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Join the Party. Another California-Based Former Employee Challenges Out-of-State Company's Non-Compete Provisions as Unfair Business Practice

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A complaint recently filed in the Northern District of California illustrates the issues that can arise when out-of-state companies require California-based employees to agree to their standard non-compete, no-hire and non-solicitation provisions. A former employee of a medical device company is suing to invalidate these provisions as void and unenforceable under California law, and is alleging that the company committed unfair business practices by seeking to enforce these restrictions and having a choice of law provision purportedly to avoid California law under which the restrictive covenants are illegal.

Summary of Complaint

An action styled **Shomit James v. Globus Medical, Inc**. ("James"), was filed March 10, 2014, in the U.S. District Court for the Northern District of California. The complaint alleges that the case "involves Globus' attempts to circumvent California's employment laws, labor polices, and employee rights through certain unfair and unlawful business practices."

Mr. James claims that he is a medical device sales representative who worked for Globus exclusively in California for three and a half years before he resigned. He subsequently joined Stryker, a Globus competitor.

Mr. James claims that when Globus hired him, he was required to sign an agreement entitled, "Globus No Competition and Non-Disclosure Agreement" (the "Agreement"). As alleged in the complaint, the Agreement provides that Mr. James is prohibited from competing with Globus in a defined territory and from soliciting customers there for a period of 12 months after termination of his employment with Globus. Mr. James is further restricted from hiring employees, contractors or representatives of Globus for 12 months following his termination.

Mr. James alleges that he is and at all times during his employment with Globus was a resident of California. He further alleges that his assigned territory was in Santa Clara County, California, that he performed his job in California and that he executed the agreement with Globus in California. Globus is a Delaware corporation with a principal place of business in Pennsylvania, and, according

to the complaint, does substantial business in California.

The Agreement — which is attached to the complaint — contains a choice of law provision providing that it is to be governed, construed and enforced in accordance with the laws of the Commonwealth of Pennsylvania. The Agreement does not contain a forum selection clause.

Mr. James alleges that after he resigned from Globus, he was told by his manager that he could not conduct business with any doctors he had previously serviced and "should not even speak to them." Mr. James alleges that his manager at Globus emailed such doctors to notify them that Mr. James was prohibited from communicating or conducting business with them. Mr. James alleges that Globus also sent him a letter reminding him of his obligations under the Agreement.

Mr. James claims that as a result of these communications from Globus, he was apprehensive that Globus would try to enforce the agreement to prevent him from pursuing his vocation. Mr. James subsequently filed suit, seeking a declaration that the non-compete, non-solicitation and no-hire provisions are void and unenforceable under California law, and that Globus committed unfair business practices by seeking to evade California law prohibiting these provisions. He is seeking an injunction and damages, including his attorney's fees.

Mr. James specifically contends that the non-compete, non-solicitation and no-hire provisions are all illegal restraints on trade that "undermine and subvert California's strong public policy against restraints on employee mobility and competition in California," and violate **California Business & Professions Code Sections 16600 and 17200**. Mr. James further claims that, despite the choice of law provision in the Agreement, California law should govern because Pennsylvania law on these matters is "contrary to the fundamental public policy of California, which has a materially greater interest in this dispute than Pennsylvania."

To date, Globus has not filed a responsive pleading and the Court has made no rulings on the claims made in the suit.

Comments

James is just one of many in what has become a cottage industry of seeking declaratory relief that such provisions are not enforceable in California. The typical fact pattern includes these common elements: the employer has the employee sign its standard, nationwide employment agreement, the employee subsequently leaves to work for a competitor, and the competitor initiates and funds the ex-employee's litigation challenging the enforceability of the agreement.

There is significant variation among the states regarding whether and to what extent restrictive employee covenants, including non-competes, non-solicitation and no hire provisions, can be enforced. A number of courts within and outside of California have addressed choice of law issues arising in such cases, reaching different results frequently dependent in part upon the forum deciding the issue, whether there is parallel litigation in another court, and related procedural issues, which can encourage forum shopping and races to the courthouse.

Despite these potential complexities, the plaintiff in James will cite precedent for the Court in James to disregard the Pennsylvania choice of law, and to apply California law under the facts alleged in the James complaint.[1]

Assuming plaintiff prevails and that California law is applied, the plaintiff will argue that the provisions

in James are unenforceable pursuant to a number of recent cases in this area.[2]

Irrespective of the outcome of James, companies with California operations are well advised to review their agreements with employees based or expected to work in California to ensure compliance with the law most likely to govern the agreement. To the extent companies wish to have the law of a state other than California govern, they may want to consider steps that will demonstrate the greater interest of that state in the agreement.

Companies may also want to consider including a forum selection clause providing for venue in the state consistent with the choice of law provision. Such clauses are prima facie valid, requiring the opposing party to demonstrate why the clause should not be enforced. While prevailing on this issue will not necessarily dictate a favorable determination on the choice of law issue, having a forum selection clause can make it more likely that the forum determining the choice of law is one preferred by the employer.[3]

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1 See e.g., Application Group v. Hunter, 72 Cal. Rptr. 2d 73 (1998) (court disregarded Maryland choice of law clause in action against a former employee who had resigned to go to work in California for a California employer, on the basis that California had a "materially greater interest" than Maryland because enforcement would violate California's fundamental public policy in favor of employee mobility, as expressed in Business and Professions Code Section 16600.)

2 See California Business & Professions Code Section 16600 ("every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."); Edwards v. Arthur Andersen LLP, 189 P.3d 285, 291-92 (Cal. 2008) (holding that non-competes are generally invalid unless authorized by a statutory exception to Business & Professions Code Section 16600 and rejecting narrow restraint doctrine); VL Systems, Inc. v. Unisen, Inc. (2007) 152 Cal.App.4th 708 (No hire provisions are equated with covenants not to compete and therefore prohibited).

3 See e.g., Meras Eng'g, Inc. et. al. v. CH20, Inc., et. al. 2013 WL146341 (N.D. Cal., Jan. 13, 2013) (dismissing first-filed declaratory relief action regarding enforceability of non-compete and in which there was parallel litigation in Washington district court on the basis that forum selection clause providing for Washington venue not shown to be unenforceable).

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