CLIENT ALERTS

Be Careful What You Ask For-Or At Least Be Careful How You Ask It: In Drafting Restrictive Covenants and In Pursuing Litigation to Enforce Those Agreements, Language is Key in Both the Agreement and the Injunctive Order You Might Obtain

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Disputes about the enforcement of restrictive covenants (non-compete and non-solicit agreements) are often aggressively fought and shine a bright light upon the language of the agreement when a court is tasked with enjoining conduct those types of agreement seek to prevent. Even where you achieve some level of success on enforcement in a proceeding seeking either a temporary restraining order or a preliminary injunction, you need to be careful to ensure that that success is not fleeting. That happened in a recent Ohio case appealed to the United States Sixth Circuit Court of Appeals. That case was *Union Home Mortgage Corp v Cromer, et. al.* [Opinion].

In that case, Union Home filed suit against a former employee, Mr. Cromer, for breach of his obligations found in a restrictive covenant not to compete with his former employer. Those obligations included his agreement to "not become employed in the same or a similar capacity" with a competitor. Union Home alleged what would typically be viewed as egregious actions by Cromer in that he forwarded and used allegedly confidential information to Homeside Financial, his new employer and a direct competitor of Union Home, and recruited other Union Home employees to join him at Homeside. The lower court entered an injunction with no time limitation prohibiting Cromer from "competing with Union Home," among other things. Cromer and Homeside appealed that ruling.

The Sixth Circuit reversed the order of the lower court and vacated the injunction. In doing so, the appellate court found that the lower court injunction suffered from several deficiencies, as urged by Cromer and Homeside. First, the court found that while the agreement prevented Cromer from being

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employed by a competitor "in the same or similar capacity" as he was with Union Home, the lower court had failed to adequately interpret that provision and apply that interpretation to the dispute at hand when it simply ordered that Cromer could not "compete" with Union Home. While Cromer and Homeside had asked the lower court to clarify its ruling, the lower court refused to do so and stood by its order.

The court of appeals took issue with several of the lower court's failures. First, the court focused on the lower court's failure to define the term "competing." The court found the term too vague in that instead of interpreting that term in connection with the contract language as to working in the same or similar capacity, the lower court issued a blanket ruling that Cromer could not compete. That failure to define the terms at issue resulted in the injunction being too broad and vague and left Cromer and Homeside to resort to guesswork to structure their conduct.

Because the lower court had failed to make specific determinations as to what conduct by Cromer constituted acting in the same or a similar capacity and ordered that he could not "compete", that broad prohibition could be read to "encompass lawful conduct because it prohibits any form of competition—irrespective of Cromer's employer, job title, or duties. As such, there is an inherent risk that the scope of the injunction exceeds the [a]greement that the parties signed."

The appeals court also addressed other deficiencies in the lower court's ruling, such as its failure to place a time limit on its injunctions and a failure to address the legal requirements for entry of an injunction, including whether the restrictive covenants were even enforceable under Ohio law. Ultimately, the appellate court vacated the injunction in its entirety. Although the court, as many courts do, had the authority to revise the injunction to remedy its problems, it chose not to do so. It thereby handed Cromer and Homeside a near complete reversal of fortune. At the same time, the court of appeals opinion made it abundantly clear that Union Home enjoyed only a Pyhrric victory.

So, what can be learned from the *Union Home v Cromer* case? At a minimum, there are at least two take-away lessons from this case. First, make sure your restrictive covenants are clear and tailored to the specific needs at issue in order to assure as best you can that they will be enforced. Being overly broad in describing restricted activity does no good whatsoever. The language of those agreements is always key to any court's analysis.

Second, and perhaps most importantly, when you do seek relief from a court for breach of such a covenant, make sure that the court is fully aware of the detailed and factual support for your contentions of breach. For example, make sure that the court is made aware of exactly how the departed employee is in breach in his or her new capacity at the new employer. What is it that he or she is now doing that is not only competitive, but specifically contrary to what he or she agreed to in the restrictive covenant? You cannot spend too much time or effort in describing or explaining to a court the factual basis for the relief you seek—an injunction against contractually prohibited behavior.

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The Trade Secret and Non-Compete Specialty Team at Butzel is well versed in the preparation of restrictive covenant agreements and their efficient and effective enforcement. It is also keenly aware of the deficiencies in enforcement actions brought against new employers and departed employees that join those new companies. The Butzel team stands ready to assist you in all aspects of counseling, preparation and litigation that touches upon restrictive covenant issues.

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