When Competition Crosses the Line, Level the Playing Field with Unfair Competition Litigation



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By now almost everyone has read about or experienced the "great resignation" and its unprecedented levels of employee turnover. With that increased worker mobility, there has been a surge in unfair competition litigation, including non-compete, trade secret, trademark, copyright, patent, and similar matters. While we all know that competition is the "American way" and in many instances drives economic growth, there are laws that limit unfair competition. Here are some of the commonly asked questions about unfair competition litigation.

Are non-compete agreements enforceable? It depends on the wording of the agreement and other factors, including duration and geographic scope. As a general matter, yes, non-compete agreements are enforceable in Arkansas. Although there has been proposed legislation, there are currently no laws prohibiting non-compete agreements outright.

How long is a reasonable duration of a non-compete agreement? Generally, non-compete agreements may restrict employee competition for up to two years. This is not absolute, however, as this general rule can be different where the facts and circumstances of a particular situation clearly demonstrate that two years is unreasonable compared to the employer's protectable business interest.

What is a reasonable geographic area of coverage for a restriction? There is usually no presumed reasonable geographic area. The Arkansas non-compete laws provide guidance that the lack of a specific geographic restriction does not make a non-compete unenforceable as long as: (1) the non-compete is limited with respect to time and scope, and (2) it is not greater than necessary to defend the protectable business interest of the employer. Beyond that guidance found in the statute, lawyers will look to past cases to determine what is reasonable under the facts of a particular situation.

What about confidentiality, non-solicitation, non-disclosure, and other related provisions? Sometimes non-compete agreements are talked about as if they exist in a vacuum. They do not. Rather, non-compete agreements are often merely one prong in a nuanced legal strategy. Non-solicitation agreements prevent departing employees from going after existing customers. Non-disclosure agreements guard against sharing corporate strategies with a competitor. Confidentiality provisions offer a broader safety blanket to safeguard all types of intellectual capital. Enforcing the rights of a business to prevent unfair competition and preserve an investment in human capital is an area of the law that involves taking a tailored approached to meet each business's needs.

How do intellectual property rights play into this? Intellectual property rights—sometimes formally registered as trademarks, copyrights, and patents, and at times arising even without formal registration—also can become relevant. Sometimes as standalone infringement cases, and sometimes alongside other

claims, legal counsel can help protect and enforce intellectual property rights. These issues often are integral to a business' brand, reputation, and value, so protecting intellectual property is a key component of unfair competition litigation.

How does a business prosecute unfair competition claims? Retaining experienced counsel to identify claims, develop a strategy, and prosecute their unfair competition case is one of the most important decisions the business makes. Experienced counsel will start by understanding a client's business, asking about their biggest risks, and working together to create a strategy that is laser focused. A comprehensive legal strategy, focused on a business' goals and safeguarding their most important assets, is one that prepares a case for trial while simultaneously pursuing early-stage resolution.

Businesses are built through hard work and significant investment. One of the most significant investments a business makes is the investment of time and resources in its people. Protecting that investment is often crucial to the brand and to the future of a business. While litigation can be costly and time-consuming, sometimes it becomes necessary. Working to protect and defend the core of a business by upholding the integrity of its valuable intellectual property rights and its investment in its people is one of the most critically important challenges that a business faces.

Attorney Devin Bates is a litigator and trial lawyer. He helps clients manage and resolve complex disputes including those relating to employment issues, non-compete litigation, intellectual property, trade secret disputes, claims of fraud and breach of contract.

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