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FALL 2008

Potential Tort Liability for Attempting to Enforce An Unenforceable Restrictive Covenant

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The situation is this – you want to enforce a restrictive covenant against a former employee who you believe is unlawfully competing and/or soliciting clients. Time is of the essence, and you want your legal counsel to send a cease-and-desist letter to the new employer. In reviewing the restrictive covenant and learning about the underlying facts, the lawyer determines that an argument could be made either way that the covenant does or does not prohibit the former employee's work for his new employer. Or, perhaps the former employee has gone to work for a competitor, and you suspect that the employee is breaching his or her obligations under a restrictive covenant but lack proof that there has been a breach; however, the failure to take action if a breach is ongoing would cause significant harm. In either event, a court could rule against you for one of the many reasons that courts refuse to enforce restrictive covenant agreements. Perhaps the covenant might be deemed to broad in geographic scope, or perhaps it extends for too long a period of time, or perhaps the covenant is written more broadly than is necessary to protect the legitimate interests of the employer, or maybe it is unclear whether the new employer fits within the restrictive covenant's definition of a "competitor."

Employers frequently respond to this situation by having their counsel send a letter to the former employee and his or her new employer, demanding that the new employer terminate its relationship with the former employee, with the expectation that a court ultimately would resolve any dispute over the enforceability of the restrictive covenant. This tactic, however, can potentially create liability for the employer.

Maryland recognizes the tort action for wrongful interference with contractual or business relationships in two general forms: inducing the breach of an existing contract and, more broadly, maliciously or wrongfully interfering with economic or prospective relationships. A cause of action for tortious interference with an existing contract is fairly easy to establish under Maryland law. In order to prove a case for tortious interference with an existing contract, a plaintiff must establish: 1) the existence of a contract between plaintiff and a third party; 2) the defendant's knowledge of that contract; 3) the defendant's intentional interference with that contract; 4) a breach of that contract by the third party; and 5) resulting damages caused to the plaintiff by the breach. *See, e.g., Fowler v. Printers II, Inc.*, 89 Md. App. 448, 466 (1991), *cert. denied*, 325 Md. 619, 602 A.2d 710 (1992).

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In order to prevail on a cause of action for tortious interference with prospective advantage, under Maryland law a plaintiff must establish: (1) intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) that were done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) with actual damage and loss resulting. *Natural Design, Inc. v. The Rouse Co.*, 302 Md. 47, 71 (Md. 1984) (citation omitted). The Court of Appeals has held that wrongful or malicious interference with prospective advantage requires interference that is independently wrongful. "Wrongful or unlawful acts include common law torts and 'violence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith.'" *See K & K Management, Inc. v. Lee*, 316 Md. App. 137, 166, 557 A.2d 965 (1989), quoting Prosser, *Law of Torts*, § 130, 952-53 (4th ed. 1971).

Given the elements of these two causes of action, the risk inherent in causing a new employer to terminate a relationship with an employee based on the threat to enforce an invalid restrictive covenant is apparent. It is uncertain, however, whether a Maryland court would consider interference with a former employee's at-will employment with another employer under the rubric of tortious interference with contract or tortious interference with prospective advantage. While the Maryland appellate courts have not addressed a claim for tortious interference by a former employee in a situation where the former employer erroneously attempted to enforce an unenforceable restrictive covenant, there is wellestablished, long standing law in other states holding that a former employer may be liable if a potential new employer withdraws an offer of employment based on the threat of litigation.

In some jurisdictions, the former employer will be liable, but only to the extent that the employer failed to act in good faith and with a reasonable basis to believe that the restrictive covenant was enforceable. *See Luketich v. Goedecke, Wood & Co.*, 835 S.W.2d 504, 199 Mo. App. LEXIS 1077 (Mo. App. 1992). Under this reasoning, the court focuses on whether the former employer who threatened to enforce the noncompete or restrictive covenant had the right to assert a claim that the covenant was enforceable. According to the Luketich Court, there is no liability for tortious interference that results in the termination of employment where the termination is caused by "the exercise of an absolute right, that is, an act which one has a definite legal right to do without any qualification." "As a matter of law, . . . a former employer [is] justified in attempting to enforce its rights under [a] non-compete agreement . . . as long as [the former employer has] a reasonable, good faith belief in the validity of the agreement." *Luketich*, 835 S.W.2d at 508-09. Although "reasonableness" and "good faith" are issues of fact, this reasoning provides some protection for employers who rely on covenants that are ultimately found to be unenforceable.

In West Virginia, however, a former employer may be held liable for tortious interference with prospective relations if the restrictive covenant is unenforceable, even if the employer had a good faith reason to believe that the restrictive covenant or noncompetition agreement was enforceable. *See, e.g., Voorhees v. Guyan Machinery Co.*, 191 W.Va. 450, 446 S.E.2d 672 (W. Va. 1994). In *Guyan*, the former employer threatened to "go to the highest court in the land" to enforce a noncompetition agreement that had been signed by its former outsides salesman. In response to the threat of litigation, the competitor that had agreed to hire the former employee advised him that he had to obtain a waiver of the noncompete from his former employer or the offer of employment would be withdrawn. When Guyan would not agree to a waiver, the former employee was fired by the competitor, and the employee sued Guyan for tortious interference.

Ultimately, Guyan was unable to convince a jury that it had satisfied its burden of "demonstrating a legitimate business interest warranting the protection of the restrictive covenant" and the noncompetition agreement was deemed unenforceable. The court reasoned from this decision by the jury that any attempt to enforce the unenforceable noncompetition agreement was wrongful and therefore constituted tortious interference. Moreover, the court found that

an award of punitive damages was appropriate since the cease-and-desist letter sent by Guyan was intended to interfere with the former employee's relationship with the new employer, and since the jury's decision that the restrictive covenant was unenforceable meant, *ipso facto*, that the threat of litigation was wrongful and therefore constituted malice to support a punitive damages award. *See Voorhees*, 191 W.Va. at 456.

The well-established Maryland law on the tort of tortious interference, as well as these two lines of authority, make it imperative that employers and their counsel consider carefully whether a restrictive covenant or noncompetition agreement is likely to be enforceable before threatening a new employer with a lawsuit if it does not refuse to employ a former employee. Employers that insist on moving forward to interfere with a former employee's employment, when it is unclear whether the applicable agreement bars that new employment, must be cognizant of the risk that their threat of litigation might well result in a successful tort claim back against them by the employee whose ability to earn a livelihood has been adversely affected.