also means that the customer's aren't going to accidentally follow our employees to the next employer. We own those telephone numbers.

We're also working with our software company to create an automatic audit trail of suspicious activity, printing of lists, massive e-mails, downloads to disks, things like that. The breadth of this program is daunting. It's kind of like parental controls on home computers. We'll never be in a position where we know we're going to catch all suspicious activity, but we think we're going to be able to catch a lot of it.

And just one comment on negative research, executive research or as it's more commonly known, "head hunting," as a reputation for its cut-throat nature. Separating the wheat from the chaff in terms of finding companies who will actually pay a head hunting fee is a time consuming

and as you know, costly expenditure. But more expensive from our perspective is identifying those companies who say they will pay a fee and then stiff you when it comes time to pay it. Merely protecting a customer list has no value to the sort of negative information. You've got to be able to protect that as well.

And that brings us to (Bill Polchek) and his topic, "Attacking, Overcoming a Non-Compete Agreement." Bill's the senior shareholder of ((inaudible)) a management and labor unemployment firm in Metropolitan Detroit where he's advised and litigated on behalf of management for the past 22 years. His article on the labor law – Labor Lawyer ((inaudible)) called "Pounding Square Pegs Into Round Holes Non-Compete Agreements for Temporary Employees (stand) Existing Law on Its Head." That article has recently been selected and republished by the ADA as its best labor employment item of 2005.

Bill's going to be identifying ways to overcome non-competes and for those of you listening who seek to enforce ((inaudible)) you have to pay particular attention because this is the fight you're going to be facing.

(Bill Polchek): Thank you, (Mike).

Unlike the (holy wars) that us management, labor and employment attorneys ((inaudible)) on behalf of our clients on one side of the table with uniformity, non-compete agreements is the one area where we might be on both sides of the equation, because it fairly frequently occurs that our clients are presented with the opportunity to hire somebody that is bound by an agreement that perhaps overreaches. So, this is one area where we were able to beg – reach into the bag of tricks that we have pulled and the tricks that have been pulled upon us and the arguments that have been presented to us to come up with a pretty – a fairly complete outline. And I do want to urge everybody to take a look at the outline. We're limited to an hour here, but we have treasured ((inaudible)) citations on almost every point that we have discussed so far.

The first thing – the first slide represents a number of defenses that I have characterized as procedural ((inaudible)) procedural defenses, and the first one is that the agreement continues ((inaudible)) arbitration clause and people who practice regularly in this area know that well directed agreements provide that the company can go to court on a post-employment covenants. And even if that clause is missing from the agreement, there's a great deal of law that says that a plaintiff may seek preliminary injunction and then proceed to arbitration. And there's also laws and so forth in the outline that the award of an arbitrator granting an injunction can be enforced in court.

But the important point here is that it has occurred and I have certainly litigated matters where the parties claimed the breach of the non-compete initially in the arbitration form. And secondly, never discount the possibility that asserting the arbitration clause may cause a judge who doesn't want to make the tough decision to relinquish the case so that you can go to arbitration.

The second argument is one that people who litigate these cases frequently will recognize and that is that the agreement is ((inaudible)) predecessor. The argument is that personal service agreements are not assignable. So a large ((inaudible)) to that effect. Some, of course, hold that that is just the case with the non-compete provisions. Other courts hold that the agreements are freely assignable but the better more studied rational is that post-employment covenants do not require personal service. The covenants themselves do not, and so therefore, that aspect of the agreement is outside of the personal service contracts or not assignable rule.

Of course, you know that the presence of a successors or assignment clause in the agreement should overcome this entire argument because that is the consent that is necessary to assign a personal service contract. And I do want to draw your attention to the bottom of page 23 of the outline where the argument or the discussion occurs that mergers are different than assignments

because in an merger context usually by statute, the succeeding organization succeeds all the rights and liabilities of the predecessor.

The next bullet is that the employers ((inaudible)) briefly and frequently proves that principles of a business organization seek to enjoin their fellows when they split up and seek to compete. And so, therefore, the fact that the business organization no longer exist is a strong argument than have oppositions have had.

And then finally, I want to point out that it is in the outline, the delay in seeking an injunction itself is a ((inaudible)). Failure to mitigate and if you wait too long, obviously the injury is not immediate and ((inaudible)) otherwise you would've saw it (and) agreement.

The next slides reflects some defenses that arise from the contract or other contracts that exist. And the first is a concept that is reflected on page 24 on our CMI (Intermet) case out of Michigan where they applied a novel common doctrine found in most states, and that is if there are two agreements on the same subject matter, the latter supersedes the former agreement as a matter of law, and so therefore if the company has two agreements with the same employee and the later is a non-solicited and the former is a (non-contede), the later agreement, the more (latter) agreement is going to (triumph) the earlier agreement.

The second bullet is referring to a case that's on page 31 on the ((inaudible)) and that is later agreements with different employees that are less onerous in essence can be a concession that less protection is suffices to protect the company. And we're going to talk about how agreements must be reasonably necessary for the protection of the company, and in that case Judge (Fikans) ruled that the mere fact that there were less onerous agreements stood as a defense.

The third bullet that comes out of the (Moleki) case on page 27 of the outline, and that is that if higher ups in the organization do not have an agreement, it's again practically a concession that a non-compete is not necessary to (protect) the company.

The last bullet, oh, I'm sorry, let's go back to the – the last bullet reflects an interesting situation and that is where the individual is forced to sign a non-compete clause over (subject) collective bargaining agreement and there are actually two cases on page 24 of the outline.

We all know that state clerks hardly ever get traditional labor law correctly and here we have two different panels of "appeals" in the QIS1 and QIS2 cases are dealing with a situation where an employer, without going through the union, forced members of the bargaining unit to sign a collective, I'm sorry, to sign a non-compete. The first panel got it wrong and held that the employer could negotiate additional agreements with the employees, which I think the (NRB) would fine surprising.

But two years later, a different panel came back and had an interesting observation in that is that forcing members of a collective bargaining unit to execute a non-compete under threat of discharge is not supported by consideration because the employer didn't have the right to discharge under those circumstances. And just as an interesting footnote that shows that (Michigan's) perspective that the near continuation of at-will employment is sufficient consideration to enforce the agreement, but (congruously), the mere continuation of just-cause employment when there's not cause is not sufficient consideration. That's an interesting twist.

It is not on this slide, but I should say it so we all avoid malpractice, it's obvious that a mutual release agreement, another type of contract, could easily negate the provisions of a trade secrets agreement or a non-compete. Let's move to the next slide regarding restrain of trade arguments.

And certainly the first bullet refers to the quote that is found in the (Blake) article at Harvard Law Review that's commonly cited that ((inaudible)) Facility acquired through training and experience and pertained exclusively to the employee. In my mind, this upsets the rational of the training cases especially those in Florida where they're not really reciting that the training must be extraordinary.

The second is a kind of a rough edge argument that is made by parties not that familiar with the protectable interest doctrine, and they say that the position itself is just simply too low leveled to be worthy of protection in a non-compete. This argument can (sly) a certain length of time because of the ((inaudible)) case on page 25 that recites – that serves as a janitor cannot be prescribed even in the service of the (world's) greatest competitor. But in reality there are cases cited ((inaudible)) non-compete clauses applicable to security guards were enforced. In reality, this should be a protectable interest argument deserving of a lot more scholarly review.

Sometimes as indicated in the third bullet on this page, you have the – you're blessed with the situation where your opponent literally argues a per se a proper reason for a non-compete and you need to be able to recognize them protecting against turnover, retaining employees for a sufficient time to recoup training costs, removing competition, preventing the employee from quitting are all – are all reasons that – they're improper reasons for ((inaudible)) a non-compete, but they can be cleverly stated.

The consultants and designers case that Scott referred to with regard in creating the ((inaudible)) interest, basically says our industry couldn't exist if employees could go to competitors. Well, you know, that's an argument that a lot of people can make. And so what I do when I'm analyzing this aspect of the case, I ask whether this employer is (asserting) a reason that ((inaudible)) employer could assert.

The next day is, of course, attacks on the confidentiality of the information that is claimed to be protectable. And there are many ways to disclose this so that the company might lose its protection. I want to pass over most of them except to point out that one-quarter of the outline treated ((inaudible)) is different from (patent) because of the less access to the copyright materials in the public offices. And the argument about Web sites (touting) our customers, again, if you're really protecting the identity of individual customer contacts with authority, the negative research that ((inaudible)) keep talking about, who (what) who doesn't, does not use us – information about the wants, needs and preferences of those customers. That should not be a problem.

One area that we do have a problem though is, we have customers that give commission statements to their employees with the idea that you take them home for their records. Those commission statements list every customer that the person has dealt with. Accordingly, we're recommending to our clients that they start quoting them so its not so obvious.

I am going to pass by some of the bullets on this next slide, additional attacks on confidentiality. And (Mike) has touched on the two – on one of the two defense arguments that are emerging as a result of technology with regard to the cell phones. The other one is that employees have been allowed to work from home and have access to and can print all of the sensitive information. I am waiting for the argument that this is (append) to the cases that you can find where if the company doesn't shred its trash, it loses its trade secrets of protection, because these employees can print out at home, they can cut and paste at home and we need to be able to create a way to solve that particular issue.

Just briefly talking about attacks on the customer relationship interest, we do need to keep in mind that that proximity to the customer is only one aspect of the customer relationship, and really it's not proper to assert that as a – as a basis where the employee has no influence over the customer. The Arthur Murray case out of Ohio, which is one of the ((inaudible)) cases in this

area, talks about the much abused, much misunderstood and much misapplied customer contact theory. And the (Hasty) case out of Tennessee was a leased truck driver who had a non-compete, but the court held because he had no ((inaudible)) with customer, that did not justify the non-compete.

I do want to just point out the sub-bullets that showed the kinds of operations that didn't have a sufficient customer relationship ((inaudible)) at the bottom of the page. There's the notion that the employee brought the customer to the employer. The very solid line is cases ((inaudible)) from the ((inaudible)) page 29 of the outline rather firmly establishes that it is not a proper exercise of the non-compete to divest the employee of customers that he or she brought to the employer. However, that's a fairly bright line, and that is on the customer's that came to the ((inaudible)) solely deploy services and as a result of a recruiting effort which ((inaudible)) did not subsidize are cut out of the equation. And so accordingly, it was a fairly bright (light) for companies to follow in that regard.

These are more customer relations arguments, I do want to point out the ((inaudible)) the one bullet that says the customer's followed me without solicitation, there's an interesting citation in the (Falner) case on page 30 of the outline where the Michigan Supreme Court has said who solicits who often subjective and very artificial, and I found that to be a very useful quote. ((inaudible)) mentioned the ((inaudible)) case at page 30 of the outline where the employer had abandoned the type of business that the competitor did. He simply wanted to move away from small accounts and focus on large accounts, and accordingly the court held that they had relinquish that competitive interest.

In Michigan, we have many arguments that the new employer, if not actually ((inaudible)) to the former employer and because they pitch to different ((inaudible)) different business units, et cetera. But I do want to point out the interesting argument under the second sub-bullet that even though they are similar in nature, the new employer and the former employer had different

marketing plans. The (patio) enclosures verses (Herps) case in the outline gives a demonstration how one company that advertises on the gets its clients and customers through advertising on TV is not a competitor to one who obtains its customers to print media. I thought that was a hogwash theory until I actually litigated a case where one mortgage giant got all its customers on the Internet ((inaudible)) the hiring mortgage company was a brick and mortar operation and it made it clear to me that the employer's business can be defined by the way it obtains its clients.

I think that's basically close to the time that I have. I do want to put out just one more interesting argument. I use the necessary requirement that the ((inaudible)) necessary at times of creative ways ad in terms of the employee leasing situation that Scott mentioned, I have noted that the American Staffing Association had a code of ethics that said, for our business, employees should be ((inaudible)) to freely transition to another company when one company loses to the contract to argue that ((inaudible)) is not necessary to protect the business.

OK. And (Mike) has touched on the money damage problem, and so I'm not going to need to discuss that further. And I will be in a position to hand this deck over to (Dan McQuen).

(Mike Reinecke): Thanks, Bill.

As you mentioned, a company that puts a strong reliance on its – on the enforceability of its own covenant has to consider very carefully the unclean hands aspect of hiring other employees who are subject to non-compete. At the Accretive Solutions, we're very careful when we're faced with that hiring decision, and we do a couple of things.

In most circumstances, we tell the employees flat out that if they're challenged by their former employer, we will not defend them, because we do not want to be in a position where we're arguing unenforceability. We tell them that we will do our best to accommodate the challenge, for

example give them duties that are non-competitive, then that will ((inaudible)) a former employer. But if it comes to a battle, we will not defend them.

The second thing we do in cases where we know a new employee absolutely will not sign on with us in the absence of some sort of protection, we temporarily relocate them to a geographic area to sit out their non-compete. This is expensive, but if the employee is worth it, we'll do it.

And also, on the enforceability side, I did a little soul searching in preparation for this presentation. There has never been a case that we've – my company's been involved in, where we have simply gone after a former employee solely for the reason that they've gone to work for a competitor. There's always some other compelling reason that goes with it. In one case we had a former employee alleged sexual harassment and discrimination purpose of which was to negotiate her way out of her non-compete. Well, we tried to – we won the discrimination case in front of the (EELC), she quit and went to work for a competitor. Obviously, we couldn't tolerate that. That extraordinary circumstance, we couldn't encourage that for our other employees.

In another case, we had a startup competitor in a local market trying like crazy to adopt a business model that's very much like ours, one that's difficult to grow organically. They were having very little success until they hired away one of our managers, who obviously had the experience. Again, this is one of the situations where we simply had to respond. It was too extraordinary. This was not only a situation where it was inevitable disclosure, it was an intended disclosure and we had to act.

Anyway, my point here is to two-fold, if we do hire someone subject to non-complete, we never go on record as saying we believe it's unenforceable. And second, we ourselves never go to the mattresses on a mere non-compete. There has to be an extraordinary circumstance that allows us to argue a differentiating point.

That brings us to (Dan McQuen) and his overview of Canadian law. (Dan) is counsel to the ((inaudible)) Ontario law firm of (Shared Cruise). (Shared Cruise) is exclusively a management employment labor law firm. (Dan) joined the firm two years ago following a 10-year stint as senior counsel, labor and employment law for Nortel Networks. ((inaudible)) reputation here in the United States is both well founded and well known. I think it's sort of interesting to get the perspective of our Canadian neighbor's non-compete, so I have to believe it presents the same problem here.

So, (Dan).

(Dan McQuen): Thank you, (Mike).

I'll be very brief in the interest of time because we're coming up close to the end of the presentation. I would encourage all of the attendees to read my contribution to the outline, which I believe begins at about page 34.

What I'm going to do in the brief time that I have is try to compare and contrast employment law in Canada as it relates to restrictive covenants in employment contracts. And I guess the starting place is that the employment at-will or the concept does not exist in Canada. All employees in Canada have a contract of employment of some shape or fashion. Employment contracts in Canada consists of terms and conditions that are either implied or expressed. With respect to this topic of restrictive covenants, there are some restrictions that are implied as a matter of law into the employment contract even without expressed terms.

Turning very quickly to implied terms and conditions, the major distinction in Canada, you must bear in mind, is the distinction that exist between the employees who are considered fiduciaries as compared to employees who are simply near employees.

Fiduciaries are subject to a stricter ethic. The way the courts have interpreted this in Canada, and they do tend to be the senior most upper most positions within a company with an employer, the basic prohibition is that a fiduciary ((inaudible)) is disqualified from ((inaudible)) or diverting to another a maturing business opportunity. Fiduciaries must honestly and in good faith advance the employer's best interest. They cannot enter into engagements in which they have a personal interest. And they cannot solicit a former employer's customers or employees for a reasonable period of time post-employment.

As I indicated who is a fiduciary, well, as I said, they tend to be the upper most senior management, certainly directors would qualify, individuals who are senior offices of a company. There has been a very recent case and this exhibits a bit of a trending Canadian law whereby courts are finding fiduciary status extends down into lower parts of an organization, including key employees.

In the materials, in the outline, you'll see a reference to a case called "Western Tank and Lining Limited." They're some key employees who were merely in a sales capacity were found to be ("The face of the company in the province of Manitoba"). They were found to be fiduciaries, and even in the absence of any expressed terms in their contract, the moving party was able to obtain an injunction.

What is a fiduciary and what is the real – how are they definable? Well, really, they have a scope for exercise of discretion of power; they may unilaterally exercise that discretion of power to affect the beneficiaries, i.e. the employees' legal and practical interest; and the beneficiary is vulnerable to the fiduciary holding the discretion or power.

I'm going to jump very quickly into expressed terms, just based on the amount of time we have here. Consideration is an issue in Canada just like it is in the U.S. with respect to expressed terms in an employment contract that restrict the employee. The issue doesn't usually arise,

however – the consideration issue if the restrictive covenant is part of the original hiring documentation. The problem only arises where the employer ((inaudible)) to require an employee to execute an agreement containing restrictive covenants after employment commences. The problem is that these sorts of clauses either failed because there's an absence or lack of consideration or a constructive dismissal was caused because the employer is unilaterally trying to implement something new into the employment contract that is significant.

What is acceptable consideration for a restrictive covenant in Canada? Well, again it's quite similar to what you've heard already here today. Pay various kinds of incentives perhaps a promotion. You'll see in the slides when you get them, that with respect to ((inaudible)) of dismissal. This is something that is bit of a question mark right now in Canadian employment law.

My understanding is that we're coming to the end of the presentation and so, what I would just like to do is just sum up Canadian ((inaudible)) trend. Basically courts in Canada do not like restrictive covenants in employment. They see them void, as a restrain of trade, and you'll have more success trying to enforce a non-solicit than you will a non-compete. And as I indicated earlier, there's a growing expansion of the scope of individuals that may be subject to fiduciary duties.

In the interest of the little time that we have and perhaps to afford attendees more time for questions, I think I'm going to close on that remark. Thank you.

(Mike Reinecke): Thanks, (Dan). I apologize. We kind of crunched you up at the end there and in fact I'm out of time to make any comments myself.

I do want to thank the panel for putting, not only the presentations but also their comprehensive outline on item on number on the (links) there on your left. I want to remind the attendees that

the first item under the links is the evaluation form. If you click on that, it'll take you – it'll link you to the form itself. Make sure you select today's topic. There are a few other topics out there. On the last slide when you get these, there are contact information for all of the panel and also, as I said, in the bios under the links, you could also get additional contact information there.

Thanks to all the attendees for attending and to the extent we can answer some of the questions online, we will do so after we close.

Female: OK, one moment.

END