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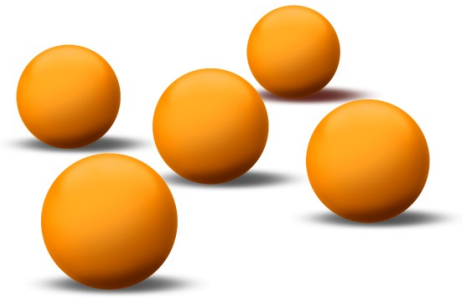
Does Bird's Eye View Render Executive Non-Compete Unenforceable?



By Peter Vilmos and Michael Morris

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So here's a good one for healthcare employers to ponder. Let's say you have an executive subject to a valid and seemingly enforceable non-compete agreement. Because the agreement concerns an executive, we would normally presume that a court is likely to strictly read the terms of a non-compete agreement and enforce it accordingly. Well, the Second Circuit Court of Appeals recently affirmed a decision that an executive whose level of seniority limited his knowledge of business details rendered him not subject to the terms of his otherwise-valid non-compete agreement.

Even before the Second Circuit's recent decision, employers in Alabama faced a number of hurdles when seeking enforcement of non-compete agreements. As a general matter, contracts restraining business are barred under ALA. CODE § 8-1-1 (1975). An exception to this general rule allows for restraints on trade where an employer-employee relationship is concerned, but this exception does not apply to professionals. The upshot of this legal framework is that physicians, physical therapists, and, perhaps, similar medical professionals are considered professionals and are exempt from non-compete agreements. However, executives and others serving corporate functions at healthcare companies usually are not and can be subject to non-compete agreements because they possess specific knowledge that could, at least in theory, give a competitor an advantage over the former employer. Taking this analysis one step further, however, led at least one court to determine that a senior executive was so far removed from the mundane specifics of the actual work product that he was no longer subject to the non-compete agreement he voluntarily executed.

Which brings us to IBM v. Visentin, 2011 WL 672025 (SDNY 2011), aff'd 437 Fed Appx 53 (2d Cir. 2011). I'll keep the facts short, although the somewhat unusual nature of the facts contributed to an unexpected opinion. Visentin worked at IBM, very successfully, for over a quarter of a century. He was so successful; in fact, that at the time he departed IBM for competitor Hewlett Packard he was in charge of a multi-billion dollar business unit. He had executed a non-compete with a one-year work restriction that on its face appeared to encompass his prospective employment with Hewlett Packard. The agreement Visentin executed included a relatively standard three-year look-back stating that the agreement only pertained to those areas of IBM's business in which Visentin worked in the three years prior to his departure.

When Visentin left, IBM sued, seeking injunctive relief based on Visentin's alleged violation of the non-compete described above. The federal district court denied the motion for a preliminary injunction. (In cases to enforce non-compete agreements, denial of the preliminary injunction usually ends the dispute… unless the former employer appeals.) IBM appealed, only to have the 2nd Circuit Court of Appeals affirm the lower court's ruling.

While the denial of the preliminary injunction motion in Visentin presents a rare circumstance due to Visentin's high-level executive position, the district court's lengthy holding contains some valuable insight into the analysis of non-compete issues. Among the points raised was that the high level of the former employee's position allowed him to operate in a supervisory capacity, (he was a manager of a business line with expertise in making operations "efficient"), and yet insulated him from the specific technological goings-on and detailed data potentially protected as a trade secret. In essence, because he maintained a bird's-eye view of operations, rather than a position with direct creative input or a position "on the line," he was insulated from information that could damage his former employer's presumed competitive advantage.

So where does that leave employers, particularly those in Alabama's healthcare industry, seeking to enforce these agreements? First of all, the free movement of medical professionals, which has been a reality in the state for some time, is not likely to change. Likewise, where non-competes have already proven enforceable against front-line corporate personnel, such as sales and account executives with detailed and confidential knowledge of patient or client lists and pricing information, they are likely to remain enforceable. The new area of uncertainty concerns those high-level executives who are valued for their business acumen, not their particular technical skills or intensive interactions with patients or clients. As Birmingham's biotechnology, pharmaceutical, and medical device sectors continue to grow, an ever increasing number of executives may fall into the category of knowing enough to run the company, but not enough to risk divulging confidential information regarding the products they sell.

In general, employers should keep in mind the necessity of providing enough detail in a non-compete/non-disclosure agreement to make enforcement easier. This may require identifying and assessing the particular information or trade secrets that could cause actual harm if disclosed. By the same token, it is important to understand what information particular employees have access to and need to do their jobs. It is the nature of the information the employer seeks to protect and the factual circumstances surrounding the former employee's duties and experience that will form the foundation of any successful argument regarding enforcement.

This is the part where I counsel you to get counsel. Better yet, make sure you get counsel familiar with these issues.

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