

# Risk Managers' Motto Is To Be Prepared

It's vital to have access to insurance policies, company's contracts

By ALEXANDREA L. ISAAC

The effects of the economy have been felt across all businesses and industries over the past two years. As a direct result of businesses cutting their budgets and personnel, the responsibilities of employees have grown.

If you are a human resources professional, you might now be responsible for handling your company's risk management. If you have always been your company's risk manager, you likely now have additional tasks to address. Whether you are new to the area of risk management or have made risk management your career, this article will provide you with a critical checklist to ensure you are max-

imizing your coverage for insured risk and transferring that risk when possible.

by your company, but you should also have complete copies of these policies readily available to you. Do not assume that your insurance company, agent or broker will have these documents should you need to refer to them.

## Organize Policies

Obtaining copies of old policies is another way for a risk manager to prepare for future litigation and save a great deal of company time and money. As most companies realized with the surge of asbestos litigation, it is vital to have copies of insurance policies going back as far as possible.

As you may be aware, courts have determined that bodily injury resulting from asbes-

tos exposure was deemed to be on-going causing what is known in the insurance industry as a "long-tail claim" and, potentially, a "continuous trigger" of coverage.

## Contracts, Record Retention

In addition to having your insurance policies accessible, it is important to retain copies of contracts entered into by your company. Most critically, you should have records of contracts wherein the company has either: 1) transferred your risk to another entity, typically by an insurance requirement that your company is added as an additional insured on another's insurance policy and/or through indemnification language; or 2) assumed the risk of another entity. Following your receipt of these contracts, you should: 1) confirm that your company has in fact been added onto the insurance policy of the party you have contracted with; and/or 2) confirm that the contracting party has been added to your insurance policy. These steps to confirm the policy complies with the terms of your contract may prevent litigation in the future.

Risk managers have routinely relied on the certificates of insurance as sufficient "proof" that they have been added as an additional insured on another's policy. This is not enough. Certificates of insurance do not govern or control the coverage you may or may not be afforded under a policy. The *only* way to have

policy and read it. If there is *anything* within that policy that you do not understand, it is critical that you seek out the advice of your broker or coverage counsel.

A risk manager that has instituted policies and procedures for record retention for the company's insurance policies and contracts will be prepared in the event of litigation.



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**If Mr. Smith was exposed to asbestos in 1960, but brought his bodily injury litigation against your company in 2000, all of the liability policies issued to your company over that 40-year term may be applicable.**

## Pre-Litigation Procedures

When some think of the role of a risk manager, they often focus too narrowly on the responsibility to attend to litigation when the company is sued. However, the work a risk manager does prior to the receipt of a lawsuit will assist him or her tremendously in the event of future litigation.

In this respect, the foundational element of all risk management is to be organized. As a risk manager, you should not only be aware of all past and present insurance policies purchased

As such, if Mr. Smith was exposed to asbestos in 1960, but brought his bodily injury litigation against your company in 2000, all of the liability policies issued to your company over that 40-year term may be applicable. Asbestos is just one example of product liability. No one can predict what the next long-tail claim might be or what services, business or industries it may impact. However, a risk manager who is able to put all its potentially applicable carriers on notice of litigation will be the most success-

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a true understanding of your coverage under a particular policy is to obtain a copy of the

or by way of an indemnification clause of a contract. Your ability to spread and transfer risk will reduce or eliminate your company's liability.

## Understand Insurer's Position

After you have tendered your claim for coverage to your insurer(s), you will likely receive their written coverage position in response. A denial or reservation of rights letter should be scrutinized. As the insured, you should have a clear understanding of the insurer's position. While you might be satisfied at first because the insurer has agreed to defend you, if they have reserved their rights, you should understand how that may affect your company in the future. This is another juncture where the insight of coverage counsel can prove highly beneficial.

## Stay Involved

A risk manager who has the proper team to evaluate and respond to an insurer's coverage position will be better prepared to hold the insurer accountable to its obligations. It is equally important to understand your insurer's position throughout the course of the litigation. If at any time the insurer issues a subsequent coverage letter, the same level of scrutiny should be taken. Diligence by a risk manager during litigation requires continued dialogue with both your defense attorney and the insurance company so that you have a working understanding of the litigation as well as any and all potential risk that may fall on your company.

While it may not be possible in every scenario to eliminate risk, having the proper policies, procedures and team in place will assist you in your role as risk manager through all stages of litigation. By taking these steps, you will be able to manage and transfer risk successfully. ■

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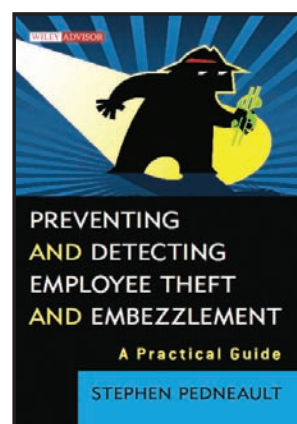
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# BUSINESS



# LITIGATION

## Federal Litigation Involving LLCs Can Be Troublesome

One problem is determining identities of company's owners

By **FRANCES CODD SLUSARZ**

In the 2<sup>nd</sup> Circuit, the citizenship of a limited liability company for diversity jurisdiction purposes depends upon the members of the LLC, rather than an analysis of the LLC's principal place of business and state of organization.

This is counter-intuitive, and can undermine the purpose of diversity jurisdiction – leveling the playing field for out-of-state litigants by providing access to the federal court as a neutral forum. Nevertheless, the LLC that plans ahead can avoid litigating in a federal court by destroying diversity *ex ante*, if doing so is in its best interest.

### Civil Procedure Class

Federal courts are courts of limited jurisdiction and the laws conferring jurisdiction are strictly construed *against* finding jurisdiction. The district courts have original jurisdiction over controversies between citizens of different states where the amount in controversy exceeds \$75,000, and where there is complete diversity, meaning that no plaintiff and no defendant are citizens of the same state.

Unlike a corporation, which is a citizen of both the state where it is organized and the state of its principal place of business, a limited liability company is a citizen of the states in which its members are citizens. This is an unintended consequence of *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), a case decided by the U.S. Supreme Court in 1990, which held that “an artificial legal entity other than a corporation does not have a state of incorporation or ‘principal place of business.’”

*Carden*, however, was decided before most states, including Connecticut, passed laws authorizing limited liability companies, so the consequence to this new business entity was not appreciated or even contemplated.

Nevertheless, the *Carden* legacy lives on: The rule that the citizenship of a limited liability company is determined by the citizenship of its mem-

bers was adopted by the 2<sup>nd</sup> Circuit in 2000. Some districts around the country apply the corporation test for citizenship to limited liability companies, but all circuits that have ruled on this point adopt the citizenship of members rule.

### Practical Problems

In practice, there are many problems with the member citizenship rule.

Foremost among these is the difficulty of determining the identities of an LLC's members *before* bringing a lawsuit. While most, if not all, states' business filings are searchable online, the identities of the LLC's members – like a corporation's shareholders – are not public record.

A plaintiff can only find out the identities of members in discovery which, necessarily, takes place after filing a complaint. Since a plaintiff cannot remove to federal court, the plaintiff bringing a lawsuit against an LLC defendant where diversity jurisdiction may exist has two choices. The plaintiff can file the complaint in state court and hope the defendant removes, or the plaintiff can file the complaint in the district court and hope the defendant does not seek remand.

The latter option carries with it the added risk that jurisdiction may be found lacking after trial, since subject matter jurisdiction is not waivable.

The defendant sued by an LLC has a similar dilemma. It has to file a notice of removal with little information other than that what is written in the complaint. Complaints often state where a business entity is organized, but they rarely identify the citizenship of LLC members. Further, it is not sufficient to state a parties' citizenship upon information and belief: A notice of removal has to be based upon the actual citizenship of the parties.

This leaves the defendant with a similar dilemma: It can file a notice of removal within 30 days after receipt of the complaint based on incomplete information and hope neither the plaintiff nor the court protests, or it can serve discovery first and remove within 30 days after receipt of

the pleading or other paper from which it can first be ascertained that the case is removable. If the defendant takes the risk of filing with incomplete information, the district court may assess fees and costs against it.

If the defendant takes the risk of taking discovery first, it must bear in mind the one-year sunset of the right to remove in diversity cases. Also, because the start of the 30-day removal period is less clear cut, the defendant must be diligent in its review of documents for facts concerning the citizenship of the LLCs members to ensure that its notice of removal is timely.

One final option in Connecticut is for either the plaintiff or defendant to file a bill of discovery action in state court, if it can show that the discovery sought relates to a claim or defense in a pending or potential lawsuit. It is unclear, however, that jurisdictional discovery would qualify, and the bill of discovery action would not stop the clock for filing a notice of removal.

### Litigation Planning

An LLC wishing to avoid diversity jurisdiction can frustrate complete diversity by organizing a corporation in a non-diverse state and transferring a membership interest to the non-diverse corporation. This is permissible under



Frances Codd Slusarz

Connecticut law, so an out-of-state LLC wishing to avoid federal jurisdiction can organize a Connecticut corporation to frustrate complete diversity. Similarly, there is nothing in Connecticut law to prevent a Connecticut LLC from organizing a corporation in another state to own an interest in it.

Since diversity jurisdiction is determined based on the facts as they exist at the time the action is commenced, the transfer to a non-diverse corporation has to take place beforehand. Thus, an LLC that wishes to stay in state court has to plan ahead. Further, the LLC has to consider all other ramifications of such a transfer, such as tax and regulatory issues, which are outside the scope of this article.

It is possible that the party opponent may seek to have the non-diverse LLC disregarded as a sham member, but there is no legal precedent for such a determination. There is no threshold membership interest before the member is considered in the diversity analysis, so the only litigation consideration is the requirement that the transfer occur before the lawsuit begins.

Another possibility in litigation planning is to transfer a membership interest away from an existing non-diverse member so that the LLC can remove or file in the district court. This is, of course, rife with complexity because the non-diverse member is not likely just to go gently into that good night.

Unless the remaining circuit courts that have yet to rule on the issue of determining the citizenship of LLCs resoundingly adopt the corporate citizenship rule, it is unlikely that the member citizenship rule will change in the foreseeable future. For the strategically thinking LLC, however, the opportunity exists to adapt its membership rolls to litigate in the forum of its choice. ■

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## Litigation On The Mark

Patent owners should diligently monitor portfolios to avoid lawsuits

By **MICHAEL J. RYE**  
and **CHAD A. DEVER**

The Patent Act includes several sections that govern marking of articles with a patent number. See 35 U.S.C. §§ 154(d), 287, and 292. While there is no requirement to mark products covered by a patent or application, there are certain benefits to marking.

Marking with an issued patent number maximizes the period during which damages may be recovered.

An infringer is liable for patent damages—a reasonable royalty or loss profits—starting from the date it received notice of infringement, such as when a product is marked with a patent number. The damages period begins on the patent issue date if products are continuously marked from that date. In the absence of marking, the

damages period begins on the date the infringer receives actual notice of the patent.

Marking with patent pending for an application has no legal effect, but puts others on notice of the pending application.

Patent marking may also have some commercial appeal by promoting the ingenuity of the product.

The Patent Act also prohibits a person from suggesting a product is patented when it is not. Recent cases have dramatically increased the exposure for falsely marking a product. In view of these cases, patent owners should carefully monitor their marking practices. Further, it is worth re-evaluating the potential risks and benefits associated with patent marking.

### False Marking

The patent law expressly prohibits so-called

“false marking,” which includes marking “unpatented articles,” or falsely indicating that a patent is pending, with the intent to deceive the public. 35 U.S.C. § 292(a).

The false marking statute deputizes citizens as private attorneys general to enforce the marking statutes. Section 292 provides for *qui tam* (“who as well”) lawsuits by private individuals. Essentially anyone can bring a false marking lawsuit provided they are willing to split half of any proceeds with the federal government. *Stauffer v. Brooks Bros. Inc.*, — F.3d —, 2010 WL 3397419 (Fed. Cir. Aug. 31, 2010).

The two elements of a § 292 false marking claim are (1) marking an unpatented article and (2) intent to deceive the public. Recent cases have made these false marking lawsuits much more attractive to plaintiffs. First, the definition of an unpatented article was broadened. Second,

the potential damages available to a plaintiff was increased almost exponentially.

However, the courts have made clear that proof of the required intent to deceive will be a difficult hurdle for a plaintiff to overcome.

An “unpatented article” is an article that is not covered by at least one claim of each patent with which the article is marked. These include an article that was correctly marked but now is no longer covered by a patent. For example, the article may no longer be covered due to modifications made to the article. More recently, the courts have held that a patent owner may be liable for false marking if it continues to mark a product with a patent number after the patent has expired. *Pequignot v. Solo Cup Co.*, 608 F.3d 1356, 1361 (Fed. Cir. 2010).

## BUSINESS



## LITIGATION

# Obtaining Financial Information Gets Harder And Harder

Business litigants must know how to find paper, electronic records

By **STEPHEN PEDNEAULT**

After forming a limited liability company and working together for several years, one member alleges his partner has been diverting business and funds from the company for his own benefit. The partner has been solely responsible for most of the financial aspects of the entity, and has sole access to their accounting system and records. As the member asks questions of his partner, discussions that have never occurred until recently but should have been occurring all along, the partner becomes more and more defensive. Ultimately, their relationship breaks down, disrupting the normal course of their business.

One morning, the member attempts to access their business, only to find that the locks have been changed. Looking through the windows, the member can see that the computer traditionally sitting on his partner's desk is no longer there. After repeated attempts to connect with his partner, the member's only course of action is to contact an attorney and start legal action to preserve his interest in his company as well as obtain access to all the company records, including the accounting records.

The member starts contacting customers

to continue business as best as possible, only to learn that the customers have been recently contacted by his partner, trying to move the business over to a new entity that his partner started. This is the start of a financial disaster for the member, and unfortunately it has become all too common in this day and age.

Whether your case is similar to the one described, is within a matrimonial context, probate, bankruptcy, collection of a judgment, or any other type of matter, the logical start of the matter from a financial aspect is to seek access to any and all financial information pertaining to the entities and individuals involved. Once complete and accurate financial information has been produced, which in this day and age is close to an anomaly, one could independently and objectively determine what happened as well as use the information for other aspects of resolving the matter, such as placing values on businesses, tracing what happened to assets, and determining amounts involved.

### Fabricated Rationalizations

Gaining access to complete and accurate financial information is likely a main determinant in the outcome of the matter. In my experience,

two challenges will exist. The first resides with opposing parties who choose not to provide full and complete access to the requested information, and/or don't produce information in a timely fashion. Delays and fabricated rationalizations as

to why the information cannot be located, generated, made available or otherwise produced has become commonplace, and even working through legal processes up through obtaining court orders, one may never gain access to the much needed financial information that would reveal what actually occurred.

Traditionally, most businesses maintained their bookkeeping and accounting records within their company, sometimes maintained by an outside bookkeeping firm or at their accountant's office. Records for the most part today are computerized, in many cases using QuickBooks in smaller entities, with paper copies of supporting financial records maintained in their files. Although there has been movement toward paperless accounting environments, the movement has been slow, and very few finance departments are truly paperless.

For the majority of businesses, customer sales invoices, shippers, receivers, packing lists, statements, vendor invoices, purchase orders, credit memos, store receipts, bank statements and other



Stephen Pedneault

For example, an individual or business mails a vendor a physical check. The vendor utilizes remote deposit capture, a process whereby deposits are completed leaving your desk. The deposited items are scanned and the deposit is completed electronically. The vendor then destroys the deposit items (the checks received). What occurred is each deposit item (check received) was converted to an electronic withdrawal by the vendor. No cancelled check images will ever exist for the companies who issued the physical checks, and requesting images for all transactions will produce no check images for these transactions.

### Locating Accounting Files

Another issue is physically identifying where the accounting records reside. Many accounting systems are now being utilized via the Internet, allowing user access from anywhere simply by logging in through the Internet. Where the actual company accounting system files reside may be anyone's guess. They could be located on a server right in town, within the state, across the country or around the world.

Packages like QuickBooks and several of the payroll providers currently offer "cloud computing" systems with Internet access. Placing the company's most valuable assets (accounting, customers, sales, vendors, employees, and other intellectual data) on a server controlled, maintained and supported by some third party somewhere else in the world may not make sense to me, but I understand the need for access and why companies are doing it. Locating the files to obtain an electronic copy may become a challenge.

A third issue involves technology, and access to banking and financial data through non-traditional means, such as through Blackberrys and other wireless devices. Here, too, locating

**The accounting landscape is changing, and knowing what to request and where to request it will become more challenging.**

supporting financial documents are still being received and maintained on paper. Some have begun scanning these documents and only maintaining them electronically, but not many based on my experience. Great news if, in fact, they are scanned, in that all of the scanned images of every supporting document *should* (*I said should*) be made available when requested, and there is less likelihood that a "fire" or "flood" will permanently prevent them from being produced.

A real issue to consider is where and how financial records are being maintained for the targeted organization and individual. The accounting landscape is changing, and knowing what to request and where to request it will become more challenging. The nature of the financial information and supporting documentation is changing, replacing traditional paper documents, such as cancelled check images, with electronic counterparts, like electronic withdrawals (i.e. check truncation and ACH conversion).

files and electronic evidence to support unauthorized access and activity via wireless devices will be an issue and a challenge.

How successful you will be in obtaining complete production of accounting, tax and other financial information needed to resolve your matters will be largely dependent on what you request and where you request it. My recommendation is to spend the time up front learning as much about the targeted organization's or individual's accounting systems and financial records as possible. Think about all of the forms (paper and electronic) the information sought could be maintained, all the places the data could be stored, and all the means in which transactions could have been completed (transmitted) and accounts could have been accessed or transacted. The investment made early in the process should allow you to be as specific as possible within your requests and subpoenas to cover all the information sought (electronic and paper) wherever it may reside. ■

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Section 292 states that anyone who falsely marks “shall be fined not more than \$500 for every such offense.” For a century, the false marking statute has been interpreted to impose a single fine for continuous false marking. *London v. Everett H. Dunbar Corp.*, 179 F. 506 (1st Cir. 1910). That is, the “offense” was the decision to falsely mark an article rather than each instance of the falsely marked article.



Michael J. Rye

The \$500 fine was not much of a deterrent to patent owners nor much of an incentive to *qui tam* plaintiffs (who would pocket only \$250 with half going to the federal government).

In 2009, the Federal Circuit held in *Forest Group, Inc. v. Bon Tool Co.* that § 292 imposed a maximum fine of \$500 per article. The court held that § 292 had not been re-evaluated after the 1952 amendments to the false marking statute and the rest of the Patent Act.

First, the statutory fine at issue in *London* was a minimum fine of \$100. Because the fine was a minimum, there would be a penalty of \$100 for each mismarked article. The 1<sup>st</sup> Circuit concluded that “[i]t can hardly have been the intent of Congress that penalties should accumulate as fast as a printing press or stamping machine might operate.”

In 1952, Congress changed the \$100 minimum fine to a maximum fine of \$500 with the explanation that courts had been interpreting the \$100 as a maximum fine.

The *Forest Group* court held that both the statutory language and the underlying policy rationale supporting the *London* court’s interpretation changed after the 1952 amendments.

The *Forest Group* court further held that the policy considerations required that the fine act as a deterrent against false marking and an incentive for *qui tam* plaintiffs to bring suit.

Interpreting § 292 to impose a single \$500 fine for false marking on many occasions “would eviscerate the statute.” The Federal Circuit also held that the amount of the fine is determined at the discretion of the district court: “In the case of inexpensive mass-produced articles, a court has the discretion to determine that a fraction of a penny per article is a proper penalty.”

*Forest Group* did not provide any guidance on how a district court should exercise this discretion.

The change from \$500 for a continuous marking offense to \$500 per article obviously provides a huge incentive to bring false marking suits. In *Solo Cup*, the plaintiff accused Solo Cup of falsely marking at least 21,757,893,672 articles, and sought an award of \$500 per article, one half of which would be shared with the United States. The Federal Circuit noted: “Incidentally, such an award to the United States, of approximately \$5.4 trillion, would be sufficient to pay back 42% of

the country’s total national debt.” *Solo Cup*, 608 F.3d at 1359 n.1.

**Intent To Deceive**

In *Solo Cup*, the plaintiff, a patent attorney, brought a false marking case against the Solo Cup Company for marking lids, used with plastic and paper cups, with patents that had expired. The patents had covered the lids prior to their expiration.

The court found that once the patents expired, the lids became “unpatented articles” and subject to the false marking statute. However, the Federal Circuit held the company’s improper marking was not done “for the purpose of deceiving the public.”

Solo had relied on an attorney’s advice (erroneous, as it turned out) that continuing to mark with an expired patent was not false marking. The attorney did caution that the patent number should be removed, if possible.

Shortly thereafter, Solo developed a policy under which it would eliminate marking of expired patents only when mold cavities needed to be replaced due to wear or damage. Because the molds can last many years, Solo continued to use molds that imprinted the expired patent numbers.

Solo’s true intent was not to deceive but instead to reduce the cost and burden of replacing the mold cavities. Given Solo’s good faith, the Federal Circuit affirmed the district court’s dismissal on summary judgment of no violation of the false marking statute.

**Conclusion**

Despite the high standard for proving the intent to deceive element of a false marking claim,

we expect to see cases filed at a higher frequency.

Patent owners should monitor their patent portfolios for patent expiration dates and patents that have lapsed due to failure to pay maintenance fees. Patent owners also should review whether a product remains covered by a particular patent after any changes or modifications to the product. And they should ensure there is a current, updated list of active patent numbers whenever replacement molds are ordered.

Patent owners should exercise vigilance knowing that a successful false marking suit could result in a windfall for the plaintiff. Finally, patent owners should consider whether the expected benefit of an increased damages period outweighs the risk of false marking suits. ■

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