Sometimes Noteworthy Non-Compete Decisions Have No Non-Competes

Insights
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As a non-compete litigator, I often scan the case reports looking for noteworthy non-compete decisions. In doing so, I look for the usual buzzwords of interest -- non-compete, trade secret, preliminary injunction, etc. But every once in a while, I come across a case that has nothing to do with non-competes that is worth tucking away in the research file. Wolfe v. TBG Limited is just such a case.

In Wolfe, an employee filed suit against his employer alleging claims of negligence and intentional misrepresentation, breach of contract and/or wrongful termination of a long-term incentive plan. By all measures, I would not normally expect this case to catch my eye. But there were two things about the court's decision that caught my departing employee-trained eyes: rejection of an argument about adhesion contracts and enforcement of a forum selection clause.

The stage for this decision was set after the employer announced a buyout of a long-term incentive plan shortly before the employee was scheduled to receive a bonus. The employee filed suit to challenge the employer's action, and the employer moved to dismiss based on a forum selection clause providing for sole jurisdiction in England. Opposing the motion, the employee asserted two arguments that commonly arise in non-compete cases.

First, the employee argued that the forum selection clause was an unenforceable contract of adhesion and therefore unconscionable because it resulted from undue influence and overwhelming bargaining power. This is an argument that employees often assert when they seek to oppose the enforcement of a restrictive covenant. But the Eastern District of Pennsylvania found in this instance that inequality of bargaining power did not render the contract or its terms unenforceable, and it noted that even adhesion contracts are enforceable unless the employee lacked a meaningful choice about accepting the provision and the provision was oppressively one-sided. According to the court, this was true even if the employee was told to sign the provision or be fired. To be voided, the employee would have to establish that the clause was procedurally and substantively unconscionable. The fact that the employer did not negotiate the terms of the contract was insufficient to establish unconscionability.

In this case, the employee echoed arguments offered by many non-compete defendants. The employee complained that the plan was presented on a take-it-or-leave-it basis and without any opportunity to negotiate. However, it was well-established that placement of such a clause in a non-negotiated contract did not render it unreasonable and, thus, the fact that the employee did not engage in actual negotiations did not make the clause unenforceable. According to the court, even if the employee had been told to sign the agreement or be terminated, that would be insufficient to defeat the contract.

Rejecting the first argument, the court noted it was still obligated by a recent U.S. Supreme Court decision to consider Section 1404(a) forum non conveniens factors in determining whether to enforce the forum selection clause. Specifically, in Atlantic Marine Constr. Co. v. U.S. Dist. Court for Western Dist. of Texas, the Supreme Court held just last year that courts must consider forum non conveniens factor even where a forum selection clause is otherwise enforceable, but in doing so, courts should consider only public interest factors and not private interest factors. In other words, inconvenience to the employee was not a factor to be considered by the court, but public interest factors might justify invalidation of the forum selection clause. In this case, the employee made no effort to argue that the public interest warranted invalidation, and the court chose not to infer any such justification. In doing so, the court paid heed to Atlantic Marine's ruling that by agreeing to a forum selection clause, parties waive the right to challenge the preselected forum on the grounds of convenience.

Given that forum selection clauses are often found in employment agreements, Atlantic Marine is a decision that is likely to be invoked in non-compete cases. Much as the decision played a decisive role in validating the forum selection clause in Wolfe, employers can expect it to play in their favor in non-compete cases.

In short, Wolfe is a decision from which non-compete courts may draw influence. I know I will keep it in mind.

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