Summer 2020

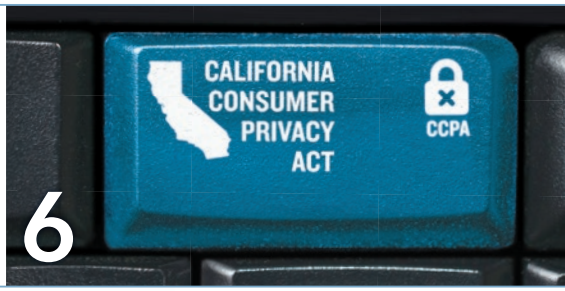
Moss & Barnett Advocate

Is the Future Uncertain for Non-Compete Agreements?

By Craig A. Brandt

CCPA Compliance: What Your Company Needs to Know

By Michael T. Etmund



The Poison Pill in North Dakota's Mechanic's Lien Law

By Jeffrey A. Wieland

ALSO IN THIS ISSUE:

Moss & Barnett

Is the Future Uncertain for Non-Compete Agreements?

In November 2019, Minnesota Attorney General Keith Ellison joined officials from about 20 other states in requesting that the Federal Trade Commission ("FTC") adopt a new rule that would render non-compete agreements illegal for low-wage workers and where they were not specifically negotiated.

What Is a Non-Compete Agreement?

A non-compete agreement is a contract in which an employee agrees that he/she will not compete in specified ways with the employer while employed and for a period of time after the employment relationship ends.

The request by many states for a rule restricting non-compete agreements represented a reaction to perceived employer overuse of non-compete agreements, such as with low-wage employees. An example is the Jimmy John's sandwich chain, which drew negative publicity over its practice of asking its employees to sign non-compete agreements.

As of September 1, 2020, the FTC has yet to release notice of any proposed rule restricting the enforceability of non-compete agreements.

Efforts to Modify Existing Non-Compete Law in Minnesota

Another effort to limit the enforceability of non-compete agreements recently played out at the Minnesota Legislature. DFL legislators proposed a bill to limit Minnesota non-compete law by prohibiting the use of these agreements for physicians. While the bill progressed in the DFL-majority House, it did not receive a hearing in the GOP-controlled Senate, and has not become law.

Varying Approaches Among the States

States have adopted widely-differing approaches to enforcing non-compete agreements. Some states, such as California and North Dakota, prohibit non-compete agreements or strictly limit their enforcement. In other states, including Minnesota, courts will often enforce non-compete agreements if they are reasonable in scope and duration and necessary to protect a legitimate interest of the original employer that seeks to enforce the restriction. Broadly, the trend across the country is toward restricting enforcement of non-compete agreements. In recent years, at least six states have moved in this direction.

Challenges in Enforcing Non-Compete Agreements Under Minnesota Law

While neither the FTC nor Minnesota's Legislature has expressly forbidden non-compete agreements, recent court decisions in Minnesota illustrate the challenges that an employer can face in seeking to enforce these types of contracts.

- In one case, the court refused to enforce a non-compete agreement signed by an employee on his second day on the job because the employer had not mentioned the restriction to the employee before he accepted the job offer and the employer failed to provide the employee with "independent consideration" for signing the restriction.
- Another court denied an employer's request for an injunction to enforce a non-compete covenant because of a lack of evidence that the employer had a legitimate interest that was genuinely threatened by its former employee's work for a competitor. The court was unconvinced that there was a genuine threat simply because the employee worked in sales jobs with both companies.
- In another recent decision, the court denied an employer's attempt to enforce a non-compete agreement that was drafted to apply to "prospective" customers of the employer. The prospective nature of the relationships in question caused the court to conclude that there was an insufficient threat of harm to justify enforcing that type of restriction.
- In a ruling in which the court did enforce a customer non-solicitation provision through a temporary injunction, the court also held that the former employee subject to the injunction was entitled to know the names of all "off-limits" customers, information which the former employer had been reluctant to provide.

"Non-Compete Agreements" Continued on Page 5

Alerts

1 Changes to Bankruptcy Law Affect Farmers and Small Businesses

The Family Farmer Relief Act of 2019 revises the definition of "family farmer" to include farmers whose aggregate debts do not exceed $10,000,000 — double the previous debt limit.

The Small Business Reorganization Act of 2019 ("SBRA"), effective February 19, 2020, simplifies the reorganization process for certain small businesses. Procedures and fees required in Chapter 11 bankruptcies, including the appointment of committees of unsecured creditors, the filing of a disclosure statement in connection with a debtor's proposal of a plan of reorganization, and the payment of U.S. Trustee quarterly fees, are eliminated under the newly created subchapter of Chapter 11 of the Bankruptcy Code. The objective of these changes is to lower the costs of bankruptcy for small businesses and increase the efficiency of the bankruptcy process.

Under the SBRA, a small business debtor is required to file its plan of reorganization within 90 days of the date it files its bankruptcy petition. The new law also changes the substantive requirements of a plan with respect to treatment of secured creditors and all classes of creditors' roles in supporting a plan of reorganization.

Notably, the SBRA also raises the bar for Chapter 11 trustees seeking to bring preference-payment recovery actions against creditors. Specifically, the SBRA requires claims of less than $25,000 to be filed in the district where the defendant resides and requires the trustee to conduct due diligence into a would-be defendant's likely affirmative defenses to a preference claim.

2 Moss & Barnett's COVID-19 Resource Page

The COVID-19 virus is having significant and rapidly changing legal implications for both businesses and individuals. Moss & Barnett has created a resource page to provide information that may be helpful in your decision-making. Visit **LawMoss.com/news-moss-and-barnett-covid-19-resource-page** to learn more. We know that this is a difficult and stressful time for everyone, and new challenges will emerge as this situation continues to evolve. Together, we are well-equipped to navigate these challenges and overcome these trying times.

3 The Setting Every Community Up for Retirement Enhancement (SECURE) Act

On December 20, 2019, The Setting Every Community Up for Retirement Enhancement (SECURE) Act was enacted into law. The SECURE Act changed several retirement provisions, most notably:

- For an IRA owner, the new required minimum distribution age is 72 (under prior law, it was age 70 ½).
- Funds held in an IRA must now be distributed to a designated beneficiary within 10 years after the IRA owner's death. Exceptions apply if the beneficiary is a surviving spouse, a minor child, or a disabled or chronically ill beneficiary. The new law limits the use of so-called "stretch IRAs" — a financial strategy that allowed the designated beneficiary to receive IRA distributions over his/her lifetime.
- Individuals may now contribute to an IRA after age 70 ½.

If you would like assistance assuring best practices in these areas, please contact your attorney at Moss & Barnett.

Team News

Kevin M. Busch and Timothy L. Gustin Re-elected to Moss & Barnett Board of Directors

Kevin M. Busch and **Timothy L. Gustin** were recently re-elected to three-year terms as members of Moss & Barnett's Board of Directors.

Kevin serves as the firm's Chief Operating Officer and Chief Financial Officer and is a member of the firm's financial services, business law, mergers and acquisitions, multifamily and commercial real estate finance, and energy and public utilities practice groups.

Tim serves as the firm's Chairman, chairs the firm's multifamily and commercial real estate finance and real estate practice groups, and is a member of the firm's financial services practice group.

Kevin and Tim will each continue practicing law on a full-time basis in addition to handling their management responsibilities. They are joined on the Board by co-directors, **John P. Boyle, Jana Aune Deach, Brian T. Grogan, and James J. Vedder.**

Three New Attorneys Have Joined Our Team

Aaron P. Minster

612-877-5263
Aaron.Minster@lawmoss.com

Litigation

A former law clerk to the Honorable Francis J. Magill, Aaron has experience in shareholder derivative actions, close corporations, real estate litigation, trusts and estates, construction disputes, employment litigation, trade secrets, malpractice actions, and property tax litigation. He is a member of the International Association of Privacy Professionals and holds the organization's ANSI/ISO accredited Certified Information Privacy Professional (CIPP/US) designation. Being a former network systems engineer, software programmer, and data security consultant, Aaron is uniquely positioned to assist clients in the area of information technology litigation and related risk analysis.

Mitchell D. Sullivan

320-654-4117
Mitchell.Sullivan@lawmoss.com

Business Law, Mergers and Acquisitions, Closely Held Businesses, Securities, Real Estate

Mitchell serves clients in a variety of industries, including real estate, construction, hospitality, agriculture, retail, manufacturing, technology, and shipping. He advises his clients on a broad range of corporate, financial, and real estate transactions, including entity formation, shareholder and partnership agreements, contract drafting and negotiation, purchase and sale agreements, business succession planning, business governance, and real estate issues and transactions. Mitchell strives to fully understand his clients' business needs at every stage of a transaction, and then he delivers innovative and effective solutions to achieve their goals.

Garrett M. Weber

612-877-5264
Garrett.Weber@lawmoss.com

Intellectual Property
Business Law

Garrett proactively works with businesses to distinguish their products and services and to position them for growth. His expertise ranges from trademarks, branding, advertising and marketing, to complex contracts and transactions, licensing and technology. His skills transfer across industries from financial services, to food and beverage, retail, e-commerce, medical device, and manufacturing. In addition to his work on trademark registrations, Garrett also works to enforce trademarks through cease and desist letters, consent agreements, and administrative and court proceedings. He has successfully resolved disputes before the U.S. Trademark Trial and Appeal Board. Garrett also has experience in all areas of intellectual property, including trade secrets, confidentiality agreements, copyrights, and litigation.

We're Proud to Recognize

For over 125 years, our lawyers, paralegals, and professional staff have demonstrated dedication and tenacity in serving the needs of our clients. As we look to the future, our dedication strengthens, as does our appreciation for our clients and our community. Quality legal service is our profession, our business, and our privilege.

2020 "Best Law Firm"

Moss & Barnett

Ranked in *U.S. News – Best Lawyers®*

2020 Financial Services Regulation Law "Lawyer of the Year"

Kevin M. Busch

Attorney

Awarded by *Best Lawyers®*

Field Nation

Mynul Khan

Moss & Barnett Client

Mynul Khan
Founder / CEO
Field Nation

Once a budding tech startup, Field Nation has found its stride in the on-demand workforce market — connecting companies to skilled technicians in one easy-to-use platform and mobile app.

Founder and CEO, Mynul Khan, started Field Nation in 2008. Since then, more than 100,000 technicians and 7,000+ companies (including Fortune 500 clients) joined the Field Nation marketplace. On the platform, more than 1,000,000 field service work orders have been processed annually — with a total success rate of 98 percent. And the opportunity for Field Nation is only growing. As more and more people prefer to take independent contracting jobs, companies are evaluating their own workforce strategies. By 2025, some estimates say more people will be working in gig arrangements than full-time positions.

Moss & Barnett is proud to offer Field Nation outside legal counsel, as well as business development opportunities for their growing team. To learn more about Field Nation, visit fieldnation.com.

"Non-Compete Agreements" Continued from Page 2

Conclusion

Recent developments reflect the competing policy interests implicated by non-compete agreements. On one hand, employers have a legitimate interest in protecting their confidential information and customer relationships. On the other hand, employees naturally expect to be able to maximize their earnings, which may mean taking their experience and skills to a competitor. There is also a broader societal interest in favoring robust business competition.

Given the changing landscape of non-compete law, it is important to work with a qualified attorney when drafting or seeking to enforce non-compete agreements or other contracts containing restrictive covenants. Moss & Barnett attorneys work frequently with clients in navigating these issues. Please contact your Moss & Barnett attorney if we can assist you.

Craig A. Brandt is a Minnesota State Bar Association Certified Labor and Employment Law Specialist and a member of our Employment Law group. He works with both employers and employees to analyze issues arising from the employment relationship.

612-877-5360 | Craig.Brandt@lawmoss.com

LawMoss.com/people-craig-a-brandt

CCPA Compliance: What Your Company Needs to Know

Any company that does business in California should evaluate its obligations to comply with the California Consumer Privacy Act (CCPA). Enacted in response to a growing concern regarding data privacy, the CCPA provides California residents with rights to the data that companies collect about them. The effective date of the CCPA was January 1, 2020. Unfortunately, the California State Legislature rushed the CCPA into law with broad language and limited guidance. Thus, it is crucial for companies doing business in California to understand how to comply with the CCPA. While the CCPA only applies to California residents, it is expected that similar laws will be enacted in other states in the coming years.

Three Important Steps to Mitigate CCPA Liability

1. Determine Whether the CCPA Applies to Your Company

The CCPA applies to for-profit entities doing business in California that collect or process personal information on customers and meet at least ***one*** of the following criteria:

- Generate annual gross revenue of $25,000,000; or
- Alone, or in combination, annually buy, receive, sell, or share the personal information of 50,000 or more consumers (that are California residents), households, or devices for commercial purposes; or
- Derive 50% or more of their annual revenue from selling consumers' personal information.

There is a common misconception that a company is exempt from complying with the CCPA if it complies with other federal privacy laws, such as the Gramm-Leach-Biley Act ("GLBA") or the Health Insurance Portability and Accountability Act ("HIPAA"). This is not entirely accurate.

Many categories of consumer information typically collected by companies (such as biometric data, geographic data, and internet activity information) are arguably not subject to GLBA and HIPAA but likely fall within the purview of the CCPA. Further, many companies are not subject to the GLBA or HIPAA but may be subject to the CCPA. Accordingly, complying with the CCPA would be the most efficient manner to service data on such accounts.

2. Update the Privacy Policy Posted on Your Company's Website

While including a privacy policy on a company website is a best practice for businesses, the CCPA actually mandates disclosure to consumers regarding several categories of personal consumer information that may be collected prior to such collection. In addition, the CCPA requires that a company must disclose their policies regarding gathering, sharing, retaining, and deleting information and the consumers' rights regarding the data.

The first step in drafting a CCPA-compliant privacy policy is to map the categories of data maintained by your company and the sources of that data. The completed data mapping will provide the information necessary to begin designing a CCPA-compliant privacy policy and will provide an opportunity for your company to evaluate the data it collects and the utility of that data.

3. Devise a Strategy in Response to "Verifiable Consumer Requests"

There are two key consumer protection features of the CCPA: (1) consumers have the right to request disclosure of what data is being collected about them; and (2) consumers have the right to request that their information be deleted. Companies should be ready to respond to such requests immediately. The law requires that a company respond to requests for information or deletion within 45 days (with one 45-day extension).

Notably, a company must only respond to a "verifiable consumer request." Thus, it is crucial that a company be able to verify the consumer's identity before responding. Further, companies are exempt from responding to a "verifiable consumer request" to the extent that it requests:

"CCPA Compliance" Continued on Page 7

Michael T. Etmund practices in our Financial Services and Litigation groups. He represents corporations and other general business entities in matters involving defense of consumer protection statutes, compliance and regulatory analyses, and commercial collection.

612-877-5309 | Mike.Etmund@lawmoss.com

LawMoss.com/people-michael-t-etmund

The Poison Pill in North Dakota's Mechanic's Lien Law

Most jurisdictions, including North Dakota, have a remedy for non-payment to those who provide labor or materials to improve real property. In North Dakota that remedy is called a construction lien. In most other jurisdictions, it is called a mechanic's lien. But North Dakota's mechanic's lien statute contains a poison pill provision that makes it dangerous for contractors to exercise that remedy.

The various state legislatures enacted mechanic's lien statutes because construction is different from other commercial situations. If you stop making payments after buying a car, the bank or the dealership can repossess the car. It is much harder for a carpenter to take back the labor and material he or she put into building a house. A mechanic's lien provides the contractor with a mechanism to force the sale of the property that was improved to get compensated for his or her services.

However, North Dakota's construction lien statute contains an attorneys' fees provision that favors the owner of the real property. The relevant portion of the North Dakota statute provides: "Any owner that successfully contests the validity or accuracy of a construction lien by any action in district court must be awarded the full amount of all costs and reasonable attorneys' fees incurred by the owner." N.D.C.C. § 35-27-24.1 (emphasis added). This one-sided attorneys' fees provision makes it risky for contractors to invoke the construction lien remedy.

A 2012 North Dakota Supreme Court case demonstrates the danger the attorneys' fees provision poses to contractors. In *Northern Excavating Co., Inc. v. Sisters of Mary of the Presentation Long Term Care*, 815 N.W.2d 280 (N.D. 2012), an excavation contractor worked for an owner on a time and materials contract. At the end of the project, the owner disputed the contractor's charges and did not pay. The contractor sued and asserted a mechanic's lien against the owner's property. At trial, the jury awarded the contractor more than 82% of the amount it sought, which was more than twice the amount the owner claimed it should have to pay. The court ruled that the contractor was the prevailing party, but under the mechanic's lien statute's fee provision, it awarded the owner $3,231 in attorneys' fees because the owner successfully challenged the amount of the lien. After an appeal to the North Dakota Supreme Court and further proceedings at the district court level, the owner was ultimately awarded $12,500 in attorneys' fees. The contractor's eventual recovery was reduced by over 15% through the attorneys' fee provision in the statute. It is easy to imagine cases where an attorneys' fee award to the owner could completely swallow or even exceed the amount the contractor wins, yielding the contractor a victory in principal, but a disastrous defeat in reality.

Contractors need to be cautious before using the mechanic's lien remedy in North Dakota. There are ways to mitigate the danger from the attorneys' fee provision. Contractors should consult with counsel before contracting for work in North Dakota to make sure they have adequate protection against non-payment in the contract. Contractors should also work with a knowledgeable attorney as soon as non-payment becomes an issue on a project.

Jeffrey A. Wieland practices in our Construction Law and Litigation groups. He has a B.S. in Engineering Physics and a Master's degree in Mechanical Engineering. He spent 15 years working as an engineer and project manager before becoming a lawyer. He is licensed in the state and federal courts in Minnesota and North Dakota where he typically represents contractors, subcontractors, suppliers, and owners.

612-877-5261 | Jeff.Wieland@lawmoss.com

LawMoss.com/people-jeffrey-a-wieland

"CCPA Compliance" Continued from Page 6

- Data needed to complete a transaction;
- Data necessary to comply with legal obligations; and
- Data used in a lawful manner that is compatible with the context in which the consumer provided the information.

Every company doing business in California should immediately implement a strategy for responding to such consumer requests for disclosure or deletion in a matter that conforms to the law. While individual review of each consumer request is required, if your company anticipates response to consumer requests will be identical, templates for responding to consumer requests in writing, and scripting for responding to consumer requests by phone, may be a prudent way to ensure consistency.

Moss & Barnett

www.LawMoss.com

Minneapolis, MN
150 South Fifth Street
Suite 1200
Minneapolis, MN 55402
Telephone: 612-877-5000
Fax: 612-877-5999

St. Cloud, MN
3800 Eighth Street North
Suite 102
St. Cloud, MN 56303
Telephone: 320-654-4100
Fax: 320-654-4101

Moss & Barnett

We Advise. You Decide.

Moss & Barnett Congratulates

Our Lawyers Listed to 2020 *Super Lawyers* and *Rising Stars**

With special congratulations to **Susan Rhode** and **Jana Aune Deach**, listed on the Top 50 Women and Top 100 Minnesota Super Lawyers lists for 2020; and **Jim Vedder**, listed on the Top 100 Minnesota Super Lawyers list for 2020.


Cindy J. Ackerman


Bradley R. Armstrong*


Kevin M. Busch


Jana Aune Deach


Aaron A. Dean


Kelly C. Engebretson*


Charles E. Jones


Susan A. King*


Brittney M. Miller*


Susan C. Rhode


John M. Schmid*


Dave F. Senger


Thomas J. Shroyer


Taylor D. Sztainer*


Bryant D. Tchida


James J. Vedder