Non-Compete Alert: Montana Supreme Court Weighs in on Enforcing Non-Competes Against Terminated Employees

Insights
12.07.11

Courts continue to wrestle with the issue of whether a company has a legitimate business interest in enforcing a post-employment non-compete when it fires an employee without cause. Last September this Blog discussed Missett v. Hub International Pennsylvania, LLC, in which the Pennsylvania Superior Court explained that "the circumstances of termination are, alone, not determinative of whether the restrictive covenant is enforceable...." See You're Fired!! And Don't Forget Your Non-Compete! In its September 2010 decision, the Pennsylvania court backed away from a bright line rule of unenforceability that had been read into two of its earlier opinions. Over the years, other courts have weighed in with varying pronouncements. Recently, however, relying in part on one of the much earlier decisions from the Pennsylvania Superior Court (the 1994 decision in Insulation Corp. of America v. Brobston), the Montana Supreme Court appears to have renewed the bright line of unenforceability in cases of involuntary termination without cause. On November 22, 2011, the Montana Supreme Court in Wrigg v Junkermeir, Clark, Campanella, Stevens, P.C., concluded "an employer normally lacks a legitimate business interest in a covenant when it chooses to end the employment relationship." (A copy of the opinion is available in pdf format below.)

Facts of Wrigg v Junkermeir, Clark, Campanella, Stevens, P.C.

The facts of Wrigg are interesting in a number of respects. Wrigg was hired as a staff accountant for Junkermeir, Clark, Campanella, Stevens, P.C. (the "Firm"). Fifteen years later, she was promoted to a

shareholder of the firm and held that status for six years. Under the terms of the shareholder agreement, if the agreement was terminated for any reason, Wrigg would have to pay an amount equal to 100% of gross fees previously billed by the Firm in the twelve months preceding termination for any Firm client who is serviced by Wrigg's new employer within a year of Wrigg's termination. The court treated the shareholder agreement as an employment agreement and the payment clause as non-compete clause. The shareholder agreement expired by its own terms, and the Firm advised Wrigg that it was not renewing the agreement. At trial Wrigg conceded she had solicited clients of the Firm and performed work for them at her new employer within the one-year temporal restriction. The trial court found the covenant enforceable.

On appeal, the Montana Supreme Court reversed, agreeing with Wrigg that the covenant serves no legitimate business interest when the employer terminates the relationship without cause. The language of the shareholder agreement mirrored language that the Montana Supreme Court had found reasonable and enforceable in a 1985 decision. The court nonetheless rejected the Firm's call for equal treatment, distinguishing the earlier ruling on the grounds that in the earlier case the employee voluntarily terminated his employment. The court reasoned that, "[t]he employee makes an informed decision under [those] circumstances about the risks associated with a covenant's enforcement and voluntarily chooses to encounter those risks." The court further reasoned that when an employee is terminated without cause, "no informed decision exists" and thus "[e]nforcement of the covenant could impoverish an employee who has done nothing to warrant his termination."

In reaching the conclusion that ordinarily there is no legitimate business interest served in enforcing a non-competition clause when the employee has been terminated without cause, the Montana Supreme Court's analysis relies heavily, but not exclusively, on two cases: the Pennsylvania Superior Court's 1994 Insulation Corp v. Brobston decision and the 7th Circuit's 1983 decision in Rao v. Rao, applying Illinois law. According to state supreme court, the Brobston court determined that "[a]n employer's decision to end the employment relationship reveals the employer's belief that the employee is incapable of generating profits for the employer." Thus, "[i]t would be disingenuous for an employer to claim an employee was worthless to the business and simultaneously claim that the employee constituted an existential competitive threat." The Rao court, according to Wrigg, concluded that when an employee is terminated without cause, "[a]n employer needs no covenant to protect its business . . . as the employer sits in the best position to protect itself simply by maintaining the employment relationship." Whether Brobston and Rao can be appropriately used to support a bright line rule that does not look at the unique facts of each case is open to question. As mentioned above, in Missett the Pennsylvania Superior Court chastised courts for their bright line application of Brobston. More recently on December 1, 2011, the Illinois Supreme Court issued a decision establishing that under Illinois law, courts are required to make determinations on the existence of a legitimate business interest based on the totality of the circumstances of each particular case, not on any limited pre-determined set of factors.

In Wrigg, the Firm apparently did not offer any explanation for the termination. One clear takeaway for employers who seek to enforce their non-competes is that if there is a basis to support a for cause termination, it is far preferable to have the reasons on the record, then simply to let an employment contract lapse by its own terms.

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