ASAP® A Littler Mendelson Time Sensitive Newsletter

ASAPs

Midwest

Missouri Courts Further Restrict the Application of Covenants Not To Compete

July 2009

print

By:

Harry W. Wellford

The Missouri Court of Appeals has held that a covenant not to compete and nonsolicitation agreement, which was reasonable in scope and temporal terms, was, nevertheless, unenforceable because the employer did not establish that an employee, who had substantial customer contacts, could make use of those contacts with customers to his former employer's disadvantage.

Factual and Procedural Background

In *Brown v. Rollet Bros. Trucking Company, Inc., R.B.T., Inc., E & R Lime Co., and Rollet Bros. Logistics, Inc.*, slip op No. ED91533 (Mo.App. E.D. June 16, 2009), the Missouri Court of Appeals affirmed a trial court's decision, which found a covenant not to compete and nonsolicitation agreement unenforceable even though it was reasonable in its limitations. In *Brown*, the employee, Russel S. Brown ("Brown"), had been a dispatcher for Rollet Bros. Trucking Company, Inc. ("Rollet") since 1999. Brown signed an agreement, as a condition of employment, which contained the following covenants not to compete:

2. [Plaintiff] agrees that, for [three years after the date of cessation of employment with defendants], [plaintiff] will not directly or indirectly or in concert with any person or persons, firm, corporation, or other entity, or in any manner, solicit, divert or handle or attempt to solicit, divert or handle any of the past or present customers of [defendants], regardless of where such customers might be located with respect to any business that consists of, pertains to, or relates in any way to the business conducted by [defendants].

Rollet was engaged in the brokerage of commodities business. Brown's job was to locate

commodities to be transferred and then pair those with available trucks for transport. Brown had no authority to deviate from the rates charged by Rollet for transportation or commodities price. The court found that Rollet's customer list was nothing more than a "phone book" and that Brown's knowledge of Rollet's customer needs and demands did not rise to the level of a trade secret.

In November 2005, Brown was hired by a direct competitor of Rollet. After Rollet sent a letter to the competitor threatening litigation, Brown was terminated. Brown then brought a declaratory judgment action, asking the trial court to find that the noncompetition agreement was unenforceable.

The court of appeals noted that the key issue in enforcement of a noncompetition agreement in Missouri is that the employer must show that the employee had contacts of a kind enabling him to influence customers.[1] "In other words, the opportunity for influencing customers must exist."[2]

Rollet presented evidence to the court that Brown had regular telephonic contact with the employer's customers and prospective customers as part of his job. Brown also provided football tickets and other types of entertainment opportunities to those customers and called them daily.

Despite this evidence, the court found that the employer could only establish that Brown had regular contact with customers, entertained customers, and knew their demands and requirements, but did *not* establish that Brown could influence the customer to switch businesses as a result of the customer's contacts. Brown presented several witnesses who indicated that the client had never changed businesses based upon a driver switching from one employer to another, and that the driver had no special influence over customers. Rollet had argued that it had shown enough by proving a reasonable agreement and the employee's "opportunity" to influence customers.

What Does This Mean to Employers in Missouri

The *Brown* case suggests a very high bar for the enforcement of noncompetition agreements involving employees who work, at a level higher than clerical, but below the level where they have either access to trade secrets or have a proven track record of having clients follow them from job to job. *Brown* may make obtaining a temporary retraining order much more difficult. Moreover, the *Brown* case follows a trend in Missouri in which the Missouri Courts of Appeals have increasingly shown a reluctance, if not a penchant, for *not* enforcing covenants not to compete.[3]

---

[1] *Easy Returns Midwest, Inc. v. Schultz*, 964 S.W.2d at 453 (Mo. App. E.D. 1998).

[2] *Osage Glass Inc. v. Donovan*, 693 S.W.2d 68 at 75 (Mo. 1985).

[3] *See, e.g., Payroll Advance v. Yates*, 270 S.W.3d 428 (Mo. App. E.D. 2008); *Supermarket*

Merchandising & Supply, Inc. v. Marschuetz, 196 S.W.3d 581, 585 (Mo. App. E.D. 2006).

Harry W. Wellford is a Shareholder in Littler Mendelson's St. Louis office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Wellford at hwellford@littler.com.