

How Important are Irreparable Injury Provisions in Non-Compete Agreements?

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by Jack Sullivan and Trevor Brown

Today's workforce is more mobile than in past generations. Long gone are the days when an employee started and ended a career at the same company. Knowing how to protect your company's confidential information when a trusted employee leaves can have a lasting impact on your ability to compete. So, what can you do when a former employee goes to work for a competitor? ***Is having an irreparable injury provision in your non-compete agreement enough to obtain a court order prohibiting that individual from working at his/her new job?***

In Minnesota, courts want to see more than just words in a contract before they will grant injunctive relief against a former employee.

This week, the Supreme Court of Minnesota issued a decision in *St. Jude Medical, Inc. v. Carter*. The case arose after Heath Carter left his employer to work for a competitor. The employer filed suit against Mr. Carter and the competitor, alleging violations of Mr. Carter's non-compete agreement. The employer did not seek money damages but asked the court for injunctive relief; specifically, an order enforcing the terms of the non-compete agreement and prohibiting Mr. Carter from working for a competitor in his then-current position. The case went to a jury, which ultimately found that Mr. Carter had breached his non-compete agreement. But the court refused to enter an injunction, finding that the employer failed to establish that it had been harmed.

The case made its way to the Supreme Court, where the question became what to do about specific language in the non-compete agreement that addressed the issue of whether and how the former employer was harmed. The language at issue is commonly included in many non-compete agreements:

In the event Employee breaches the covenants contained in this Agreement, Employee recognizes that irreparable injury will result . . . that [the Employer's] remedy at law for damages will be inadequate, and that [the Employer] shall be entitled to an injunction to

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restrain the continuing breach by Employee.

At first glance, the provision appeared to resolve the issue of whether the employer suffered irreparable harm—Mr. Carter agreed that it had. But the Supreme Court disagreed. The court noted that “[a] private agreement is just that: private,” and concluded that such contractual language does not, by itself, entitle an employer to an injunction after proving the breach of a non-compete. The court emphasized that regardless of what the parties agree to, the burden will always fall on the employer to show that: (1) legal remedies (i.e., money damages) are inadequate; and (2) “great and irreparable injury” will result without an injunction. Because the employer did not offer *proof* of an irreparable injury, the court held that the employer was not entitled to an injunction.

So what now? Are provisions like those quoted above meaningless? Should employers scramble to re-write their non-compete agreements? The short answer is “probably not.”

Minnesota aligns with a number of states in which mere contractual language about irreparable harm is not enough to win injunctive relief. Nevertheless, these provisions are still worth including in non-compete agreements because courts can consider them as one of many factors that bear on whether an employer has suffered irreparable harm. Other factors will usually be more persuasive, often including evidence of some or all of the following:

1. The departing employee took confidential information when he or she left (e.g., client lists, marketing plans, and pricing information).
2. The departing employee disclosed confidential information to the competitor or put confidential information to use in the new job.
3. The departing employee solicited business from former clients or customers and used confidential information to solicit such business.
4. The former employer lost client or customer goodwill because of the departing employee’s breach of the non-compete agreement.

Ultimately, *Carter* serves as a useful reminder to employers on both sides of an employee’s job change. Former employers should carefully consider how they have been harmed by an employee’s departure (and what evidence they anticipate being able to present as proof of that harm). Hiring employers should understand and reinforce to their new employees the importance of complying with prior non-compete agreements. And for employers on both sides, consulting with experienced employment attorneys even before these types of cases go to litigation can be the key to a successful outcome.