When Confidentiality Agreements Operate as de Facto Non-Competes

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A recent California Court of Appeal decision, *Brown v. TGS Management Co., LLC*, (2020) 57 Cal. App. 5th 303, highlights the dangers of overbroad confidentiality restrictions in employment agreements. As well, it shows the courts' willingness to overturn arbitrator decisions which are inconsistent with the protection of a party's statutory rights. In doing so, it provides some cautionary advice for everyone.

In *Brown*, a securities trader sued his former employer (TSG) following his termination, invoking the arbitration provision in his underlying employment agreement. In that proceeding, Brown sought, among other relief, a declaration that the confidentiality restrictions in that agreement effectively barred him from his chosen profession indefinitely. TSG, in turn, counterclaimed for violations of those same provisions, seeking disgorgement of some of plaintiff's compensation.

After the arbitrator ruled against Brown, that decision was confirmed by the trial court. In reversing, the Court of Appeal first relied on the exception to the general deference given to arbitrator awards for cases "in which granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights", citing *Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 32.

Then, citing California's public policy against non-compete restrictions embedded in Bus. & Prof. Code Section 16600, the *Brown* appellate court found that the employment agreement defined "confidential information" so broadly as to equate with TGS claiming "for itself, without limitation*, all* information that is 'usable in' or that 'relates to' the securities industry". The court found that "these overly restrictive provisions operate as a de facto noncompete provision; they plainly bar Brown in perpetuity from doing any work in the securities field, much less in his chosen profession of statistical arbitrage."

Notably, over TGS's objection that it was not defending the breadth of its "confidential information" definition, the appellate court held that the arbitrator was still required to find the confidentiality provisions void on their face when "patently" violative of Section 16600.

In response to TSG's argument that voiding these provisions would prevent it from protecting its trade secrets, the *Brown* court made two points that are useful to everyone: First, absent such de facto non-compete provisions, employers are free to craft and enforce "a properly drawn confidentiality agreement which preserves an employee's right to compete after leaving" their employer. Second, employers can always prevent former employees from disclosing trade secrets and other confidential information by pursuing injunctive relief and tort remedies under the Uniform Trade Secrets Act (Civ. Code Sections 3426 *et seq*.) and the Unfair Competition Law (Bus. & Prof. Code Section 17200 *et seq.*).

Takeaways: Trade secrets and other proprietary information may be among a company's most valuable assets. Fully protecting those assets requires precise drafting of confidentiality agreements. *Brown* reminds us that overbroad provisions may be deemed de facto non-compete restrictions facially invalid under Bus. & Prof. Code Section 16600, regardless of whether the dispute begins in arbitration or in court.

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