



Remedies in Non-Compete Cases

WHAT ARE THE DAMAGES?

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Let's say you're the CEO of a mid-sized technology company that needed to fill an account executive position in Metro City, USA. You sifted through hundreds of resumes, conducted dozens of phone interviews and chose three finalists for in-person interviews. Upon the conclusion of those interviews, you offered your ideal candidate the position, which she happily and enthusiastically accepted. A week later, she met with your head of human resources to complete the new employee information packet. In that packet was a document titled "Confidential Information and Non-Compete Agreement." Your new employee read it, denied the assistance of independent counsel to review it and signed it, along with the numerous other documents put in front of her. You spent the next six weeks training her on your technology, de-

veloped over many years at a cost of millions of dollars. Then, you sent her out into the field to begin calling on prospects. All was good with the world.

Eight months later, your new employee informed you that she was leaving your company for "personal reasons." You conducted an exit interview, reminded her of her contractual obligations and wished her well, disappointed it didn't work out. Two weeks later, you got a call from a trusted customer informing you that your former employee was now working for one of your competitors, promoting a product that was in direct competition with the one she promoted for you. You filed suit against her to enforce the terms of the Non-Compete Agreement, and the court issued a temporary restraining order and preliminary injunction which prohibited her from con-

tinuing to compete against you. Over the next several months, you continued to litigate the case against her seeking damages and a permanent injunction. At summary judgment, the court ruled that your former employee did indeed breach her contractual obligations. However, the court struggled to determine the proper measure of damages and requested further discovery and a trial on damages only.

Does this sound familiar? It very well might as this scenario is played out all over the country each year. Courts have long grappled with the enforcement of non-compete agreements but often more important to businesses and former employees everywhere, courts have struggled to determine the proper measure of damages when it is determined that an employee has indeed breached their non-compete agreements.

Typically, available remedies in breach of non-compete agreement cases are injunctive relief, actual damages and in some cases, liquidated damages.

INJUNCTIVE RELIEF

In our scenario above, the court has already provided some injunctive relief while it took the time to reach a decision on the merits. Initial injunctive relief in the form of a temporary restraining order is a remedy of very short duration, sometimes less than 10 days, usually only requiring a plaintiff to show it has a colorable claim and will suffer immediate irreparable injury if such an order is not issued.

For a plaintiff to get injunctive relief of longer duration, it will want to move for a preliminary injunction. Two almost universal considerations of courts as to whether a preliminary injunction is appropriate are that the plaintiff will suffer irreparable harm and there is a substantial likelihood of success on the merits. Many courts also require the moving party to demonstrate that a balancing of the equities tips in its favor. Jurisdictions across the country differ in which element holds the most importance in the analysis. Some states, like New York, find that irreparable harm is the most important factor while other states, like Massachusetts, find that success on the merits is the most important factor. Often, preliminary injunctions are issued for the duration of the litigation.

The ultimate form of injunctive relief, the permanent injunction, requires the plaintiff to prevail on the merits and is often issued when a plaintiff cannot be adequately compensated with monetary damages as a result of defendant's breach.

In breach of non-compete cases, plaintiffs will often move for the issuance of a temporary restraining order and a preliminary injunction at the same time. The purpose of this is to ensure that while the case is being litigated on the merits, the defendant cannot cause the plaintiff any further harm than has already allegedly been caused. If the plaintiff prevails on the merits at trial, the court may issue injunctive relief which essentially enforces the terms of the non-compete starting as of the day of the order. In the scenario above, if the court found that the plaintiff prevailed on the merits nine months after the case was filed and preliminary injunctive relief was awarded, the court might very well enforce the terms of the non-compete starting on the day it issued its final judgment. The end result of this is that the breaching party may be bound to the terms of the non-compete for a duration longer than is set forth in the agreement itself.

MONETARY DAMAGES

What happens when injunctive relief is insufficient, and the harm has already been done? This is an area that has confounded courts across the country because assigning a monetary damages figure can be incredibly difficult and, in many cases, requires the assistance of experts.

Typically, plaintiffs in non-compete cases are entitled to seek monetary relief in the amount of lost profits sustained during the applicable period of anti-competitive behavior. The lost profits must have been contemplated by the parties when the contract was formed, must be the probable result of the breach and must be demonstrable with reasonable certainty. While the lost profits need not be proven with absolute certainty, the evidence must establish a basis for the assessment of damages with a fair degree of probability. In other words, speculation on damages will not suffice.

As one can imagine, proving damages in breach of non-compete cases could be difficult. Determining the impact of the anti-competitive behavior may require extensive investigation and analysis of information from non-parties, e.g., the customers, using subpoenas and depositions. The impact of such investigation might be hugely detrimental to the relationship between the plaintiff and its customers. Moreover, analyzation and interpretation of the information received from these investigations of potentially numerous customers would undoubtedly require the retention of an expert, or possibly many experts. The cost of proving damages alone might be more than the damages suffered!

In the scenario above, the plaintiff would need to find out how many of its customers (and possibly prospective customers, depending on the language of the non-compete) the former employee had prospected and whether any of those customers had chosen to abandon the plaintiff's products for the competitors because of such prospecting. Then, the plaintiff would have to determine the dollar value those losses represent and present that information to the court in such a way that makes sense. To do so, the plaintiff would be paying experts significant amounts of money while angering its former or prospective customers at the same time.

LIQUIDATED DAMAGES

Because of the difficulty ascertaining damages in non-compete cases, many businesses have included liquidated damages provisions in their non-compete agreements. The purpose of these provisions is to attempt to predict damages in the event

of a breach, typically in the form of a fixed amount. Courts across the country have found such provisions to be valid when the amount fixed is a reasonable forecast of just compensation for the harm and the harm is such that it is incapable or very difficult to determine. Importantly, courts have held that "reasonableness" of liquidated damages is not determined retroactively by their correspondence with actual damages, but by reference to the prospective difficulty of estimating the possible damages that would flow from a breach. The greater the difficulty of estimating damages, the greater the range of reasonableness used in assessing a liquidated damages provision. However, liquidated damages provisions which are unconscionable, contrary to public policy or grossly disproportionate to the loss from the breach will be found unenforceable if challenged.

Let's return to our scenario above. Recall that the court found that the former employee did indeed breach her contractual obligations. Additional discovery commenced, and the court conducted a trial on damages only. There are four potential outcomes, absent a valid liquidated damages provision. First, the plaintiff fails to prove monetary damages but the court issues judgment enforcing the terms of the non-compete starting on the day of the judgment. Second, the plaintiff, through expert testimony, proves monetary damages and the court issues judgment awarding the damages in the amount proven at trial. Third, the plaintiff proves monetary damages and the court issues judgment awarding monetary damages *and* enforcing the terms of the non-compete. Lastly, and least desirable from the plaintiff's perspective, plaintiff fails to prove monetary damages, the court deems any further injunctive relief impractical so, after all the expense and hassle of litigation, awards plaintiff nominal damages of \$1.00. As with any litigation, a careful cost/benefit analysis is critical when deciding whether to pursue these types of claims.



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