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From time to time cases are decided by the courts which we feel should be brought to your attention. This month the Missouri Supreme Court reached a decision which explicitly detailed the Missouri law on two different issues. The first issue related to non-compete agreements and the second issue dealt with claims for tortious interference with contracts. In the case of Health Care Services of the Ozarks, Inc. v. Pearl Walker Copeland and LuAnn Helms, decided August 8, 2006, the court dealt with some executives of a home health agency which left their employer to help start a new business in competition. Both ladies had signed non-compete agreements which purportedly prohibited such an activity. A lawsuit ensued and the matter was ruled on by the Trial Court, then the Court of Appeals and finally the Missouri Supreme Court. In reaching its decision that the non-compete agreements should be upheld, the Supreme Court set forth four significant factors which needed to be considered before ruling upon a non-compete agreement. The factors were:

1. An employer needs to be able to engage a highly trained workforce in order to be competitive and profitable without fear that the employee will use the employer's business secrets against it or steal the employer's customer after leaving employment.
2. The employee must be mobile in order to provide for his or her family and to advance his or her careers in an ever-changing marketplace.
3. The law favors the freedom of the parties to value their respective interests in fairly negotiated contracts.
4. Contracts in restraint of trade are generally unlawful.

The court went on to find that non-compete agreements are definitely contracts in restraint of trade, but they may fall into an exception where they are not unlawful if they are "no more restrictive than is necessary to protect the legitimate interest of the employer". This means that they can be enforced if they are narrowly tailored geographically and temporally. They are not enforceable simply to protect an employer from mere competition by a former employee, **but only to the extent that the restrictions would protect the employer's trade secrets or customer contacts.**

"Trade secrets" comprise information that is not known outside of the business and which the employer has taken some steps to protect. It cannot be information which could be properly acquired or duplicated by others.

"Customer contacts" is defined as "the influence an employee acquires over his employer's customers through personal contact". Factors to be considered are the quality, frequency and duration of the employee's exposure to customers. In this case, for example, the defecting supervisors did not personally treat the patients. However, they had significant relationships with the nurses, knew their salary structure and were in a position to use that knowledge and influence to recruit the former employer's nurses and raid its patients. Although the court did not say so, this reasoning probably applies to vendors and other critical relationships as well.

The court did not decide whether the protection applies to potential new customers or how it might be applied in the sale of an ongoing business, although non-compete agreements in business sales have been enforced by Missouri courts for many years.

In cases like this, the question of interference with business relationships often comes up as well. The court defined the elements of that tort as: (1) a valid contract or business expectancy; (2) the defendant's knowledge of the contract or relationship; (3) an intentional

interference by the defendant which induces or causes a breach of that relationship; (4) the absence of any justification for the behavior; and (5) resulting damage to the plaintiff.

While this case provides great insight into the approach, appellate courts in both Missouri and Kansas take to non-compete cases, and it should be noted that most of these cases ask for injunctive relief to keep the former employee from competing. Injunctions are equitable relief and when trial courts sit as courts of equity, they tend to "do equity". In other words, they look first to the basic fairness of a result, regardless of the application of legal standards. A judge may analyze a case based on whether injunctive relief feels appropriate under the circumstances. Therefore, a trial court might find, for instance, a plaintiff is entitled to damages from unlawful competition, but it may not authorize a restraining order or injunction. This is problematic in that actual damages in these cases are very hard to quantify and may not always be provable. For this reason, we advise our clients to craft non-compete clauses so that they don't over reach and are likely to support injunctive relief and not just damages. We try to help our clients effectively define and protect their specific business interests in each case instead of relying on a generic clause that may not be as good an application in a particular instance.