MINTZ

Who Hurts More? Another Battle in the Non-compete Wars

October 02, 2014 | Blog |

VIEWPOINT TOPICS

- Employment

RELATED PRACTICES

RELATED INDUSTRIES

Written by **Jessica Catlow**

A recent decision from a Georgia federal district court concerning post-employment non-compete agreements reached two notable conclusions of which employers should take note:

1. Restricting a former employee's access to customers could result in lost opportunities for the employee which are difficult, if not impossible, to quantify; and
2. Loss of business due to free and fair competition is not a "harm"; violation of legal rules designed to promote competition however, is a harm.

In ***Wells et al v. Daugherty Systems Inc.***, eight former DSI employees, who left to start a consulting firm named Aspirent, asked the court to prevent DSI from attempting to enforce their non-compete agreements. They did so in part because DSI was telling potential Aspirent clients that DSI was going to sue to enforce the non-competes, that the non-competes were enforceable and that the former employees were acting unethically. This case is somewhat unique because it was the former employees who sued.

Usually, a former employer seeks immediate temporary relief and an injunction to prevent a former employee from competing because once the proverbial horse is out of the barn (i.e., their confidential customer information and customer relationships may be on the move), the employer can never be made whole and the only harm to the former employees is that they just have to find work with another employer that is not a competitor.

In granting the former employees' temporary restraining order application, the court evaluated four factors: (1) substantial likelihood of success on the merits, (2) that the former employees would suffer irreparable injury if they did not obtain the TRO, (3) that the potential injury to them outweighs the potential injury to DSI if the court did not grant the TRO, and (4) the TRO would serve the public interest. It was in the analysis of the second and fourth factors that the court held that the former employees would suffer irreparable injury because the lost client opportunities would be difficult to quantify and that any impediment to free and fair competition outweighed DSI's anti-competitive interests. The court also held that the TRO would serve the public interest because of Georgia's stated policy disfavoring restrictions on fair competition.

While each state's non-compete law is different and the facts and circumstances of each case is different, there are certain broad policy statements in this decision of which employers should be mindful. As we say repeatedly, it is critical to ensure that any post-employment non-compete restrictions are narrowly drafted to ensure enforceability.

Authors