Client Alert

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Five Key Lessons for Business Litigators from *National Abortion Federation v. Center for Medical Progress*

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On February 5, 2016, Morrison & Foerster secured a preliminary injunction on behalf of its client, National Abortion Federation ("NAF"), in *National Abortion Federation v. Center for Medical Progress*. The firm's work on this high-profile matter was recently featured in *The New York Times* and has been the subject of extensive media coverage. The case is at the center of a political firestorm that erupted last summer when a little-known anti-abortion group, Center for Medical Progress, released secretly recorded videotapes showing what the group claimed were physicians discussing the sale of fetal body parts for profit. Those allegations have subsequently been disproved. Twelve separate states have opened and closed investigations, finding no wrongdoing on the part of the physicians who were secretly taped, and in January the director of the anti-abortion group and one of his associates were indicted on felony charges in Texas for using fake drivers licenses to gain access to Planned Parenthood facilities. The preliminary injunction Morrison & Foerster secured on behalf of the Foundation represents the latest legal setback for Center for Medical Progress *et al*.

While the factual setting of this fascinating case is undoubtedly unique, there are several important lessons business litigators and in-house counsel overseeing business litigation can take from this headline-generating case.

1. **Confidentiality Agreements Are Critical If You Want Injunctive Relief.** NAF was able to file suit and seek injunctive relief preventing the release of over 500 hours of tape secretly taken at its meetings. Why? Because NAF required everyone attending its meetings (including the defendants) to sign confidentiality agreements preventing the publication of information learned at its meetings. Why isn't an injunction here an unconstitutional prior restraint in violation of the First Amendment, as the defendants claim? Because constitutional rights can be waived by contract, and courts have found that a confidentiality agreement constitutes a knowing and voluntary waiver of any First Amendment right to subsequently disclose information obtained in violation of that agreement. The lesson for in-house lawyers here is simple: Employees or third parties with access to confidential information inside your company (whether or not the information amounts to trade secrets) should be required to sign a confidentiality agreement. Having such agreements in place maximizes your chances of obtaining injunctive relief and avoiding prior restraint and anti-SLAPP arguments in the event of threatened disclosure. NAF's confidentiality agreements were a vital component of securing injunctive relief to protect its information from public disclosure.

2. **Leveraging Internal Expertise Maximizes Your Chances of Prevailing.** Having a knowledgeable and responsive client is a huge asset that is often overlooked in litigation, particularly when the case involves specialized knowledge or a rich or complicated industry backdrop. Oftentimes even experienced outside counsel will lack the necessary context to properly understand the key facts of any particular case, at least initially. For any company that is considering bringing a lawsuit or (more commonly) is faced with the prospect of being sued, it is absolutely vital for in-house counsel to connect outside litigation counsel with the individuals inside the company who possess the relevant knowledge, both with respect to the facts of that particular case and the industry background as a whole. In *NAF*, the ability of outside counsel to work smoothly and seamlessly with in-house counsel and the critical employees with the relevant knowledge proved essential. NAF was able to secure a temporary restraining order on shortened time, preventing further irreparable harm to NAF's members, only because this connection was made early on.

3. **Tell a Compelling Story in the Pleadings.** Under Rule 8 of the Federal Rules of Civil Procedure, a complaint that contains a "short and plain" statement establishing jurisdiction and the grounds for relief is sufficient – but a well-drafted complaint can be so much more. The complaint is a golden opportunity to tell a compelling story that explains the key facts and grabs the reader. It should be a punch to the gut. In the NAF case, the complaint laid out a gripping story full of factual detail, intrigue, and nefarious conduct. It was replete with direct quotes from emails and photographs of the defendants. It explained the campaign of harassment perpetrated against its members, the means by which the defendants carried out their campaign, and the irreparable harm NAF and its members suffered as a result. The initial pleadings present the first opportunity to lay out your story, in detail, for the court. This opportunity is especially critical in cases where the court is called upon to issue preliminary relief on a limited record. Do not miss that chance. It is a strategic mistake to do so.

4. **Guard Your Credibility with Everything You Have.** There is no more important rule in litigation. Be a zealous advocate on behalf of your client, but be faithful to the facts and the law when crafting your arguments. If you do not, your credibility is shot, and every argument you make thereafter will be an uphill battle in front of a skeptical judge. Do not overstate your case. The same principle applies to discovery disputes. Be clear with your adversary and the court about what you view as fair game for discovery purposes and what you view as off limits. Whereas NAF was upfront in discovery about what it would produce in response to each request and what it would not, the defendants made a series of errors in this regard, which ultimately lead the court to issue orders describing their tactics as a "shell game" and an "attempt to hide the ball." No company wants to be on the wrong end of orders like that.

5. **Be Selective About Issues to Appeal Early in a Case.** Whenever a trial court rules against you on important threshold issues, it is tempting to consider a writ or interlocutory appeal to correct what you view as an error. But even if your view of the merits is correct, the standards on a writ or interlocutory appeal are difficult to meet, and the odds of success tend to be low. There are also important collateral consequences to appealing, and losing, early in a case. In the NAF case, the defendants appealed a series of rulings the trial court made early in the case to the Ninth Circuit and even the U.S. Supreme Court. They claimed that the restraining order was an unconstitutional prior restraint, that discovery should be stayed under California's anti-SLAPP statute, and that discovery concerning the identity of their

funders violated their First Amendment rights of association. In every instance, the Court of Appeals affirmed the correctness of the trial court's rulings on these issues. Not only did these rulings confirm for the trial court that it was on solid legal ground, because of the "comeback case" rules applicable in the Ninth Circuit, the same panel that decided these threshold issues will very likely hear any further appeals in the case. Think very, very carefully about interlocutory appeals. Otherwise, you risk not just losing that particular fight but diminishing your chances of prevailing on subsequent appeals.

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