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NEWSLETTERS

Noncompetes: Michigan Decision Highlights Strategy Of Cease And Desist Letters

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If your business is faced with a former employee you think is working for a competitor in violation of a noncompete agreement or other restrictive covenants, where does the new employer fit into your action plan to obtain compliance? A recent federal district court decision from Michigan highlights this strategic decision. The court dismissed a tortious interference lawsuit filed by a medical imaging repairman against his former employer for making a competitor aware of restrictive covenants restricting the employee, but the case also indirectly cautions businesses to think each situation through carefully before acting in these situations.

The pattern in *Bonds v Philips Electronic North America*, 2014 WL 222730 (E.D. Mich. January 21, 2014) is straightforward and familiar to many businesses with noncompete agreements – employee has noncompete, employee leaves and goes to work for a competitor, old employer sends the competitor a copy of a letter to the employee cautioning the employee to comply with is restrictive covenants. Things can go various directions from there.

In *Bonds*, the new employer, Barrington Medical Imaging, LLC, quickly fired the employee (Bonds), who in turn sued the old employer (Philips) for tortious interference with his relationship with Barrington. Bonds claimed that Philips tortiously caused him to be fired by Barrington by communicating, through its counsel, to Barrington about the restrictive covenants in his agreement with Philips. Philips had sent a letter to Bonds reminding him of his various post-employment contractual obligations to Philips. While it sent a copy of the letter to Barrington, it did not ask that Barrington terminate Bonds. About a week later, though, that is exactly what Barrington did. The Court dismissed Bonds' case, saying that Phillips acted without malice and had a legitimate business reason for sending the letter. Therefore, Bonds could not sustain a tortious interference claim. This was good news for the enforcing employer and seemingly the right result in this particular situation.

Whether to copy the competitor is one of two important strategic decisions regarding such cease and desist letters. The first decision is whether to even send such a letter rather than simply filing a lawsuit. There are many reasons to send the letter first:

1. It costs less in legal fees to send a letter than to file a lawsuit.
2. Often a lawsuit is not necessary because the matter can be worked out in some fashion short of a lawsuit. (Certainly things worked out well for Philips in this case, other than the legal bill for defending this lawsuit.)

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3. Where there is litigation over a noncompete, being able to portray your company as the reasonable party to the court is often critical in these fact intensive cases. If an employer jumps straight to litigation, the lawyer for the employee and/or the competitor might under some circumstances be able to portray that as part of an overreaching approach to enforcement. Of course, particularly urgent situations may make this decision for a business.

The reason *not* to send the letter is that, where there is more than one state where the case could be litigated, and those states' noncompete laws are different, a cease and desist letter can be a "heads up" that allows the former employee and/or the new employer to run to court on their home turf, where the laws may be more favorable to the employer and new employer. A common example of this is where the courts in the old employer's state will modify a noncompete they find to be overly broad to the extent necessary to make it enforceable, but the courts in the new employer's state will not. In that scenario, if the case is litigated under the new employer's state laws and the court finds the restrictions to be overbroad, the former employer can literally be left with no restrictions on the employee's activities. In short, the case is won or lost based on what state's law applies.

If the decision to send a cease and letter is made, as is often prudent, the next question is whether to send the letter to the competitor as well. Like virtually every strategic decision in the noncompete area, that is a case by case decision. Why do it? It certainly shows the enforcing company is serious, and may solve the issue immediately, as it seemed to have done in *Bonds* – the competitor fired the employee, presumably alleviating the enforcing employer's concerns. It is not uncommon for the employee not to have told the new employer he/she even has a noncompete, even if the new employer asked, and if that's the case the new employer will often wash its hands of the new employee immediately.

Why not copy the competitor? These reasons could include:

1. The former employer may have to pay to defend a tortious interference lawsuit like this one (even if it wins). Claims such as Bonds' are uncommon when the employee no longer has the backing of the new employer. Still, the cost of defending such a case is one consideration.
2. A more common consideration is that, by directly bringing in the competitor, the former employer is more likely to get the new employer invested in the matter, likely resulting in higher priced opposing counsel tending to increase the enforcing employer's legal costs as well. That may happen anyway, but directly inviting the new employer into the matter increases the likelihood of it.
3. As noted above with respect to the more aggressive move of filing a lawsuit before sending a cease and desist letter, the enforcing employer can sometimes benefit in subsequent litigation from having taken the more measured approach (again, if business circumstances give your business that option).

As always, there is no cookie cutter answer; these situations are like snowflakes with numerous distinctive considerations that need to be taken into account in formulating the strategy. *Bonds* is a good example of one set of decisions and results your business should take into

consideration when making these decisions.

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