



VOLUME 20 | NUMBER 4 | 2019

TRANSPORTATION LAW UPDATE



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Enforceability of “No-Hire” Provisions

In July 2019, the Pennsylvania Supreme Court agreed to hear *Pittsburgh Logistics Systems v. BeeMac Trucking, LLC*. The appeal follows a January 2019, 7-2 decision of the Superior Court, where the Superior Court affirmed the Beaver County Court of Common Pleas’ decision invalidating a “no-hire” provision of a Motor Carriage Services Contract (MCSC) between a logistics provider and a shipper.

In *PLS v. BeeMac*, BeeMac, a shipper, did non-exclusive business with PLS, a logistics provider. As is common in the shipping world, PLS and BeeMac entered into an MCSC. MCSCs generally govern the terms of the parties’ business relationships.

The MCSC between PLS and BeeMac contained a provision wherein BeeMac agreed to refrain from hiring any employees of PLS during the term of the contract and for two years after the termination of the contract. The MCSC also contained a “non-solicitation” agreement wherein BeeMac agreed not to solicit PLS’s customers or disclose PLS’s confidential information during the term of the contract and for one year after the termination of the contract.

While the contract between PLS and BeeMac was still under effect, four employees left PLS and took a job with BeeMac. PLS brought suit against both BeeMac and the former PLS employees seeking an injunction: (1) preventing BeeMac from employing the former PLS employees; and (2) preventing BeeMac from soliciting business directly from other entities that had done business with PLS.

The trial court partially granted injunctive relief, ordering that: (1) BeeMac and the former PLS employees are enjoined from soliciting customers of PLS; however (2) the former PLS employees were not enjoined from working for BeeMac.

PLS thereafter appealed the trial court’s decision, and argued that the trial court should have enjoined the former PLS employees from working for BeeMac. The Superior Court, rehearing argument *en banc*, decided 7-2 in favor of BeeMac and the former PLS employees.



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Judge Ott wrote the majority opinion. The Superior Court agreed with the trial court and reasoned, in essence, that the “no-hire” provision in the MCSC was void as against public policy as it essentially forced the PLS employees to be bound by a contractual provision for which they gave no consideration, and were likely not aware of. In other words, the “no-hire” provision between the two sophisticated business entities, PLS and BeeMac, had the effect of becoming a non-compete agreement which was imputed upon each employee, and each employee did not knowingly agree, or give consideration, to be bound by this imputed non-compete agreement.

The Superior Court also suggested that each MCSC contract between PLS and a new carrier would contain such a “no-hire” agreement, and further implied that in such a scenario, where a company like PLS does business with many different carriers and companies, employees would essentially be shut out from working in that industry at all.

The Superior Court also cited with approval, the trial court’s finding that the “no-hire” provision was largely superfluous in light of the enforceable “non-solicitation clause.”

Judge Bowes authored a dissenting opinion joined by Judge Murray. Judge Bowes emphasized that the “no-hire” provision at issue was between the two employers in this case, PLS and BeeMac. Pursuant to the “no-hire” provision, BeeMac agreed not to hire any PLS employees. The “no-hire” provision itself did not restrict or restrain the employees’ actions. Judge Bowes also cited persuasive case law which suggested that such a “no-hire” provision in a contract between two sophisticated business employers, by itself, only has the effect of prohibiting such an employee from working for that one business.

The Pennsylvania Supreme Court agreed in July 2019 to hear the case. This case, when it is scheduled to be heard, could have major implications for “no-hire” agreements and may drastically change the way shippers, carriers, and logistics companies do business. Both sides have a

convincing argument. On the one hand, it does not seem just and fair that an employee, without signing a non-compete clause, should be prohibited from taking a job wherever she chooses. Indeed, given the injunctive relief sought in the *PLS v. BeeMac* case, many would argue that it is unfair and extreme for the court to quite literally pluck that individual away from their job, where the employee was totally innocent and did not violate any agreements or contracts.

On the other hand, where two sophisticated businesses reach an agreement at arm’s length, and the one party agrees to limit its hiring pool (by agreeing not to poach/hire the other party’s employees) in exchange for a favorable and prosperous business relationship, is it proper for the court to invalidate this agreement?

If the Supreme Court does affirm the lower court’s decision, the Supreme Court has an opportunity to narrow and clarify the state of the law regarding “no-hire” clauses. For one, the Supreme Court could limit the invalidity of “no-hire” clauses to situations where the former employer does a large volume of business with a large volume of clients, and includes a “no-hire” provision in every MCSC agreement. In this scenario, the employee is effectively ousted from the entire industry. By invalidating “no hire” clauses only in such scenarios, employers would still retain a legitimate means of protection from poaching, but without totally stonewalling the employee from the entire industry.

Additionally, the Supreme Court could also find that the invalidity of “no-hire” provisions only applies to instances where the former employer seeks injunctive relief. Right now, as *PLS v. BeeMac* is written, it seems that simply where two business employers enter into a contract with one another, and that contract contains a “no-hire” clause, such a clause is invalid as it unfairly restricts the employees from finding another job. However, the *PLS v. BeeMac* case dealt with PLS’s request to enjoin its former employers from working for BeeMac. Indeed, in such a scenario, a court is rightfully cautious to take an innocent employee’s

job away purely by virtue of the fact that a sophisticated business party breached its agreement with another sophisticated business—especially in circumstances where the would-be employee did not even know that such an agreement was in place.

However, if PLS had sought only monetary relief from BeeMac, that is drastically different than forcibly removing innocent employees from their place of employment. The Supreme Court, if it does affirm, has an opportunity to narrow the invalidity of “no-hire” provisions only to injunctive scenarios, thereby ensuring that poachers compensate the poached party for conduct in clear breach of an agreement. In such a scenario, the poacher is held

accountable for its violation of a provision in an arms-length agreement, yet the innocent employee is not made to suffer.

Either way the Supreme Court rules, its decision in *PLS v. BeeMac* will undoubtedly have profound effects for all employers, especially those in the trucking industry. If *PLS v. BeeMac* is affirmed, employers will likely have to exclusively rely on non-compete contracts with their own employees as a means of preventing poaching. Non-compete provisions are often challenged in court and sometimes invalidated. An affirmation of *PLS v. BeeMac* would give employers one less tool to combat the problem of “poaching.”

Kevin G. Gallagher is an associate in the Philadelphia office of Rawle & Henderson LLP. He concentrates his law practice in the areas of commercial motor vehicle defense, insurance coverage, employment relations, and maritime law.

Kevin earned his J.D. from Temple University James E. Beasley School of Law in 2018 and graduated with a Certificate in Trial Advocacy and Litigation. Kevin was the recipient of the Law Faculty Scholarship. He also received the Lenard Sigal Memorial Award for Excellence in Criminal Law Studies.

While attending law school, Kevin worked as a summer associate and law clerk for a Philadelphia maritime law firm specializing in maritime insurance defense. Additionally, Kevin served as a legal intern for the Philadelphia District Attorney’s Office and the Delaware County District Attorney’s office.

Kevin earned his B.A. in Political Science and Communications & Rhetoric, *cum laude*, from the University of Pittsburgh in 2015. While attending the University of Pittsburgh, Kevin hosted his own radio show on the school’s local radio station WPTS 92.1.

Kevin is admitted to practice in Pennsylvania and New Jersey. Prior to joining Rawle & Henderson LLP, he served as a judicial law clerk for the Honorable Steven C. Tolliver in the Montgomery County Court of Common Pleas.

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The Commercial Motor Vehicle Section has an **After Hours Emergency Response Number — 717-433-6230** — so the attorneys are accessible to respond to any emergency which arises after customary business hours.

ARKANSAS TRUCKING SEMINAR

Gary N. Stewart spoke at the annual **Arkansas Trucking Seminar** in Rogers, Arkansas, in September 2019. Gary was a panelist for the session “*Beyond the Basics: Best Practices for Effective Accident Investigation and Early Case Evaluation – Litigation Holds and Responses to Preservation Letters.*”

Gary is a partner in our **Harrisburg** office and a member of our Executive Committee. He defends cases throughout Pennsylvania as well as other Mid-Atlantic states. He focuses his practice on the defense of the trucking industry, specifically commercial motor vehicles and the companies that insure them, and represents most of the motor carriers and their drivers seen on our highways. He is admitted to practice in the State and Federal Courts of Pennsylvania, New Jersey, Massachusetts, Vermont and Rhode Island, and has been admitted pro hac vice in other jurisdictions throughout the Mid-Atlantic region. He graduated *magna cum laude* from the Harrisburg campus of Widener University School of Law. Gary was the recipient of the James C. Crumliss Jr. Award for Excellence in Scholarship and Administrative Law. He received his undergraduate degree from the U.S. Merchant Marine Academy at Kings Point, New York, and holds U.S. Coast Guard professional licenses as Master of Oceans, Steam or Motor Vessels up to 1600 gross tons as well as Chief Officer, unlimited tonnage, all oceans. Gary was selected as a **2019 Pennsylvania Super Lawyer**.



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