Yes, Attorneys' Fees Clauses are Enforceable in Non-Compete Cases

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For many years it was debated and disputed whether an attorneys' fee shifting clause in a non-compete agreement would actually be upheld. That is, if an employee signed a non-compete with its employer (or former employer) and went to work for a competitor, would a court really make the former employee pay his former company's attorneys' fees if the company filed a suit against him and prevailed. Many argued that it would be inequitable. Some argued that it would not be "reasonable" to award such fees against an individual employee. Others assumed that courts would reform the agreement. Still others banked on the fact that the employer wouldn't take the matter that far (and potentially through appeal) to worry about it.

But it is now clear that defendants in such cases *should* worry about such clauses. Two recent cases applying Michigan law have upheld attorneys' fee clauses, awarding the former employer its attorneys' fees incurred in enforcing a non-compete against its former employees. It is clear that such clauses should not be taken lightly. These provisions could also potentially serve as very strong leverage for an employer enforcing non-compete agreements.

The Cases

The first case on point was the case of ***Resource Point, LLC v. Addolux, LLC*, 2018 WL 4579725 (Mich. App. Sept. 20, 2018)**. Although unfortunately an unpublished opinion, this ruling by the Michigan Court of Appeals addressed the issue of awarding attorneys' fees to an employer who enforces its non-competes. The Court of Appeals overturned a trial court's failure to award the employer its attorneys' fees, holding that the trial court "clearly erred" in failing to award them when such was provided in the parties' contract.

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In this case, an employee signed and agreed to a "Confidentiality and Noncompetition Agreement" under which the employee agreed not to solicit the employer's clients if he left its employ. But when his employment ended, he in fact started a new company that competed with his former employer and began soliciting his former employer's clients. The employer sued.

The case went all the way through to a bench trial, at which point the court held that the employee breached his non-compete agreement. The employer then sought its attorneys' fees and costs incurred in enforcing the contract, which amounted to nearly $100,000.00. The contract provision upon which it relied stated:

> Contractor Employee agrees to indemnify and hold harmless Company for any and all loss, costs and other liability incurred or threatened, including attorney's fees, related to violations of the obligations set forth in this Agreement of Contractor's Employee.

Id. Despite this clear contractual provision, the trial court denied the employer's request for attorneys' fees "with no real explanation." Instead, the lower court limited the employer to its attorneys' fees and costs permitted under statute and court rule, which are quite limited and much lower than the actual attorneys' fees incurred.

The Michigan Court of Appeals disagreed and overturned the lower court's ruling. "Although parties are generally required to bear their own litigation costs, they may also contract for the 'payment of reasonable attorney fees' in the event of a contractual dispute." *Id.*; quoting *Fleet Business Credit v. Krapohl Ford Lincoln Mercury, Co.*, 274 Mich. App. 584, 588 (2007). "Attorneys' fees awarded under contractual provisions are considered damages, not costs." *Id.*; quoting *Central Transp., Inc. v. Fruehauf Corp.*, 139 Mich. App 536, 548 (1984).

In the case before it, the Court of Appeals held that "[t]he plain and unambiguous language of the noncompete agreement provides that [the employer's] attorney fees are part of the damages award in this case." *Id.* "This language was clear and capable of no other interpretation." *Id.* Thus, the Court of Appeals held that "the trial court fundamentally erred in awarding [the employer] only those costs and fees allowed under statute and court rule." *Id.* The court therefore vacated the lower court's order and remanded the matter back to the trial court to determine the amount of reasonable attorneys' fees.

The case is now on appeal to the Michigan Supreme Court. Butzel Long will continue to follow this matter and publish any updates that may come from that appeal.

The second case in question was an opinion issued by the Sixth Circuit Court of Appeals, on appeal from the federal District Court for the Eastern District of Michigan. In *Kelly Services, Inc. v. Steno, et al*, 2019 WL 157654 (6th Cir. Jan. 10, 2019), the Court of Appeals analyzed a non-compete agreement governed by Michigan law. The defendants/employees signed a one-year non-compete agreement with their former employer. They later left and went to work for a competitor, and the employer sued to enforce the non-compete. The district court granted a preliminary injunction stopping the employees from working for the competitor.

The employer then sought to recover its attorneys' fees pursuant to a provision in the non-compete agreement. The contract provision in question read:

> If I break this Agreement, [Employer] is entitled to recover as damages from me the greater of the amount of the financial loss which [Employer] suffers as a result of the amount of the financial gain which I receive. *I will pay [Employer's] reasonable attorney's fees and costs involved in enforcing this agreement.*

Id. (emphasis added by the court). The defendants raised, among others, a novel argument that the contractual attorneys' fees could not be awarded without a jury trial under the Seventh Amendment, arguing that the "reasonableness" of the fees should be determined by a jury. The district court disagreed, and awarded the employer its attorneys' fees. The Sixth Circuit upheld that award.

The Sixth Circuit applied long standing principles under Michigan law, noting that courts applying Michigan law "will enforce attorneys' fees provisions like any other term in a contract unless contrary to public policy." *Id.*; quoting *Pransky v. Falcon Grp., Inc.*, 874 N.W.2d 367, 383 (Mich. App. 2015) (internal brackets omitted). "As with any other term in a contract, courts should look first to the plain language of the contract, and if the language is unambiguous it will be enforced as written." *Id.* (internal citations omitted). "An unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Id.*; quoting *Quality Prods. and Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251, 259 (Mich. 2003).

The court noted that by the contract's express terms, it did not require a final determination of liability in favor of the employee as a condition for the award of fees. The contract did not use words like "prevailing party," nor did its literal language require a final determination of liability. Instead, the contract permitted the employer to obtain attorneys' fees for "enforcing" the contract, which here it did. The Sixth Circuit clarified that in a hypothetical case where an employer sought to enforce an agreement in a way that was unreasonable, made with little or no basis, or made for purposes of oppression or harassment, then an award of attorneys' fees merely for "seeking to enforce" the non-compete would not be reasonable. But where, as in this case, the plaintiff employer properly sought to enforce a valid non-compete and was successful in receiving an injunction, then the award of attorneys' fees incurred in "enforcing the agreement" was reasonable and warranted.

As to the defendants argument that a jury was required to determine the amount of "reasonable attorneys' fees," the Sixth Circuit again disagreed. The Seventh Amendment of the U.S. Constitution states in pertinent part that "where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . . ." The defendants therefore argued that any award of attorneys' fees (at least in excess of twenty dollars, presumably) could only be determined by a jury if the defendants so chose. The appellate court held, however, that this argument "lacks merit." *Id.*

In a debate that may sound esoteric to lay people but will be well recognized by attorneys everywhere, the court differentiated between "legal" claims and "equitable" claims. The Seventh Amendment gives parties the right to a jury only for determination of "legal" claims, but there is no such right for "equitable" issues. The court cited cases from the Second Circuit and even the U.S. Supreme Court for the determination that the computation of reasonable attorneys' fees is an

"equitable" determination that can be made by the court and need not go to a jury.

The court concluded that "[t]he Seventh Amendment accordingly does not require a jury determination of the amount of attorneys' fees in this case." *Id.* Because the Court could determine as a matter of law that the employer was entitled to the attorneys' fees, it could make the equitable determination of the amount of the reasonable fees. Thus, the award of the employer's attorneys' fees was upheld, and the defendant employees had to pay those fees to their former employer, which surely felt like having salt rubbed into their wounds.

The Takeaway

What is clear from both of these cases is that courts will presume that contracts and non-compete agreements say what the parties mean for them to say. Defendants should not take attorneys' fee clauses lightly, and should be careful not to be in a position to have to pay their former employer's attorneys' fees that it incurred while stopping the employee from working. And employers should make sure that they have such fees written into their non-compete agreements and other restrictive covenants and should seek to enforce them whenever they enforce the restrictive covenants.

If you are an employer who utilizes non-competes and other restrictive covenants, you should make sure your agreements include such a provision. If not, contact your attorney to have them updated. And if you are an employee who has signed a non-compete but is planning to compete against your former employer, be careful that you do not find yourself paying your former company for the privilege of being prohibited from working!

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