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Missouri: True Non-Competition Agreements Are Still Enforceable, but Solicitation Restrictions Must Be Limited to Existing Customers with Whom the Employee Dealt During Employment

By Harry Wellford, Jr.

The Missouri Supreme Court rarely entertains non-competition cases. In *Health Care Services of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604 (Mo. 2006), the court enforced a non-solicitation of customers and a true non-competition agreement. In *Copeland*, the employee had not directly challenged the validity of the non-competition provision. The court, in dicta, nevertheless suggested that true non-competition agreements (*i.e.*, those agreements that preclude competition in general or in a specified geographic region) may not be enforceable. Fast forward six years, and the court, with a significantly different makeup, held in *Whelan Security Company v. Kennebrew and Morgan*, No. SC92291 (Mo. Aug. 14, 2012), that true non-competition agreements are, indeed, enforceable in Missouri. In doing so, the court broadly construed agreements that restrict an employee's post-employment activities for a reasonable time and within a reasonable geographic area. The court also placed restrictions on agreements prohibiting solicitation of customers, limiting the enforceability of those agreements to customers with whom the employee dealt during his or her employment.

Background

Whelan Security is a nationwide security guard services firm with operations in 23 states. As a condition of their employment, two employees signed an employment contract that contained non-competition and non-solicitation clauses. The non-competition clause limited competition for two years within a 50-mile radius of the location where the employee provided services. The non-solicitation agreement precluded the employees from soliciting customers, potential customers, and employees of the company for two years. In 2009, following the resignation of both employees, one employee solicited a current company client, and the second employee solicited his former co-workers to leave the company and work for a competitor. The employer sued both employees to enforce the non-competition and non-solicitation agreements.

The Supreme Court's Decision

The Missouri Supreme Court reversed a lower court decision and: (1) enforced the non-competition agreement with a 50-mile radius; (2) judicially modified the non-solicitation of customers clause to limit it to actual customers with whom the employees had contact while working for the company; and (3) remanded to the trial court the question of whether a two-year non-solicitation of employees provision is enforceable.

With respect to the non-solicitation of customers provision, the court focused on the requirement that such clauses are only valid to protect "the influence an employee acquires over his employer's customers through personal contact." The court then held the non-solicitation provision in the employment agreement that precluded solicitation of any "potential" customer was overbroad. Nevertheless, the court exercised its equitable powers to "blue pencil" the non-solicitation provision to make it reasonable. In the court's judgment, an agreement to refrain for a two-year period from solicitation of customers with whom the employee actually dealt during employment was reasonable.

The court then turned to the true non-competition provision. In its analysis, the court noted that there was "considerable precedent" in Missouri for the reasonableness of a two-year non-compete agreement that is limited to 50 miles from where the services were rendered by an operations manager and cited several Missouri Supreme Court and appellate court decisions. Without much further analysis, the court held that the employer's non-competition agreement, which was consistent with those parameters, was enforceable.

The final issue, concerning the enforcement of a non-solicitation of employees provision for a period greater than one year, was one of first impression. Missouri has a statutory provision providing that a covenant not to solicit employees (excluding clerical employees) is enforceable based upon the facts and circumstances of the case. The statute provides that the restriction "shall be conclusively presumed to be reasonable if its post-employment duration is no more than one year." Mo. Rev. Stat. § 431.202. In *Whelan*, the restriction on employee solicitation was for two years. The court declined to reach the question of whether a two-year period would be enforceable because there were genuine issues of material fact as to the parties' intent with respect to the two-year period. The case was remanded for further consideration of that issue alone.

Recommendations for Employers

Whelan confirms that narrowly-tailored true non-competition agreements that restrict post-employment activities are enforceable in Missouri and provides strong support for including post-employment restrictions in employment agreements. Employers should review their agreements and business circumstances to determine whether a true non-competition provision is warranted and whether it is reasonable. In addition, employers should recognize that the trend is for courts in Missouri to look at the ability of an employee to influence a customer to support the enforcement of a non-solicitation of customers provision. Finally, while it is apparent that the court will enforce a non-solicitation of employees provision, it is unclear how long a time period would be upheld. Employers should consider stating in the agreement the basis for any non-solicitation period exceeding one year to provide a court, if necessary, with grounds for the enforcement of such a lengthy period.

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