

Litigation Is Not the Only Option: Thoughts on Resolving Trade Secret & Non-Compete Disputes from Outside Counsel

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Agenda

1. Background on Trade Secret and Non-Compete Law
2. Using the Employment Agreement as Your First Line of Defense
3. Non-Litigation Dispute Resolution
4. Prosecuting a Trade Secret/Restrictive Covenant TRO Case
5. Defending a Trade Secret/Restrictive Covenant TRO Case
6. Key Takeaways



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Background

1. Definitions
2. Legal Theory
3. Confidential Information & Trade Secrets



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Restrictive Covenant Law

- Restrictive covenants are contracts, but not automatically enforceable simply because parties sign.
- Traditionally, employment or continued employment constitutes sufficient consideration
 - Some states have moved away from this
 - Examples: Ban on using non-competes with low-wage workers; income thresholds for high-wage earners; continued payment during restricted period
- Courts are supposed to evaluate the restriction before it can be enforced.
- From a defense perspective, lots of opportunities exist to attack plaintiff's case, but this often leaves room for compromise.

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Legal Theory Behind Restrictive Covenants

- Test for enforceability of a restrictive covenant: “narrowly tailored to protect a legitimate business interest”
- What is “narrowly tailored”?
 - Has geographic and temporal limitations
 - Activity restrictions can be substituted for geographic limitations
- Courts will ask the question of whether the restrictions are no more burdensome than necessary to protect company's legitimate interests

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Legal Theory Behind Restrictive Covenants

- Requires a legitimate business interest
- Traditional legitimate business interests:
 - Protecting confidential information
 - Protecting long-standing, near permanent customer relationships
- “Newer” legitimate business interests:
 - Maintaining a stable workforce (leading to need for employee non-solicits)
 - Protecting company goodwill (essential for non-compete agreements in sale of business context)

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Legal Theory Behind Restrictive Covenants

- Restriction must have a temporal limitation and is not supposed to be longer than is necessary to protect the interest and can never be indefinite
- Restriction must have either a geographic or activity restriction
 - Geographic limit is usually no broader than where employee worked or where the company does work or anticipates doing work in near future
 - Activity restriction generally bound to where the use of the employee’s knowledge of confidential or trade secret information would harm company

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Trade Secrets and Confidential Information



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Trade Secrets v. Confidential Information

- Axiom: All trade secrets are confidential information but not all confidential information are trade secrets
- Trade secret definition – Information that:
 - Derives independent economic value
 - Not generally known or readily ascertainable
 - Subject to reasonable efforts to maintain secrecy
- Confidential information – Not generally known and subject to reasonable security measures

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Trade Secrets Continued

- Law generally defined by two statutory schemes
 - Uniform Trade Secrets Act (adopted by 49 of 50 states plus District of Columbia; New York sole exception, North Carolina adopted a modified version of the Act)
 - Defend Trade Secrets Act (enacted by Congress in 2016)
- Statutes define trade secrets to include formulas, patterns, compilations, programs, devices, methods, techniques, or processes
- Anything can constitute a trade secret if it fits the statutory definition.
- Violation of statutes can lead to exemplary damages and award of attorney's fees, but DTSA requires certain safe-harbor language to qualify

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Trade Secrets Continued



Independent Economic Value Derived from Information Remaining Secret

- Actual or potential value
- Can be proven counterintuitively by showing how competitor wanted/used misappropriated information



Not Generally Known

- Weighed against others in the industry, not public at large
- Independent discovery or reverse engineering does not violate Acts.



Reasonable Efforts to Maintain Secrecy

- Agreements usually a necessity
- Password protection
- Need not be herculean but efforts must match size of company

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Employment Agreement As First Line of Defense



- Best and cheapest way to protect trade secrets and customer relationships
- Need to perform cost benefit analysis in determining length of restrictions
- Activity or geographic restraint
- State law considerations
- Applicability questions
- One size may not fit all

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Restrictive Covenant Terminology

- **Restrictive Covenant/Employment Agreement** – A contractual device that limits an employee's ability to compete against his or her employer, usually during and after employment ends.
- **Non-compete** – A specific form of restrictive covenant traditionally viewed as prohibiting an employee from joining a competitor completely or in a specific role
- **Non-solicit** – Another form of restrictive covenant traditionally used to prohibit an employee from soliciting either customers or other employees of the company
- **No Hire** – Sometimes used as an alternative to an employee non-solicitation.

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Restrictive Covenant Terminology Continued

- **Confidentiality Agreement** – A more limited restriction focused on prohibiting the disclosure of confidential information.
- **Choice of Law/Venue Provision** – A provision in many restrictive covenant agreements purporting to set out the law and location in which a dispute will be litigated.

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How It All Fits Together

- Concept is to weigh needs of organization against state law considerations
- Also want to factor in recruiting and retention
- How do we protect company while not simply restraining competition?
- Drafting a well-crafted agreement is far cheaper than litigation
- May need revisions and monitoring for state-law changes



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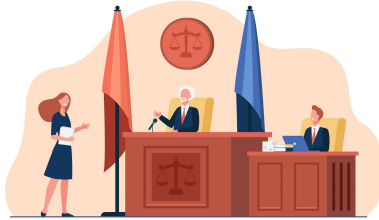
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Why It Works



- Fairly common in many industries
- Can have a deterrent effect
- Well-crafted restrictions are legally enforceable
- Protects legitimate business interests from improper acts by former employees and competitors
- Companies and former employees tend to be risk adverse

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Non-Litigation Dispute Resolution



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Starts With On-Boarding Process



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- Know new employee's obligations
- Firewall from old clients
- Make sure management is onboard with restrictions
- Make clear expectations in offer letter
- Hire with eyes' wide open

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Starts With Off-Boarding Process



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- Exit Interview
- Provide copy of agreements to departing employee
- Device analysis
- To accept two weeks' notice or not to accept
- Protection starts before departure

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Strategic Considerations



- What does a win look like to your organization?
- Can you achieve without litigation?
- Conduct cost-benefit analysis
 - Actual litigation cost
 - Time cost to business
 - What is really at stake
- Develop strategy before starting fight

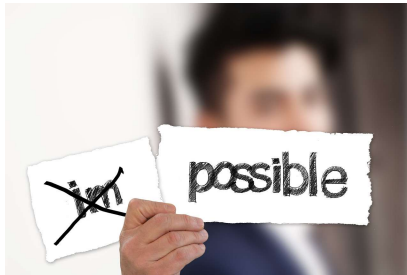
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Evidence & Strategy Critical



Restrictive Covenant Specific

- Actual competitors?
- Risk of harm?
 - No solicitation of former customers
 - Selling different products
 - Siloed within organization
- Restrictions narrowly tailored?
- State-specific law considerations
- Can a resolution be crafted between businesses and outside of court

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Evidence & Strategy Critical

Trade Secret Specific

- Was there actual misappropriation? Actual use?
- Was it innocent retention?
- Can you return?
- Is the information actually a trade secret?
- Did former employer take adequate steps to protect information?
- Would information be of any value to you? If not, cooperation may be cheaper



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Options Abound

- Letter writing – reminder v. demand
- Non-litigation “settlements” with new employer
 - Customer restrictions
 - Activity restrictions
 - Employee non-solicits
- Periodic certifications
- Forensic investigation and remediation
- Mediation



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Prosecuting a Trade Secret/Non-Compete Action



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Analysis of Common Causes of Action

- Breach of Non-Compete
 - What is the breach? Real competitors? Customer solicitation? Stolen information?
 - Consider questions of enforceability. Reasonable restrictions? Evidence to support same.
 - Is the agreement supported by adequate consideration?
- Trade Secret Misappropriation
 - Is it a trade secret? Can you adequately identify the trade secret?
 - Evidence of improper taking/use?
 - Adequate steps to protect information?
 - Litigation necessary to stop actual or threatened use?
- Tortious Interference
 - Competitor aware of agreement? Some evidence of inducement of employee to breach?

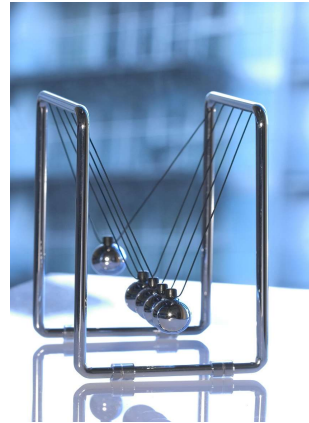
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Evidence Collection

- Employee personnel file – Usually contains all agreements, training records, reviews, territory assignments
- Forensic examination – Evidence of misappropriation? Suspicious activity? External media devices? Email exfiltration?
- Evidence of Competition or Solicitation – Lost business? Current bids? Customer solicitation?
- Affidavits – need to authenticate evidence and usually done this way



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Defending a Trade Secret/Non-Compete Action



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Quintessential Fire Drill



- No advanced warning
- Often filed to gain strategic timing advantage of TRO hearing
- May need to answer complaint/move to dismiss and respond to motion for TRO before hearing
- May need to line up local counsel
- May need to perform forensic analysis as part of response
- Will definitely involve substantive interviews

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Other Strategic Considerations



- Are the restrictions narrowly tailored? Are you competitors? Is there an actual threat?
- Are trade secrets at risk? Misappropriated?
- Can you attack the proposed TRO?
- What do you know about the judge?
- Opposing counsel? Do they know the law?
- What about jurisdiction?
- Is there a challenge to venue or jurisdiction? (Need to raise at outset)

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Key Takeaways



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Key Takeaways for Own Program

- Days of One-State-Fits-All Model are over
- Design restrictive covenant programs to fit needs of today and tomorrow
- Stay abreast of changes in law
- Programs must be nimble; scalability is key
- Find a trusted advisor or develop a process to stay updated
- Do not attempt to enforce unenforceable covenants

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Key Takeaways for Hiring

- Do not assume that just because a candidate has an agreement that it is enforceable
- Pay attention to choice-of-law and venue provisions in evaluating enforceability
- Wear the white hat
- Make clear expectations in offer letter and own agreement(s)
- Follow-up with competitive hires to make sure they are abiding by restrictions

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Key Takeaways to Avoid Litigation

- Understand that litigation is not the only option
- Approach dispute looking for resolution in way that adequately protects business
 - What does that look like?
 - Reobtaining information? Protecting specific client relationships? Protecting against certain activities?
- New employer likely also wants to avoid litigation
- Trust but verify

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Key Takeaways if Litigating

- Collect facts quickly; interviews, main documents
- Retain evidence; emails, text messages, metadata
- Access your weak points and address in initial pleadings; i.e., question enforcement of provision in agreement, then only enforce what you can win
- Understand what constitutes a win; protecting customer base, protecting trade secrets, enjoining competitor from stealing same

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Key Takeaways if Facing Litigation

- Triage – fact collection, analysis of claims, development of strategy
- Determine if you are representing new employee or not
- Use underlying onboarding program to fight claims
- Be honest in your analysis; if case has weaknesses, be prepared to find quick path to exit
- Exploit weaknesses in opponent's case by knowing the law and knowing what they need to plead to obtain TRO

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**Any
Questions?**

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Thank You!



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