A Timely Analysis of Legal Developments

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In *Paradise v. Midwest Asphalt Coatings, Inc.*, the Missouri Court of Appeals held that an employer is entitled to immediate injunctive relief for the threatened violation of a covenant not to compete, even in the absence of the employee's actual or threatened solicitation of customers. The court's opinion highlights the seeming dichotomy between noncompetition and nonsolicitation agreements in Missouri.

Missouri Remains a Paradise for Enforcement of Noncompetes

By Harry W. Wellford, Jr.

In *Paradise v. Midwest Asphalt Coatings, Inc.*, No. WD70944 slip op. (Mo. App. W.D. Mar. 16, 2010) the Missouri Court of Appeals for the Western District held that an employer is entitled to immediate injunctive relief for the threatened violation of a covenant not to compete, even in the absence of the employee's actual or threatened solicitation of customers. The court's opinion highlights the seeming dichotomy between noncompetition and nonsolicitation agreements in Missouri.

Under the former, the mere fact that the employee is in a competing industry is a sufficient basis to issue injunctive relief, whereas in the latter there may be a higher standard before injunctive relief is issued. This was the position articulated by the Missouri Supreme Court in *Osage Glass, Inc. v. Donovan*.[1] The *Paradise* decision is important because the Missouri Supreme Court, in *Healthcare Service of the Ozarks, Inc. v. Copeland*, in dicta,[2] suggested that noncompete agreements might be unenforceable because they go "beyond protecting the employer's interest and [are] overly restrictive."[3] The *Paradise* decision is also noteworthy because it did not award the plaintiff attorneys' fees per the contractual "prevailing party" language, even though the court found that the agreement was enforceable, after modification, and an injunction should have been issued. The court's logic was the plaintiff was not a prevailing party because the trial judge had modified the original agreement lessening the period of the non-compete restriction. Thus, even though the plaintiff had succeeded in having the agreement declared enforceable, the court's "blue penciling" of the agreement to modify the agreement meant that the plaintiff was not a prevailing party.

Facts

Midwest Asphalt Coatings, Inc. ("Midwest") was in the asphalt paving and asphalt maintenance business in Southwest Missouri. Robert Paradise ("Paradise") was Midwest's first salesperson, and, ultimately, the General Manager and head of all Midwest salespersons. Paradise signed a non-compete at the inception of his

employment. After eight years of employment, he left to start a competing business. Paradise did not begin solicitation of customers. Instead, he filed a declaratory judgment action requesting that the non-competition agreement be declared void because Midwest had failed to pay certain bonus payments.

The trial court found that the restriction in the non-compete agreement was enforceable if modified from 32 to 26 months and, curiously, declined to issue an injunction. Instead, the trial court noted that Mr. Paradise was expected to follow the 26-month restriction.

Appellate Court's Opinion

The appellate court upheld the trial court's decision and made several significant observations.

First, the Court of appeals noted that, once the trial court found that there was an enforceable noncompetition agreement, there was no need for the employer to establish that the employee had attempted to solicit customers. Relying on *Osage Glass*, the mere fact that the employee was in a competing industry was sufficient basis to issue an injunction relying on *Osage Glass*. The court of appeals noted that the trial court erred in that regard. The court did not address the dicta in *HealthCare Services* that suggested noncompetes had, perhaps, fallen out of favor with the Missouri Supreme Court.

Second, the court of appeals awarded Midwest its attorneys' fees under the contract as a prevailing party. The court noted that "Midwest's main issue at trial was that the non-compete agreement was reasonable and should be enforced." Since the trial court determined that the three-year time restriction in the contract was unreasonable and should be modified, the court reasoned that Midwest was not a prevailing party. In the court's view, the trial court had great discretion, under these circumstances, to either modify an agreement or declare it void[4] (The appellate court noted the trial court had only found the agreement "reasonable" after discretionary modification of the restricted timeframe from 32 to 26 months). The fact that an injunction should have issued, did not change the court's mind. The court drew a distinction between the issuance of an injunction, which is a remedy, as opposed to the main issue (the enforceability of the agreement). Even though a party obtained the remedy it sought, if it did not prevail on a main issue, it was not a prevailing party in Missouri for purposes of the award of attorneys' fees under a contractual provision in a non-compete agreement.

The *Midwest* case will provide ammunition for employers to continue to include non-competition provisions in their employment agreements, as opposed to relying strictly on non-solicitation provisions. Moreover, the court reaffirmed the reach of *Osage Glass*, which demands that a trial court issue an injunction when it finds a non-competition is enforceable and the employee is in a competing field. Finally, the court's reading of the prevailing party language may make it difficult for employers who seek to enforce a noncompetition agreement, in whole, to obtain fees, especially in cases where the court "blue pencils" the agreement. In *Paradise*, the plaintiff Midwest was not deemed a prevailing party under the agreement's attorneys' fees clause, even though it came away with a 26-month restriction on the defendant Paradise's competition. It could be argued that, even in circumstances where the agreement is modified yet enforced in part, it is the *employee* who is the prevailing party and entitled to attorneys' fees.

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[1] 693 S.W.2d 71, 73 (Mo. banc 1985).

[2] 198 S.W.3d 602, 610 (Mo. 2006).

[3] 198 S.W.3d at 611.

[4] Citing *Payroll Advance, Inc. v. Yates*, 270 S.W.3d 428, 437 (Mo. App. S.D. 2008).