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Do your non-compete agreements contain a liquidated damages provision? Recent case law suggests they should.

On August 11, 2010, the U.S. Court of Appeals, Eighth Circuit (which has jurisdiction over appeals from U. S. District Courts in Missouri), applying Missouri law, upheld a lower court decision awarding a liquidated damage provision in a shareholder non-compete agreement, which affirmed a \$1.4 million award of damages against former employees. The case is *Mayer Hoffman McCann, P.C. v. Thomas Barton, et al.*, Case No. 09-2061.

“Valued Clients” were solicited and followed the former employees to their new business.

Before tendering their resignations to CPA firm Mayer Hoffman McCann (“MHM”), four shareholder employees formed a new company and prepared solicitation letters that began with, “To Our Valued Clients”, asking the clients to terminate their relationship with MHM and to transfer their business to defendants’ new company. The client solicitation letters went out within a day of defendants’ resignations from MHM. Shortly thereafter, 124 MHM clients and four other MHM employees followed the defendants to their new company.

Applying Missouri law, the district court held that MHM’s two-year non-competition provision in defendants’ shareholder agreement was reasonable and that MHM was entitled to recover liquidated damages based on its “total billings” for two years prior to defendants’ resignations. The district court rejected defendants’ various arguments, including the undisputed fact that they had business relationships with these clients before joining MHM.

Liquidated damages based on total billings are a reasonable measure of damages.

The departing employees sued by MHM argued that liquidated damages based on MHM's total billings was not a reasonable measure of damages and thus constituted a penalty, and therefore could not be the basis for an award of damages. In upholding the district court, the Eighth Circuit held that total billings was a reasonable measure for liquidated damages regardless of the fact that MHM would only net a fraction of the total billings. As the court concluded, since MHM was entitled to collect 100% of the gross fees from its clients and those fees were lost as a result of defendants' breach, these total billings were "a reasonable forecast for the harm caused by the breach and the harm of a kind that is difficult to accurately estimate."

What This Means to You

This case is significant to Missouri employers for two reasons: First, if you do not have liquidated damage provisions in your company's non-compete agreements, you should consider adding it. Should you need to litigate breach of a non-compete, your burden of proving damages is considerably lightened by having a reasonable liquidated damage provision such as that affirmed in this case.

Second, if you do have liquidated damage provisions in your non-competes, you need to consider whether you are limiting your liquidated damages to your net profit – rather than gross billings. If so, you might be leaving money on the table.

Contact Info

If you are interested in further information, please contact your Husch Blackwell Sanders attorney.

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