BARNES & THORNBURG LLP

Noncompete Roundup – Oklahoma

November 6, 2015 | | Non-competes And Trade Secrets,Labor And Employment

Hannesson Murphy
Partner

Many employers would be surprised to learn that Oklahoma has some of the country's toughest standards when it comes to enforcing restrictive covenants. The sharp contrast between the laws of the Sooner State and its peers, such as Texas, was recently highlighted in by the Fifth Circuit Court of Appeals in *Cardoni v. Prosperity Bank* (Case No. 14-20682). As background, Oklahoma expressly provides that *any restraints* on a lawful profession, trade or business are *void*, unless it meets one of a handful of narrow exceptions. While the exceptions technically extend to the former employees of a company, the law states that even workers who agree not to compete with their former employers still can engage in the same business (or similar business) as the former employer, *as long as* the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer. In short, while Oklahoma generally bars noncompetes for employees, it allows a non-solicitation agreement if the employee agrees not to (a) solicit, (b) the sale of goods, services (or a combination of these), (c) from the established customers of the former employer. The statute does not define "established customers"; however, this term has been interpreted by the courts to mean customers with whom the employer has had an ongoing relationship that it anticipates will continue in the future. With that summary out of the way, we come back to *Cardoni.* The case involved a Texas bank that bought a rival bank in Oklahoma. As you would expect, several of the Oklahoma bank's vice presidents stayed with the new bank after the acquisition, and signed non-competition, non-solicitation and non-disclosure agreements with their new Texas-based bank employer. Cleverly, the restrictive covenants were subject to a Texas choice of law clause that deftly sidestepped the strict prohibitions associated with Oklahoma. The restrictions themselves also were – by most standards – fairly reasonable: the term was for three years, and prohibited competition in 50-mile radius of where the bank did business and contact with existing or prospective customers of the bank. Eventually, the bank VPs left and went to work for a competitor in Oklahoma. Thereafter, the Texas bank went to court seeking an injunction enforcing the terms of the restrictive covenants. After a mixed decision at the District Court level, the Fifth Circuit on appeal rejected the contract language that applied Texas law to the non-compete. The Fifth Circuit agreed that the law of Oklahoma trumped that of Texas, because Oklahoma had the most significant relationship to the parties and the transaction: most of the contractual negotiations had taken place in Oklahoma, the defendants resided there, and all of the work was to be performed in Oklahoma. More significantly, the court concluded that given its long-standing antipathy toward noncompete agreements, Oklahoma had a stronger interest than Texas in preventing the enforcement of prohibited non-competes by companies operating within the

RELATED PRACTICE AREAS

Labor and Employment
Non-Compete and Trade Secrets

RELATED TOPICS

nonsolicitation agreement
Non-Compete Agreement
Oklahoma

state against its residents. As it relates to the non-solicitation restrictions, the Fifth Circuit allowed the choice of Texas law in this context and remanded the decision back to the District Court to determine whether the non-solicitation provision would be enforceable under Texas law. As for the non-disclosure provision, the Fifth Circuit agreed that Texas law was appropriate because both Texas and Oklahoma allow these restrictions. However, the Court significantly upheld the denial of an injunction, holding that the Texas bank had failed to provide *any* evidence – aside from speculation – that the vice presidents actually had disclosed or used any confidential information. The case provides several lessons for employers that operate in multiple states:

- Courts need *evidence* that an employee has (a) actually misappropriated or (b) threatened to misappropriate, the company's confidential or trade secret information. Speculation about what an employee *might do* is *never sufficient*.

- Restrictive covenants should be tailored to the standards (and peculiarities) of the states where the employer may seek enforcement as much as possible. A carefully drafted restrictive covenant that relies on a foreign choice of law clause ultimately may prove worthless if a court refuses to enforce it because of public policy concerns.