Opinion: Bad Facts Make Bad Law, Especially in Non-Compete Cases

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A non-compete agreement that prohibited a former sales rep from working for a competitor in any capacity, "even as a custodian," is overly broad and unenforceable.At least that's what a North Carolina Court of Appeals recently concluded in a case captioned CopyPro, Inc. v. Musgrove.

But does this holding go too far? Should companies be forced to craft their restrictive covenants with such surgical precision that they specify employees are free to work for competitors as janitors or cafeteria cooks? In my opinion, the North Carolina Court of Appeals went too far in this case, and it did so unnecessarily. Let's take a look at the facts.

The plaintiff, CopyPro, sells and leases office equipment systems to customers in eastern North Carolina. The defendant, Musgrove, signed a non-compete agreement. The non-compete precluded his affiliation with a competitor for three years after his employment ended. Its geographic scope was limited to a list of expressly delineated counties, and its substantive scope was limited to "any business of the type and character of the business engaged in by the Employer at the time of such termination."

During his employment with CopyPro, Musgrove primarily worked in Pender and Onslow Counties. After he resigned, he joined a competitor to work in a different county. Importantly, he refrained from contacting CopyPro's customers in the two counties he had covered for it, and his new employer forbade him from contacting CopyPro's customers in those two counties.

When CopyPro learned that Musgrove was working for a competitor, it sued alleging breach of the non-compete agreement. The trial court issued an injunction precluding Musgrove from violating his agreement, and Musgrove appealed.

On appeal, Musgrove argued that the non-compete agreement was unenforceable because it was unreasonably overbroad. Like most states that permit restrictive covenants, North Carolina requires a showing that a covenant does not impose an "unreasonable hardship" on the employee, and it should not be "broader than necessary to protect [the employer's] legitimate business interest."

The North Carolina Court of Appeals concluded this covenant was unenforceable because it prohibited Musgrove from working for the competitor "in any capacity, including as a custodian." It is here that I think the court's reasoning breaks down.

Musgrove was not seeking to join the competitor as a custodian. He was working for the competitor in a similar, if not identical capacity, albeit in a different geographic location. The court easily could have invalidated the covenant by holding that its geographic and temporal restrictions were unreasonable under these facts. But the court expressly stopped short of making such a determination. Instead the court explained:

"Although Plaintiff has raised serious questions about the validity of these temporal and territorial restraints…, we need not address Defendant's challenges to these provisions given our decision to reverse the trial court's order on the grounds that the noncompetition agreement between the parties prohibits a broader array of activities than is necessary to protect Plaintiff's legitimate business interests."

I understand the argument that courts want to discourage employers from drafting gratuitously overbroad covenants. I'm also aware that many courts reason employees, with fewer resources than their employers, may not be in a position to challenge overbroad agreements, and restrictive covenants may have the effect of scaring employees away from accepting jobs that should not be precluded by contract.

But this was not a case where the employer showed no attempt to reasonably limit its restriction. Nor was it a case where the employee was seeking to join a competitor in a different employment capacity. Musgrove was not looking to become a custodian at a competitor. He was looking to become a competitor. The question on which the court should have focused is whether Musgrove was seeking to compete unfairly. The court easily could have held that it was unreasonable under these facts to preclude Musgrove's employment in another county, particularly when he had not contacted any of CopyPro's clients.

Instead of deciding this case on equitable grounds, the court walked right up to the edge of creating a bright line rule that restrictive covenants in North Carolina may not preclude employees from working for a competitor in any capacity. In doing so, the court ignores the reality that sometimes an employee can do damage even if his duties and geographic location change when he changes jobs. For instance, employees can utilize or disclose confidential information even if their duties change, and they can do so from any location. Admittedly, the court found that Musgrove did not have sufficient access to confidential information to warrant the covenant in this case, but again, that finding would have been sufficient to defeat the covenant on an "as applied" basis. After all, courts

finding would have been sufficient to defeat the covenant on an "as applied" basis. After all, courts commonly acknowledge that enforceability of restrictive covenants is a fact-intensive question. Articulating a bright line rule was entirely unnecessary.

In my opinion, it appears that the court felt injunctive relief was unwarranted in this case. In reaching that result, the court went too far in its holding. As has been observed by many lawyers, bad facts make bad law.

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