

Non-Compete and Trade Secret Review for February 2013

Insights

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February 2013 was an active month in the world of non-competes and trade secrets, and if we read the tea leaves, it looks like things are only going to get busier. Before I recap some of February's highlights and direct you to some of the best resources out there on the web, let's briefly discuss one reason I think non-compete issues are likely to be pushed to the forefront over the coming months and year -- Warren Buffet. Warren Buffet? That's right, Warren Buffet, and people like him.

It was widely reported in February that Warren Buffet's Berkshire Hathaway teamed up with 3G Capital Management to acquire H.J. Heinz. Buffett said Berkshire is contributing "something between" \$12 and \$13 billion to the deal. Of greater interest, however, Buffet said that Berkshire is sitting on another \$47 billion in cash and he joked, "I'm ready for another elephant. Please, if you see any walking by, just call me." What does this have to do with non-competes and trade secrets? A lot. Over the past few years with all of the economic and political uncertainty, a lot of private equity has built up and remained on the sidelines, but like Warren Buffet's \$47 billion, that cash is sitting there waiting for the right elephant to walk by. But private equity investors aren't foolish. After investment committees decide to pursue a target acquisition candidate and deal professionals successfully submit an offer to the seller, it is time to get the lawyers involved in the due diligence phase. Due diligence includes more than just validating management's stated operational and financial figures. Due diligence is the point at which it is critical to determine who has a non-compete and who does not. Just as important, the agreements need to be examined to ensure they are appropriately tailored to protect the target company's legitimate interests, and to ensure they will remain

enforceable after the acquisition. If key employees lack restrictive covenants, due diligence is the time to address the issues. Then, of course, someday, if and/or when employees leave, litigation becomes a distinct possibility. In short, mergers and acquisitions precipitate non-compete and trade secret contracting and litigation. Without a doubt, the month of February told us this issue is going to be hot well into the 2010's.

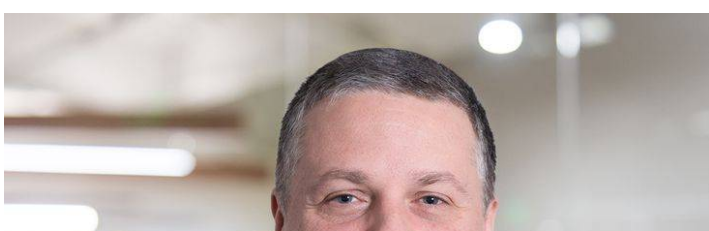
What else did we learn in February? Let's look around the web.

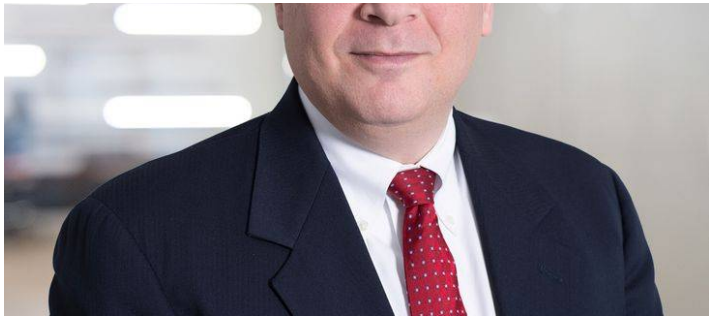
- Forum selection clauses were a hot button issue in February. We saw that they may be enforced even if they require employees to fly over 8,000 miles just to appear in Court. Robert Milligan does a great job dissecting an opinion from the U.S. Eastern District of Missouri and credibly wonders what one has to prove in Missouri in order to demonstrate that a forum selection clause satisfies the judicially required "gravely inconvenient" standard to invalidate such a clause.
- Jonathan Pollard reminded us that the race to the courthouse does not always work in California when a forum selection clause suggests that the lawsuit should proceed elsewhere, even if the new employer was not a party to the contract containing the forum selection clause.
- The Obama Administration announced its five point initiative, "Strategy on Mitigating the Theft of U.S. Trade Secrets," to combat the threat imposed by international trade secret misappropriation. Care to know what it says, what's good about it, and what's not? John Marsh does a great job laying it out in his bog, The Trade Secret Litigator.
- Want to know what's happening with pending non-compete legislation? Check out what Kenneth Vanko has to say about Michigan's proposed statute.
- While we are talking about statutes, Russell Beck can fill you in on the status of things in Massachusetts where the legislature is making another run at non-compete legislation this term.

Finally, for those of you who have taken my advice to pay a visit to the blogs written by John Marsh, Russell Beck and Kenneth Vanko, I'm sure you share my opinion they are top notch. If you enjoy them as much as I do, consider listening to one of their podcasts.

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