PLUNKETT COONEY

Former Employees Barred From Soliciting Firm's Clients Despite Office Closing

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Bloomfield Hills

The Michigan Court of Appeals, in *Rooyakker & Sitz, PLLC, et. al. v Plante & Moran, PLLC, et al.*, (No. 273173, Rel'd for publication 6/26/07), 2007 WL 1429691, held that an agreement prohibiting client solicitation is valid, even when an employer closes a local branch of its company.

This is an important development since the appellate court is continuing to broaden the definition of "reasonableness" in relation to restrictive covenants within employment agreements.

The defendant in *Rooyakker* is a national accounting and business firm that had an office in Gaylord. As a condition of the plaintiffs' employment, each signed a "Practice Staff-Relationship Agreement," which was drafted by the defendant, and contained a client solicitation and an arbitration clause.

The clause precluded staff members, after termination, from "directly or indirectly, rendering professional accounting, tax, consulting or any other service provided by the firm to any firm client." In the event of a breach, former staff members were required to pay the defendant an amount equal to or greater than the billings to such client by the defendant in the 12-months following termination or the average annual billings to the client by the defendant.

When the defendant firm closed its Gaylord office, the plaintiffs were all offered a job at the defendant's Traverse City office. However, the plaintiffs decided to remain in Gaylord, terminate their employment with the defendant and open their own office. Thereafter, several of the defendant's Gaylord clients hired the plaintiffs to provide accounting and tax services.

The defendant then initiated arbitration proceedings against the plaintiffs for violation of the client solicitation clause contained within the employment agreement. The plaintiffs responded by filing suit seeking a declaration that the Practice-Staff Relationship Agreement was unreasonable and unenforceable.

The defendant countered that the claims arising out of the agreement must be arbitrated. The plaintiffs then moved for summary disposition contending that the parties agreement was unenforceable because the client solicitation clause violated Michigan's Anti-Trust Reform Act (MARA), MCL 445.771 *et seq*., and because its purpose had been frustrated by the closing of the defendant's Gaylord office. The trial court granted summary disposition in favor of the defendants, and the plaintiffs appealed.

On appeal, the plaintiffs alleged that the agreement's client solicitation clause was actually a covenant not to compete, which violated Section 2 of the MARA, and therefore, was unenforceable.

The appellate court found that because the parties expressly agreed to arbitrate all claims arising out of the contract and that the issue of whether the client's solicitation clause violated MARA was a dispute arising from the contract, the issue, by the parties' own agreement, was subject to arbitration.

The court went further and indicated that the "client solicitation clause" itself did not violate MARA, because it was reasonable in relation to the defendant's competitive business interests. Specifically, the court relied on the recent case of *St. Clair Medical, PC v Borgiel*, 270 Mich App; 715 NW2d 914 (2006), in which an agreement precluded an employee from practicing medicine within seven miles of a clinic for one year following the employee's termination was upheld as being reasonable.

Specifically, the court noted that "[t]o be reasonable in relation to an employer's competitive business interest, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill."

The court then reasoned that similarly, in this case, the clause at issue merely prevented the plaintiffs from acting as accountants for the defendant's former clients, and did not preclude from performing accounting services entirely. Moreover, "[u]nder Michigan law, preventing the anti-competitive use of confidential information is a legitimate business interest." *Whirlpool Corp v Burns*, 457 F Supp 2d 806, 812 (WD Mich 2006). Since the plaintiffs had acquired confidential information due to the nature of the accounting profession regarding both the defendant and its clients, and the restriction had a limited length, the court determined that the clause was reasonable and enforceable.

The decision was selected for publication on June 29, thereby making it binding precedent.