

Medical Device Industry Remains a Hotbed for NonCompete Litigation

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A recent opinion stemming from a lawsuit between two competitors in the medical device industry reminds us of the old adage “be careful what you wish for.” In *Howmedica Osteonics Corp. v. Zimmer, Inc.*, the plaintiff seemed to get what it desired – a broad injunction against its competitor. Unfortunately, that injunction came with some likely unforeseen and unpleasant consequences when the 3rd Circuit Court of Appeals found that the injunction was overly broad, thus placing Howmedica’s \$6 million bond at risk.

The lawsuit between Howmedica and Zimmer, competitors who manufacture and sell spine-related medical devices, was sparked when a number of Howmedica’s sales representatives resigned to join Zimmer. Zimmer apparently sought to increase its market presence in Las Vegas and Arizona and hired sales representatives from Howmedica who were already accustomed to selling medical devices in that region.

After Zimmer hired the sales representatives, Howmedica sued Zimmer claiming, among other things, that the representatives had breached employment agreements with the company. As frequently happens in these cases, Howmedica moved for an injunction claiming that it would be irreparably harmed if Zimmer and the sales representatives were not prohibited from engaging in certain conduct.

The New Jersey District Court was persuaded by Howmedica's arguments and entered injunctive relief against the individuals and Zimmer to enforce their employment agreements. The District Court's Order generally followed the relief requested by Howmedica in its application for an injunction.

Zimmer filed an immediate appeal of the injunction, compelling Howmedica to secure the broad relief it won through the injunction entered at the trial court level with a bond. In what may be counterintuitive, the party obtaining an injunction is frequently required to post a bond in order to help compensate defendants if the injunction is later overturned. The bond may act as a check on the type of relief sought by plaintiffs in injunction cases because all or a portion of the bond may be forfeited if the relief that was requested and granted is later overturned.

In this case, on appeal, the 3rd Circuit concluded that the injunction entered by the District Court was overbroad in certain respects and modified it to make it less restrictive. When the injunction was modified, the defendants asked the District Court to recover on the bond on the grounds that they were wrongfully restrained by the preliminary injunction and should be entitled to damages as a result. This put the District Court in the uncomfortable position of having to potentially punish the same party that it had previously rewarded.

The District Court delayed a decision on the bond by ruling that the defendants would have to prevail in the lawsuit before attempting to collect on the bond. The Court found that vacating certain portions of the injunction was not the same as a final decision on the merits. Accordingly, the Court concluded that the motion was premature and the defendants were not entitled to damages against the injunction bond.

This case is a reminder that requests for injunctive relief should be carefully considered because relief that goes beyond the contract, or that is otherwise overly broad, can subject a plaintiff to liability on the bond posted in support of the injunction. In this case, the language in the order proposed by the plaintiff went beyond the scope of the contract and the defendants' legal obligations (according to the 3rd Circuit). While securing broad injunctive relief against former employees can be invaluable to protecting a company's business, care should be taken to carefully craft language that does not expose the company to liability.

This recent case also serves as a reminder that the medical device industry is a hotbed for noncompete litigation, and companies in this industry should consider whether they are adequately protected with well-written and enforceable restrictive covenants and confidentiality agreements.

Companies should also consult counsel and work with new hires to ensure that they comply with enforceable restrictive covenant provisions in order to mitigate any risks associated with the hire.

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