

Interfere at Your Own Risk: Legal Fees Awarded as Damages for Violating A Non-Compete Agreement

Article By:

Jennifer B. Rubin

We all know the default American Rule for attorneys' fees: unless you get fees in a contract or from a statute, you shouldn't count on someone else paying the freight if you win your case. But a recent **non-compete case** brings home an exception to this rule: attorneys' fees were awarded as a component of damages to a former employer against the employer who hired away an employee subject to a restrictive covenant.

In *St. Jude Med. S.C., Inc. v. Biosense Webster, Inc.*, a Federal District Court in Minnesota awarded attorneys' fees as a component of damages against Biosense Webster, Inc. and Johnson & Johnson for the costs that St. Jude Medical Center incurred in enforcing its non-compete with a former employee.

St. Jude argued that Biosense tortiously interfered with its non-compete agreement with its former employee when Biosense hired him. The Court found the non-compete agreement was enforceable, and likewise found that Biosense was aware of the non-compete agreement, but hired the employee anyway. The Court concluded that Biosense's tortious conduct — interfering with and causing the breach of contract — thrust St. Jude into litigation, which of necessity required it to hire a lawyer to protect its rights

Minnesota is not alone in recognizing the "thrust into litigation" exception to the American bear-your-own fees rule. Other states have recognized that attorneys' fees are rightfully recoverable when one is forced to litigate due to the bad acts of another. New York for example, recognizes the tort of "wrongful involvement in litigation," when a party is involved in litigation because of the tortious act of another. Arizona and Utah are other jurisdictions that acknowledge that if hiring a lawyer is a foreseeable result of tortious conduct, those legal fees may be recoverable as consequential damages.

These cases provide good examples of the potential consequences of hiring an employee subject to a non-compete agreement. If a former employer retains counsel, asserts a tortious interference or other tort claim, and wins, then depending on the jurisdiction, this may be yet another effective weapon in the non-compete battle.

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