To TRO or Not to TRO?
An Employer's Enforcement Perspective of Non-Compete Agreements

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Virtually every business that requires its employees to execute a non-compete agreement as a condition of employment, or otherwise, will one day face a situation where it will have to determine whether to seek to enforce the terms of the agreement against a former employee. Although the Maryland Rules lay out the general framework for such enforcement, it is not as straightforward as it may seem at first glance. For example, questions such as— Should we seek to enforce the agreement that we have? Should we seek a temporary restraining order under the particular facts of the case? Must we file a bond before the court tells us what amount to file? Do we need to state an underlying cause of action before seeking injunctive relief?—all likely will arise during this process, and the answers are not as black and white as many think, but they are certain to affect the outcome.

This article seeks to describe the approaches that I have found in my practice to produce the most effective and efficient results for employers seeking to enforce rights under non-compete agreements against former employees. I have intentionally limited my analysis to pre-suit issues and the first potential stage of litigation—the temporary restraining order ("TRO") stage. My experience has been that this stage of litigation, if implicated, tends to make or break the entire case. I note that the drafting of non-compete agreements may be the most important factor in determining whether a non-compete agreement will be enforced at all, but that this article assumes that the drafting is complete (for better or for worse), and the employer is at the pre-filing stage of litigation.

Determining the Enforceability of a Non-Compete

Although Maryland is generally known as a "blue pencil" state, where courts are allowed to modify non-compete agreements to eliminate unenforceable provisions, and leave enforceable portions, courts will not employ this right when agreements are so broad to prevent any type of competition. See, e.g., Deutsche Post Global Mail, Ltd. v. Conrad, 116 Fed. Appx. 435 (4th Cir. 2004) (unpublished opinion), aff'g 292 F. Supp.2d 748 (D. Md. 2004). Thus, if the agreement at issue appears overly broad on its face, serious thought should be given to whether to proceed with litigation in the first place against a former employee whom the employer believes is violating the agreement.

There simply is no need for an employer to incur significant legal expenses and costs in litigation where the agreement is not likely to be enforced.

In any event, the decision of whether to proceed with litigation against a former employee under a non-compete agreement may become more of a business decision than a legal one. For instance, even though the agreement may appear to be overly broad, the employer may have this same agreement signed by several hundred (or even thousand) employees. These circumstances and an employer's desire to test the enforceability of this agreement may drive the decision to litigate. Moreover, facts such as the particular employee's access to the former employer's trade secret information and exposure to the inner, confidential workings of the company may practically dictate the decision to litigate. These types of facts also may weigh in favor or enforceability of the subject agreement, notwithstanding the breadth of the agreement.

The bottom line is that at this stage of the analysis, attorneys and their clients should work closely together to determine the desired business results that are in the best interest of the client. Although we attorneys do not like to admit it, sometimes a good legal decision is not a good business decision. Accordingly, attorneys and their clients should jointly determine whether the facts of each individual case weigh in favor of litigation or not, keeping in mind the guideposts of recent precedent and the desired business result. Once the decision to litigate is made, however, as set forth below, I have found that a conservative and "black-letter law" approach is most effective.

A Practical Guide to Surviving the TRO Stage of Non-Compete Litigation

The vast majority of non-compete agreements explicitly state that a breach of the agreement entitles the non-breaching employer to "injunctive relief" and/or a TRO. Notwithstanding the existence of this explicit contractual language, my experience has shown that one should tread lightly when running to the courthouse with the argument that the non-breaching party is entitled to what is no less than one of the most "extraordinary" forms of relief. See B & P Enters. v. Overland Equip. Co., 133 Md. App. 583, 758 A.2d 1026 (2000). Requests for TROs occur at the very early stages of litigation, and are granted (or denied) "without opportunity for a full adversary hearing on the propriety of . . . issuance." Maryland Rule 15-501. As a result, even though the employer client will no doubt believe that the ex-employee's actions have created an emergency, a close analysis of the situation and the underlying rules of procedure is imperative.

Be Brief and Move Quickly to Seek Relief.

Since all attorneys like to tell war stories when given the opportunity, I will take this opportunity to tell one myself from the perspective of an attorney representing an ex-employee against non-compete claims of an ex-employer. It was a typical weekday afternoon when my office received a call from an attorney who informed us that he intended to be in court that afternoon with a request for a TRO against a new employee of one of the firm's corporate clients. In response, I began the process of collecting my TRO research and arranging my afternoon so that I could attend the "emergency" hearing

that had been requested by the ex-employer. After being invited with my colleague into the judge's chambers, along with counsel for the employer seeking to enforce a non-compete agreement, we were presented with what was no less than a multi-page, multi-tabbed law review article intended by the complaining ex-employer to be a Complaint and Motion for a TRO against our ex-employee client. Upon presentation of these materials, the judge literally tossed the enormous amount of attorney work-product across his desk, and asked counsel for the ex-employer how such a filing could have been made if the situation was truly an "emergency" as alleged.

At this point, I knew that the judge was not inclined to grant the requested "extraordinary relief." Although I took the limited opportunity that I was given to attack the substance of the ex-employer's arguments, I am still convinced today that the judge had decided to deny the request for a TRO based simply upon the size of the filings, and the fact that the employer plainly had waited several weeks after having notice of the alleged improper activity of the ex-employee to seek court intervention. In the end, the judge denied the requested injunctive relief, and the parties ultimately settled the case favorably for the ex-employee and his new employer.

The moral of the story above is simply that employers should not delay in attempting to enforce their rights, and there is absolutely no need to submit a novel to the court to justify the request for injunctive relief. In addition to the fact that the ex-employer's approach above did not recognize the underlying demands of immediacy for issuance of a TRO, I am quite sure that it cost the employer several thousands of dollars that ultimately could have been spent more wisely. See Maryland Rule 15-504(a) (establishing the TRO standard as "immediate, substantial, and irreparable harm").

Follow the Letter of the Procedural Rules.

My experience also has demonstrated that if you are going to ask the court to issue a TRO, you had best follow the exact letter of the Maryland Rules. For example, although each court (and maybe even each judge) may have different approaches to this issue, an employer seeking a TRO under a non-compete is well served to file a bond at the time of filing the Complaint and Motion for TRO. Although I admit that I have seen judges and attorneys argue that such a filing is not advisable until the actual amount is set by the court, this approach is risky and potentially disastrous.

Maryland Rule 15-503 specifically states, in part, "a court may not issue a temporary restraining order or preliminary injunction unless a bond *has been filed*." Maryland Rule 15-503 (*emphasis added*). Thus, the Rule is written to require the filing of a bond before injunctive relief can be granted. Practically speaking, it is difficult to imagine a scenario where counsel for the moving party would succeed in arguing to a judge that she should hold off on ruling on the TRO until counsel can exit the courtroom, contact the appropriate surety, and file a bond with the clerk of the court. It is just more practical, efficient, and, frankly more in compliance with the Maryland Rules to file a bond prior to the time you are in front of the judge arguing the merits of the TRO.

Additionally, I strongly suggest that any request for a TRO be accompanied by a *separate* Affidavit signed by the client, which should affirm all of the allegations set forth in the Complaint and Motion for TRO under oath. Even though Maryland Rule 15-504 states, in relevant part, that a request for a TRO must be supported by "specific facts shown by affidavit *or other statement under oath*," I have seen situations where judges will not even entertain the issuance of a TRO without a separate Affidavit. Maryland Rule 15-504(a) (*emphasis added*). Accordingly, take the little extra time in drafting your papers to attach the appropriate Affidavit.

Support a Request for a TRO with a Separate and Distinct Cause of Action.

The "conservative letter of the law" approach described above also should be followed when drafting the Counts set forth in your employer client's Complaint. In one scenario that I was involved in recently, a judge refused to grant a request for a TRO because I had simply set forth a cause of action for "Injunctive Relief" in the Complaint. See Paul Mark Sandler & James K. Archibald, *Pleading Causes of Action in Maryland* at pp. 487-489 (3d ed. 2004). The judge stated unequivocally that I needed to plead an underlying and separate cause of action in order to be entitled to any type of injunctive relief. Although I was able to pull *Pleading Causes of Action in Maryland* from the judge's bookshelf in his chambers and show him my justification for pleading one cause of action for injunctive relief, this argument did not win the day.

The judge then instructed me to come back to his chambers with a Complaint setting forth an underlying and separate cause of action to support the requested issuance of a TRO. As a result, I proceeded to locate a local attorney's office in the area, and was able to amend the Complaint to add a Breach of Contract cause of action (What would we do without courteous, professional colleagues and technology?). With an Amended Complaint in hand, I returned to the courthouse, and the judge immediately signed the requested TRO, which led to my client obtaining all relief it was seeking in the case.

Notice (and More Notice) is the Best Choice.

I also have found that most judges are not inclined to grant *ex parte* injunctive relief under almost any circumstance when the requested relief involves potentially cutting off an ex-employee's job opportunities as it typically does in non-compete disputes. Although Maryland Rule 15-504(b) appears to allow for such *ex parte* relief when certain minimal actions are taken by the moving party's counsel, I have found it to be a good practice to fax (and/or hand-deliver) all documents to the opposing party in sufficient time prior to the requested hearing before the court in an attempt to open lines of communication between the parties' counsel.[1] Moreover, I strongly suggest that, regardless of whether you are able to make contact with the opposing party or their attorney, you also should come to court armed with at least one contact number. My experience has shown that this practice exhibits a sense of good faith to the presiding judge, and may eliminate completely the concerns of your particular judge about granting

[1] Obviously, every attorney should consult the Maryland Rules of Professional Conduct when determining who is the appropriate party to contact in these types of situations.

the requested relief in the short timeframe in which TROs are litigated and ultimately decided.

The Proof is in the Damages.

Lastly, it is imperative that attorneys come to any hearing regarding injunctive relief with substantial and admissible proof of damages. Although most non-compete agreements state that such proof is not necessary to entitle the employer to injunctive relief, I again have seen several circumstances where this is the only factor that the presiding judge is concerned about. Indeed, I have witnessed and been directly involved in cases where the actual damages suffered by the ex-employer are extremely hard to quantify or, alternatively, do not exist because the enforcing party has attempted to comply with the "better to move quickly" approach described above. In almost all of these cases, the presiding judge has completely ignored what I had always thought was the relatively low threshold requirement that all that must be shown is an "immediate" and "substantial" *threat* of irreparable harm "before a full adversary hearing." Maryland Rule 15-504(a). Indeed, my experience has shown that evidence of actual harm (or as close thereto as possible) may be required to sustain a request for a TRO in practice. Thus, a close analysis of the existence, depth, and exigent circumstances surrounding the damage claims should be a strong factor in deciding whether to proceed in the TRO arena, or, alternatively, choosing to file a Complaint and pursue the action through the normal course of discovery.

Conclusion

In summary, as we all know, litigators are generally trained to aggressively pursue the rights of their employer clients in the non-compete arena. This aggressiveness, however, should be tempered by a good amount of practicality and pragmatism when pursuing an ex-employee under the terms of a non-compete agreement. Otherwise, it is my belief that attorneys are more likely to spend their client's money and ultimately not achieve the outcome desired by the client, which is a situation no attorney ever wants to face.