A Timely Analysis of Legal Developments

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On June 25, 2009, the Colorado Court of Appeals held that a covenant not to compete with a mid-level supervisor who lacked key decision make authority is enforceable. In doing so, the court provided guidance on Colorado's non-compete statute which provides limited exceptions to the unenforceability of covenants not to compete, including, as applied here, where the employee is "management personnel."

Colorado Court Provides Guidance On Enforceability of Covenants Not to Compete Against "Management Personnel"

By Darren E. Nadel and Michelle Soltani Simmons

In Colorado, covenants not to compete are void unless they fall within one of four statutorily defined exceptions. One of the exceptions that is unique to Colorado is that covenants that restrict "executive and management personnel and officers and employees who constitute professional staff to executive and management personnel" are permissible. Thus, for executive and management employees and their professional staff a covenant not to compete is lawful even in the absence of evidence that the management employee will threaten to disclose trade secrets.[1]

The Colorado Court of Appeals previously provided a test for determining who is professional staff to executive and management personnel.[2] The Colorado Court of Appeals has now, in *DISH Network Corp. v. Altomari*, (No. 08CA1741, June 25, 2009), provided guidance on who is "executive and management personnel." Concluding that the plain, dictionary meaning of "management personnel" must be applied to the statute, the appellate court held that even mid-level supervisors who lack key decision-making authority are properly the subject of a covenant not to compete in Colorado.

Factual and Procedural Background

DISH Network Corporation and DISH Network, L.L.C. (collectively, "DISH") hired defendant Christopher Altomari in December 2007 as a Commercial Director. As part of his compensation package, Altomari entered into an agreement that contained a covenant not to compete with DISH.

In July 2008, Altomari announced that he was leaving DISH to work for DirecTV, DISH's largest competitor. DISH filed a complaint and sought to enjoin Altomari from working at DirecTV based upon the covenant not to compete. The trial court refused to enforce the noncompete, finding that a mid-level supervisor does not fit the definition of "management employee" found in Colorado's statute. DISH appealed the decision and the court of appeals reversed, concluding that the covenant not to compete was enforceable under that circumstance.

The Trial Court's Reasoning

The trial court found that Altomari supervised 50 of DISH's 22,000 employees. Although there were several layers between him and the CEO, he was at the top level of compensation and "at least at the start of the decision-making level." Altomari "had to go through a lot of hoops to get authority to do many, many things, but there was a certain amount of autonomy that [he] was allowed." The trial court also found that Altomari "was a mid-level manager at best," but he "definitely had management responsibilities." Despite these findings, the trial court concluded that Altomari was not the type of manager that fell within the statutory exemption for covenants not to compete, and therefore the covenant with DISH was void. The trial court reasoned that the statutory exception applied to "key personnel," employees who are "in charge," those who are at the "heart of the business," and "those few executives at the highest echelons of a company." Altomari was none of these.

The Court of Appeals Decision and the Definition of Management Personnel

The Colorado Court of Appeals disagreed with the trial court's restricted view of the statutory exception. First, the appellate court noted that "executive" and "management personnel" are two separate categories of employees. The issue was whether Altomari was "management personnel." The legislature did not define the term, so the appellate court looked to dictionary definitions to apply a plain meaning to the statute. Citing to *Webster's Third New International Dictionary*, the appellate court explained that *management* is the conducting or supervising of something, such as a business, and *personnel* is a body of persons employed in some service, such as an office. Therefore, according to the appellate court, "persons who conduct or supervise a business would be considered 'management personnel.'"

While the appellate court agreed that "management personnel" would undoubtedly encompass the category of individuals considered by the trial court to be management, the trial court's delineation was too narrow. "To exclude from the definition of 'management personnel' those managers like Altomari who 'direct, control, and supervise' approximately fifty people nationwide in a division of a business with a ten million dollar budget, inappropriately narrows the statutory language and is inconsistent with the plain language of the statute."

The appellate court distinguished several prior Colorado cases that did not interpret the plain language of the Colorado statutory exceptions for covenants not to compete. The appellate court emphasized that, had the legislature intended to limit the "management personnel" exception to "key personnel at the heart of the business" as the trial court had done, it could have easily done so by defining the term or using different language.

Implication for Employers

The *DISH Network Corp. v. Altomari* decision is helpful precedent for employers seeking to apply restrictive covenants to its middle-management employees potentially broadening the scope of protection for legitimate business interests. The appellate court makes clear that management personnel is not synonymous with "executives" who are "at the heart of the business." Nevertheless, employers should not overreach in relying on the broad "management personnel" definition provided by the appellate court, as the court relied on the fact that Altomari worked in a supervisory, managerial capacity.

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[1] Colo. Rev. Stat. § 8-2-113(2)(d).

[2] *Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835 (Colo. App. 2007).