Connecticut Law Tribune
JANUARY 25, 2010
VOL. 36, NO. 4 • $10.00
An ALM Publication
CTLAWTRIBUNE.COM

Seeking Remedies In Non-Compete Cases

Courts weigh whether monetary damages preclude injunctive relief

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Every practitioner handling non-compete litigation knows that irreparable harm and lack of an adequate remedy at law are threshold requirements for injunctive relief. These requirements describe essentially the same condition – a loss that cannot be measured fully in money damages.

And in non-compete jurisprudence in which the interest protected is customer relationships, it is virtually presumed that the plaintiff's loss cannot be measured fully in money damages and thus, is irreparable. "The very nature of the defendant's conduct [the loss of a customer's future patronage] is such that its real impact will not be felt fully for several years in the future," the court ruled in *Case v. Zeff,* 10 Conn. Supp. 530, 532 (1942). Consequently, the "plaintiff's actual injury is not susceptible of determination to its entire extent, but is estimable largely by conjecture and prediction."

But what if in addition to providing for injunctive relief in the contract, the employer has also called for liquidated damages for violations that result in customer loss, and the liquidated damages specified are not grounded on some approximation of lost profits over time, but are a multiple of the revenue the customer generated for the plaintiff in the past? Has the employer overreached in seeking to protect itself, even if its contract provides that none of the remedies are exclusive? Has the employer, by creating this liquidated damage provision, admitted that its loss is measurable? Has the employer made it impossible for it to prove irreparable harm and the lack of an adequate legal remedy, and thus destroyed what might otherwise be its entitlement to injunctive relief?

Adequate Remedy

Connecticut law does not definitively answer these questions. Moreover, the experience here and elsewhere makes it difficult to predict how a Connecticut appellate court would rule. The only Superior Court decision on the point is *TD Banknorth Insurance Agency, Inc. v. Kirsch,* 2005 WL 3623966. There, in addition to providing for injunctive relief, the contract authorized liquidated damages equal to half the defendant's commission for a sale to a protected customer during the period of restraint. The judge held that "under these circumstances, this court cannot agree with plaintiff that it has no adequate remedy at law . . ." The judge cited the only other Connecticut case to address the issue, the U.S. District Court's decision in *Nationwide Mutual Insurance Company v. Stenger III,* 695 F. Supp. 688 (D. Conn. 1988). In that case, rejecting plaintiff's motion for preliminary injunction, the court wrote: "Assuming, as the Court must on the present record, that liquidated damages are due and owing under the Agreement for defendant's breach, then plaintiff cannot be found without an adequate remedy at law." Unfortunately, neither judge discussed, or even mentioned, measurability of damages in their opinions.

Nor did they discuss, or even acknowledge, a Restatement section that squarely addresses the subject. Section 361 of the Restatement (Second) of Contracts states: "Specific performance or an injunction may be granted to enforce a duty even though there is a provision [in the contract] for liquidated damages for breach of that duty." The comment to Section 361 supplies the rationale. "A contract provision for payment of a sum of money as damages may not afford an adequate remedy even though it is valid as one for liquidated damages and not a penalty. Merely by providing for liquidated damages, the parties are not taken to have fixed a price to be paid for the privilege not to perform."


Richard C. Robinson

But what if the liquidated damages specified do indeed measure the full loss of a customer's future patronage, including good will? Can the loss properly be deemed irreparable under those circumstances? How can full compensation for the entirety of an economic loss ever be considered inadequate? This undoubtedly explains why Section 361 is cast in permissive, rather than directory, terms.

Forced Sale

Some courts in other jurisdictions, focusing on the concept of measurability, have held that a liquidated damage provision will ordinarily preclude injunctive relief. The rule in most jurisdictions, however, seems to be to the contrary.

The author recently represented defendants (employees and their "new" employer) in a non-compete enforcement case in another jurisdiction in which the issue of liq-

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uidated damages precluding injunctive relief was front and center. The plaintiff's counsel maintained that injunctive relief was appropriate despite the liquidated damages provision because the court should not force the plaintiff to sell its entire business. (In the abstract, the forced sale of an entire business could be the conclusion the defendants' argument would produce in certain cases.) The defendants responded that the plaintiff's entire business was not at risk in the case, but even if it were, the liquidated damages the plaintiff specified – 1.5 times the last annual revenue the plaintiff received from the customers the defendants "took" – was a "sale of the business" type price, in both structure and amount; thus, there was nothing inequitable in refusing injunctive relief. More importantly, the defendants argued, the plaintiff, by virtue of its liquidated damage clause, had admitted that the loss was measurable, and it followed, therefore, that the harm was not irreparable and a perfectly adequate legal remedy was present.

The court forged its own path to a compromise result. It observed that in restrictive covenant cases where there are no liquidated damage issues present, injunctions are the remedy to prevent future loses, while damages are the remedy for losses that have already occurred. Thus, it reasoned, that since there was nothing incompatible about damages and injunctive relief in the same case, there could be nothing incompatible about liquidated damages and injunctive relief in the same case; that the former would compensate for existing losses, while the latter would prevent future losses. The problem with this approach is that it fails to account for the fact that the plaintiff, with its "sale of the business" type liquidated damage provision, had specified a measure for all of its losses, both present and future, including good will and the loss of its entire business.

It may well be that the answer to the question of whether liquidated damages preclude injunctive relief in non-compete cases lies with the notion that irreparable harm and lack of an adequate legal remedy are concerned with more than just the measurability or lack of measurability of particular losses. These concepts are also concerned with avoiding the need for multiple lawsuits – in this case, for example, a requirement that the plaintiff sue each time a protected customer is "taken." Yet, at least in the employment context, where the typical durational restraint is only one or two years, and the statute of limitations is six years from the breach, there is much less force to the "multiple lawsuit" concern.

Suffice it to say, there is plenty of fodder for each side when litigating over injunctive relief in non-compete cases where the contract provides for liquidated damages. ■