

Non-Competes Pay a Rare Visit to the U.S. Supreme Court

Insights

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This week, the U.S. Supreme Court issued a ruling in a non-compete case -- a type of dispute that rarely finds its way to the high court. See [Nitro-Lift Technologies v. Lee](#), 568 U.S. --- (2012). The issue that brought this case to the Court was arbitration, a topic the high court has ruled on a number of times in recent years. The Supreme Court reaffirmed what most employers have believed for quite some time: if you include an arbitration clause in your employment agreement, you can count on being able to enforce the agreement to arbitrate.

In Nitro-Lift, the Oklahoma Supreme Court had ruled that the state court could rule on the enforceability of -- and ultimately invalidate -- an employee's confidentiality and non-compete agreement with his former employer even though the employee's contract had a clear arbitration clause stating that "[a]ny dispute . . . between Nitro-Lift and the Employee . . . shall be settled by arbitration. . . ." (slip op. at 1). The case began when Nitro-Lift served its former employee with a demand for arbitration, claiming he was violating his non-compete agreement. The former employee responded by filing a preemptive strike lawsuit in Oklahoma state court, asking the court to (a) declare the covenants unenforceable under Oklahoma law, and (b) enjoin their enforcement. The trial court dismissed the action, finding that the arbitration clause required the dispute about enforceability be submitted to an arbitrator, rather than the court (slip op. at 2). But when the

employee appealed, the Oklahoma Supreme Court declared the agreement null and void under Oklahoma non-compete law and refused to stay its hand in favor of arbitration. The state Supreme Court's core ruling was that, "the existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement." *Howard v. Nitro-Lift LLC*, 2011 OK 98, par. 15 n.20 (2011).

Nitro-Lift petitioned the U.S. Supreme Court for certiorari, asserting that the Oklahoma Supreme Court had ignored controlling decisions of the U.S. Supreme Court under the Federal Arbitration Act, 9 U.S.C. sec. 1 et seq. The U.S. Supreme Court granted certiorari and promptly vacated the Oklahoma Supreme Court's decision on the grounds that the Oklahoma court had failed to apply the federal law of arbitration as reflected in the FAA and the Supreme Court's decisions interpreting the statute, and had violated the Supremacy Clause of the U.S. Constitution by asserting that Oklahoma's restrictive covenant jurisprudence controls the issue, rather than the federal arbitration law (slip op. at 4-5).

The U.S. Supreme Court's ruling rested on a body of well established Supreme Court case law upholding arbitration clauses against myriad challenges from lower court rulings that reflect a "judicial hostility to arbitration" that is contrary to the dictates of the FAA (slip op. at 5, quoting *AT&T Mobility v. Concepcion*, 563 U.S. ___, ___ (2011) (slip op. at 8). In that sense, there is very little new in this opinion for employers, except that employers can take heart that the Supreme Court has further reaffirmed that valid arbitration clauses will be enforced, including in the context of employment relationships.

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