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**News Bulletin by Brad Hamilton** **February 15, 2010**

## Does Your Business Use Non-compete Agreements? Non-Competes in Colorado Take Another Hit.

In 2009 the Colorado Court of Appeals decided two important cases on the scope and enforceability of non-compete agreements in Colorado.

Colorado is one of several states that have laws severely restricting the application of non-compete agreements. Colorado law 8-2-113 says that non-compete restrictions are void, except (1) as part of the purchase of a business, (2) for the protection of trade secrets, (3) if the business paid for its employee's education, and (4) for executives, officers, professional staff and "management personnel". I'll discuss this more below, but the two cases need to be considered in the context of this Colorado law.

**Lucht's Concrete**

The first case, Lucht's Concrete Pumping, Inc. v. Horner, is particularly interesting. In Lucht's Concrete the court held that if a business and an employee enter into a non-compete agreement **after** the employee has already begun work, the business must provide additional consideration to the employee for the non-compete agreement to be enforceable – continued employment is **not** sufficient consideration.

Lucht's Concrete needs to be watched, because it invalidates a fairly common practice – businesses often request or require employees to enter into non-compete agreements at some point during the life of the company, and in the past many of those businesses, and their lawyers, assumed that allowing the employee to keep his job was sufficient consideration to enforce the non-compete agreement. Particularly considering that under the law of contracts, a mere "peppercorn of consideration" is generally sufficient to keep a contract from failing for lack of consideration.

Start-up, emerging growth and restart companies often launch their business with minimum capital, and even less legal advice. As the business and revenue grow, the founders seek out legal services to "clean up" business documents, reduce their risk and protect their intellectual property and confidential information by getting contracts in place. One of the first questions business lawyers usually ask these clients is whether they have employment and non-compete agreements with the key employees. Usually, they do not, and it is common to require key employees to sign some form of non-compete agreement as a condition to continued employment. The court in Lucht's Concrete invalidated that practice, holding that since the employee was not given a pay increase, bonus, promotion or any additional benefits for the non-compete commitment, the non-compete was unenforceable for lack of consideration.

Not surprisingly, on February 1, 2010 (after initial publication of this article) the Colorado Supreme Court granted certiorari to review the single question "Whether the court of appeals

erred in concluding that the continued employment of an existing at-will employee was not adequate consideration to support a noncompetition agreement." Lucht's Concrete may well be overturned by the Colorado Supreme Court.

Unless the Colorado Supreme Court overturns Lucht's Concrete, Colorado companies that have employees who signed non-compete agreements **after** they began employment, and without paying any new consideration, may need to enter into **new non-compete agreements** with those key employees the next time the employee receives a raise, bonus, promotion or other increase in compensation or benefits. You should work with your business lawyer, employment lawyer, general counsel or HR professional to implement the appropriate program.

**DISH Network**

The court decision in DISH Network Corporation v. Altomari is a bit more helpful to businesses. In DISH the court clarified that the "management personnel" under the statute who may be bound by a non-compete agreement includes non-executive managers who are mid-level managers, so long as those persons supervise other employees, have decision making authority and a "certain level of autonomy". The DISH employee supervised 50 employees and was at the top of the compensation scheme for like persons, which may have also been factors.

**Action**

In light of DISH Colorado businesses may now be able to extend their non-compete agreements to lower level management employees than previously thought. Each case will be decided on its particular facts, but DISH sets out a test for "management personnel", and Colorado businesses who believe non-compete agreements are important to their business should re-visit the level and class of employees who it requires to enter non-compete agreements – the requirement may extend further down the org-chart than before.

**Non-Competes in Massachusetts**

There is an interesting discussion over at VC Experts about the effort to enact legislation in Massachusetts that is similar to the Colorado and California laws restricting non-compete agreements. Apparently, venture capital groups in the Boston high-tech corridor have been lobbying Massachusetts legislators to restrict or prohibit non-compete agreements (which are currently allowed in Massachusetts), on the grounds that non-compete agreements stifle new start-ups and potential innovation (in other words, VC inventory). It's an interesting point of view. Consider that the average VC fund has a 10 year life, and intends to divest itself of each portfolio investment in 3-5 years. Consider that many entrepreneurs want to build a company with long-term prospects and lasting returns, and most employees do not want to have to change jobs every 5-10 years. A cynic could argue that the VC funds want to prohibit non-compete agreements so that key employees and entrepreneurs are free to leave the company that the VC fund just sold, to start a new company that the next VC fund can invest in, thus creating and churning inventory for the VC's. The VC's argue that competition is important to innovation and economic growth. Either way, the Massachusetts legislature is considering legislation that will restrict non-compete agreements in that state.

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