Non-Competes: A Matter of Dollars and Sense?

By Michael R. Greco

August 9, 2011

Can employees avoid preliminary injunctions because they are not as wealthy as their employers? A recent federal court decision says "No."

Standards for Injunctive Relief

Seasoned (and even not-so-seasoned) litigators are well familiar with the "four factors" that courts commonly consider when deciding whether to enforce a non-compete by way of an injunction. Namely, (1) whether the party seeking injunctive relief is likely to succeed on the merits; (2) whether the party seeking injunctive relief will be irreparably injured by denial of the relief; (3) whether granting injunctive relief will result in even greater harm to the nonmoving party; and (4) whether granting the injunction will be in the public interest.

Balancing the Burden on Employees with the Benefit to Employers

When opposing requests for injunctions, employees often point to the burden imposed by the restrictions at issue and argue that the burden imposed outweighs the benefit to the employer. In making this argument, employees sometimes focus on the disparate financial standing of the parties. In essence, employees sometimes argue: "I am small.

The company is big. Therefore, the burden on me will necessarily outweigh the benefit to the company." This argument was recently rejected by a Pennsylvania federal court in Centimark Corporation v. Donald Lavine. The Court noted:

"In cases involving restrictive covenants, the harm to the employee 'almost always seems greater than the harm to the company. . . . [T]he employee, as an individual, apparently will have a hard time financially surviving if he is out of work. By this superficial calculus, the harm to the employee is always greater.' That said, 'the numerous courts that have specifically enforced non-compete covenants against the employee have concluded that, regardless of the relative wealth of the employer and employee, the harm to the employer trumps the harm to the employee.'"

In reaching this conclusion, the Lavine court recognized that it was balancing the burden to the employee with the harm the employer would suffer in the absence of an injunction: "Despite his assertion of hardship, a preliminary injunction would not prevent Lavine from working. He could work for Great Lakes or another roofing firm outside the Detroit market, or in sales in a different industry in Detroit. As such, the Court cannot conclude that the harm to Lavine would outweigh any benefit to CentiMark."

Some employees conflate this analysis with irreparable harm and suggest that their comparatively larger former employers cannot possibly be irreparably harmed. But various courts have rejected this approach as well. For example, in Ruscitto v. Merrill Lynch, the United States District Court for the Northern District of Texas held:

"The court rejects the facile temptation simply to compare the corporate employer with the individual former employee and to balance the harm only with reference to their correlative financial standing. To do so would almost always dictate a ruling against the corporate behemoth. The proper equation is surely otherwise, balancing instead the terms and breadth of the injunction contemplated against the threatened harm if equitable relief does not issue."

The Ruscitto court's conclusion was hardly surprising given that it was following controlling Fifth Circuit precedent. Namely, in another securities industry case, Merrill Lynch v. Stidham, the United States Fifth Circuit Court of Appeals rejected as "specious" the "argument that because Merrill Lynch is a large concern, the injury is miniscule." According to the Fifth Circuit, "[o]ne cannot be certain, but the success of Merrill Lynch may well be attributable to its diligence over the years in holding parties to the contracts that they freely executed."

The rationale employed by the Ruscitto and Stidham courts is not limited to cases in the securities industry. In Quaker Chemical Corporation v. Varga, the United States District Court for the Eastern District of Pennsylvania noted that "in a[n injunctive] case such as this, the harm to the employee almost always seems greater than the harm to the company. The employer, as a company-in this case, a very successful company, it appears-will be able to financially survive an employee's leaving for a competitor. And the employee, as an individual, apparently will have a hard time financially surviving if he is out of work. By this superficial calculus, the harm to the employee is always greater." Against this backdrop, the Quaker Chemical court concluded that "regardless of the relative wealth of the employer and employee, the harm to the employer trumps the harm to the employee."

The "take-away" from these decisions is that when courts balance the harm presented by enforcing or not enforcing a restrictive covenant, the key question is not the "correlative financial standing" of the parties. Rather, courts will focus on whether the covenant is reasonable in light of the legitimate interests of the employer, and whether the employee will face any undue burden. When drafting restrictive covenants, employers should therefore focus on whether their covenants are reasonably tailored to protect their legitimate interests. A key question is whether the covenant is more burdensome than necessary to protect the employer's legitimate interests such as goodwill or its confidential information.

Michael R. Greco is a partner in the Employee Defection & Trade Secrets Practice Group at Fisher & Phillips LLP. To receive notice of future blog posts either follow Michael R. Greco on Twitter or on LinkedIn or subscribe to this blog's RSS feed.