MASSACHUSETTS Lawyers Weekly

1st Circuit affirms injunction in non-solicitation case

Delaware choice-of-law provision properly applied

By: Eric T. Berkman April 16, 2020

A Delaware choice-of-law provision was properly applied in enforcing a non-solicitation agreement against a former sales employee who went to work for a competitor, the 1st U.S. Circuit Court of Appeals has determined.

Defendant Timothy Day and his onetime employer, plaintiff NuVasive, entered an employment agreement in early 2018 that contained both a non-solicitation agreement and a choice-of-law provision stating that the laws of Delaware, where NuVasive was incorporated, governed all disputes between the parties.

When NuVasive sought to enforce the non-solicitation agreement against Day, U.S. District Court Judge Denise J. Casper granted the motion, finding that NuVasive would likely succeed on the merits under Delaware law.

Day argued on appeal that Massachusetts law, under which he claimed NuVasive would not likely succeed on the merits, should have governed the dispute rather than Delaware law.

Specifically, Day asserted that the new Massachusetts Noncompetition Agreement Act, which lays out the requirements for enforceable noncompete agreements, represented a fundamental Massachusetts policy that application of Delaware law would violate in this case. The act bars enforcement of restrictive covenants like the one in his contract, Day argued.

The 1st Circuit disagreed.

"[T]he MNCA 'only applies to employee noncompetition agreements entered into on or after October 1, 2018,' … and Day signed the [agreement] nearly a year earlier, on January 6, 2018," Judge David J. Barron wrote, quoting the Supreme Judicial Court's 2020 decision in *Automile Holdings, LLC v. McGovern*. "Moreover, none of the MNCA's provisions are relevant to the [agreement's] nonsolicitation clause because, '[b]y its terms, the [MNCA] does not apply to nonsolicitation agreements.'"

The 1st Circuit panel also rejected arguments that the choice-of-law provision was unenforceable because Delaware lacked a sufficient relationship to the parties and because Day's departure from the company prior to joining its competitor constituted a "material change" in his employment relationship that voided pre-existing restrictive covenants.

NuVasive, Inc. v. Day, Lawyers Weekly No. 01-075-20 (13 pages)

THE ISSUE: Was a Delaware choice-of-law provision properly applied in enforcing a non-solicitation agreement against a sales employee who jumped to a competitor?

DECISION: Yes (1st U.S. Circuit Court of Appeals)

LAWYERS: Mary Taylor Gallagher, Christopher W. Cardwell and M. Thomas McFarland, of Gullett, Sanford, Robinson & Martin, Nashville; Holly M. Polglase and Michael S. Batson, of Hermes, Netburn, O'Connor & Spearing, Boston (plaintiff)

Bryan E. Busch of Busch, Slipakoff, Mills & Slomka, Atlanta; Steven D. Weatherhead of Marathas, Barrow, Weatherhead, Lent, Boston (defense)

'Correct decision'

One of Day's attorneys, Steven D. Weatherhead of Boston, declined to comment. Counsel for NuVasive could not be reached for comment prior to deadline.

But Michael L. Chinitz, an employment litigator in Needham, said he agreed with the decision.

For starters, Chinitz said, the MNCA became applicable after Oct. 1, 2018, so the statute was inapplicable on its face. Additionally, even if the agreement had been executed after the statute's effective date, *NuVasive* involved a non-solicitation provision, not a noncompete, he said.

> *Following the enactment of the MNCA, lawyers have been asserting that the statute represents a broad change in the state's public policy toward restrictive covenants, said Michael L. Chinitz of Needham. "This decision provides some fairly solid authority that the statute should not be read in such a manner."*

More broadly, Chinitz said, lawyers have been asserting, following the enactment of the MNCA, that the statute represents a broad change in the state's public policy toward restrictive covenants generally.

"This decision provides some fairly solid authority that the statute should not be read in such a manner," he said.

Russell Beck, a Boston attorney and leading expert on noncompete law, said the decision was "unsurprisingly disappointing" in terms of providing any new insight into the substance of the new noncompete law.

Still, he said, any 1st Circuit decision in a non-solicitation preliminary injunction case will have important takeaways, and *NuVasive* is no exception.

For one thing, he said, the decision indicates that in the context of a choice-of-law analysis, the fact that a company is incorporated in Delaware is enough to apply Delaware law to a Massachusetts resident subject to a restrictive covenant.

At the same time, the case involved a non-solicitation agreement in a contract that pre-dated the MNCA's effective date, Beck said.

> *"Whether the 1st Circuit's decision will continue to permit application of another state's law to noncompetes signed on or after Oct. 1, 2018, remains to be seen."*
>
> *— Russell Beck, Boston*

"So whether the 1st Circuit's decision will continue to permit application of another state's law to noncompetes signed on or after Oct. 1, 2018, remains to be seen," he said. "I expect the court will apply Massachusetts law notwithstanding any other choice-of-law provision in the agreement."

Dawn Mertineit, a Boston attorney who handles trade secret and noncompete cases, noted that the 1st Circuit did not go as far as the U.S. District Court, which had found that the agreement would have complied with the MNCA if the statute applied.

"The 1st Circuit didn't dispute that finding, but it didn't necessarily agree with the District Court either; it just completely ignored the issue," she said.

Mertineit also said attorneys should not be too hopeful about defeating restrictive covenants in future cases by pointing to the 1st Circuit's failure to affirm the District Court directly on that point.

"But you'll definitely have creative practitioners who try and point out that because the 1st Circuit didn't say anything, it doesn't necessarily agree with the District Court's decision," she said.

Choice of law

On Jan. 1, 2018, Day rejoined NuVasive, a manufacturer of spine disease treatment products, as a Massachusetts and Rhode Island sales director after spending a decade shuttling between NuVasive and two of its distributors.

As a condition of his employment, Day signed a "Proprietary Information Inventions Assignment" agreement, or PIIA, which included a non-solicitation clause and a noncompete effective for a year after any departure. The PIIA also contained a choice-of-law provision stating that Delaware law governed any disputes under the agreement.

A year later, Day left to become an employee and owner of Rival Medical LLC, yet another exclusive distributor for NuVasive. Several months later, he dissolved Rival and terminated its relationship with NuVasive.

In response, NuVasive sent Day a notice of material breach of contract and reminded him of his non-solicitation and noncompete obligations. Nonetheless, Day soon joined Alphatec Spine, a NuVasive competitor.

At that point, NuVasive brought tortious interference and breach-of-contract claims against Day in U.S. District Court and sought a preliminary injunction to bar Day from violating his non-solicitation agreement.

Casper granted the injunction, finding that under Massachusetts choice-of-law rules, the PIIA's choice-of-law provision governed the dispute and that, under Delaware law, NuVasive had shown a reasonable likelihood of succeeding on the merits of its non-solicitation claim.

Day, barred from engaging in certain work for Alphatec, appealed.

Policy analysis

The 1st Circuit was unmoved by Day's argument that the choice-of-law provision should not have applied in the case because Delaware lacked a substantial relationship to the parties or the transaction.

"[T]his exception [to the choice-of-law rule under Massachusetts law] plainly does not apply here, because Delaware is NuVasive's place of incorporation and NuVasive is the plaintiff," Barron wrote.

Day also could not persuade the court that applying Delaware law to enforce the non-solicitation agreement contradicted fundamental Massachusetts policy behind the new MNCA.

Barron pointed out that the MNCA took effect on Oct. 1, 2018, nearly a year after Day and NuVasive executed the PIIA. Besides, the judge noted, the MNCA deals with non-competition agreements and, by its terms, does not apply to non-solicitation agreements.

Finally, the 1st Circuit rejected Day's contention that Massachusetts' "material change" doctrine constituted a fundamental policy that enforcement of the PIIA would violate in the case before it. Under the doctrine, a restrictive covenant in an employment contract is deemed void upon a material change to the employment relationship.

The panel observed that the alleged material change occurred here when Day moved to Rival, terminating his employment relationship with NuVasive.

"That is significant because Day has not identified any precedent that indicates that such a 'termination' — at least when it has been occasioned, as it was in this case, by an employee's own choice to terminate that employment — is a qualifying 'change' under Massachusetts' 'material change' doctrine," Barron wrote. "Rather, the only cases that Day cites in support of his position as to what constitutes such a qualifying 'change' involve changes in the conditions of employment of an employee who continued to be employed by the same employer, such as an employer cutting the employee's pay, an employer demoting the employee, or an employer materially breaching some term of the employee's employment contract."

Accordingly, the 1st Circuit concluded, the District Court decision should be affirmed.

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