

BURR ALERT

SCOTUS Reigns Supreme on Issue of Arbitration of Non-Compete Agreements

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Some states specifically allow non-compete agreements. Of those states, some have legislation that provides guidelines to parties to a non-compete agreement regarding enforceability. Other states take the approach that agreements restricting employment are void and unenforceable as against public policy. So here's a situation on which the United States Supreme Court recently rendered an opinion (see Nitro-Lift Technologies, L.L.C. v. Eddie Lee Howard, et al., US Supreme Court Case No. 11-1377, November 2012):

Nitro-Lift Technologies contracts with oil and gas operators to provide services that enhance production. Nitro-Lift entered into confidentiality and noncompetition agreements with its employees that contained an arbitration clause. The arbitration clause referred any dispute, difference or unresolved question to single arbitrator arbitration in Houston, Texas using AAA rules. Two of the employees subject to the confidentiality and noncompetition agreements left the company and went to work for a competitor. During their employment, the former employees had worked in Texas, Arkansas and Oklahoma. The employer served the former employees with a demand for arbitration, to which the former employees responded with a lawsuit in Oklahoma state court seeking a judicial declaration that the noncompetition agreement was null and void. The Oklahoma lower court dismissed the lawsuit, finding that the contract contained a valid arbitration clause dictating that the arbitrator, and not the trial court, should resolve the parties' disputes.

The matter advanced to the Oklahoma Supreme Court. In that court, the employer argued that the matter was for the arbitrator to decide and cited as authority United States Supreme Court decisions interpreting the Federal Arbitration Act. The Oklahoma Supreme Court ruled that despite the federal opinions to the contrary, it had the authority to determine the validity of the noncompetition agreements under Oklahoma law. Not surprisingly – given the limitations Oklahoma puts on the enforcement of noncompetition agreements – the Oklahoma Supreme Court determined that the noncompetition agreements were void as against public policy, based on “adequate and independent state grounds.”

Apparently the US Supreme Court took umbrage with the Oklahoma Supreme Court's opinion, because they issued a rather strongly worded Per Curiam opinion that reiterated that the FAA “declares a national policy favoring arbitration” applicable in state and federal courts. Because the former employees focused their contractual attacks on the validity of the noncompetition clauses and not on the validity of the arbitration clause, the US Supreme Court held that the arbitrator was vested with the authority to resolve the parties' dispute. If the arbitration clause was valid – as the lower court found in the Nitro-Lift matter – then “the validity of the remainder of the contract... is for the arbitrator to decide.”

The Court based its decision on the FAA's “national policy favoring arbitration” and on the established rule of law that “when parties commit to arbitrate contractual disputes, . . . attacks on the validity of the

contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved ‘by the arbitrator in the first instance, not by a federal or state court.’” Id. (quoting *Preston v. Ferrer*, 552 U.S. 346,349(2008)). The Court also cited the supremacy clause from the US. Constitution, Article VI, cl. 2.

Although brief, this SCOTUS opinion provides excellent insight into the interpretation of non-compete clauses in agreements that also contain valid arbitration clauses. In essence, an employer seeking to arbitrate an alleged violation of a noncompetition agreement can essentially force the issue (and the significant expense of the proceedings) on a former employee even in circumstances or jurisdictions in which the noncompetition clause is potentially unenforceable.

If you have questions about your non-compete agreement, or want advice on how to craft a non-compete agreement that best suits your situation, consult a legal professional familiar with these issues.

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