How Important are Irreparable Injury Provisions in Non-Compete Agreements?

Employers who use non-compete agreements take note: Minnesota courts want to see more than just words in a contract before they will grant injunctive relief against a former employee, warns a **post on the website** of Dorsey & Whitney LLP.

The article discusses *St. Jude Medical, Inc. v. Carter*, which arose after Heath Carter left his employer to work for a competitor. The employer filed suit against Carter and the competitor, alleging violations of Carter's non-compete agreement. The employer sought an order enforcing the terms of the non-compete agreement and prohibiting Carter from working for a competitor in his then-current position. Although the jury found that Carter had breached his non-compete agreement, the court refused to enter an injunction, finding that the employer failed to establish that it had been harmed.

The Minnesota Court noted that "[a] private agreement is just that: private," and concluded that such contractual language does not, by itself, entitle an employer to an injunction after proving the breach of a non-compete.

Read the article.

Dick Sayles Named Dallas Bar Association's 2018 Trial Lawyer of the Year

Dallas trial lawyer and **Sayles Werbner** co-founder Richard A. "Dick" Sayles was chosen by the Dallas Bar Association as the 2018 Trial Lawyer of the Year based on his achievements in the courtroom.

Sayles, a native of Gatlinburg, Tennessee, is profiled in the July issue of the Dallas Bar Association's Headnotes in the article, "**Dick Sayles: 2018 DBA Trial Lawyer of the Year**." The story highlights Sayles' motivation for becoming a lawyer, provides a history of how he became a courtroom master, and explains how Sayles Werbner maintains its status among the most respected law firms in the nation.

"To me, there is no greater honor than to be recognized by your peers," says Sayles. "It's also a testament to the dedication and commitment of my colleagues at Sayles Werbner. I am very proud of what our firm has become."

Sayles credits his firm's strong relationship with large, national firms as a key factor in Sayles Werbner's success. "We are often asked by major, out-of-state firms to serve as co-counsel in high profile, high stakes cases."

In a release, the firm said Sayles has made a career of representing clients in big cases involving commercial litigation, personal injury and patent litigation. His list of accomplishments includes significant defense wins, 150 cases tried to verdict, and more than a dozen multimillion-dollar jury verdicts, the firm said.

This year Chambers USA, the legal guide, honored Sayles for the sixth time as a top litigator in Texas. Texas Lawbook named Sayles to the Lions of the Texas Bar, an exclusive list of the state's most respected and influential lawyers. The Best Lawyers in America recognized him as the 2018 Dallas-Fort Worth Lawyer of the Year for bet-the-company litigation. He also received recognition in the 2018 edition of Benchmark Litigation and has been named seven times to the list of Top 10 attorneys in the state in the annual Texas Super Lawyers guide.

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3 Ways Trump's Supreme Court Pick Could Transform U.S. Labor Law

The Washington Post **reports** that President Trump's nominee for the Supreme Court may prove a crucial conservative vote in cases defining protections for gay and lesbian workers, the scope of union organizing and the rights of workers to take their grievances to court, according to labor law experts.

The president selected Brett M. Kavanaugh, a federal judge on the U.S. Court of Appeals for the District of Columbia Circuit.

Reporter **Jeff Stein** quotes Benjamin Sachs, a labor law expert

at Harvard University: “This last term was horrendous for workers. If you are to have imagined a nightmare scenario for workers and workers rights, this would be it. But in those cases, the ruling justices also planted seeds that could lead to further damage against workers.”

Read the *Washington Post* article.

ITT’s Former Top Executives Settle Fraud Charges With SEC

The Washington Post **reports** that tormer top executives at ITT Educational Services, the parent company of defunct ITT Technical Institute, have settled fraud cases with the Securities and Exchange Commission, avoiding a trial slated to begin Monday.

ITT chief executive Kevin Modany and former chief financial officer Daniel Fitzpatrick were chagred with civil fraud in 2015 for allegedly deceiving investors about high rates of late payments and defaults on student loans backed by the company, writes **Danielle Douglas-Gabriel**.

Although they didn’t admit or deny any wrongdoing, they agreed to pay penalties of $200,000 and $100,000, respectively. The agreement bars them from serving as officers and directors of public companies for five years.

Read the *Washington Post* article.

Halliburton Accused by Government of Harassing Muslim Workers

Energy giant Halliburton failed to act as two Muslim workers in North Texas were regularly harassed about their religion by supervisors and co-workers, the federal government alleges in a lawsuit.

Bloomberg Law **reports** the Equal Employment Opportunity Commission alleges Hassan Snoubar and Mir Ali were harassed and otherwise discriminated against because of their national origin. Snoubar is from Syria, and Ali is from India. Both worked for Halliburton Energy Services Inc. as operator assistants, the EEOC says.

Reporter Patrick Dorrian writes: "The lawsuit continues the agency's crackdown on employer practices or other workplace behaviors that target workers who are Muslim or Sikh, or of Arab, Middle Eastern, or South Asian descent. Eliminating such discrimination is one of the federal job rights watchdog's top enforcement priorities."

Read the article.

IADC Calls for Class Action Reforms in Ontario, Canada

The **International Association of Defense Counsel** (IADC) recently submitted to the Law Commission of Ontario (LCO) recommendations for reform to the Ontario Class Proceedings Act (CPA) that could eventually affect class action legislation in Ontario and other Canadian provinces.

The IADC began the initiative in 2014 by forming its Canadian Class Actions Task Force to study and develop positions on key issues that the Ontario government asked the LCO to consider. The LCO has described the project as the most comprehensive assessment of the CPA in more than 25 years.

In a release, the organization said the Task Force is made up of IADC members who are lawyers with class action experience in Canada, the United States and Australia. The Task Force also includes representation from Lawyers for Civil Justice, DRI – The Voice of the Defense Bar and the Federation of Defense and Corporate Counsel, all of which have members who represent and serve as in-house attorneys with companies exposed to class actions in Ontario. All of these organizations, along with the Canadian Defence Lawyers and the Product Liability Advisory Council, supported the Task Force's submission to the LCO.

The release continues:

> "The IADC is committed to improving civil justice, and to positive reform of the civil justice system. This includes ensuring fairness in the judicial process and a proper balance between plaintiffs and defendants in litigation procedures in the United States, Canada and other countries

as well," said Gordon McKee, an IADC board member, chair of the Canadian Class Actions Task Force, and a partner at Blake, Cassels & Graydon LLP in Toronto. "When the Law Commission of Ontario requested stakeholder input as part of itsreview of class action procedures, the IADC committed to responding on behalf of its members who represent corporate defense interests."

IADC members include lawyers with large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives. A significant number of IADC members are Canadian, and many other IADC members represent multinational companies with subsidiaries that do business in Canada and/or that have been defendants in class actions in Ontario and other parts of Canada.

"Our corporate defense perception is that class action procedures in Ontario currently are unbalanced and unduly tilted in favor of plaintiffs, and a more level procedural playing field between plaintiffs and defendants is required to achieve fairness and judicial economy," said Peter J. Pliszka, also a member of the IADC and its Canadian Class Actions Task Force, as well as a partner with Fasken Martineau DuMoulin LLP in Toronto."We want to help ensure access to just outcomes that are not driven by matters extraneous to the merits of a case."

McKee added that, for example, the current regime in Ontario can create undue pressure on companies to settle class actions for extraneous reasons such as the high cost of defense, potential impact on shareholder value or business transactions, and negative publicity surrounding a claim regardless of its lack of merit.

The IADC's Canadian Class Actions Task Forcerecommendations for more fair and efficient class proceedings in Ontario include:

– Adding a merits analysis prior to or at certification, and giving the court more ability to critically review evidence, to weed out class actions with little or no merit, and to narrow overly broad class actions at an early stage;

– Requiring the court to consider coordinated case management and discovery as an alternative to a class action where there are a small number of cases, to allow more timely and proportionate resolution of the claims of the putative class members;

– Allowing plaintiffs and defendants equal opportunities to appeal certification decisions, and discouraging wasted resources and costs caused by material changes to the class claims/issues/definition on appeal;

– Codifying transparency and other requirements for third-party litigation funding to prevent unfairness to the parties or the class members and to remove incentives to fund claims with little or no merit; and

– Adopting provisions to address overlapping class proceedings in multiple provinces, including requiring a certification judge to consider whether he or she should defer to an overlapping class action in another jurisdiction.

After considering input from the IADC and other submissions, the LCO says it plans to issue a final report to the Ontario government at the end of this year or in early 2019. It is expected that the LCO's report will also be carefully considered by governments in other Canadian provinces.

Texas Supreme Court Redefines an Offset Well Clause

The Texas Supreme Court has held that an offset well clause in an oil and gas lease did *not* require the lessee to drill wells calculated to protect against drainage, reports Gray Reed & McGraw in its **Energy & the Law** blog.

According to authors **Charles Sartain** and **Chance Decker**: "The Court purported to limit its holding to these facts, but the opinion could have far-reaching consequences. Wells drilled in the most active plays in Texas today are by and large horizontal, tight-shale wells. The opinion indicates the historical understanding of an 'offset well' is antiquated in this context."

Four dissenting justices believed the majority disregarded the well-established meaning of "offset well" used in the oilfield for decades.

Read the article.

Texas Lawyers React to

Justice Anthony Kennedy's Retirement

U.S. Supreme Court Justice Anthony M. Kennedy announced his plans to retire this summer after serving 30 years on the nation's highest court. Widely known for his swing vote on a range of issues, Justice Kennedy will leave at the end of July.

Attorneys like **Larry Vincent** of Dallas-based Burns Charest, who once clerked for Justice Kennedy, provide their reactions in a post on the website of **Androvett Legal Media & Marketing**.

"It's disappointing that he chose to retire at this time. I've always been proud of his opinions regarding individual liberty grounded in the Fifth and 14th amendments. Given what we know about the list of potential replacements already circulated by this administration, I think his legacy in those areas will be eradicated. I hope he doesn't look back in a few years and regret his decision to leave the court at this juncture.

"I've spent much of my legal career, including my time here at Burns Charest, working to help people and companies recover for losses caused by negligence or the breach of a legal duty. Given the ideological shift at the court to restrict the ability of parties to use the courts to recover the amount they are due for the harm done to them, the loss of a compassionate conservative like Justice Kennedy is particularly frustrating."

Philip Hilder, founder of Houston's Hilder & Associates, P.C.: "Retirement of the swing justice will energize voters from all political stripes to come out this mid-term. Voters now realize the significance that a Supreme Court Justice has over their daily lives. Any nominee will need Senate confirmation and those elections this fall will be red hot battlegrounds

unlike any in recent memory."

Lara Hollingsworth, appellate lawyer and Of Counsel at Houston's Rusty Hardin & Associates, LLP: "The court will never be the same. The era of moderate appointments has passed never to be seen again. The Merrick Garlands of the world don't stand a chance. It's a sad day for justice and our country."

Chip Babcock of Jackson Walker: "Justice Kennedy will be recorded by history as one of the great justices of the United States Supreme Court. It was regular practice in close cases for entire briefs and oral arguments to be tailored just for him. He was that important. That cannot be said of many, if any, other members of the court in its history."

Contracts with Foreign Companies May Require a Rewrite

A recent California case may force companies doing business with foreign entities to reconsider—and maybe rewrite—their contracts, points out Sheppard, Mullin, Richter & Hampton in its **Corporate & Securities Law Blog**.

In *Rockefeller Tech. Invs. (Asia) VII v. Changzhou Sinotype Tech. Co.*, No. B272170, the California Court of Appeal held that parties may not contract around the formal service requirements of the Convention on the Service Abroad of

Judicial and Extrajudicial Documents, commonly referred to as the Hague Service Convention.

Authors **Hwan Kim** and **Neil Popovic** write that the decision could have profound implications for international business.

"The *Rockefeller* decision arguably makes it impossible to require foreign companies from some of the largest economies including China, Japan, Germany, U.K., India, Korea, Russia and Mexico, to show up in a California court based on notice provided by mail, courier (FedEx), or email even if the parties agreed to such forms of notice in their contract," the authors warn. "This will have profound consequences for companies with global supply chains such as Apple and GM, for investment funds with foreign investors, for engineering and construction companies that procure materials and handle projects around the world, such as AECOM, and potentially for any company that imports or exports goods to or from the United States."

Read the article.

Supreme Court Deals Big Setback to Public Unions

Conservatives on the Supreme Court said Wednesday that it was unconstitutional to allow public employee unions to require collective bargaining fees from workers who choose not to join the union, a major blow for the U.S. labor movement, reports

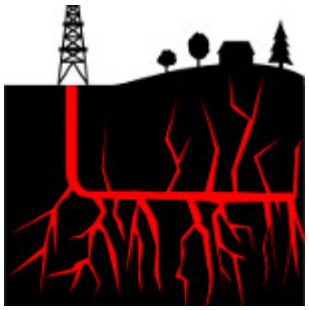
The Washington Post.

Reporter **Robert Barnes** writes that the 5-to-4 decision overturned a 40-year-old precedent and said that compelling such fees was a violation of workers' free speech rights. The old rule could force the workers to give financial support to public policy positions they oppose, the court said.

"States and public-sector unions may no longer extract agency fees from nonconsenting employees," Justice Samuel A. Alito Jr. wrote for the majority. "This procedure violates the First Amendment and cannot continue."

Read the *Post* article.

PA Court Rejects Fracking Company's Appeal In 'Rule Of Capture' Decision



A Pennsylvania appeals court rejected a request by a natural gas production company to rehear a case whose outcome could affect drillers across the country, **reports WSKG**.

Briggs v. Southwestern Energy Production Company involves the legal principle known as "rule of capture," which means a property owner has the right to extract or "capture" an

underground resource such as water, oil or gas, even if it flows from beneath another property owner's land, explains reporter **Susan Phillips**. The case calls into question the longstanding practice as it applies to fracking, which requires subsurface rock to be deliberately broken in order to release trapped gas.

"In 2015, the Briggs family sued Southwestern Energy for trespass and conversion, arguing that the company's fracking efforts were illegal and it should not be allowed to use wells on neighboring properties to tap gas beneath their land," writes Phillips. "The family owns about 11 acres of land in Susquehanna County and did not lease its land for gas drilling."

The trial court rejected their arguments, but an appellate court found that the Briggs' arguments had legal merit.

Read the article.

An Arbitrator's Power May Be Greater Than That of a Judge

Arbitration is a creature of contract, and an arbitrator's powers are in effect defined by the parties' arbitration agreement, points out a post on the Mintz, Levin, Cohn, Ferris, Glovsky and Popeo blog **ADR: Advice From the Trenches**.

"Paradoxically, although an arbitration agreement can be written (double-spaced) on one side of a cocktail napkin, in

some cases it may grant greater authority to an arbitrator than a judge has," writes **Narges Kakalia**.

In the post, she discusses *Timegate Studios, Inc. v. Southpeak Interactive, LLC*, in which the Fifth Circuit confirmed an arbitration award in which the arbitrator substantially reformed the parties' commercial agreement by, among other things, awarding one a broad perpetual license to certain of the other's intellectual property, despite the fact that the original agreement had granted only a more narrowly drawn ten-year license.

Read the article.

Oil Firm, Once Called 'Wolf of Wall Street Type' Company, Sued By SEC for Fraud

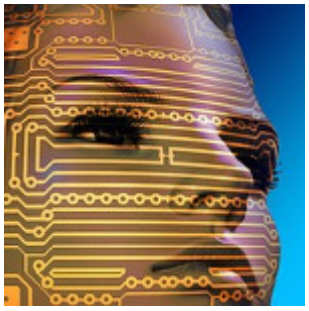
The Dallas Morning News is **reporting** that Dallas-based Texas Coastal Energy Company defrauded 80 oil and gas investors out of more than $8 million, according to a lawsuit filed Tuesday by the Securities and Exchange Commission, the stock market regulator.

The SEC alleges the company, its co-founder, Jefferey Gordon, and his sales representatives misrepresented the company's finances, exaggerated a geologist's background and inflated the reserves and expected production of its wells in Texas and Kansas, according to reporter **Jeff Mosier**.

"In an offering fraud, people who seek to steal investors' hard-earned money will often use cold calls and inflated promises to carry out their schemes," said Shamoil T. Shipchandler, director of the SEC's Fort Worth regional office. "Their self-serving statements are no substitute for an investor's due diligence."

Read the *Dallas News* article.

Benefits and Challenges of Robotized Arbitration



Winston Maxwell and **Gauthier Vannieuwenhuyse** of Hogan Lovells point out that we are living in the era of constant technological progress, and then ask the question: As smart contracts emerge, why not think about totally automated arbitration?

"Big data and e-discovery can assist counsel in document management and reduce the risk of human error during discovery," they write for an article for **Bloomberg Law**.

They discuss machine learning, predictive justice, and sophisticated programs that can even analyze the behavior of specific judges and arbitrators to predict their propensity to grant or deny certain motions and claims.

"This may open arbitration to new markets, such as low value disputes, whose players were traditionally reluctant to resort

to this type of resolution," they write.

"While it is possible to envision completely robotized arbitration taking place in a not-so-distant future, that sort of arbitration would not be recognized by state institutions. If the arbitration occurs in a self-contained, self-executing framework, then its nonrecognition by state institutions may not be a major obstacle," the authors conclude.

Read the article.

Citigroup Agrees to Pay Fine Over State Libor Probes

Image by Mike Mozart

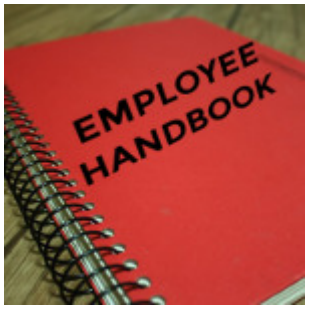
Bloomberg is **reporting** that Citigroup Inc. agreed to pay a combined $100 million to 42 U.S. states to resolve a probe into fraudulent conduct tied to interest-rate manipulation that affected financial instruments worth trillions of dollars.

The states had alleged Citigroup misrepresented the integrity of the Libor benchmark to state and local governments, not-for-profit organizations and institutional trading counterparties, sometimes to protect the bank's own reputation, reports **Erik Larson**.

"The accord is the latest development in probes by governments around the globe into manipulation of benchmark interest rates, one of the key scandals that led to a cultural overhaul of the industry over the past decade," Larson writes. "Global fines have topped $9 billion. In October, Deutsche Bank paid 45 states $220 million in penalties and disgorgements to resolve U.S. and U.K. probes."

Read the Bloomberg article.

Are Your Employees' Electronically-Signed Agreements Enforceable?



Drew York, writing in Gray Reed & McGraw's **Tilting the Scales** blog, offers some advice on how to "failsafe" electronic agreements with employees.

He describes a scenario in which a company requires its

employees to electronically acknowledge receiving, reviewing and agreeing to abide by the company's employee handbook. One of the workers later is injured on the job, and the company wants to invoke the handbook 's arbitration agreement.

"In several recent cases, employees have disputed that they electronically acknowledged an agreement with their employer," writes York. "This raises an intriguing question: how do employers prove that an employee 'signed' an agreement when there is no written signature?"

Read the article.

Texas Court Holds Drop in Oil Prices is Not Force Majeure

A divided panel of the Texas Court of Appeals in Houston has held that the 2014-2015 drop in oil prices is not a force majeure for purposes of general force majeure contractual protection, **report**s Liskow & Lewis in its Energy Law Blog.

Jackie E. Hickman explains that the court addressed a dispute between ConocoPhillips Company and TEC Olmos over a farmout agreement that required Olmos to commence drilling by a specified date.

"During the interval between execution of the agreement and commencement of drilling, however, changes in the global supply and demand of oil caused the price of oil to drop significantly. As a result, Olmos was unable to secure

financing for drilling and informed ConocoPhillips that it would be unable to meet its drilling obligations. ConocoPhillips filed suit against Olmos and the guarantor of the contract, Terrace Energy Company, for breach of the farmout agreement. The lawsuit sought $500,000 in liquidated damages," Hickman writes.

Olmos invoked the force majeure clause of the farmout agreement to excuse its inability to perform, but the court agreed with ConocoPhillips.

Read the article.

$17M Target Data Breach Settlement Affirmed on Second Try

Image by Mike Mozart

Target Corp.'s $17 million class settlement to resolve consumer claims over a 2013 data breach passed Eighth Circuit

scrutiny on its second trip to the appeals court, reports **Bloomberg Law**.

The court rejected an objector's challenge that the named plaintiffs weren't adequate representatives for the whole class because they received compensation while others didn't, according to reporter **Perry Cooper**.

He explained:

> "All class members had the ability to register for credit monitoring, and all of the compromised payment cards undoubtedly were canceled and replaced by the issuing banks," Judge Bobby E. Shepherd wrote for the U.S. Court of Appeals for the Eighth Circuit.
>
> "Any risk of future harm is therefore entirely speculative," the court said.

Read the Bloomberg Law article.

King & Spalding Case Spotlights Response to Ethics Report

Bloomberg Law **reports** that a ruling that an ex-King & Spalding associate can go to trial on a claim he was fired for raising ethics concerns highlights a critical question for law firms—how to respond to an internal ethics complaint without

appearing to retaliate?

A New York federal court rejected King & Spalding's argument that associate David Joffe clearly was terminated for bad performance and "administrative shortcomings," and not in retaliation for reporting ethical concerns stemming from two partners' representation of Chinese telecommunications company ZTE Corp., writes **Mindy L. Rattan**.

"While most associates are at-will employees, New York associates are protected from retaliation after the associate reports or threatens to report ethical concerns about others in the firm," according to Rattan.

Read the Bloomberg Law article.

VA Nurses' Class-Action Overtime Lawsuit Could Open Door to More Plaintiffs

A lawsuit accusing the U.S. Department of Veterans Affairs of failing to pay overtime to nurse practitioners and physician assistants since December of 2006 has been certified as a class action, according to a web post by **Androvett Legal Media & Marketing**. The certification is listed as an opt-in class, opening the door for more plaintiffs.

Class representatives Stephanie Mercier, Audricia Brooks, Deborah Plageman, Jennifer Allred and Michele Gavin brought

the lawsuit on behalf of nurse practitioners and physician assistants from VA facilities across the country. Attorneys estimate as many as 10,000 VA employees nationwide ultimately could be represented in the class action.

According to the lawsuit, nurse practitioners and physician assistants were required to process electronic and computer patient records after work hours using VA facility computers, laptops and sometimes their own personal home computers without compensation. The work is vital to the treatment of patients and is considered mandatory by VA supervisors.

Provost Umphrey attorneys **Michael Hamilton** of the firm's Nashville office and **Guy Fisher** in the Beaumont, Texas, office are among the attorneys working on the lawsuit along with counsel David Cook and Clement Tsao of Cincinnati's Cook & Logothetis, LLC, Douglas Richards of Lexington, Kentucky and Robert Stropp of Mooney Green, P.C. in Washington, D.C.

"These are medical professionals who are taking care of our veterans," said Hamilton. "If we aren't paying them properly, what sort of statement does that make about the importance of caring for those who watched over us and our rights?"

"Ultimately, it's about patient care," said Cook. "We need to do our utmost for those who have put on the uniform and defended our rights. And, we can start by properly paying the medical professionals who care for them when they need it."