CLIENT ALERTS

Establishing “Legitimate Business Interests” When Enforcing Non-Competes: A Cautionary Tale

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A recent decision by the United States District Court for the Middle District of Florida serves as yet another cautionary tale to employers seeking to hold former employees to the terms of their non-compete and non-solicitation agreements. Specifically, the November 13, 2019 Opinion and Order in *NuVasive, Inc. v. LeDuff, et al.* (Case No. 2:19-cv-00698-SPC-NPM, Doc # 37) reinforces that a company seeking to hold a former employee to his or her non-compete and non-solicitation obligations must demonstrate not only that the restrictions are reasonable in time, geography, and scope, but also as a threshold matter that the restrictions are reasonably necessary in the first place to protect the company’s business interests. The court found that, among other things, the plaintiff former employer failed to plead or prove how its non-compete and non-solicitation restrictions were necessary to protect its legitimate business interests, and the court, therefore, refused to enter a preliminary injunction against the company’s former employee. The court reached this result even though the former employee had access to the company’s proprietary and confidential information, left the company to join a direct competitor, and began selling products to multiple former customers.

A more detailed discussion of the *NuVasive* court’s decision follows below, along with some takeaways and recommendations for companies seeking to avoid such a predicament if and when they seek to enforce their own similar restrictive covenants against a departed employee.

The Facts

Defendant Christopher LeDuff was a longtime sales agent for NuVasive, a manufacturer of medical devices for spine disorders. During his last six years with the company, LeDuff sold NuVasive’s products in Fort Myers and Naples and became privy

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Trade Secret & Non-Compete Specialty Team to confidential company information. This information included, among other things, prices, customer preferences, product details and research, sales techniques and forecasts, and various trade secrets.

In late 2019, NuVasive learned that LeDuff planned to leave the company for a direct competitor, Alphatec, Inc., and was soliciting NuVasive customers and a NuVasive employee to join him. NuVasive fired LeDuff, and LeDuff then started work with Alphatec and began selling his new company's products to NuVasive's customers.

Soon after, NuVasive filed claims against LeDuff for breach of his duty of loyalty and breach of contract. Both claims turned on LeDuff's alleged violations of the non-solicitation and non-compete covenants of a Proprietary Information, Inventions Assignment and Restrictive Covenant ("PIIA") he signed with NuVasive. NuVasive also filed a motion for preliminary injunction asking the court to prohibit LeDuff from further violating the PIIA during the litigation and to require LeDuff to maintain the confidentiality of NuVasive's information and return all proprietary NuVasive information in his possession.

According to NuVasive, this requested relief was proper and warranted because the limitations in the PIIA's restrictive covenants were properly tailored in both duration and scope, thus rendering the PIIA enforceable. Specifically, the non-solicitation and non-compete covenants were effective for only a year after LeDuff's employment (with a corresponding extension for any period of noncompliance), and, based on LeDuff's qualifications and background as a "Spinal Specialist," the PIIA did not altogether bar LeDuff from working for a "Conflicting Organization," but merely from soliciting "Customers" he previously contacted or oversaw in Fort Myers and Naples. LeDuff countered that the PIIA was overbroad and unenforceable, and he likewise denied that he had either encouraged NuVasive customers to use Alphatec products or disclosed NuVasive's confidential information or trade secrets while working for Alphatec.

The Court's Analysis and Conclusion

In considering NuVasive's motion, the court first noted the high hurdle movants must overcome to obtain the "extraordinary and drastic remedy" of a preliminary injunction motion, which "courts should grant sparingly." The court also recited the general factors governing preliminary injunction motions:

- Whether the movant has a substantial likelihood of success on the merits;
- Whether irreparable injury will occur without the injunction;
- Whether the threatened injury to the movant outweighs whatever damage the proposed injunction would cause the opposing party; and
- If issued, whether the injunction would be adverse to the public interest.

The court then turned to the more specific requirement for enforcing restrictive covenants in employment agreements under Florida law (Florida Statute § 542.335(1))—*i.e.*, the restrictions must be reasonably limited in "time, area, and line of business." The court went on to summarize the other pertinent aspects of Florida law as follows:

The party seeking to enforce a restrictive covenant—here NuVasive—must "plead and prove" (1) the existence of one or more legitimate business interests justifying the restrictive covenant; and (2) "the contractually specified restraint is reasonably necessary to protect" those interests. *Id.* § 542.335(1)(b)-(c). Legitimate business interests include valuable confidential business information, substantial relationships with specific prospective or existing customers, client goodwill associated with an ongoing business, and specialized training. *Id.* § 542.335(1)(b). If the party seeking to enforce the covenant meets its burden, then the opposing party must show the restraint is "overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interests." *Id.* § 542.335(1)(c). If a restraint is overbroad, overlong, or not reasonably necessary to protect the legitimate interests, the court must "modify the restraint and grant only the relief reasonably necessary to protect such interest or interests." *Id.*; see also *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1231 (11th Cir. 2009)

In applying the above requirements to NuVasive's motion, the court ultimately concluded that NuVasive fell short of demonstrating a likelihood of success on the merits because it failed to offer sufficient or particularized *evidence* as to why the non-compete and non-solicitation restraints were reasonably necessary to protect the company's legitimate business interests. While the court acknowledged that NuVasive had in fact "alleged several legitimate business interests (*i.e.*, "protecting confidential business information; substantial relationships and goodwill with customers in LeDuff's former sales territory; and specialized training given to sales agents"), NuVasive failed to take the required next step—NuVasive neither "plead[ed] nor prove[d] why it need[ed] the non-compete and non-solicitation to protect those interests."

Thus, NuVasive's emphasis that the non-compete only "lasts for one year, is limited geographically to Naples and Fort Myers, and pertains only to 'Conflicting Organizations' like Alphatec" proved unavailing in that the mere limitations of the non-compete related only to the general enforceability of the restrictions. The limitations did not establish "NuVasive['s] need[] [for] the non-compete to protect its business interests in the first place." Moreover, the declarations NuVasive submitted to show the underlying need for the non-compete also were unpersuasive in that the court deemed them conclusory and devoid of specific facts showing how the training and information LeDuff acquired from NuVasive "improve[d] the marketability of Alphatec's (unidentified) products."

Finally, while NuVasive's failure to establish the first preliminary injunction element was alone sufficient to deny NuVasive's motion (*i.e.*, NuVasive failed to show a substantial likelihood of success on the merits), the court went on to cite the inadequacy of NuVasive's evidence as to the second and third preliminary injunction factors. Specifically, despite NuVasive's claim that LeDuff's former customers were using Alphatec products, NuVasive failed to demonstrate that LeDuff was the direct or indirect cause of physicians switching to Alphatec. Thus, NuVasive did not establish actual or imminent harm because of LeDuff, or that NuVasive's interests outweighed the harm LeDuff would suffer with an injunction. Overall then, the court found that the record lacked evidence to support the "extraordinary and drastic" remedy of an injunction.

Takeaways

While *NuVasive* was decided under Florida law, the law in Michigan and elsewhere is substantially similar,[1] and courts are all but uniform in their characterization of a preliminary injunction as an "extraordinary remedy" that is not to be granted lightly.

To that end, employers in all cases are well served to follow some basic "best practices" to maximize their likelihood of success in enforcing non-compete and non-solicitation agreements, particularly at the preliminary injunction stage if necessary:

1. Beyond ensuring that the restrictions in their agreements are well-defined and reasonably limited, companies should also work with counsel to incorporate into their agreements a specific statement connecting the restrictions at issue to the legitimate business interests they seek to protect.
2. Companies should also work with their counsel and IT personnel to implement, maintain, and enforce tight control and access restrictions, as well as employee departure protocols, with respect to confidential and proprietary company information. While these may not be a foolproof way to prevent the misappropriation of company data or know-how, these measures can help minimize the risk of misappropriation and misuse. They can also help companies detect violations promptly when they in fact occur.
3. If and when litigation proves necessary to enforce a former employee's non-compete or non-solicitation obligations, companies must maintain and provide the court with as much hard evidence as possible regarding the legitimate business interests at issue, the reasonableness of the restrictions imposed, and the causal connection between the violations of the restrictions and the harm alleged. Obtaining a preliminary injunction at the outset of a case is an immensely powerful tool not only to avoid further and irreparable injury, but also, as a practical matter, to set the stage for a fast and favorable settlement to the extent that a negotiated resolution is possible. In turn, among the most critical ingredients to a successful preliminary injunction motion is the ability to show a likelihood of success on the merits.

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[1] *See, e.g.*, MCL 445.774a(1), which provides as follows:

445.774a. Agreements not to compete; application

(1) An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.