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Reducing Litigation Costs in Noncompete Litigation: Employee's and New Employer's Perspectives (Part Two of Two)

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When an employee and his or her new employer are sued for potentially violating a noncompete agreement, they both will face immediate challenges carrying heavy costs and risks. The employee may not have told the new employer about the noncompete, perhaps because of a mistaken belief that noncompetes are unenforceable. The employer, because of tightening labor markets, may have known about the noncompete but decided to take the risk and fill an open position. Preparation for a temporary injunction in two weeks, expedited discovery, and the collection of electronically stored information require attention. Even with these urgent concerns, the employee and the new employer should plan how to limit risk and achieve their respective goals through early, cost-effective resolution.

Part One of this series reviewed noncompete litigation and resolution from the former employer's perspective. Part Two will consider the employee's and new employer's perspectives.

Trial courts often order mediation when considering the former employer's application for a temporary restraining order or expedited discovery. Counsel for the employee and the new employer should work with the former employer's counsel to identify a mediator with the reputation, personality, style and experience to facilitate early resolution.

A key part of early resolution is defining the parties' respective interests. The employee's and new employer's interests align on certain issues, like contesting the enforceability or scope of the covenant. All parties, whether or not they choose to admit it, have a common interest in reducing costs and not causing collateral damage to each other's customers through third-party discovery. A mediator can collaborate with all parties to identify the common interests and resolve the divergent ones.

While aligned as co-defendants, the new employer and the employee also have distinct interests. The employee is concerned with maintaining employment, business reputation and customer relationships. The new employer is focused on getting back to business with as little disruption as possible. These separate interests lead

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Gary Fowler of JAMS.

to potential conflicts, and often the employee has separate representation, in some cases reimbursed by the new employer. Other conflicts may develop between the employee and the new employer; a lawsuit obviously is not a great start to a new career. As noted, the employee may or may not have advised the employer about the noncompete before accepting the job offer. The employee may have taken electronic information on departure. The employer may defend claims of breach of the noncompete or confidentiality obligations by arguing that it was unaware or prohibited the use of information from third parties.

The employee and the new employer will likely have different views on settlement. Others have discussed the potential ethical concerns and the advantages (and disadvantages) of joint or separate representation and the use of joint representation agreements to preserve privilege. (*See, e.g.*, Pera, "The Ethics of Joint Representation" 40 No. 1 Litigation 45 (ABA 2013).)

A good mediator will guide the parties in reviewing their respective strengths and weaknesses. Before *Light v. Centel Cellular*, 883 S.W.2d 642 (Tex. 1994) was all but abrogated, defendants often argued that the covenant, on its face, failed the statutory standard that the covenant be "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made." (Tex. Bus. & Comm. Code § 15.50(a).) Now, in some cases, defendants may argue that the former employer has no legitimate interest (e.g., protecting confidential information, goodwill or specialized training) in enforcing the covenant and that the covenant is entirely unenforceable.

After the Supreme Court of Texas' decision in *Marsh USA Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011), the focus is more on the scope of the covenant, that it may be overly broad as to time, geography or activity. For example, a covenant prohibiting a sales employee from competing throughout the United States, but whose market was limited to Texas, may well be overly broad geographically. A covenant that prohibits an employee from obtaining employment with any competitor may well be overly broad as to scope of activity.

Unlike other states' laws that limit or prohibit a court from reforming overbreadth, Texas law permits courts to reform the covenant for injunctive relief. In negotiation over the terms of injunctive relief, the employee and the new employer should consider the easy concessions and work toward compromise on the harder ones. Defendants can also point out that plaintiffs cannot recover damages for breach of an overly broad covenant prior to reformation, even if the employee violated the covenant as ultimately reformed. An employee can also urge that Texas law provides for recovery of his or her attorneys' fees, even when enjoined on a reformed covenant, when the employer knew at the execution of the agreement that the covenant was unreasonable and still sought to enforce it. (Tex. Bus. & Comm. Code § 15.51(c).)

Depending on the facts, defendants have other potential strengths in negotiation. They may point to the plaintiff's practices in not honoring noncompetes using competitor information. (This may be a double-edged sword for new employers that require noncompetes from their own employees.) Employees will point out that, as restraints of trade, noncompetes are disfavored and may be aimed more at suppressing competition (and wages) than preserving legitimate employer interests. In concurring, Justice Willett observed in *Marsh* that the former employer "must demonstrate special circumstances beyond the bruises of ordinary competition such that, absent the covenant, [the employee] would possess a grossly unfair competitive advantage. And even the restrictions imposed must be as light as possible and not restrict [the employee's] mobility to an extent greater than [the former employer's] legitimate need." (*Marsh*, 354 S.W.3d at 785.)

In the post-*Marsh* era of noncompete litigation, "pro covenant" and "pro competition" judges will have different views on enforceability of noncompetes, and whether they are reasonable as to time, geography and scope of activity. This inherent unpredictability, along with the escalating costs of litigation prior to the temporary injunction hearing, is the primary reason that all parties should pursue early resolution through mediation or other means.

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