Non-Compete Agreement Litigation: Lessons from Recent Eighth Circuit Case

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Litigation over non-compete agreements can be complex, involving simultaneous lawsuits in different states, timely legal maneuvering, and substantial organizational challenges. The stakes are often high. Litigating in this area involves developing a strategy, and constantly revising that strategy when circumstances suddenly change. And when fighting over non-compete agreements, circumstances change frequently. Many of these points are illustrated in a recent decision handed down by the U.S. Court of Appeals for the Eighth Circuit. This blog post will discuss litigation over non-compete agreements, drawing lessons learned from this recent Eighth Circuit decision.

Negotiated Settlement of Dispute Over Non-Compete Agreement. When companies become adverse over non-compete agreements, there are many reasons why a negotiated settlement can be much preferred over litigation. Non-compete litigation can be expensive, time-consuming, and fast-paced. It can be contentious, presenting a risk to public reputation, employee morale, and ongoing customer relationships. Due to these reasons among others, a risk averse company will often attempt to negotiate a settlement over the alleged breach of a non-compete agreement. This recent case from the Eighth Circuit provides a classic example. One company threatened to enforce a president's non-compete agreement. The other company claimed that the president's non-compete agreement was invalid. Presumably, after extensive negotiations to avoid litigation, the parties entered into a settlement agreement. However, this case is also a classic example because despite that negotiated agreement, litigation still ensued.

Race to the Courthouse. Often times, the non-compete agreement will contain a forum selection clause, meaning that any associated lawsuit would need to be filed in a jurisdiction to which the parties had previously agreed. However, such forum selection clauses are not bulletproof. Even when there is a forum selection clause in the agreement at issue, for a variety of reasons, litigation over non-compete agreements could be commenced in multiple possible locations. Cue what lawyers colloquially refer to as a "race to the courthouse." Sometimes, the party that files in its preferred venue first, has a significant advantage in arguing that its first-filed lawsuit should control over a later lawsuit filed elsewhere by its opponent. For example, in this recent Eighth Circuit case, there was a dispute involving multiple actions. The parties had a forum selection clause designating Delaware as its chosen forum. The appeal involved one case pending in Missouri, and one in Delaware. As such, this case illustrates a lengthy battle on multiple fronts even where there was a forum selection clause.

Complex Litigation and Strategic Lawyering. Litigation over non-compete agreements is often complex. It can involve substantial document production and extensive electronic discovery, which means sifting through thousands of e-mails, text messages, and sensitive documents, along with their corresponding

metadata. The litigation itself can also be procedurally complex and nuanced. In this recent Eighth Circuit case, as mentioned above there were lawsuits in both Missouri and Delaware, and one party moved for a temporary restraining order (TRO) to stop an individual defendant from beginning work at a competitor. The TRO was heard on an expedited basis and granted. In this appeal from the Missouri case to the Eighth Circuit, the parties had accepted and submitted to the Delaware Court's authority, and both parties agreed that no actual controversy remained as in the Missouri Court. However, that still left the question of whether the Eighth Circuit should to vacate the Missouri Court's order below. The Eighth Circuit applied its "normal practice of vacating the lower court's judgment in a moot appeal" and remanded with instructions to dismiss the complaint. The takeaway here is that when engaging in litigation over non-compete agreements, a company should closely work with its lawyers early on to develop a legal strategy to account for the complexities of this area of the law and achieve its goals.

Case reference: *Panera, LLC* v. *Act III Management, LLC*, Case no. 19-1683 (8th Cir. June 8, 2021).