

When Courts Invoke Equitable Tolling In Noncompete Cases

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Companies routinely rely on employment agreements with restrictive covenants such as noncompete and/or nonsolicitation provisions to protect their intellectual property assets and prevent former employees from using or disclosing confidential information for the benefit of a new employer. These agreements generally limit an employee's activities after the termination of employment for a set time period (e.g., six months, one to three years).

"Equitable tolling" is a doctrine by which a court may, in certain circumstances, extend the term of restriction beyond the time period specified in an employment agreement — often equal to the time that an employee is in violation of a restrictive covenant. This doctrine arises under inherent principles of fairness in order to give full effect to a restrictive covenant, particularly when litigation arises to enforce the covenant. As a result of the delays often associated with litigation, an employer may be deprived of the benefit of its bargain and receive little relief if an injunction is not issued until the eve of, or after, the expiration of the restrictive covenant. Equitable tolling allows the employer to extend the restrictive period so that the employer can enjoy the full benefit of the restrictive term.



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Two Recent Cases

Two recent district court decisions provide further insight regarding the circumstances in which courts may equitably toll a term of restriction.

In *Amedisys Inc. v. Interim Healthcare of Wichita Inc.* (D. Kansas April 27, 2015), the district court granted injunctive relief and agreed that equity demanded an extension of the noncompetition period by seven months to make up for the time period during which the former employee had been in breach of her agreement. The court found that, since the former employee left to join a direct competitor, the plaintiff had experienced a substantial reduction in the number of referrals it received from the accounts she formerly managed. There were also admissions by the former employee that she had in fact been providing medical services as part of her new job, in direct competition with the plaintiff.

The district court observed that, under Kansas law, the court could "extend equitable relief beyond the contract terms if reasonably necessary." The court then held that the plaintiff's request to equitably extend the noncompete provision was reasonable because it was limited to the approximately seven-

month period during which the former employee had been in breach. The court stated that its ruling was “bolstered” by the inclusion of a “tolling provision” in the employment agreement, which stated:

Tolling: In the event Employee breaches a time-limited restriction contained in this Agreement, Employee hereby agrees that the applicable period of restriction shall be extended by one day for each day the Employee is found to have been in violation of such restriction up to, but not to exceed, the length of time that is equal in length to the period of restriction that would have applied absent the violation.

In contrast, the employment agreement at issue in *Ocean Beauty Seafoods LLC v. Pacific Seafood Grp. Acquisition Co. Inc.* (W.D. Wash. June 25, 2015) did not contain a tolling provision. On remand from the Ninth Circuit, the district court was directed to reconsider the denial of a preliminary injunction and to consider equitably extending the noncompete’s one-year term if the court granted an injunction.

Pacific Seafood argued that, because the one-year period set forth in the agreement was due to expire shortly (due to litigation-created delays), any injunction issued should be equitably extended, or else it would be moot. It argued this was necessary in order “to give full effect to the non-compete agreement, to prevent a party from wrongfully benefiting from breaching an agreement, and to protect the integrity of the judicial system.”

Ocean Beauty, on the other hand, argued that tolling was inappropriate. It emphasized that, “although Pacific Seafood could have, it did not include a tolling or extension provision in its Employment Agreement as many employers do.” Ocean Beauty thus argued that Pacific Seafood was asking the court to rewrite its employment agreement by adding a tolling agreement to which the employee had never agreed. It also focused on the merits of the case and argued that (1) there was no evidence that the ex-employee had solicited any former customers during the term of the noncompete covenant, and (2) in any event, any information allegedly “in his head” would have “seasoned sufficiently” after expiration of the one-year contract term.

Ultimately, the district court remained unconvinced as to the merits of the breach claim, and again denied the injunction. The court also explained why, even if the court or the Ninth Circuit were to issue an injunction, the court would not have invoked equitable tolling.

The district court conducted its analysis under Oregon law and found that both the Oregon Supreme Court and the Ninth Circuit had declined previously to extend the term of a restrictive covenant, specifically where the covenant had expired or substantially expired by its own terms during the pendency of litigation. The court also cited to several other United States Courts of Appeal that “had declined to equitably extend a restrictive covenant that has expired on its own terms at the time of appeal.” The court distinguished other cases extending restrictive covenant terms on grounds that those cases involved clear evidence of repeated and economically detrimental customer solicitation by a former employee. Pacific Seafood has since again appealed to the Ninth Circuit, and that appeal is pending.

Takeaways

Equitable tolling cases are decided under state law, and thus jurisdictions have different laws addressing a court’s authority to equitably extend the term of a restrictive covenant. Not surprisingly, however, these recent cases show that a court’s decision whether to invoke equitable tolling will be influenced largely by (1) whether the employment agreement includes a tolling provision, and (2) whether there is

strong evidence of sufficient wrongdoing by the ex-employee to justify extension of the restrictive term.

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