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EMPLOYMENT LAW

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A Little Knowledge Can Be a Dangerous Thing

Several issues to consider before litigating a noncompete case

Joseph Big, the managing partner of the biggest and baddest law firm in the state, storms into your office looking to squash the seventh-year associate who up and quit the firm and took various clients' files. Mr. Big explains that the attorney signed an ironclad noncompete agreement and requests that you immediately file an order to show cause to restrain the ungrateful twit. You quickly review the agreement, confirm it says what Mr. Big represented and accept the case. You have some familiarity with noncompetes and believe this is a great opportunity to show the Big boys you know how to litigate with the best of them. Be wary, however, because the expression "a little knowledge can be a dangerous thing" rings especially true in the area of restrictive covenants.

The basics concerning noncompetes are easy enough to find. *Solari Industries, Inc. v. Malady*, 55 N.J. 571 (1970), is the logical starting point. It holds that noncompete agreements will

be totally or partially enforced to the extent reasonably necessary to protect the employer's legitimate interests, will cause no undue hardship on the employee and will not impair the public interest. This limited knowledge, however, is not enough. Other things you need to consider include:

1) Know your judge. This is probably the most important item on the list, as each judge has his own view on noncompetes. For example, in a case where our firm was defending a temporary restraining order application, the judge stated off-the-record that he "didn't believe in restrictive covenants." Learn what you can about the judge before appearing. Are there reported or unreported decisions in matters he handled? Have any of your colleagues appeared before him on similar matters?

2) Know what court you want to be in. Contrary to what many attorneys believe, applications for injunctive relief are not limited to the Chancery Division. See Hon. William A. Dreier and Paul A. Rowe, Esq., *Guidebook to Chancery Practice in New Jersey* at 157 (6th Ed. 2005). Choosing the right forum also relates to point one above. In counties with only one Chancery judge, you'll know who will decide the application. Even in counties with two judges, you can often find out which judge will be handling the emergent application and may have the option of deciding whether to file the case in Chancery or Law

Division, depending on the remedies selected.

3) Know whether you want a jury. See points one and two above. Obviously, if you want a jury, you will either file initially in the Law Division or hope to have the matter transferred there after the Chancery judge deals with the restraints and any other equitable issues. In the latter case you should still include the jury demand in the verified complaint or file a separate demand before the 10-day deadline under R. 4:35-1. Whether a judge or jury would be best for your client is beyond the scope of this article, but something which requires careful consideration.

4) Know how to handicap the likelihood of obtaining restraints. The best way to do this is to know the judge. See point one above. It is not enough to have familiarity with Solari when handicapping a favorable outcome. It is also extremely important to understand your client's business. Is he a physician? If so, have a good working knowledge of *Karlin v. Weinberg*, 77 N.J. 408 (1978), and its progeny. While a restrictive covenant involving a doctor is enforceable, it may be too broad if it impacts the public's access to medical help. See, e.g., *Community Hosp. Group v. More*, 183 N.J. 36, 60-63 (2005). Is he an attorney, as in the fact pattern above? If so, restrictive covenants are unenforceable. See *Jacob v. Norris McLaughlin & Marcus*, 128 N.J. 10 (1992). Whether

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noncompetes for in-house counsel are similarly unenforceable is proposed to be on the agenda for the April 24 meeting of the New Jersey Supreme Court's Advisory Committee on Professional Ethics. Being denied a temporary restraining order at the outset of the case can be devastating, especially in restrictive covenant cases which have a very short shelf life. Once a plaintiff hears that the Court is unconvinced about the ultimate likelihood of success on the merits, noncompete cases tend to unravel. Don't have the wind taken out of plaintiff's sails if the likelihood of obtaining restraints prediscovers is slim. It might be better to take some discovery and only then seek restraints on the return date of the order to show cause. See point 6 below. A weak application will also result in a negative first impression with the court with possible consequences for the ultimate outcome of the case, especially if the case is tried by the same judge who decided the restraints application.

5) Know that all of the elements in *Crowe v. DiGoia* do not have to be met. Understand the relief needed. If you simply want to maintain the status quo, don't set the bar too high in your moving papers. While it would be helpful to advise the court why you will ultimately be successful on the merits, it is not necessarily required to maintain the status quo ante. *General Electric Co. v. Gem Vacuum Stores*, 36 N.J. Super 234, 236-237 (App. Div. 1955).

6) Know the discovery rules. What is the likelihood of obtaining a temporary restraining order? Can you satisfy the elements necessary without discovery? How much information is exclusively within defendant's control?

Know that the discovery rules, with leave of court, allow for expedited discovery which your client might desperately need before appearing back in court for a preliminary injunction. R. 4:14-1; 4:17-4(b); 4:18-1(b); 4:22-1.

7) Know the extent of relief you're likely to get. Don't overreach. It detracts from your client's application. While the court has the right to blue pencil the agreement, and cut it back dramatically in terms of the geographic and temporal scope of the restraints (see *Solari* cited above), asking for too much might cause the court to conclude that you are attempting to stifle legitimate competition rather than safeguarding your client's legitimate protectable interests. The same holds true when drafting noncompetes.

8) Know the defendant's position. You shouldn't proceed with blinders on. One must consider the circumstances surrounding a defendant's termination or decision to leave the employer. Was he treated shabbily? Will that cause the court to consider not enforcing the restraints agreed to in the contract? See *Platinum Management, Inc. v. Dahms*, 285 N.J. Super. 274 (Law Div. 1995). Will the filing of the suit result in counterclaims (such as for wrongful or constructive discharge, discrimination, etc.) which defendant must assert based on the entire controversy doctrine? See R. 4:30A. Do you want to open that can of worms? The imposition of restraints in the face of a wrongful termination claim also provides defense counsel with a potent argument to the fact finder that the employer has not only wrongfully terminated the employee, but also prevented subsequent employment.

Likewise, you should consider the potential impact a ruling denying restraints may have on other employees with similar noncompetes. The flip side is the message the employer sends to other employees when someone leaves and ignores his or her contractual obligations. One must carefully weigh the likelihood and benefits of restraints against the client's exposure to an employee's claims. Also consider the dynamics of the application for restraints on the prospect for settlement. An application for restraints accompanied by expedited discovery imposes high costs in a compressed time frame on all parties, potentially increasing the chances of a quick settlement. Once the court decides the application for restraints, the likelihood of settlement may increase since the loser will usually be quite pessimistic about the chances for a contrary outcome at the trial of the case. On occasion, a restrictive covenant restraints application may result in a competitor who desires the employee's services to contribute to or underwrite defense costs, further complicating a potential settlement.

9) Know the recent adoption of model forms of orders to show cause. In November, the New Jersey Judicial Council published three forms of order to show cause approved for use by litigants in New Jersey Superior Court. In March, the Supreme Court Civil Practice Committee reported that the incorporation of these three model forms into the appendices of the rules would be considered in its next term.

Hopefully, the above gives you food for thought the next time Mr. Big walks into your office.