

Validity of Non-Compete Agreement Upheld Despite Its Broad Territory Restriction

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The Seventh Circuit recently affirmed summary judgment in favor of D.E. Miller Holdings, Inc. in the case *E.T. Products, LLC v. D.E. Miller Holdings, Inc.*, 872 F.3d 464 (7th Cir. 2017). The defendants, Doug Miller and his son Tracy, were the owners of a fuel-additive businesses, Petroleum Solutions, and its supplier E.T. Products. The Millers sold E.T. Products to a group of investors in 2011, and as part of the sale, signed a broad non-compete agreement which prohibited them from assisting any company engaged in the same industry as E.T. Products in the entire continent of North America. The Millers were also prohibited from owning, operating, investing in, advising, or otherwise assisting any competitor.

The Millers continued to own Petroleum Solutions until January of 2012 when it was sold to an individual, John Kuhns. Throughout 2012, the Millers provided consulting services to Kuhns and retained a former salesman from E.T. Products to work at Petroleum Solutions. Later in 2012, E.T. Products ceased its relationship with Petroleum Solutions. The Millers stopped their consulting efforts as soon as the relationship was severed, recognizing their obligations under the non-compete agreement.

E.T. Products filed a claim for breach of contract, alleging that the Millers violated the non-compete agreement by providing consulting services to Petroleum Solutions. The court however, granted Millers' summary judgment motion reasoning that Petroleum Solutions did not directly or indirectly compete with E.T. Products during the time that the Millers were assisting the new buyer of Petroleum Solutions.

On appeal, the Seventh Circuit considered two issues: (1) whether the non-compete agreement was enforceable and (2) whether the Millers violated the non-compete agreement. The court started its analysis by noting that "Indiana courts generally disfavor non-compete restrictions and enforce them only if they are reasonable." *Dicen v. New SESCO, Inc.*, 839 N.E.2d 684,687 (Ind. 2005). "But business-sale non-compete agreements, which usually involve parties with relatively equal bargaining power, 'stand in better stead' than those in other contexts." *E.T. Products*, 872 F.3d at 468.

The court was required to determine whether the geographic restrictions in non-compete agreements were too broad to be valid. The court applied a four factor test in analyzing this issue. Indiana courts specifically consider the following: (1) the type of business being sold, (2) the effect of including territory into which the transferring business did not extend, (3) the extent of the purchaser's original business as a factor, and (4) the period of restraint. *Fogle v. Shah*, 539 N.E.2d 500, 503 (Ind. Ct. App. 1989). The court determined that the first and second factors weighed in favor of enforcement because a distribution business can be expected to reach customers over a larger area and the investors who purchased the business planned to expand into new territory. The court also held that the third and fourth factors weighed in favor of enforcement because the Millers had already expanded into 13 states. The court further acknowledged previous precedent, concluding that a five year time period was reasonable. *E.T. Products*, 872 F.3d at 469, see *Dicen*, 839 N.E.2d at 688. The court concluded that the non-compete agreement was enforceable.

E.T. Products argued that the assistance the Millers provided when E.T. Products and Petroleum Solutions were still working together in 2012 violated the non-compete agreement. The court disagreed and held that the relationship between the companies could not be construed to be competitive in nature. E.T. Products further argued that the Millers violated the non-compete agreement because they did not revoke Petroleum Solutions' property lease when the Millers sold Petroleum Solutions. The court held that because the Millers did not take affirmative steps to lease to Petroleum Solutions after Petroleum Solutions began competing with E.T. Products, there was no violation of the non-compete agreement.

This case serves as a reminder to employers to articulate reasonable and clearly defined territorial restrictions in non-compete agreements so that they do not impose greater limitations than necessary to protect legitimate business interests. For questions relating the drafting or validity of non-compete agreements, please contact the attorneys in the Employment & Labor Practice Group at Heyl Royster.