POACHING IS NOT JUST ABOUT EGGS

(05/20/21)

We usually do not see many restraint of trade cases arising under the rubric of contracts or tort. Restraint of trade normally involves federal law under the antitrust statutes. While Pennsylvania does subscribe, as a common law obligation, to the federal antitrust laws, in the past our courts have unfortunately been dormant on the subject.

The case of *Pittsburgh Logistics v. Beemac Trucking*, 2021 Pa. LEXIS 1853 (April 29, 2021) (Mundy, J.), represents a marvelous departure from such prior court reluctance. The opinion addresses so-called "no poach" provisions ancillary to a services contract between business entities. The court finds that such agreements are not appropriate and are struck down as a matter of public policy.

Pittsburgh Logistics Systems, Inc. ("PLS") is a third-party logistics provider that arranges for shipping of its customers' freight with selected trucking companies. Beemac Trucking is a shipping company that conducts non-exclusive business with PLS. PLS and Beemac entered into a one-year Motor Carriage Services Contract, which automatically renewed on a year-to-year basis until terminated by either party. The contract contained a non-solicitation provision and a no-hire provision. While the contract was in force, Beemac hired PLS employees and naturally PLS asserted the so-called "no-poach" agreement.

PLS filed an action in the Court of Common Pleas of Beaver County against Beemac, alleging breach of contract, tortious interference with a contract in violation of Pennsylvania's Uniform Trade Secrets Act, 12 Pa. C.S. §§ 5301-5308, and civil conspiracy. The court issued an order enjoining Beemac from employing the former PLS employees and soliciting PLS customers pending a hearing. PLS sued its former employees for breach of contract concerning the non-competition and non-solicitation provisions in their employment contracts. The court entered an order enjoining the former employees from employment with Beemac and soliciting certain PLS customers pending a hearing. Following a full hearing, however, the trial court upheld the non-solicitation provision as necessary to protect PLS's interest in its customers, but vacated the order enjoining Beemac from hiring former PLS employees.

The Superior Court issued an en banc opinion on January 11, 2019, affirming the trial court. The Superior Court exercised a highly deferential standard of review with respect to the grant for denial of a preliminary injunction and examined the record to determine if the trial court had an apparent reason for its actions. The court agreed with the trial court that the contract violates public policy by preventing non-signatories, PLS employees, from exploring alternate work opportunities in a similar business. The Supreme Court reviewed cases from a number of jurisdictions, since this was a matter of first impression in Pennsylvania.

The court, after carefully examining precedent, ruled as follows:

> While the enforceability of a no-hire provision ancillary to a services contract between two businesses is an issue of first impression for this Court, we will apply the foregoing reasonableness test that applies to ancillary restraints on

trade. Here, the no-hire provision was ancillary to the principal purpose of the shipping contract between PLS and Beemac. The no-hire provision is a restraint on trade because the two commercial entities agreed to limit competition in the labor market by promising to restrict the employment mobility of PLS employees. See RESTATEMENT (SECOND) OF CONTRACTS § 186(2) ("A promise is in restraint of trade if its performance would limit competition in any business"). PLS had a legitimate interest in preventing its business partners from poaching its employees, who had developed specialized knowledge and expertise in the logistics industry during their training at PLS. See PLS's Brief at 25, 32; *Morgan's*, 136 A.2d at 846 (recognizing an employer has an interest in preventing its employees from using their specialized knowledge and skills in competition with the employer).

However, the no-hire provision is both greater than needed to protect PLS's interest and creates a probability of harm to the public. It is overbroad because it precludes Beemac, and any of its agents or independent contractors, from hiring, soliciting, or inducing any PLS employee or affiliate for the one-year term of the contract plus two years after the contract ends. The no-hire provision precluded Beemac from hiring or soliciting all PLS employees, regardless of whether the PLS employees had worked with Beemac during the term of the contract. As the Superior Court noted, "[b]y the plain reading of the language of this restrictive provision, it was meant to have effect in the broadest possible terms." *Pittsburgh Logistics Sys.*, 202 A.3d at 808.

Further, the no-hire provision creates a likelihood of harm to the public, *i.e.,* non-parties to the contract. The no-hire provision impairs the employment opportunities and job mobility of PLS employees, who are not parties to the contract, without their knowledge or consent and without providing consideration in exchange for this impairment. Further, the injury to PLS employees is not hypothetical. In this case, PLS enforced the no-hire provision by seeking to enjoin Beemac from employing the former PLS employees who had already left PLS and obtained employment with Beemac. If PLS was successful, the effect of its enforcement of the no-hire provision would have deprived its former employees of their current jobs and livelihoods. Moreover, the no-hire provision undermines free competition in the labor market in the shipping and logistics industry, which creates a likelihood of harm to the general public. See, e.g., Donald J. Polden, Restraints on Workers' Wages and Mobility: No-Poach Agreements and the Antitrust Laws, 59 SANTA CLARA L. REV. 579, 610 ("[T]he high percentage of U.S. workers who are subject to agreements and covenants restricting their employment opportunities are contributing to slow wage growth and rising inequality. For example, recent studies have demonstrated that worker wages are 4%-5% higher in states that do not recognize or enforce worker non-compete restraints.")(footnotes omitted). Balancing PLS's interest against the overbreadth of the no-hire provision and the likelihood of harm to the public, we conclude that the no-hire provision is unreasonably in restraint of trade and therefore unenforceable.

*Pittsburgh Logistics, supra, at *41-*44.*

Accordingly, the order of the Superior Court was affirmed.

The bullet-point takeaway from this opinion are as follows:

- Enforceability of a no-hire provision ancillary to services contract between two businesses is an issue of first impression.
- Reasonableness test applied to ancillary restraints on trade.
- No-hire provision was ancillary to principal purposes of shipping contract.
- No-hire provision is a restraint on trade.
- Due consideration was given to the interests of the employees who were not a party to the contract and would suffer injury as a result of enforcement of the no-hire provision.
- The no-hire provision is both greater than needed to protect the interests of any party and creates a probability of harm to the public.
- The court finds the no-hire provision is an unnecessary- restraint of trade.

This opinion strikes an enormously positive balance between contracting parties and the right to work. The court next will have to take a look at restrictive covenants not to compete, which have a deleterious effect on the practice of medicine whereby doctors oftentimes cannot move from hospital to hospital or practice group to practice group because of onerous restrictions which are a restraint of trade.

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