

RECENT BUSINESS LAW CASES OUT OF WISCONSIN & DELAWARE

November 16, 2016

Nathan J. Neuberger

414-298-8100

nneuberger@reinhartlaw.com

Reinhart Boerner Van Deuren s.c.

1000 North Water Street, Suite 1700, Milwaukee, WI 53202

www.reinhartlaw.com



Nathan J. Neuberger is a shareholder in Reinhart's Corporate Law Practice and a member of the firm's Private Equity, Venture Capital and Corporate Finance group. Nate works with clients to facilitate a wide range of corporate sale and acquisition transactions including leveraged buyouts, strategic mergers and acquisitions, and recapitalizations.

Nate represents a range of private equity sponsors located in Illinois, Wisconsin and other states, and specializes in middle-market deals with transaction values between \$10 and \$250 million. In addition, he works closely with clients on a variety of other business matters including venture capital investments, startups and capital raises, corporate governance issues, and senior and mezzanine finance.

Webinar Housekeeping

Viewing the Slides

Today's slide presentation will advance automatically in synch with the live presentation.

Handouts

If you would like a hard copy of the slide presentation, a printable version was e-mailed to you yesterday.

Adjusting Your Volume

Volume can be adjusted using the volume control on your computer or phone.

Asking Questions

Throughout the webinar, type your questions using the "QUESTIONS" section in the webinar panel. We will answer as many questions as possible during our Q & A session at the end of the presentation.

Information

This webinar provides general information about legal issues. It should not be construed as legal advice or a legal opinion. Attendees should seek legal counsel concerning specific factual situations confronting them.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

What is Hydraulic Fracturing ("Fracking")?

What is Hydraulic Fracturing ("Fracking")?

- Well stimulation technique

What is Hydraulic Fracturing ("Fracking")?

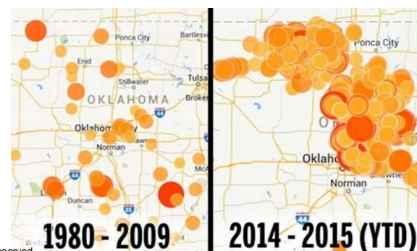
- Well stimulation technique
- New access to fossil fuels

What is Hydraulic Fracturing ("Fracking")?

- Well stimulation technique
- New access to fossil fuels
- Shales

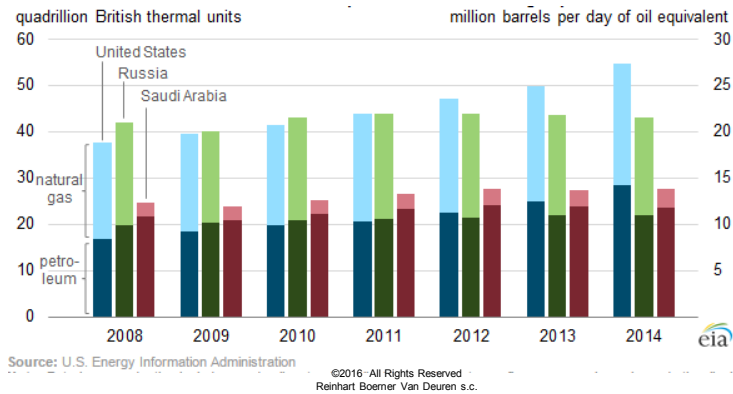
What is Hydraulic Fracturing ("Fracking")?

- Well stimulation technique
- New access to fossil fuels
- Shales
- Controversial

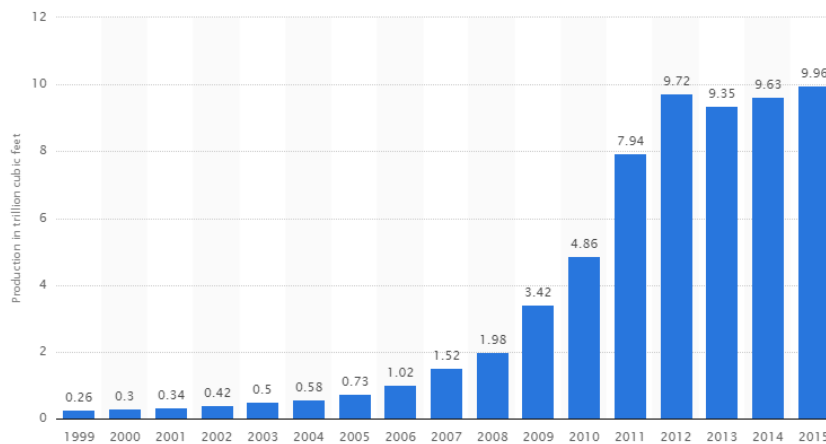


US: World's top producer of petroleum and natural gas in 2014

"....directly attributed to its success at exploiting tight oil formations and shale gas..."



U.S. shale gas production from 1999 to 2015 (in trillion cubic feet)

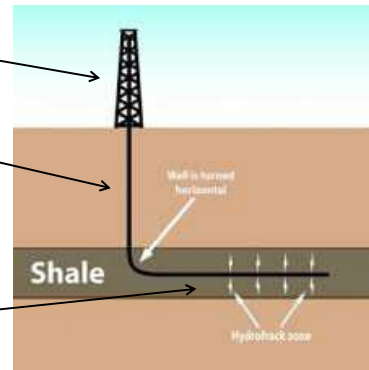


What is Hydraulic Fracturing ("Fracking")?

Well head

Vertical wellbore
(50–300 ft.)

Horizontal wellbore
(1,500–5,000 ft.)



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.



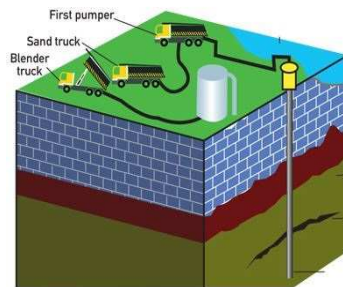
©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Fracturing fluid pumped into well bore at high pressure

Water (90%)

Sand (9.5%)

Chemical additives (0.5%)



Source: www.belalipakpe.com



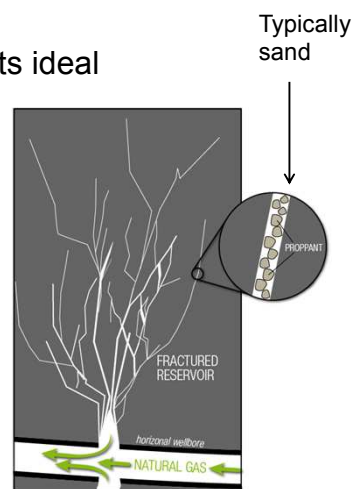
©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Sand

- High-purity quartz sand; from sandstone
- Crush resistant; very round
- Western Wisconsin sand exhibits ideal characteristics



Source: www7.nau.edu



Source: igs.indiana.edu

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Wisconsin far and away leading producer of frack sand in 2014

Nearly 50% of U.S. production in 2014

State	Preliminary frac sand production estimates for 2014 (rounded to nearest 10 ⁶ metric tons)*	Percentage share of estimated U.S. frac sand production (rounded to nearest whole percent)**
Wisconsin	24	44
Illinois	8	15
Texas	8	15
Minnesota	5	9
Arkansas	2	4
Iowa	2	4
Nebraska	2	4
Arizona	1	2
Michigan	1	2
Missouri	1	2
Total	54	101

Source: rockproducts.com

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.



But expansion has slowed as crude oil prices have declined

LEADER-TELEGRAM

Serving Eau Claire, Wisconsin, and surrounding communities

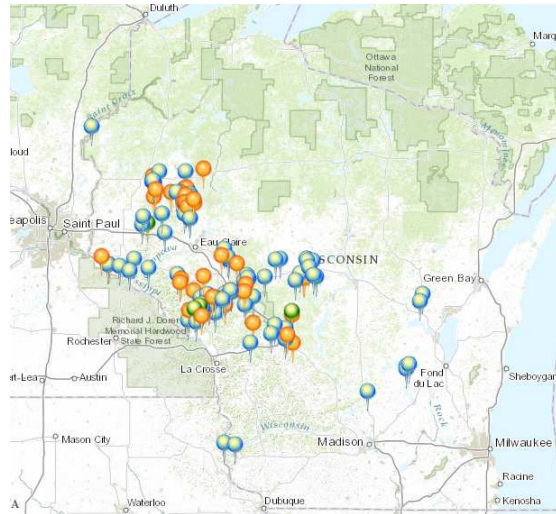
Silent sandbox: Once booming frac sand industry continues major downturn

A dramatic downturn in the sand mining sector continues into spring, when in recent years business would be loud and booming at west-central Wisconsin mining operations

posted May 8, 2016 12:00 a.m. (CDT)

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Current Wisconsin frack sand mining operations



Source: dnr.wi.gov

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

84 active facilities:

- Mines
- Processing
- Loading

Minerals Development v. Hunton & Williams, LLP Court of Appeals of Wisconsin, February 26, 2015

- Wildcat owned a 300-acre frac sand mine in Monroe County (near Tomah)

Wildcat
(mine)

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

- Wildcat owned a 300-acre frac sand mine in Monroe County (near Tomah)
- Minerals Development Company ("MDC") contracted with Wildcat to purchase "Ottawa White" frac sand

Wildcat
(mine)



MDC

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

- Wildcat owned a 300-acre frac sand mine in Monroe County (near Tomah)
- Minerals Development Company ("MDC") contracted with Wildcat to purchase "Ottawa White" frac sand
 - ❑ Contract restricted Wildcat's ability to contract with other buyers

Wildcat
(mine)



MDC

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

- Wildcat owned a 300-acre frac sand mine in Monroe County (near Tomah)
- Minerals Development Company ("MDC") contracted with Wildcat to purchase "Ottawa White" frac sand
- MDC enters into Exclusive Supply Agreement with Superior Silica Sands in 2009



Wildcat
(mine)



MDC



Superior
Silica



Oil and
gas
industry

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

Exclusive Supply Agreement:

- Superior Silica must purchase its "requirements" for Ottawa White from MDC

Wildcat
(mine)



MDC



Superior
Silica



Oil and
gas
industry

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

Exclusive Supply Agreement:

- Superior Silica must purchase its "requirements" for Ottawa White from MDC
- Superior Silica: \$4 million deposit for 530,000 tons of sand

Wildcat
(mine)



MDC



Superior
Silica



Oil and
gas
industry

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

Exclusive Supply Agreement:

- Superior Silica must purchase its "requirements" for Ottawa White from MDC
- Superior Silica: \$4 million deposit for 530,000 tons of sand
- Termination provisions—numerous outs

Wildcat
(mine)



MDC



Superior
Silica



Oil and
gas
industry

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

Exclusive Supply Agreement:

- Superior Silica must purchase its "requirements" for Ottawa White from MDC
- Super Silica: \$4 million deposit for 530,000 tons of sand
- Termination provisions—numerous outs
- August 1, 2009—Super Silica notifies MDC that it is terminating Exclusive Supply Agreement

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Wildcat
(mine)



MDC



Superior
Silica



Oil and
gas
industry

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

Exclusive Supply Agreement:

- Superior Silica must purchase its "requirements" for Ottawa White from MDC
- Super Silica: \$4 million deposit for 530,000 tons of sand
- Termination provisions—numerous outs
- August 1, 2009—Super Silica notifies MDC that it is terminating Exclusive Supply Agreement
- Superior Silica demands refund of \$3.7 million of deposit

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Wildcat
(mine)



MDC



Superior
Silica



Oil and
gas
industry

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

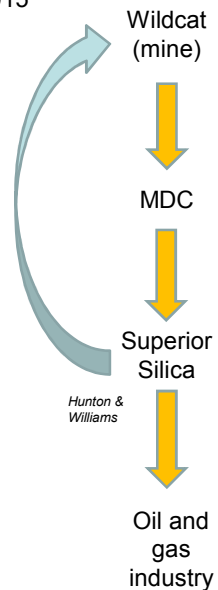
- Superior Silica represented by Hunton & Williams LLP



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

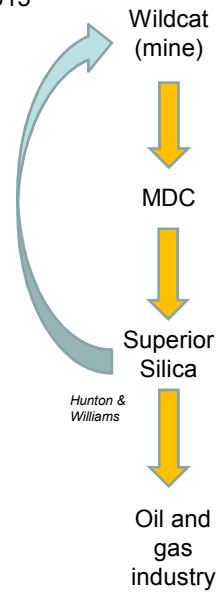
- Superior Silica represented by Hunton & Williams LLP
- Hunton reaches out to Wildcat
 - Wants confirmation of no restrictive covenants
 - Proposes direct contract between Superior and Wildcat



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

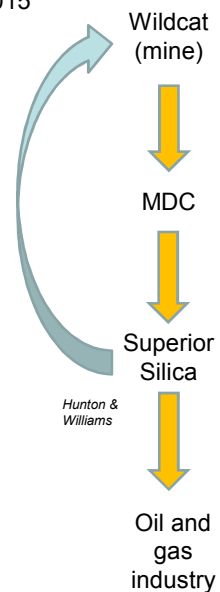
- Superior Silica represented by Hunton & Williams LLP
- Hunton reaches out to Wildcat
 - Wants confirmation of no restrictive covenants
 - Proposes direct contract between Superior and Wildcat
- August 19, 2009: Wildcat and Superior sign agreement



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

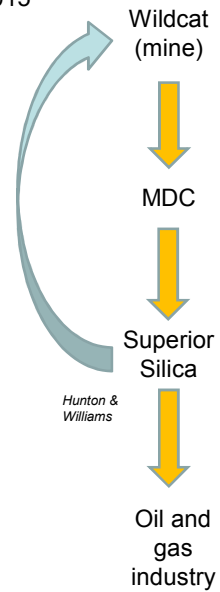
- Early 2010: MDC commences arbitration with Superior Silica



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

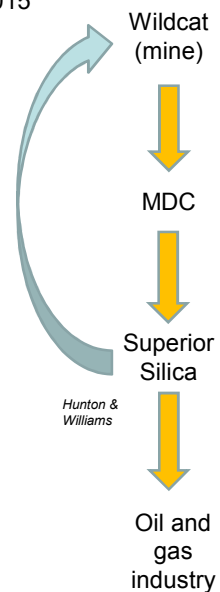
- Early 2010: MDC commences arbitration with Superior Silica
- July 30, 2010: MDC sues Hunton & Williams in Monroe County



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

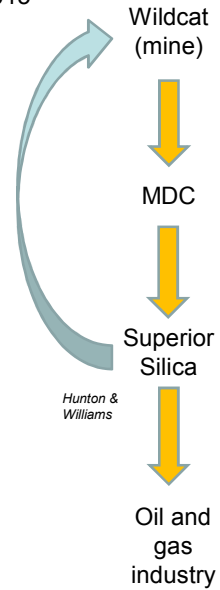
- Early 2010: MDC commences arbitration with Superior Silica
- July 30, 2010: MDC sues Hunton & Williams in Monroe County
 - Hunton's "strong arm tactics" convinced Wildcat to terminate its MDC contract



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

- Early 2010: MDC commences arbitration with Superior Silica
- July 30, 2010: MDC sues Hunton & Williams in Monroe County
 - Hunton's "strong arm tactics" convinced Wildcat to terminate its MDC contract
 - Tortious interference with contract

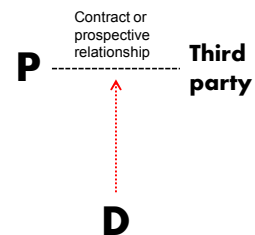


©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

Tortious Interference with Contract/Relationship (WI):

1. P had current or prospective relationship with third party ✓
2. D interfered with that relationship ✓
3. Interference was intentional ✓
4. D's interference caused P's damages ✓
5. D not "justified or privileged" to interfere???

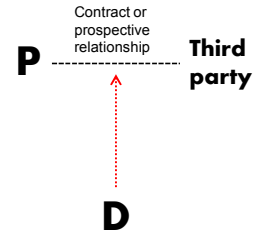


©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

Tortious Interference with Contract/Relationship (WI):

1. P had current or prospective relationship with third party ✓
2. D interfered with that relationship ✓
3. Interference was intentional ✓
4. D's interference caused P's damages ✓
5. D not "justified or privileged" to interfere???

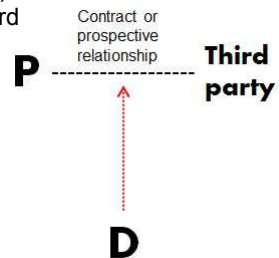


©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

Tortious Interference with Contract/Relationship (WI):

1. P had current or prospective relationship with third party ✓
2. D interfered with that relationship ✓
3. Interference was intentional ✓
4. D's interference caused P's damages ✓
5. D not "justified or privileged" to interfere???

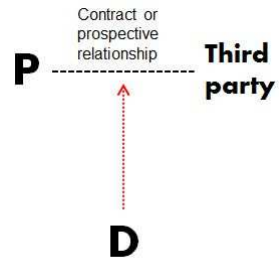


When does "competition"
become a tort?

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

- When are you not "justified or privileged" to interfere?
- Depends on whether P already has a contract in place with third party

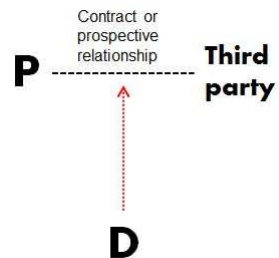


©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

If P does not have a contract with the third party:

- D has the privilege to interfere with the relationship in connection with competition

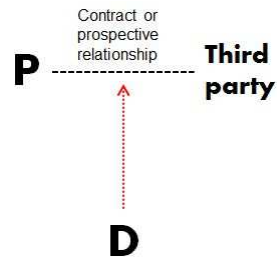


©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

If P does not have a contract with the third party:

- D has the privilege to interfere with the relationship in connection with competition
- However, privilege to compete is not absolute
 - "Independently tortious or wrongful"
 - Breach of fiduciary duty
 - Misuse of confidential information
 - Fraud
 - Misrepresentation
 - Intimidation
 - Malicious intent
 - Bad faith

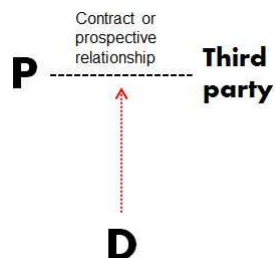


©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

If a contract is in place between P and third party:

- "Competition" is not privileged

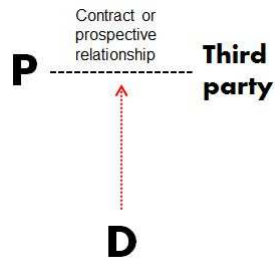


©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

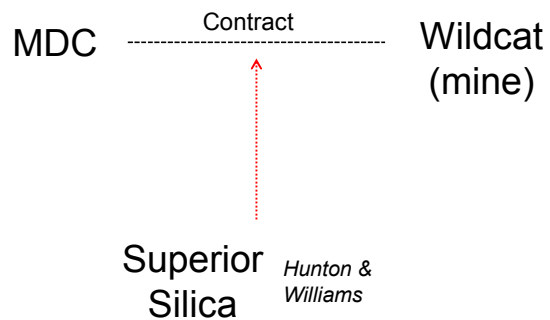
If a contract is in place between P and third party:

- "Competition" is not privileged
- D can interfere with P's contract only in very limited circumstances
 - Protecting proprietary information
 - Protecting a legal right
 - Exercising a right under a contract
 - Stating "truthful" facts
 - Good faith belief in right to interfere



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

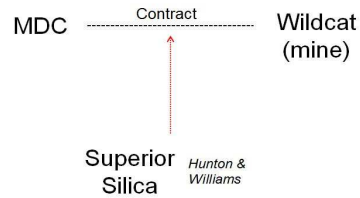
Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

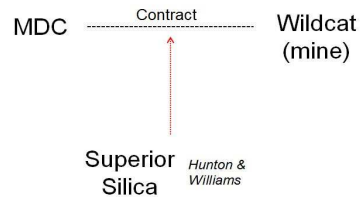
- October 2010: Arbitration is settled
 - Superior to pay MDC \$500,000
 - MDC to release all claims with prejudice, except claim against Hunton & Williams



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

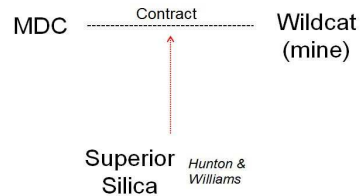
- October 2010: Arbitration is settled
 - Superior to pay MDC \$500,000
 - MDC to release all claims with prejudice, except claim against Hunton & Williams
- Superior pays the cash



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

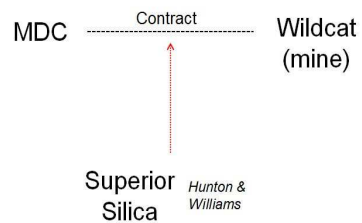
- October 2010: Arbitration is settled
 - Superior to pay MDC \$500,000
 - MDC to release all claims with prejudice, except claim against Hunton & Williams
- Superior pays the cash
- MDC does not release claims against Superior → adds to claims in litigation



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

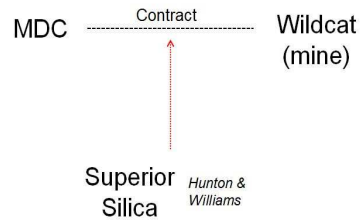
- June 2012: Hunton motions for sanctions



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

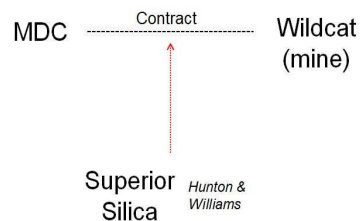
- June 2012: Hunton motions for sanctions
- Jan 2013: State court dismisses MDC's claims with prejudice



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

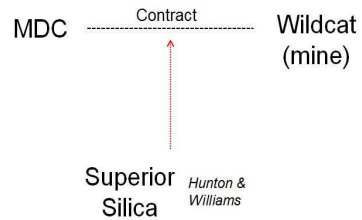
- June 2012: Hunton motions for sanctions
- Jan 2013: State court dismisses MDC's claims with prejudice
- August 2013: Court awards Superior sanctions against MDC and its attorneys



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

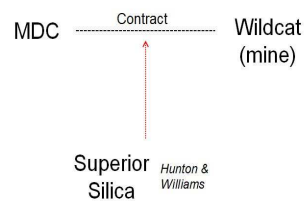
- June 2012: Superior motions for sanctions
- Jan 2013: State court dismisses MDC's claims with prejudice
- August 2013: Court awards Superior sanctions against MDC and its attorneys
- MDC appeals



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

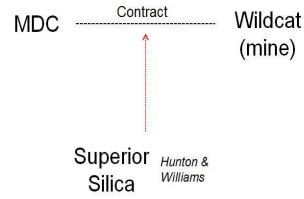
- Rationale for dismissing Hunton: Hunton & Williams had "qualified immunity"



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

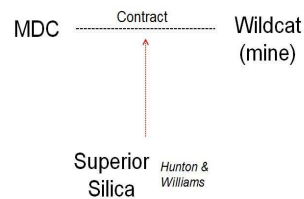
- Rationale for dismissing Hunton: Hunton & Williams had "qualified immunity"
- Qualified immunity for attorneys (WI):
Attorneys not liable to third parties



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

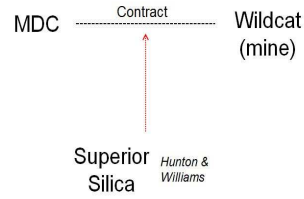
- Rationale for dismissing Hunton: Hunton & Williams had "qualified immunity"
- Qualified immunity for attorneys (WI):
Attorneys not liable to third parties
 - Act within scope of A/C relationship



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

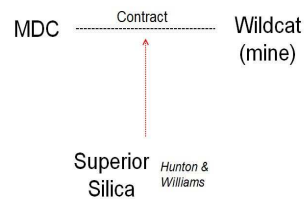
- Rationale for dismissing Hunton: Hunton & Williams had "qualified immunity"
- Qualified immunity for attorneys (WI):
Attorneys not liable to third parties
 - Act within scope of A/C relationship
 - Exceptions:
 - Fraudulent and malicious acts
 - Induce client to commit unlawful act



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

- Rationale for dismissing Hunton: Hunton & Williams had "qualified immunity"
- Qualified immunity for attorneys (WI):
Attorneys not liable to third parties
 - Act within scope of A/C relationship
 - Exceptions:
 - Fraudulent and malicious acts
 - Induce client to commit unlawful act
 - Inducing client to breach contract or fiduciary duty is protected



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

Rationale for sanctions:

Wisconsin Statutes section 802.05: By filing a paper with the court, an attorney is certifying:

- **No improper purpose (harass; needlessly increase cost of litigation)**
- Claims are warranted by law
- Alleged facts have support

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

Rationale for sanctions:

Wisconsin Statutes section 802.05: By filing a paper with the court, an attorney is certifying:

- **No improper purpose (harass; needlessly increase cost of litigation)**
- Claims are warranted by law
- Alleged facts have support

If violated → court may impose sanctions "upon the attorneys, law firms, or parties..." (Wisconsin Statutes section 802.05(3))

- Directives of a nonmonetary nature
- Penalty to the court
- Reasonable attorneys' fees and other expenses

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

Improper purposes:

- Ratchet up the pressure on Superior to settle arbitration

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

Improper purposes:

- Ratchet up the pressure on Superior to settle arbitration
- Kept the \$500,000 settlement while continuing the litigation

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

Improper purposes:

- Ratchet up the pressure on Superior to settle arbitration
- Kept the \$500,000 settlement while continuing the litigation
- Should have known Hunton had immunity

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Minerals Development v. Hunton & Williams, LLP
Court of Appeals of Wisconsin, February 26, 2015

Improper purposes:

- Ratchet up the pressure on Superior to settle arbitration
- Kept the \$500,000 settlement while continuing the litigation
- Should have known Hunton had immunity
- Needlessly increased the costs of litigation: failed to "have the good sense to pull the plug" after learning of defects in claims

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

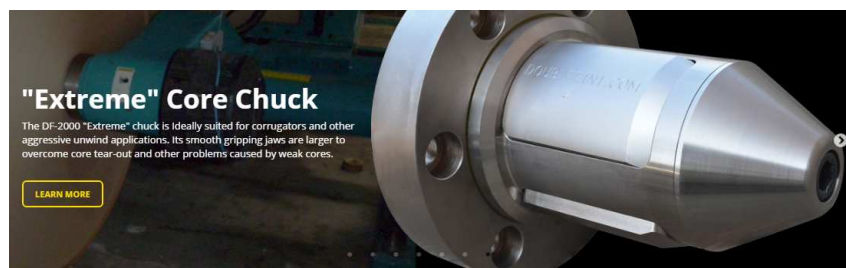
Prairie Capital
Del. Chancery Ct. 2015

- Prairie Capital: Chicago middle market private equity group

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- Prairie Capital: Chicago middle market private equity group
- Portfolio company: Double E Company
 - Accessories for web process manufacturing



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.



*Prairie Capital
hancery Ct. 2015*

Chicago middle market
oup
y: Double E Company
web process manufacturing



"Extreme" Core Chuck

The DF-2000 "Extreme" chuck is ideally suited for corrugators and other aggressive unwind applications. Its smooth gripping jaws are larger to overcome core tear-out and other problems caused by weak cores.

[LEARN MORE](#)

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.



*Prairie Capital
hancery Ct. 2015*

Chicago middle market
oup
y: Double E Company
web process manufacturing



"Extreme" Core Chuck

The DF-2000 "Extreme" chuck is ideally suited for corrugators and other aggressive unwind applications. Its smooth gripping jaws are larger to overcome core tear-out and other problems caused by weak cores.

[LEARN MORE](#)

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.



"Extreme" Core Chuck

The DF-2000 "Extreme" chuck is ideally suited for corrugators and other applications. Its smooth gripping jaws are larger to overcome core tear-out and other problems caused by weak cores.

[LEARN MORE](#)

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

*Prairie Capital
Del. Chancery Ct. 2015*

- 2011: Auction

Prairie Capital
Del. Chancery Ct. 2015

- 2011: Auction
- Feb 2012: Exclusive with Incline Equity Partners

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- 2011: Auction
- Feb 2012: Exclusive with Incline Equity Partners
 - \$27 million nonbinding bid

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- 2011: Auction
- Feb 2012: Exclusive with Incline Equity Partners
 - \$27 million nonbinding bid
 - Contingent on monthly sales goals

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- 2011: Auction
- Feb 2012: Exclusive with Incline Equity Partners
 - \$27 million nonbinding bid
 - Contingent on monthly sales goals
- Target March 2012 for closing

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- March 2012: Incline might walk

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- March 2012: Incline might walk
- March 2012 target sales = \$3.2 million

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- March 2012: Incline might walk
- March 2012 target sales = \$3.2 million
 - March 15 sales numbers = \$0.5 million 😬

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- March 2012: Incline might walk
- March 2012 target sales = \$3.2 million
 - March 15 sales numbers = \$0.5 million 😬
 - March 19 = \$1.1 million 😬

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- March 2012: Incline might walk
- March 2012 target sales = \$3.2 million
 - March 15 sales numbers = \$0.5 million 🤖
 - March 19 = \$1.1 million 😞
 - March 23 = \$1.5 million 🤖

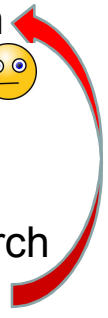
©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- March 2012: Incline might walk
- March 2012 target sales = \$3.2 million
 - March 15 sales numbers = \$0.5 million 🤖
 - March 19 = \$1.1 million 😞
 - March 23 = \$1.5 million 🤖
- April 2: Prairie informs Incline that March sales goals were met (\$3.2 million) ➡

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- March 2012: Incline might walk
- March 2012 target sales = \$3.2 million
 - March 15 sales numbers = \$0.5 million 🤔
 - March 19 = \$1.1 million 😞
 - March 23 = \$1.5 million 🙄
- April 2: Prairie informs Incline that March sales goals were met (\$3.2 million) 
- April 4: Transaction closes

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- June 2013: Incline asserts claims
 - \$650,000 of false shipments

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- June 2013: Incline asserts claims
 - \$650,000 of false shipments
- Sep 2014: Delaware Chancery Court
 - Indemnification claims under SPA

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- June 2013: Incline asserts claims
 - \$650,000 of false shipments
- Sep 2014: Delaware Chancery Court
 - Indemnification claims under SPA
 - Fraud claims
 - Representations in SPA
 - Extra-contractual statements

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

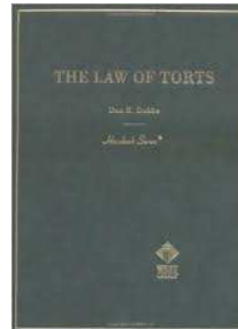
- June 2013: Incline asserts claims
 - \$650,000 of false shipments
- Sep 2014: Delaware Chancery Court
 - Indemnification claims under SPA
 - Fraud claims
 - Representations in SPA
 - Extra-contractual statements
- What benefit by proving fraud?

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

Fraud:

- (i) **a false representation**,
- (ii) the defendant's knowledge of or belief in its falsity or the defendant's reckless indifference to its truth,
- (iii) the defendant's intention to induce action based on the representation,
- (iv) reasonable reliance by the plaintiff on the representation, and
- (v) causally related damages.



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- Two types of "representations"
 - Express representations in SPA:

Section 4.6. Financial Statements. The Seller represents and warrants to the Purchaser that the Seller's financial statements as of December 31, 2015 fairly present, in all material respects, the financial condition and results of operations of the Seller as of such date and for the 12-month period then ended.

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

- Two types of "representations"
 - Express representations in SPA:

Section 4.6. Financial Statements. The Seller represents and warrants to the Purchaser that the Seller's financial statements as of December 31, 2015 fairly present, in all material respects, the financial condition and results of operations of the Seller as of such date and for the 12-month period then ended.

- Extra-contractual representations
 - Verbal statements and written materials
 - Revenue recognition policies
 - March 2012 revenue goal
 - Financial statements reflecting incorrect March 2012 sales

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

Court: Purchase Agreement precludes
reliance on extra-contractual reps → **no
fraud claim**

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

Court: Purchase Agreement precludes
reliance on extra-contractual reps → **no
fraud claim**

– "Exclusive representations" clause +

5.6. No Other Representations. The Buyer agrees that except for the representations and warranties expressly set forth in this Agreement, the Buyer disclaims reliance on any representations or warranties, express or implied, by or on behalf of any Company Party or their respective representatives.

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

Court: Purchase Agreement precludes
reliance on extra-contractual reps → **no
fraud claim**

– "Exclusive representations" clause +

5.6. No Other Representations. The Buyer agrees that except for the representations and warranties expressly set forth in this Agreement, the Buyer disclaims reliance on any representations or warranties, express or implied, by or on behalf of any Company Party or their respective representatives.

– Standard "integration clause"

9.3. Entire Agreement. This Agreement (including the exhibits and Schedules attached hereto) together with the Ancillary Agreements constitute the entire understanding and agreement of the parties hereto with respect to the transactions contemplated by this Agreement and the Ancillary Agreement and supersede any other agreements, whether written or oral, that

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital
Del. Chancery Ct. 2015

KEY POINT:

"Exclusive representations" clause

5.6. No Other Representations. The Buyer agrees that except for the representations and warranties expressly set forth in this Agreement, the Buyer disclaims reliance on any representations or warranties, express or implied, by or on behalf of any Company Party or their respective representatives.

Must be a statement from the
perspective of the buyer

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

FdG Logistics
Del. Chancery Ct. Feb 2016

- Mason Wells as buyer

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

FdG Logistics
Del. Chancery Ct. Feb 2016

- Mason Wells as buyer
- Disclaimer given by seller

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

FdG Logistics
Del. Chancery Ct. Feb 2016

- Mason Wells as buyer
- Disclaimer given by seller
- Fraud claim based on extra-contractual representations allowed

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

FdG Logistics
Del. Chancery Ct. Feb 2016

- Mason Wells as buyer
- Disclaimer given by seller
- Fraud claim based on extra-contractual representations allowed
- \$1 million deductible/\$20 million cap

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital - FdG Logistics

Takeaways:

- Disclaimer by buyer

Prairie Capital - FdG Logistics

Takeaways:

- Disclaimer by buyer
- No magic words
 - Include non-"reliance"

Prairie Capital - FdG Logistics

Takeaways:

- Disclaimer by buyer
- No magic words
 - Include non-"reliance"
- Tie in data room, CIMs, etc.

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital - FdG Logistics

Takeaways:

- Disclaimer by buyer
- No magic words
 - Include non-"reliance"
- Tie in data room, CIMs, etc.
- Fraud is broad ("equitable" fraud)

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital - FdG Logistics

"Fraud" means an actual and intentional fraud with respect to the making of a representation or warranty set forth in Section 3 or Section 4 (as applicable), provided, that, with respect to representations and warranties set forth in Section 3, such actual and intentional fraud shall only be deemed to exist if any of the individuals named in the definition of "Knowledge" below had actual knowledge (as opposed to imputed or constructive knowledge) that such representation or warranty set forth in Section 3, as qualified by the Disclosure Schedule, was actually breached when made, with the express intention that Buyer rely thereon to its detriment.

- Fraud is broad ("equitable" fraud)

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Prairie Capital - FdG Logistics

Takeaways:

- Disclaimer by buyer
- No magic words
 - Include non-"reliance"
- Tie in data room, CIMs, etc.
- Fraud is broad ("equitable" fraud)
- Not limited to M&A?

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

– Orthopoxviruses (smallpox)



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- Orthopoxviruses (smallpox)
- 20–60% mortality rate



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- Orthopoxviruses (smallpox)
- 20–60% mortality rate
- 300–500 million deaths during 20th Century



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- Orthopoxviruses (smallpox)
- 20–60% mortality rate
- 300–500 million deaths during 20th Century
- Eradicated in 1979



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- Orthopoxviruses (smallpox)
- 20–60% mortality rate
- 300–500 million deaths during 20th Century
- Eradicated in 1979
- Biological warfare

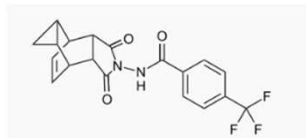


©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

SIGA:

- Tecovirimat—antiviral drug

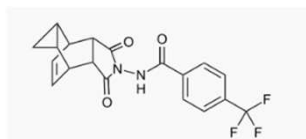


©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

SIGA:

- Tecovirimat—antiviral drug
- Prevents virus leaving cell

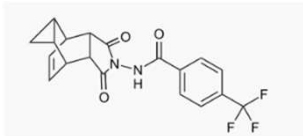


©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

SIGA:

- Tecovirimat—antiviral drug
- Prevents virus leaving cell
- Strategic Stockpile—Project BioShield Act of 2004

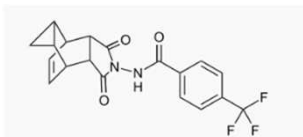


©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

SIGA:

- Tecovirimat—antiviral drug
- Prevents virus leaving cell
- Strategic Stockpile—Project BioShield Act of 2004
- SIGA's 2011 contract
 - 2 million courses to Strategic Stockpile
 - \$463 million
 - Additional options



©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- 2004: SIGA acquires ST-246 (Tecovirimat)

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- 2004: SIGA acquires ST-246 (Tecovirimat)
- 2005: SIGA has no money; lacks expertise

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- 2004: SIGA acquires ST-246 (Tecovirimat)
- 2005: SIGA has no money; lacks expertise
- Jan 2006: Non-Binding Term Sheet with PharmAthene
 - Pharm pays \$6 million license fee to SIGA
 - Additional milestone payment obligations (\$10 million)
 - Pharm pays 8–12% royalty on sales and 50% bonus on excess margins to US Government

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- March 2006: SIGA and PharmAthene explore merger

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- March 2006: SIGA and PharmAthene explore merger
- March 2006: PharmAthene provides \$3 million bridge under loan agreement

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- March 2006: SIGA and PharmAthene explore merger
- March 2006: PharmAthene provides \$3 million bridge under loan agreement

"Upon any termination of the Merger Term Sheet . . . , termination of the Definitive Agreement relating to the Merger, or if a Definitive Agreement is not executed . . . , SIGA and PharmAthene will negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [Non-Binding Term Sheet] . . . "

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

Things start to look up for SIGA:

- March 2006: \$5 million grant from NIAID

SIGA Technologies
Del. Supreme Ct. Dec. 2015

Things start to look up for SIGA:

- March 2006: \$5 million grant from NIAID
- July 2006: First successful human clinical trials

SIGA Technologies
Del. Supreme Ct. Dec. 2015

Things start to look up for SIGA:

- March 2006: \$5 million grant from NIAID
- July 2006: First successful human clinical trials
- Sep 2006: Positive feedback from CDC

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

Things start to look up for SIGA:

- March 2006: \$5 million grant from NIAID
- July 2006: First successful human clinical trials
- Sep 2006: Positive feedback from CDC
- SIGA—internal \$3–\$5 billion valuation

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

Chief Scientific Officer e-mail:

"With [these new grants] we could have gone all the way ourselves.
Instead we got sold into slave labor and if anything the [PharmAthene]
gang will drag us down"

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

Chief Scientific Officer e-mail:

"With [these new grants] we could have gone all the way ourselves.
Instead we got sold into slave labor and if anything the [PharmAthene]
gang will drag us down"

Oct 2006: SIGA's board terminates merger
discussions with PharmAthene

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

"Upon any termination of the Merger Term Sheet . . . , termination of the Definitive Agreement relating to the Merger, or if a Definitive Agreement is not executed . . . , SIGA and PharmAthene will negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [Non-Binding Term Sheet] . . . "

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

"Upon any termination of the Merger Term Sheet . . . , termination of the Definitive Agreement relating to the Merger, or if a Definitive Agreement is not executed . . . , SIGA and PharmAthene will negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [Non-Binding Term Sheet] . . . "

- Oct 2006: PharmAthene asks to sign proposed license agreement

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

"Upon any termination of the Merger Term Sheet . . . , termination of the Definitive Agreement relating to the Merger, or if a Definitive Agreement is not executed . . . , SIGA and PharmAthene will negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [Non-Binding Term Sheet] . . . "

- Oct 2006: PharmAthene asks to sign proposed license agreement
- Nov/Dec: SIGA rejects license agreement containing term sheet terms

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

"Upon any termination of the Merger Term Sheet . . . , termination of the Definitive Agreement relating to the Merger, or if a Definitive Agreement is not executed . . . , SIGA and PharmAthene will negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [Non-Binding Term Sheet] . . . "

- Oct 2006: PharmAthene asks to sign proposed license agreement
- Nov/Dec: SIGA rejects license agreement containing term sheet terms
- Dec 2006: PharmAthene sues

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- "Preliminary Agreement"

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- "Preliminary Agreement"
- Typically → "Reliance Damages"

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- "Preliminary Agreement"
- Typically → "Reliance Damages"
- Delaware Supreme Court → "Expectation Damages"

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- "Preliminary Agreement"
- Typically → "Reliance Damages"
- Delaware Supreme Court → "Expectation Damages"
- \$113 million damages award

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- Agreements to "negotiate in good faith"

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- Agreements to "negotiate in good faith"
- Delaware "expectation damages" outlier

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- Agreements to "negotiate in good faith"
- Delaware "expectation damages" outlier
- Binding agreement vs. nonbinding agreement
 - Term sheets and LOIs

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

- Agreements to "negotiate in good faith"
- Delaware "expectation damages" outlier
- Binding agreement vs. nonbinding agreement
 - Term sheets and LOIs
- Avoid "willful" behavior

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

Postlude:

- Sep 2014: SIGA files Chapter 11 Bankruptcy

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

Postlude:

- Sep 2014: SIGA files Chapter 11 Bankruptcy
- Dec 2015: Delaware Supreme Court affirms
→ \$205 million

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

Postlude:

- Sep 2014: SIGA files Chapter 11 Bankruptcy
- Dec 2015: Delaware Supreme Court affirms
→ \$205 million
- Chapter 11 Plan of Reorganization:
 - Pay PharmAthene in full, OR
 - PharmAthene gets all shares of SIGA
 - Other unsecured claims (\$3 million) paid in full

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

SIGA Technologies
Del. Supreme Ct. Dec. 2015

Postlude:

- Sep 2014: SIGA files Chapter 11 Bankruptcy
- Dec 2015: Delaware Supreme Court affirms
→ \$205 million
- Chapter 11 Plan of Reorganization:
 - Pay PharmAthene in full, OR
 - PharmAthene gets all shares of SIGA
 - Other unsecured claims (\$3 million) paid in full
- \$104 million of cash as of March 31, 2016

©2016 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Questions?



THANK YOU!