# Choice of Forum and the Parties Matter in Med Device Cases (Particularly in Minnesota)!

Insights
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The medical device industry has seen a litigation boom in recent years in non-compete litigation. A new case out of the District of Minnesota involving Medtronic, Inc. ("Medtronic"), one of the med device industry leaders, serves as a good reminder to attorneys. When filing a new case, make sure to give full consideration of who you are suing where.

In *Medtronic, Inc. v. Ernst*, Medtronic sued one of its global competitors in the neuro-stimulation device market, Nevro Corp. ("Nevro"). Nevro is an industry leader in the market in Australia. Medtronic is an industry leader in the United States and working to expand globally. At the time of the case, Medtronic was fourth out of four companies in Australia. Nevro hired Ernst to market neuro-stimulation devices to physicians in Australia. She had formerly worked for Medtronic in a similar position marketing to U.S. physicians. She worked directly with these physicians and formed strong relationships. Accordingly, Medtronic had her enter a non-compete to protect itself from her potential departure to prevent her from leveraging these relationships for a new employer in a new position for a competitor to its detriment. The position she accepted with Nevro appeared, on its face, to be such a position.

Indeed, when Medtronic initially sued Nevro in Minnesota state court, it obtained a temporary restraining order ("TRO"). Notably, Medtronic did not sue Ernst at this time. Following entry of the TRO, Nevro moved to remove the action to federal court to the District of Minnesota. Only then did Medtronic serve Ernst and add her as a party. This delay proved to be crucial to the outcome of the case.

Medtronic opposed the removal and sought to remand the case back to state court (where it had already obtained a TRO.) Medtronic relied on a forum-selection clause in Ernst's employment contract whereby she agreed to litigate all disputes in Minnesota state court and waived her right to removal. The provision essentially blocked Ernst from removing a case to federal court. Moreover, under 28 U.S.C. § 1446(b)(2)(A), unanimous consent of all defendants is required to remove a case so any case where she was joined, including a case with a new employer such as Nevro, could not be removed either. However, since Ernst did not become a party until *after* Nevro moved to remove, Ernst did not have to consent to the removal. The court instead analyzed whether Nevro, a non-party to the employment contract, was "closely related party" such that it was "foreseeable" that it would be bound by the contract and forum-selection clause. The court determined that it was not. Nevro

did not voluntarily add Ernst to the litigation (Medtronic did), and Nevro did not have a sufficiently common interest with Ernst, as evidenced by the fact that they were not represented by the same counsel.

Having found itself to be the proper forum, the court was free to take up the merits of the case. It decided, contrary to the state court, that Medtronic had not met the requirements for a TRO because it could not establish irreparable harm. Even though the undisputed evidence proved that Ernst had misappropriated confidential information (usually a key piece of evidence for the employer and against the employee), the court found that this did not establish irreparable harm because Ernst had returned the information, had not accessed it since she left, and could not access it in the future. The court further found no evidence of irreparable harm because Ernst had only worked with U.S. physicians while with Medtronic and took no part in Medtronic's global marketing efforts. Therefore, her new marketing position, working exclusively in Australia with Australian physicians, would not harm Medtronic.

The key lesson to be taken from *Medtronic v. Ernst* is that the choice of forum, as well as the parties to it, matter. The employer could have ensured its choice of forum by including the former employee as a defendant from the outset. It did not do so, was forced to litigate in a different forum, and ultimately the forum proved to be determinative and not in its favor.