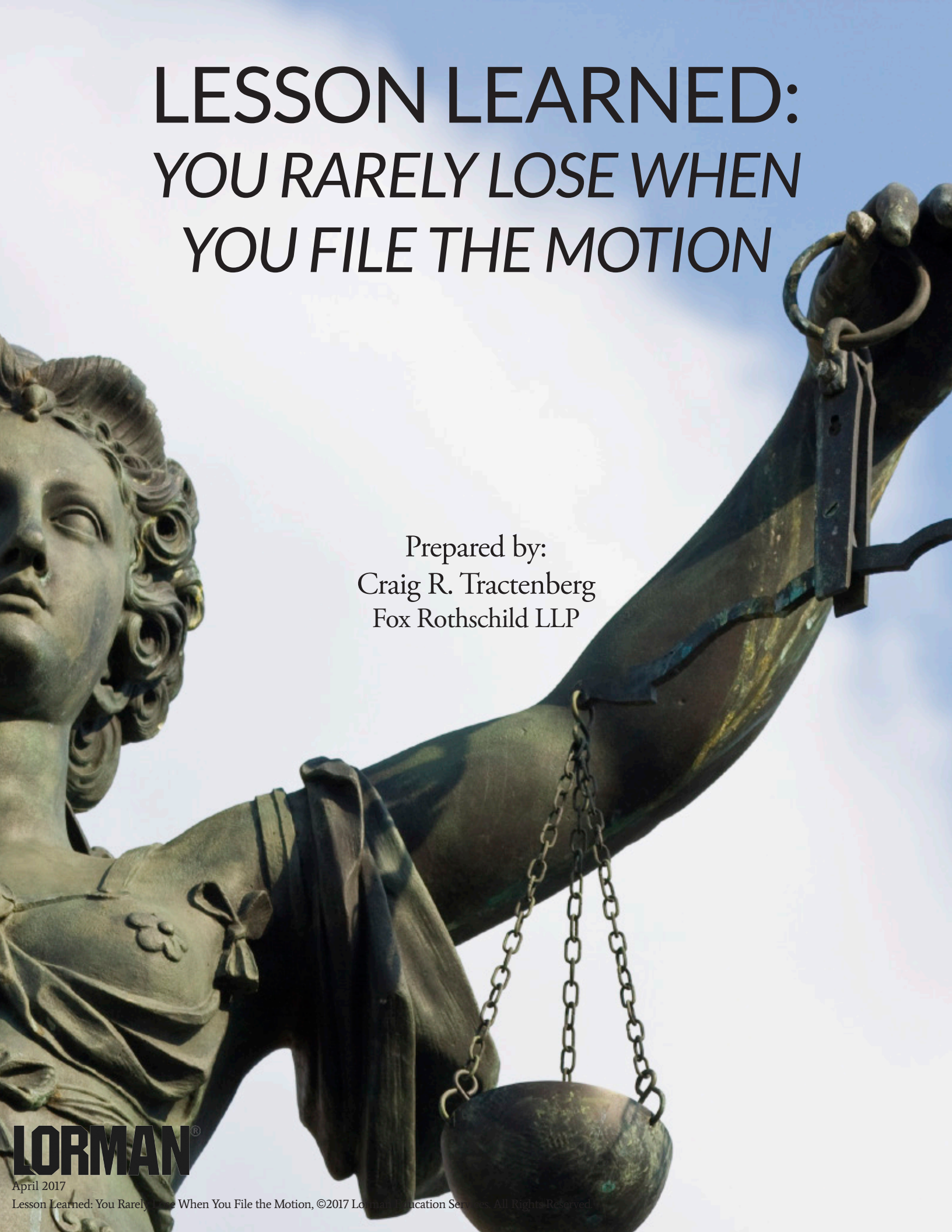
LESSON LEARNED:
YOU RARELY LOSE WHEN YOU FILE THE MOTION



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Lesson Learned:
You Rarely Lose When You File the Motion

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The Legal Intelligencer
Craig R. Tractenberg

Stephanie could only laugh that the arrogant had been brought low. As predicted, the argument succeeded and she got what she sought, a waiver of attorney-client privilege and the embarrassment of the overly aggressive franchisor. For want of a motion, all of the files were laid bare and subject to discovery. Says Stephanie, "they should have filed the motion."

Stephanie represents the franchisee, who claims he was terminated without the right to properly cure. Yes, the franchisor sent the notice of default. Yes, the franchisor gave an opportunity to cure. But the issue became whether the franchisee got the full benefit of the cure period, that is, did the franchisor grant enough time to cure. And wait—you see it coming—why didn't the franchisor give enough time to cure?

We see it in car accident litigation where the driver is asked, "Were you in a hurry? Were you agitated? Were you distracted?" It is a fair inquiry to ask whether something else was going on which explains the behavior. Even in a contract case where good faith and fair dealing is questioned, the motive is relevant to explain the expectations of the parties.

Stephanie argues that the franchisor was exceedingly aggressive. The franchisor had legitimate grounds to send a notice of default for failure to pay overdue items. The overdue items resulted from some real estate tax escalation which was challenged and partially remedied, the amounts nevertheless had been paid by the franchisor who owned the land, and reimbursement was sought against the franchisee as permitted under the sublease. The franchisor gave five calendar days to cure the default, but never stated definitively when the deadline for payment was to occur. In addition to the monetary defaults, there were operational defaults which also had a five-day notice to cure. Despite the double default notices, the franchisee was fully prepared to cure all defaults and scheduled an inspection of his location to prove that all operational defaults were cured. The inspection was scheduled for Wednesday after the notices had been sent.

Each default notice was sent by overnight mail, which was one of the methods authorized for notice under the franchise agreement. The default notice may also be sent by a variety of other methods, including by facsimile, or hand delivery, in which case, the clock starts ticking for cure upon the next day in order to grant five days to cure. The franchise agreement does not explicitly authorize notice by email. Here, the franchisor also gave notice by email. Unlike the other forms of notice, the franchise agreement does not state when email notice is effective, the same day sent or the next day. The email arrived on Thursday night and the overnight mail notice arrived Friday. The store inspection was scheduled on Wednesday.

On Wednesday morning at 7, the store inspection occurred and was concluded by 9 a.m. The store still had some deficiencies, but they

could be easily corrected and none would have justified termination. At 11 a.m., the franchisor sent a letter to the franchisee's counsel advising that the franchise agreement is now terminated because the monetary cure was not made as of yesterday. In response, the franchisee countered that the inspection for the operational cure occurred this morning, the location had passed and the franchisee was ready, willing and able to pay the money. Please send wire instructions and rescind the termination notice, Stephanie requested. But the franchisor said no, the time had expired based on the five days counted by the email notice of default and not the overnight letter of default.

Why would the franchisor not take the money? Stephanie thought the only plausible reason was that the franchisor had a buyer for the location and was motivated to sell to its buyer by confiscating the old franchise agreement by termination and bringing a stronger operator into the location. But the franchisor refused to concede that issue and immediately brought a lawsuit to confirm termination of the franchise agreement. Stephanie filed a counterclaim on behalf of her client claiming breach of the covenant of good faith and fair dealing. The franchisor preferred a private equity backed developer to the mom and pop client of Stephanie. The franchisor did not see that it had divided loyalty under the franchise agreement and was motivated by this arrangement to truncate the cure period. What harm could befall the franchisor to take the money offered in cure, except more years with the mom and pop operator?

But the franchisor would not budge. "Go call Dial a Prayer" mocked the franchisor when the cure was tendered. Everyone knows that a

monetary default uncured is grounds for termination and it does not matter what the motivation is when asserting an express breach of the contract. Stephanie's counterclaim asked for discovery regarding the franchisor's arrangements with a proposed buyer of the location and other systemwide discovery regarding good faith and fair dealing. The franchisor balked, claiming that where rent is due and owing, it is irrelevant whether the default notice was motivated by a new tenant waiting in the wings. When rent is due, you had better pay it.

The discovery issue was set for a hearing. Why should the franchisee be entitled to systemwide discovery about good faith and fair dealing claims, or the availability of a buyer, when no one disputes that rent was due? The franchisor claimed no covenant of good faith and fair dealing is breached by insisting that rent be paid as required. No such cause of action, and no such defense exists to payment of rent. Moreover, disclosure of this information might intrude on the attorney-client privilege and other privileges. But Stephanie had a simple answer for the court by reference to the Rules of Civil Procedure.

Stephanie explained that discovery is framed by the pleadings. Allegations of bad faith and breach of fair dealing are denied by the franchisor and are at issue in the case. Despite the argument that such a cause of action or defense does not exist, the franchisor is seeking to sub silento file a motion for summary judgment by precluding this claim or defense by precluding discovery. The franchisor is seeking to perform magic by putting the rabbit in the hat, having a motion for in limine granted without requesting it.

At this point, the judge saw the wisdom of Stephanie's arguments. Discovery preclusions was premature as the claims were still alive and the discovery was relevant to the claims. Stephanie noted that clients are sometimes reluctant to file the motions early in the case because motions to dismiss are not the favorites of the court and the money spent in motion practice could be used to settle. But here, the choice was between broad and intrusive discovery and finding a narrow path for the case. Rather than produce the discovery, the parties resolved the case was quietly and without further embarrassment. But the lesson was learned. You rarely lose when you file the motion.