

RESTARTING THE CLOCK: Court Determines that Prohibition on Competition Under Injunction Commences From Date of Order as Opposed to Termination

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Resolving a nettlesome issue in restrictive covenant litigation, the Pennsylvania Superior Court recently held that the amount of time a former employee is prohibited from competing with his former employer under an injunction commences upon the entry of an injunction order, as opposed to the employment termination date, even if it expands the temporal restrictions in excess of those initially set forth in the contractual documents. In *Tyco Fire Products, L.P., et al. v. Fuchs*, No. 20 EDA 2017 (Pa. Super. Ct. Nov. 17, 2017), the Superior Court affirmed, in a non-precedential opinion, a Montgomery County trial court's grant of an injunction to Tyco Fire Products, L.P. ("Tyco") against Ralph M. Fuchs, a former Tyco senior sales manager who had left Tyco in 2016 and began working in a similar position at Reliable Automatic Sprinkler Company, Inc. ("Reliable"). In effect, the court hit the "reboot button" on the length of the restrictive covenant based upon evidence that the plaintiff's former employee had been violating at least the spirit, if not the letter, of his non-compete covenant upon joining his new employer.

In its ruling, the Superior Court noted that when Fuchs left his job at Tyco in January 2016, counsel for Tyco instructed both Fuchs and Reliable by written correspondence as to Fuchs' various legal obligations to Tyco. Reliable subsequently moved Fuchs to an "internal project." However, Fuchs continued to accompany other Reliable employees on visits to customers to whom Fuchs had been prohibited from selling under his restrictive covenant. In an effort to stop Fuchs' competitive activity, Tyco filed a complaint in Montgomery County Common Pleas Court in April 2016 (approximately three months after the termination of Fuchs' employment with Tyco), seeking a preliminary injunction to prohibit Fuchs from working for any company engaged in the same business as Tyco in his former Tyco sales territory, which had included eleven states.

The trial court granted the preliminary injunction on November 21, 2016, approximately eleven months after Fuchs had left Tyco (and with only one month of the non-compete restriction remaining under Fuchs' contract with Tyco), finding that Fuchs was in violation

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of his non-competition agreement, and ordered that Fuchs: (i) return all confidential information to Tyco (and that Fuchs not disclose or misappropriate the same); (ii) not perform any sales duties for Reliable in Fuchs' former Tyco territory for one full year; (iii) not solicit Tyco customers for two years; and (iv) not work in sales for any Tyco competitor within Fuchs' former Tyco territory for one year, with all temporal restrictions running from the date of the trial court's injunction order.

On appeal, Fuchs argued that the trial court abused its discretion by ordering that the prohibition period under the injunction should commence on the date the order had been entered, rather than retroactively upon the termination of Fuchs' employment at Tyco. In an opinion written by Superior Court Judge John Bender for a unanimous three-judge panel, however, the Superior Court upheld the trial court's decision, finding the period of restriction to be reasonable in light of Fuchs' failure to "abide by the terms of the non-compete agreements after his resignation from Tyco." In support of its decision, the Superior Court looked to *Jackson Hewitt, Inc. v. Childress*, No. 06-CV-0909, 2008 WL 834386, at *10-11 (D.N.J. Mar. 27, 2008), in which the United States District Court for the District of New Jersey enjoined a former franchisee from competing for two years from the date of the former franchisee's compliance with the operative non-compete restrictions, as opposed to the date of separation from the franchise. Finding that ruling persuasive on equitable grounds, the Superior Court noted that "[t]he *Jackson Hewitt* court reasoned that the extension of the restrictive period was justified, as the defendant would otherwise 'wrongfully benefit from his refusal to comply with his contractual obligations.'"

Responding to Fuchs' argument that Pennsylvania courts have historically refused to extend the length of the restrictive covenant beyond the time period provided by contract, the Superior Court distinguished prior Pennsylvania caselaw, such as *Davis v. Buckham*, 421 A.2d 427 (Pa. Super. 1980) and *Hayes v. Altman*, 266 A.2d 269 (Pa. 1970) (both cited by Fuchs), from the situation in *Tyco*. In *Tyco*, the original contractual covenants had not yet expired, whereas in the other two cases the period of prohibition had already run. The Superior Court also indicated that, under *Hayes*, "fraud or unnecessary delay . . . may serve as a basis for an extension" of the covenant and found that Fuchs had caused unnecessary delay in the litigation by failing to produce court-ordered discovery documents. The Superior Court concluded that "[i]t seems only appropriate that the trial court refused to credit [Fuchs] for time that had passed since his resignation from Tyco, as such time was spent in non-compliance. Equity demands that the period of restrictions runs from the date of the preliminary injunction order."

The Court also rejected arguments from Fuchs that an injunction was not necessary to prevent irreparable future harm and that a two-year prohibition on contact with Tyco customers was overly broad. In doing so, the Court noted that Fuchs inappropriately cited Pennsylvania caselaw to support his arguments, when the agreement itself was governed by New Jersey law, under which two-year periods are generally found to be reasonable for non-compete and non-solicitation provisions.

The analysis performed by the Superior Court in *Tyco* measures the appropriate period of restriction under an injunction in a novel manner, while distinguishing cases that call for

damages, as opposed to an extended temporal restriction, such as *Hayes*. The decision provides guidance to businesses considering pursuit of former employees for violation of non-competition agreements, specifically in instances when employees are nearing the end of their non-competition period. *Tyco* demonstrates the possibility that, in the interest of equity, former employees who have been operating in violation of restrictive covenants may be required to reset the clock on the term of their non-competition covenant upon entry of an appropriately framed injunction order.

If you have any questions about any of the above information, or wish to discuss a particular matter, please feel free to speak with Mr. Linn, Ms. Patter or any other member of our Litigation Practice by calling us at 412-297-4900 or visiting us at www.cohenlaw.com/practices/litigation. To receive future news alerts, please send an e-mail to bulletins@cohenlaw.com.

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